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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

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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.*

AMENDMENTS TO RULES

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT [1]

7.

ATTORNEYS AND COUNSELORS.

An attorney and counselor admitted to practice and in good standing in the Supreme Court or in a District Court of the United States, or in the court of last resort in the state of his residence, may become attorney and counselor in this court on taking an oath or affirmation as prescribed by rule 2 of the Supreme Court of the United States, and upon subscribing the roll. On each admission the clerk will collect ten dollars ($10.00) to be applied to the purchase, repair and rebinding of law books for the use of the court and bar. Every person taking the oath and paying such sum shall be entitled to a certificate of his admission, signed by the clerk.

31.

LIBRARY.

All moneys collected by the clerk, the disposition of which is not otherwise directed by law, shall constitute a fund to be expended by the clerk under the direction of the presiding judge, in the purchasing, repairing and rebinding of law books for the library of the court; and it shall be his duty to render to the court, for its examination and approval, an annual account of such moneys received by him and of his disbursements thereof.

Adopted February 16, 1916.

[1] For other rules, see 202 Fed. v, 118 C. C. A. vii.

COURT RULES

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA

Supplementary Rules of Practice in Equity Adopted by the District Court for the Western District of Pennsylvania, in Effect March 1, 1913

1.

MOTION DAYS.

Section 1. The motion days at Pittsburgh shall be the first Monday of each month and the third Monday of each month except the month of July. The motion days at Erie shall be the second Monday in January and the third Monday in July of each year. On other days when the court is not engaged in trials, motions may be made at Pittsburgh upon proof of five days' written notice by the solicitor for the moving party to the solicitor for the other party.

2.

MOTIONS FOR ENLARGING TIME.

Section 1. No order allowing further time for an answer or a reply shall be made without written notice of the application for such order with reasons therefor to the solicitor on record for the opposite party, and any order which does not recite such notice, or that such solicitor attended at the hearing of the application, may be disregarded.

3.

PROCESS.

Section 1. The service of subpœnas upon corporations found within the district shall be in the same manner as is provided by the statutes of Pennsylvania for the service upon a corporation of a writ of summons in assumpsit.

Section 2. Where a party desires the benefit of the provisions of section 57 of the Judicial Code, he shall file with his motion for an order upon the absent defendants an affidavit showing that such defendants cannot be served with process in this district, and also, if known to the affiant, their places of residence and post office addresses and the place where it is believed process can be served upon each of them personally, and showing also the character and location of the property involved in the proceeding and the names and places of residence of those in charge of the same.

4.

SECURITY FOR COSTS.

Section 1. The clerk shall not be required to issue, nor the marshal to serve, process unless their fees are paid in advance, or security given therefor, to be approved by the court.

Section 2. In every proceeding in which the plaintiff is not at the time of filing the bill a resident of this district, or being so afterwards removes from the district, and in every other case when a defendant or a person for him shall make affidavit that he believes the costs cannot be recovered from the plaintiff by attachment or execution, a rule for security for costs may be entered upon due notice and in default of such security being given at a time designated by the court the complainant shall be liable to have his bill dismissed.

5.

SOLICITORS.

Section 1. Except where a party conducts his own case, every bill or other pleading and all notices required to be signed by counsel, when signed by nonresident counsel shall also be signed by a solicitor who shall have been admitted to practice in this court and who shall be a resident of and shall maintain an office in this district, whose appearance shall also be entered of record. Such appearance shall not be withdrawn except by leave of court, and so long as it remains all notices, rules and pleadings may be served upon him with the same effect as if served upon the party whom he represents. The attendance of such resident solicitor upon any motion, hearing or taking of testimony shall be a sufficient appearance for the party or parties whom he represents. Such resident solicitor shall be answerable to the court not only for his own delinquencies, but for those of his nonresident associate or associates.

6.

TRIAL CALENDAR.

Section 1. Cases shall be placed upon the trial calendar upon motion as of course by the solicitor of either party or at the instance of the court or a judge thereof and at the next succeeding motion day shall be assigned for trial at some near date.

7.

TRIAL.

Section 1. If the judge upon the close of plaintiff's evidence shall be of opinion that the case laid in the bill has not been sustained, and if the answer contains no matter of set-off or counterclaim, he shall have power to enter a decree of dismissal without hearing evidence on behalf of the defendant. Such decree shall have the effect of a nonsuit at law, and a refusal of the court, after motion and argument, to change the decree shall be considered a final decree for all purposes.

Section 2. As soon as the cause is at issue either party may from time to time apply to the court on notice to the opposing party for directions concerning further procedure. On the hearing of such application the court shall as far as possible ascertain from counsel the real points of controversy in order to avoid the taking of evidence as to issues not insisted upon by the parties, and may make orders concerning further procedure, including times, places and method of taking testimony, not inconsistent with the equity rules adopted by the Supreme Court of the United States or with statute.

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OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

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Hon. JOHN RELLSTAB, District Judge, New Jersey.....Trenton, N. J.
Hon. THOS. G. HAIGHT, District Judge, New Jersey.....Jersey City, N. J.
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Hon. W. H. SEWARD THOMSON, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.

[1] Resigned February 15, 1916.

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Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. WM. WALLACE LAMBDIN, District Judge, S. D. Georgia.....Savannah, Ga.
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Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
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Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.

[2] Appointment confirmed January 24, 1916.

[3] Died January 2, 1916.

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Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois.....Springfield, Ill.
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Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....Sioux Falls, S. D.
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Hon. JOSEPH McKENNA, Circuit Justice.....Washington, D. C.
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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.
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Hon. EDWARD E. CUSHMAN, District Judge, W. D. Washington.....Seattle, Wash.
Hon. JEREMIAH NETERER, District Judge, W. D. Washington.....Seattle, Wash.

[1] Appointment confirmed January 18, 1916.

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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

FIRST CIRCUIT.

National Metal Molding Co. v. Tubular Woven Fabric Co., 227 F. 884. Rehearing denied Jan. 25, 1916.

FOURTH CIRCUIT.

E. L. Moore & Co. v. Murchison, 226 F. 679. Rehearing denied Nov. 24, 1915.

Home Bank for Savings v. Lohm, 223 F. 633. Rehearing denied Dec. 13, 1915.

Washington & Berkeley Bridge Co. v. Pennsylvania Steel Co., 226 F. 169. Rehearing denied Nov. 5, 1915.

NINTH CIRCUIT.

C. A. Smith Lumber & Mfg. Co. v. Parker, 224 F. 347. Rehearing denied Nov. 1, 1915.

Chavelle v. Washington Trust Co., 226 F. 400. Rehearing denied Nov. 8, 1915.

Columbia Digger Co. v. Sparks, 227 F. 780. Rehearing denied March 6, 1916.

Consolidated Contract Co. v. Hassam Paving Co., 227 F. 436. Rehearing denied March 6, 1916.

Jung Quey v. United States, 222 F. 766. Rehearing denied Nov. 1, 1915.

Keane Wonder Min. Co. v. Cunningham, 222 F. 821. Rehearing denied Nov. 1, 1915.

National Bank of Commerce v. United States, 224 F. 679. Rehearing denied Nov. 1, 1915.

Phœnix Securities Co. v. Dittmar, 224 F. 892. Rehearing denied Nov. 1, 1915.

Sabin v. Blake-McFall Co., 223 F. 501. Rehearing denied Nov. 1, 1915.

Union S. S. Co. v. Latz, 223 F. 402. Rehearing denied Nov. 1, 1915.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

J. M. RADFORD GROCERY CO. v. POWELL (two cases).

In re SEWELL.

(Circuit Court of Appeals, Fifth Circuit. November 30, 1915.)

Nos. 2765, 2766.

1. BANKRUPTCY ⟸440—APPELLATE PROCEEDINGS—MODE OF REVIEW.

An order made in a bankruptcy proceeding, denying a lien claimed by a creditor, is reviewable by petition to revise, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⟸440.

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

2. BANKRUPTCY ⟸172—ASSIGNMENT OF INSURANCE POLICIES—EFFECT OF REDELIVERY TO PLEDGOR FOR RENEWAL.

A pledge of insurance policies to secure an indebtedness by assigning the same to the creditor is not invalidated by their redelivery to the pledgor, especially where the assignment covers also renewals.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. ⟸172.]

3. BANKRUPTCY ⟸172—LIENS—PLEDGE OF INSURANCE POLICIES.

A pledge of insurance policies by a debtor in good faith more than four months prior to his bankruptcy, by assignment to a creditor, *held* valid, and to give the creditor a lien on their proceeds in the hands of the trustee; the property having been destroyed and the loss adjusted prior to the bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. ⟸172.]

Appeal from, and Petition to Superintend and Revise Order of, the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

In the matter of C. A. Sewell, bankrupt; J. W. Powell, trustee. From an order denying its petition for a lien on the proceeds of insurance policies, the J. M. Radford Grocery Company appeals, and also files petition to revise. Appeal dismissed, and order reversed on petition to revise.

A. H. Kirby and R. W. Haynie, both of Abilene, Tex., for appellant and petitioner.

W. A. Wright and C. O. Harris, both of San Angelo, Tex., for appellee and respondent.

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

SPEER, District Judge. [1] This cause is presented to the court both by appeal and petition to superintend and revise. This being a proceeding in bankruptcy to establish a lien, the controversy is reviewable by petition to superintend and revise, and it is therefore thought proper to dismiss the appeal. Hutting Sash & Door Co. v. Stitt, 218 Fed. 1, 133 C. C. A. 641.

Upon consideration of the petition, it appears that the Radford Grocery Company, a private corporation of Abilene, in the Northern district of Texas, was a creditor of C. A. Sewell in a considerable amount. The latter was adjudicated bankrupt on February 21, 1914, and J. W. Powell was appointed trustee. Part of the assets were the proceeds of four fire insurance policies. These were issued at various dates from March, 1913, to January, 1914, all before the voluntary petition in bankruptcy was filed. That was on the 21st day of February, 1914. Before that day the fire loss under the policies mentioned above had been sustained by Sewell, and had been adjusted by the insurance companies; the amount assessed being $6,655.84. A part of this sum, to wit, $681.50 was paid by the insurance companies upon certain fixtures against which the petitioner held a chattel mortgage. By agreement between the trustee in bankruptcy and the Radford Grocery Company the sum ascertained by the adjustment of the loss was collected by the trustee, and since then has been held by him under order of the referee in bankruptcy, pending the determination of the claim now before the court. In May, 1914, petitioner presented to the referee its claim to a valid lien upon this insurance fund. The trustee objected, a hearing was had before the referee, and order was granted by that official establishing the lien of the Radford Company upon the $6,655.84, and directing the trustee to pay the same to petitioner. A certificate for the review of this order was granted by the referee. The issue was presented to the judge of the District Court for the Northern District of Texas, who, after hearing, reversed the referee, and directed that the sum in controversy be distributed by the trustee upon the claims of the general creditors. From this order of the District Court the petition to superintend and revise, now under consideration here, was filed.

The assignment of the policies was more than six months before the time of the fire. From the instrument itself, it appears that it was, as stated, more than six months before the institution of bankruptcy proceedings. It was in writing, and is as follows:

"Miles, Texas, August 4, 1913.

"For value received, I hereby transfer, assign, and set over unto J. M. Radford Grocery Company, Abilene, Texas, their successors and assigns, all my title and interest in the following described fire insurance policies, and all advantages to be derived therefrom:

"Springfield F. & M. Insurance Company policy No. 229, $1,500, expiring 1/2/14.

"The Royal Exchange Insurance policy No. 3898196, $3,000, expiring 3/3/14.

"Commonwealth Fire Insurance Company, No. 580, $1,500, expiring 12/1/13.

"Austin Fire Insurance Company, No. 18190, $2,000, expiring 11/2/13.

"Orient Insurance Company policy No. 626888, $2,000, expiring 4/28/14.

"It is further agreed and understood that, as the above policies expire and are renewed, the renewals take the place of above policies, and this transfer will hold good and be valid as to the above transfer. This transfer is for the purpose of securing said J. M. Radford Grocery Company, covering the indebtedness owing by me to said J. M. Radford Grocery Company, aggregating about seven thousand ($7,000.00) dollars, and for all advances made me by said J. M. Radford Grocery Company in the future.

"Witness my hand this the 4th day of August, 1913. C. A. Sewell.

"Witness: C. W. Gill."

[2] Now, it is complained by the trustee that after the policies of insurance were transferred they were actually handed by the Radford Grocery Company to Sewell and remained in his possession, and were returned to that company not until after the loss had accrued. This is explained by the clause in the assignment which provided for the renewal of the policies as they expired, the renewals to take the place of the policies originally assigned. There is nothing unusual or unlawful in this. In Winslow v. Harriman Iron Co. (Tenn. Ch. App.) 42 S. W. 698, the court says:

"In the case of Johnson v. Smith, 11 Humph. 396, 400, it is stated: 'There is no doubt that by an agreement of the parties the pledge may be deposited in the hands of a third person, instead of being delivered to the pawnee, and such person will be considered as the agent or servant of the pawnee, for keeping possession of the pledge; and it would seem that the pawnor himself may be constituted such agent.' Story, Bailm. par. 226; Cross, Liens, 65; Macomber v. Parker, 14 Pick. [Mass.] 497."

See, also, Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Harding v. Eldridge, 186 Mass. 39, 71 N. E. 115; Ward v. Sumner, 5 Pick. (Mass.) 59; Walker v. Staples, 5 Allen (Mass.) 34; Shaw v. Silloway, 145 Mass. 503, 14 N. E. 783; Moors v. Reading, 167 Mass. 322, 45 N. E. 760, 57 Am. St. Rep. 460; Beeman v. Lawton, 37 Me. 543; Wilkie v. Day, 141 Mass. 68, 6 N. E. 542; Kellogg v. Thompson, 142 Mass. 76, 6 N. E. 860; Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779; Easton v. German American Bank, 127 U. S. 532, 8 Sup. Ct. 1297, 32 L. Ed. 210; Martin v. Reid, 103 E. C. L. 730.

The rule would seem peculiarly applicable to policies of insurance which are issued in the name of the pledgor, and on which the premiums must be paid by him.

[3] Sewell had originally bought his stock from the Radford Grocery Company. He had been indebted to it on the original purchase and for other goods for about three years. While it is urged that he was insolvent at the time the policies were transferred, this is immaterial here, for the transfer was not made within four months antecedent to bankruptcy. The record does not disclose any evidence of fraud in connection with the assignment. This passed the title to the Radford Company of any right which might flow to Sewell through a possible fire loss resulting. It is said that the assignment was not recorded, or filed for record, as a chattel mortgage; but there is no provision of the law of Texas which requires such record of such an assignment. It is also said that no notice of the assignment was given any of the insurance companies; but the insurance companies have not been heard to complain.

It is also said that Sewell made several statements of his assets to his creditors. In two of these, one dated March 13, 1913, and an-

other June 19th of the same year, he stated the amount of insurance carried on his stock. The third statement was made on January 6, 1914. In this the insurance was not mentioned. This, however, is not a badge of fraud, for in August, 1913, he had assigned his insurance to the Radford Company. His failure to state the amount of his insurance on his stock after the policies had been assigned, when he made such statements before assignment, seems rather evidence of integrity than of purposeful wrong.

It is, however, said that the transfer is preferential, for the insurance policy is in the nature of a chattel mortgage. This seems scarcely accurate. The mortgagor has title to the chattel when the mortgage is made. In some jurisdictions he conveys the title by the mortgage; in others, he retains the title, and the mortgage is regarded merely as security for the debt. This is quite unlike the contract of insurance. It is, indeed, a contract of chance. The insurer conveys, and the insured takes nothing but a contingency. The policy itself is nothing but evidence of the contract. It becomes functus officio, and worthless, on expiration or renewal. As correctly observed by the learned District Judge in his opinion:

"The value of such policies at the time of the transfer could not have been more than an amount equal to the unearned premium thereunder."

How trivial, then, would have been such a preference.

Long v. Farmers' State Bank, 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585, is cited in contravention of these views; but in that case—

"there had been no effective transfer of certain insurance money to the bankrupt's creditor until the money was turned over by the bankrupt to the creditor, which was within four months prior to the filing of a bankruptcy petition."

This was held to constitute a voidable preference. Here, however, the money was paid to the trustee, and the matter left for determination by the bankruptcy court.

In Long v. Farmers' State Bank, supra, it was declared in the opinion of the court:

"Clearly this did not constitute an assignment of the policies in præsenti. This contract was no more than the personal agreement or undertaking of Wells that he would keep the property insured, and in case of loss he would collect and pay over to the bank sufficient to liquidate the debt. The contract conveyed nothing."

That is not this case.

In Loeser v. Savings Deposit Bank & Trust Co., 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233, there was a chattel mortgage to secure an antecedent debt, which the law of the state required to be recorded to render it valid as against lien creditors of the mortgagor, or subsequent purchasers or incumbrancers in good faith, and which, while given previously, was not recorded until within four months prior to the mortgagor's bankruptcy, and also where the mortgagee knew, or had reasonable cause to believe, the mortgagor to be insolvent. This was held a preference. Here, however, we repeat, there was no provision for record of the assignment.

Nor does it seem that the action of the Redford Grocery Company

and of Sewell was, in a business sense, immoral. Before the enactment of the Bankruptcy Law, the preference of a creditor by a debtor was permitted in many states. It is even now malus prohibitum, not malum in se. It does not seem, in the absence of fraud or disregard of the statute, that a question of morals is involved. A debtor, at a time when he might lawfully do so, sought to protect the creditor who had established him and maintained him in business. In the facts we discover no violation of the law. But, on the other hand, if the legitimate transfer of insurance is to be deemed a badge of insolvency, this mighty business, which we are told originated at least as early as the tenth century, and now constantly utilized to strengthen credit and expand enterprise, may be largely shorn of the benefits it confers.

In view of these considerations, the decision sought to be reviewed is reversed, and the holding of the referee is affirmed. It is directed that the trustee pay the costs on the petition for review, and that the appellant pay the costs of the appeal.

GRAFTON HOTEL CO. v. WALSH.

(Circuit Court of Appeals, Fourth Circuit. September 15, 1915.)

No. 1340.

1. CONTRACTS ⊂=231—BUILDING CONTRACTS—COMPENSATION—COMMISSIONS.
Under a building contract, providing that the contractor was to furnish all the material and perform all the work in erecting the building and was to be paid the cost of the labor and material necessary, and in addition 10 per cent. thereof as commissions, the contractor was not entitled to commissions on the profit made by a subcontractor on labor and material furnished by him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1046, 1047, 1051, 1052; Dec. Dig. ⊂=231.]

2. PAYMENT ⊂=41—APPLICATION—UNSECURED ACCOUNTS.
Where the owner of a building in the course of construction owed the contractor for items not used in the construction of the building, payments without direction as to application were properly applied to such items instead of on the balance due on the building, since, where one has two accounts, one of which is secured and the other unsecured, payments made without instructions as to application may be applied to the unsecured account.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 115–120; Dec. Dig. ⊂=41.]

3. MECHANICS' LIENS ⊂=154—NOTICE—FORM—SUFFICIENCY—VENUE.
A mechanic's lien notice, which does not in the caption of the affidavit on which the claim is based, nor in the body of the affidavit, show in what county it was taken, nor before what officer, and with the jurat signed only "H. F., Notary Public," without stating the county or state, is not invalid, the statute providing that the affidavit shall be sufficient if in form and effect as therein required; it being presumed that the action of the official administering the oath was within his jurisdictional limits.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 261–267; Dec. Dig. ⊂=154.]

4. MECHANICS' LIENS ⊂=146—NOTICE OF LIEN—FORM—DATE OF LAST ITEM.
Code W. Va. 1913, c. 75, § 4 (sec. 3845), providing that every lien shall be discharged unless the lienor shall, within 60 days after he ceases to

labor on or furnish material or machinery for the building or other structure, file with the clerk of the county court of the county in which the same is situate a just and true account of the amount due him, does not require a definite statement as to the date of the last items of material furnished or labor performed, so as to conclude him thereby.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 246–252; Dec. Dig. ⟸146.]

5. MECHANICS' LIENS ⟸281—NOTICE OF LIEN—TIME OF FILING.

On foreclosure of a mechanic's lien, evidence *held* sufficient to sustain a finding that plaintiff furnished the last items of material within the 60 days allowed for filing the notice of lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565–572; Dec. Dig. ⟸281.]

6. MECHANICS' LIENS ⟸291—DECREE OF SALE—PLACE OF SALE.

A decree of sale under a mechanic's lien foreclosure, merely directing the commissioner to sell the property "in the city of G." to the highest and best bidder, is not erroneous, since it will be presumed that the commissioner will advertise and sell the property in pursuance of the federal statute requiring all sales under orders or decrees of any federal court to be made at the courthouse in the county where the property is located.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 599–605, 607, 610; Dec. Dig. ⟸291.]

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

Suit by J. J. Walsh, Jr., as surviving partner of the firm of J. J. Walsh & Sons, against the Grafton Hotel Company, to foreclose a mechanic's lien. Decree for plaintiff, and defendant appeals. Modified and affirmed.

T. S. Riley and John J. Coniff, both of Wheeling, W. Va., for appellant.

J. M. Ritz and John A. Howard, both of Wheeling, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is a suit in equity, brought by the appellee in the District Court of the United States for the Northern District of West Virginia, for the purpose of enforcing a mechanic's lien against certain real estate belonging to appellant and situated in the city of Grafton, Taylor county, W. Va., and on which there had been erected by the appellee for the appellant a large building known as the Willard Hotel. On August 27, 1912, notice of claim of lien was filed by appellee in the office of the clerk of the county court of Taylor county, W. Va., affidavit to notice stating balance due appellee to be $63,981.15, and that appellee had ceased to labor on or furnish material for the said building on June 30, 1912.

On December 11, 1912, appellee's bill of complaint was filed, praying process against appellant, and also against John T. McGraw and Charles R. Durbin, trustee; the last named being made defendant because of his being trustee in deed of trust on the real estate in controversy, given by appellant after the execution of the building contract with appellee, and McGraw being made defendant because

the building contract was between him, as owner, and the appellee, as contractor, though it was understood that he was acting for appellant, which had not been incorporated. With the bill are filed, as Exhibit A, B, and C, respectively, notice of mechanic's lien, building contract, and deed to appellant of real estate in controversy. On June 4, 1913, appellant's motion to dismiss bill of complaint for reasons appearing on the face thereof, which had been made on February 1, 1913, was overruled, and exceptions taken. On June 9, 1913, the joint answer of appellants was filed, and on October 28, 1913, the cause was referred, by consent, to Charles J. Schuck, special master, with directions to ascertain, state and report as follows:

(1) What sum of money is due to the plaintiff from the Grafton Hotel Company, or any of the defendants, on account of the averments, matters, and things in the plaintiff's bill of complaint.

(2) Whether the said sum of money is a lien upon the said property of the Grafton Hotel Company, described in plaintiff's bill of complaint.

(3) What other liens, if any, are on the property of the said Grafton Hotel Company described in the plaintiff's bill of complaint, and their amounts and priorities.

(4) Any other matters or things requested by any party to this suit, or that the master may deem pertinent and proper.

On March 16, 1914, the special master filed his report setting out at length therein the reasons for his findings, which findings were that:

(1) The sum of money due from the defendants to the plaintiff was $58,615.05.

(2) Said sum is a lien on the property of the appellant in favor of the appellee.

(3) The only other lien on the property of the appellant is the deed of trust made by appellant to defendant Charles R. Durbin, trustee, on July 1, 1911, and this lien is subsequent to and follows the mechanic's lien in favor of appellee.

Exceptions were filed to the master's report, which were overruled by the lower court, and the report was confirmed, and a decree was entered in which the sum of $66,941.93, with interest from the date of decree, was adjudged to be due appellee. It was further decreed that this sum constituted a lien on appellant's property. Appellant excepted to the decree, and the case comes here on appeal.

In order that we may get a clear understanding as to the questions involved in this controversy, we deem it essential to call attention to certain provisions of the contract for the erection of the building in question. The following sections of the same relate to the questions at issue:

"Article I. The contractors shall and will provide all of the materials and perform all of the work for the erection of a hotel building at Grafton, W. Va., as shown on the revised drawings and described in the revised specifications prepared by M. A. Long, architects, which drawings and specifications are identified by the signatures of the parties hereto, and become a part of this contract."

"Article IV. The contractors shall provide sufficient, safe, and proper facilities at all times for the inspection of the work by the architects or their authorized representatives; shall, within twenty-four hours after receiving written notice from the architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them, whether worked or unworked, and to take down all portions of the work which the architects shall by written notice condemn as unsound or improper, or as in any way

failing to conform to the drawings and specifications; and shall make good all work damaged or destroyed thereby.

"Article V. Should the contractors at any time refuse to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified by the architects, the owner shall be at liberty, after three days' written notice to the contractors, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractors under this contract; and if the architect shall certify that such refusal, neglect, or failure is sufficient grounds for such action, the owner shall also be at liberty to terminate the employment of the contractors for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools, and appliances, thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractors they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractors; but, if such expense shall exceed such unpaid balance, the contractors shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage occurring through such default shall be audited and certified by the architects, whose certificate shall be conclusive upon the parties."

"Article IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractors for said work and materials shall be 10 per cent. commission on cost of work, which cost the contractors guarantee shall not exceed the sum of ninety thousand one hundred dollars ($90,100.00), including the 10 per cent. commission, if the work does not cost the above amount, including commission, the contractors agree to give the owner the benefit of such difference, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owner to contractors, in current funds, and only upon certificates of the architects, as follows: On monthly payments of 90 per cent. of the work done the previous month, the payments to be on or before the 10th of each succeeding month, as the work progresses; the balance of the 10 per cent. to be paid on the completion. The final payment shall be made within 30 days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

"Article X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

It appears that a mistake was made in computing the interest on the sum of $58,615.05, the principal amount due appellee. It is admitted by counsel for appellee that this is a clerical mistake, and that the same should be corrected, which obviates the necessity of further consideration of this point.

The next question raised by the assignment of error relates to the provision in the decree which provides that the appellee is entitled to recover as costs the sum paid as a premium on liability insurance on workmen. A careful consideration of this matter impels us to the conclusion that under this contract the court below was not justified in decreeing this amount in favor of the appellee as a part of the costs incurred in the construction of the building, and that the decree of the lower court should be modified accordingly.

[1] The next question relates to the amount of commission to which the appellee is entitled. The master's report, as confirmed, fixes the commission of the appellee at $10,048.82. It is insisted by appellant that where the contractor sublets a part of the work, as in this instance, he is not entitled to a commission on the same; it being provided, among other things, in article I of the contract, that the contractor "shall and will provide all of the materials and perform all of the work for the erection of the hotel building." It is also provided in article IX that:

"It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for the said work and materials shall be 10 per cent. commission on the cost of the work, * * * and that such sum shall be paid by the owner to contractor in current funds and only upon certificates of the architects as follows: * * * The final payment shall be made within thirty days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued."

Article X contains the following:

"It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final paymnt, shall be conclusive evidence of the performance of this contract, whether wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

The proof shows that $155,191.98, as shown by the master's report, was the aggregate of charges (less commissions) against appellant. The item of $91,692.58 included commissions of 10 per cent., and the item of $13,190.45 commissions of 7 per cent., so that the master should have found that the appellee was entitled to commissions of 10 per cent. on $50,308.95, and 3 per cent. on $13,190.45, and instead of allowing for commissions the sum of $10,048.82, he should have allowed the sum of $5,426.61. It is insisted, therefore, that the appellant is entitled to have a balance found against him of $58,615.05, less $4,622.21. The evidence shows that part of the work done by subcontractors, and the amount paid by appellee to such contractors, as appears from the following table:

	Total Charges.	Commissions Included on.
(2) Reinforced concrete, etc.	$12,340.20	$10,381.10
(3) Brickwork, etc.	9,895.20	9,000.00
(5) Ornamental terra cotta	7,500.00	7,500.00
(6) Steel and iron work	10,828.98	8,000.00
(7) Sheet metal work	5,049.25	4,271.00
(9) Tile, marble and slate work	8,640.65	7,500.00
(10) Artificial marble work	2,960.00	2,960.00
(11) Plastering, etc.	14,500.00	13,190.45
(12) Painting, etc.	4,584.98	4,584.98
(14) Hardware, etc.	2,268.60	1,600.00
(15) Electric wiring	6,595.42	6,500.00
(16) Plumbing and heating	21,224.99	18,435.50
(17) Mill work, etc.	10,987.80	9,538.00
(18) Slate roofing	696.00	696.00
(20) Revolving door	570.00	570.00
(21) Metal weather strips	156.00	156.00
		$104,883.03

It further appears that the commissions on the foregoing items were 10 per cent., except $13,190.45, on which were 7 per cent. charges. Deducting this amount from the total charges, to wit, $155,191.98 (after excluding commissions), leaves $50,308.85, and 10 per cent. on this amount would be $5,030.89; also 3 per cent. commission on $13,290.45 would amount to $395.72. Inasmuch as the appellee, under the contract, was to be paid the cost of the labor and the material necessary for the construction of the building, and in addition to this amount 10 per cent. thereof as commissions, we are of opinion that the use of the term "cost of labor and material" was intended to mean such amounts as might be paid by appellee for labor and material, and was not intended to include any profit that might be made by subcontractors due by their contracts with the appellee.

In other words, it clearly appears from the contract that appellant was to pay only the cost of the labor and the material necessary for the construction of the building, and in addition thereto 10 per cent. as commissions. Such being the case, appellee would not be entitled to commissions on such labor and material as may have been allowed to the subcontractor. It appearing that a part of the charges as allowed by the master, amounting to $13,190.45, were for work and material furnished by the subcontractor, and that such contractor allowed a commission of 7 per cent. on the same, it necessarily follows that appellee would only be entitled to 3 per cent. thereon. In other words, this contract clearly contemplated that the contractor was to receive 10 per cent. on all amounts paid for material and labor, and it would be manifestly unjust to require the owner to pay double commissions for any material furnished or labor performed. Therefore the sum of $4,622.21 should be deducted from $58,615.05, such being the amount erroneously charged as commissions.

It is also insisted that:

"The finding of the special master on the transaction arising out of the McGraw $10,000 note of August 16, 1911, is clearly erroneous; the appellant being entitled to a net credit of $4,918.34 on account of this transaction, instead of nothing, as in effect reported by the master."

The questions of fact necessary to a determination of this point were found by the master, and upon which he based his conclusion. An examination of the evidence bearing upon the same leads us to the conclusion that the action of the court below in affirming the master's report as to this item was correct.

[2] It is also insisted by counsel that, inasmuch as appellant owes appellee for certain items not used in the construction of the hotel building, any payment made by appellant should be applied as a credit on any balance due on construction of the building, and should not be applied as a payment on the account of the items in question. It is not contended that at the time the payments were made appellant gave any directions as to the application of the same. It is well settled that where one has two accounts, one of which is secured and the other unsecured, that where payments on such accounts are made without instructions as to the application of the same that the party to whom the payments are made may apply the same to the unsecured

account. While this is a rule that applies generally, the Supreme Court of West Virginia, in the case of Huntington Plumbing & Supplying Company v. McGuffin et al., 83 S. E. 194, in discussing this question, said:

"While the statute gives no lien on the property of the owner for any items in an account of such subcontractor furnished beyond the period of nine months from the date of the notice served on the owner; nevertheless it gives a lien thereon for all items of the account furnished within such period of nine months and payments made and credited will be applied first to the items not covered by the lien, so as to preserve the lien for the items actually furnished within that period."

[3] It is insisted that the appellee in giving notice of mechanic's lien has not complied with the requirements of the statute. It is urged that there is nothing in the caption of the affidavit upon which the claim is based or in the jurat clause attached thereto to show in what county it was taken, nor is there anything in the body of the affidavit to show before what officer it was taken; also, that the jurat clause is merely signed "Hayward Fleming, Notary Public," without containing anything from which it can be inferred that he was a notary public of any particular state or county.

While this question has never been raised in proceedings to enforce a lien of this character, nevertheless we are of opinion that the law of West Virginia as respects affidavits generally is applicable to affidavits filed under the statute for the purpose of perfecting a mechanic's lien. In the case of Quesensberry v. Bldg. L. & S. S. Association, 44 W. Va. 512, 30 S. E. 73, the Court of Appeals of that state held that where an affidavit designated the state and county and contained the following jurat:

"Taken, subscribed, and sworn to before me this 22d day of December, 1896, in Summers county. T. N. Reed, Notary Public"

—the affidavit in question was valid.

The statute in pursuance of which this lien was filed gives the form of affidavit to be attached to a mechanic's lien. While this is true, the statute contains the further qualification that such affidavit shall be sufficient if in form and effect as therein set forth, which raises the question as to whether this affidavit is sufficient in form and effect as provided by the statute. The special master, in passing upon this phase of the question, very pertinently says:

"If the affidavit made by Walsh had contained the name of the county in the caption of the same, there would be no question under the decisions cited that it would be sufficient; but, since the name of the county has been omitted, we must look further to ascertain whether or not this omission is fatal. Nothing appearing to the contrary, it will be presumed that the official taking the affidavit acted within his jurisdictional limits; otherwise, it must be presumed that the official in question acted without his jurisdiction and therefore violated his official obligation. 2 Cyc. page 29. Young v. Young, 18 Minn. 90 (Gil. 72); Ormsby v. Ottman, 85 Fed. 492, 29 C. C. A. 295. So, also, in Goodnow v. Litchfield, 67 Iowa, 691, 25 N. W. 882, it was held that, where an affidavit was titled 'State of Iowa, County of Webster,' it appeared to have been sworn to before a notary public in Dubuque county, it was held that in absence of evidence to the contrary it would be presumed that the notary took the affidavit in his own county. In Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774, which was a suit brought to enforce

certain liens against property the question arose as to whether an acknowledgment to a deed of trust was good which did not show that the person making the affidavit appeared in the county before the notary; and upon consideration the court held that this did not avoid the certificate and held the same to be sufficient, holding further in this regard that a substantial compliance with the statute was sufficient. In Barnard v. Darling, 1 Barb. Ch. (N. Y.) 218, we seem to have a case directly in point. In this case the jurat was as follows: 'State of New York, ——— County, ss.' The oath was signed 'O. O., Comm'r of Deeds,' without specifying the county or city for whom the person signing it was a commissioner. It appeared however, that he was in fact a commissioner of deeds for the city of Albany. It was held that the affidavit was not invalid. * * * There is no denial anywhere, so far as the defendants' case is concerned, tending to show that the notary public who subscribed his name to the affidavit in question was not in fact a notary public in Taylor county, West Virginia, or that the plaintiff, J. J. Walsh, Jr., did not make the affidavit; whereas on the other hand, the testimony is clear and specific as shown by the deposition of J. J. Walsh, Jr., at page 68 (77, printed record), that he is the person who made the affidavit, that it was made and sworn to at Grafton, Taylor county, West Virginia, on the 27th day of August, 1912. Under these decisions, and for the reasons given I hold, and therefore find, that the affidavit to the lien as filed substantially complies with chapter 75 of the Code of West Virginia, and is therefore good and sufficient in the case before me. See the following additional authorities: Hertig v. People, 159 Ill. 237, 42 N. E. 879, 50 Am. St. Rep. 162; Cox v. Stern, 170 Ill. 442, 48 N. E. 906, 62 Am. St. Rep. 385; Sullivan v. Hall, 86 Mich. 7, 48 N. W. 646, 13 L. R. A. 556."

We think the position taken by the master is fully sustained by the authorities, and under the circumstances do not deem it proper to enter into a further discussion of the same.

[4] We now come to consider the question as to whether the last work done or material furnished by the contractor was within the period of 60 days prior to the filing of the lien. It appears that the appellee's account, designated as "Exhibit A," shows that the last work was done on June 30, 1912. It is obvious that this is erroneous, the 30th being on Sunday. The appellee, in order to meet this situation in the court below, endeavored to show by testimony that material had been furnished and work had been done on the 28th day of June, 1912, and on subsequent days. However, it is insisted by appellant that appellee is bound by the last date as indicated by the lien filed, and that he cannot show a subsequent date. Appellant further insists that the last work done and material furnished on the hotel building was on the 25th day of June, 1912, and that therefore more than 60 days had expired from such date before the filing of the lien, and that the lien is therefore null and void.

This brings us to a consideration of the question as to whether the appellee is bound by the last date as shown by the lien. The law bearing upon this question is found in chapter 75, § 4 (sec. 3845), of the Code of West Virginia, which reads as follows:

"Every lien provided for in the second and third sections shall be discharged unless the person desiring to avail himself thereof shall, within sixty days after he ceases to labor on, or furnish material or machinery for such building or other structure, file with the clerk of the county court of the county, in which the same is situated, a just and true account of the amount due him, after allowing all credits, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner or owners of the property, if known,

which account shall be sworn to by the person claiming the lien, or some person in his behalf."

Under the provisions of this section the contractor is only required to file with the clerk "a just and true account of the amount due him after allowing all credits, together with a description of the property intended to be covered by the lien," etc. In other words, we find nothing in the statute which requires a definite statement as to the date of the last-named items of material furnished or labor performed. In the case of O'Niel v. Taylor, 59 W. Va. 370, 53 S. E. 471, the Supreme Court of that state said:

"When repairs, improvements, and additions are made to a building under contract directly with the owner, and the work prosecuted to completion, dates when the several items of work was done and materials furnished are not material, except that it must appear that the last work done and the last material furnished necessary to the completion of the work was done and furnished within sixty days before the filing and recording of the mechanic's lien."

The Supreme Court of Indiana, in the case of Jeffersonville Water Co. v. Riter, 146 Ind. 521, 45 N. E. 697, in passing upon this point said:

"A notice of intention to hold a mechanic's lien is not invalid for failure to specify when the work was done or material furnished."

Also Phillips on Mechanics' Liens, § 353, among other things, states:

"If a statute giving the lien does not require the notice to itemize the work or materials, it will not be necessary."

[5]The last item is a charge for hauling a certain amount of terra cotta and a half day's work for setting the same. The witness Walsh, in testifying in regard to this transaction, said:

"That on the side of the hotel building, near the stairs that led up from the platform, they were short about three pieces of terra cotta. They received this terra cotta on the 28th of June, 1912, it was delivered to the building, and in anticipation of setting of the terra cotta, witness, in making up his bill, rendered a bill for the hauling of the terra cotta, and also made an allowance for a half day's time for a bricklayer to do the work. The fact is that it was not set on the 28th, as the plaintiff neglected to notify bricklayer and foreman; foreman attended to this matter, and the work was done in the week of July, somewhere in July 6th and 11th."

It also appears from the testimony of witness Standiford that the terra cotta was set on the 11th day of July, 1912, as indicated by the time sheet. In addition to these facts, we have the findings of the master. Indeed, it is admitted by counsel for appellant in their brief that there was testimony in the court below that work was done in the early part of July. The evidence as to this point, to say the least of it, is conflicting, and the master having found in favor of the appellee, and his findings having been confirmed by the court below, we are not inclined to disturb the same.

[6] It is also insisted by counsel for appellant that:

"The part of the decree of sale directing the sale by the special commissioner to be made 'in the city of Grafton, Taylor county, West Virginia,' instead of at the front door of the courthouse of said Taylor county, or on the prem-

ises, is clearly obnoxious to United States statutory provisions in reference to judicial sales of real estate."

The decree directs the commissioner to sell the property in the city of Grafton to the highest and best bidder, and we must assume that the commissioner will advertise the property in pursuance of the federal statute, which is in the following language:

"That all real estate or any interest in the land sold under any order or decree of any United States court shall be sold at public sale at the courthouse in the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct."

In view of what we have said, the decree of the lower court should be modified as follows: (a) So as to correct the mistake which was made in computing interest on $58,615.05, the principal amount due appellee; (b) the sum of $698.26 allowed by the master for liability insurance should be disallowed; (c) the sum of $4,622.21, being the amount erroneously charged as commissions, should be deducted from the amount allowed as commissions.

The decree as thus modified is affirmed.

Modified and affirmed.

SOUTHERN EXPRESS CO. v. REAGIN.

(Circuit Court of Appeals, Fourth Circuit. September 14, 1915.)

No. 1355.

1. CARRIERS ⟸94—EXPRESS COMPANY—REFUSAL TO DELIVER.
   Evidence, in an action to recover the value of a typewriter, *held* to show that defendant express company had refused to deliver it upon payment of the transportation charges.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. ⟸94.]

2. CARRIERS ⟸91—EXPRESS COMPANY—CONVERSION.
   An express company refusing to deliver property to the consignee, upon his payment of its charges, was guilty of a conversion.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 338-355; Dec. Dig. ⟸91.]

3. CARRIERS ⟸94—EXPRESS COMPANY—ACTION FOR CONVERSION—DAMAGES.
   In an action against an express company for the conversion of property, the measure of damages was the value of the property.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. ⟸94.]

4. CARRIERS ⟸94—EXPRESS COMPANY—ACTION FOR CONVERSION—QUESTION FOR JURY—RATIFICATION.
   In an action against an express company for the value of a typewriter which it had refused to deliver to the consignee on his payment of charges, *held* on the evidence that whether the willful refusal was ratified by an officer of the company empowered to do so was for the jury.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. ⟸94.]

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5. CARRIERS ⟸94—ACTION FOR CONVERSION—INSTRUCTIONS—APPLICATION TO EVIDENCE.

In an action against an express company to recover the value of a typewriter which had been wrongly addressed and which it had refused to deliver to the consignee on his payment of transportation charges, where the evidence as to whether such refusal had been ratified by any officer authorized thereby was conflicting, defendant's requested instruction predicated on the absence of any evidence of ratification was properly refused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. ⟸94.]

6. CARRIERS ⟸94—REFUSAL TO DELIVER—CONVERSION—ACTION — INSTRUCTIONS.

In an action against an express company for the conversion of a package which had been missent, by refusing delivery on payment of charges, the court's refusal to charge that the express agent at the sending office, in writing the tag to be placed on the package, was acting as the amanuensis of the shipper, was proper, where the question of plaintiff's knowledge that the tag misstated the destination had already been submitted to the jury with instructions that if the mistake was the shipper's he could not recover, and was in any case not prejudicial to the defense, as the matter was only important on the question whether the company could properly charge for transportation from the mistaken to the proper destination, and payment of full transportation had been tendered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. ⟸94.]

7. CARRIERS ⟸80—EXPRESS COMPANY—ACTION FOR DELIVERY.

Upon the shipper's mistake in the address of a parcel, an express company was not liable if it went to the wrong place; but if its own agent made such mistake it would be bound to deliver it to the proper place, without charge from the place to which it had been sent, or to return it to the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 273; Dec. Dig. ⟸80.]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. M. Smith, Judge.

Action by B. J. Reagin against the Southern Express Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Nelson Frierson, of Columbia, S. C. (Barron, McKay, Frierson & Moffatt, of Columbia, S. C., on the brief), for plaintiff in error.

Frank G. Tompkins, of Columbia, S. C. (F. W. Cappelmann, of Columbia, S. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The defendant in error will hereinafter be referred to as "plaintiff," and the plaintiff in error as "defendant"; such being the relative positions the parties occupied in the court below.

The plaintiff brought this action against the defendant company in the circuit court of common pleas for Richland county, S. C., for the purpose of recovering damages against the defendant for the alleged

conversion of a typewriter. The plaintiff's demands for judgment embraced three items of damage, to wit: (1) The value of the typewriter; (2) five times the value of the typewriter as a penalty, under a statute of the state of South Carolina; and (3) punitive damages in the sum of $5,000.

On a motion of defendant the cause was removed to the District Court of the United States for the Eastern District of South Carolina on the ground of diversity of citizenship. Upon the trial of the cause the District Judge held that plaintiff was not entitled to recover the penalty sued for as the second item of his alleged damage. Neither party excepted to the ruling of the court as to this phase of the controversy.

The jury brought in a verdict in favor of the plaintiff for $45, the value of the typewriter, and $500 exemplary damages, and the cause comes here on writ of error.

The allegation to the effect that just prior to the bringing of this suit the plaintiff, in company with one of his attorneys, called at the office of the express company in Columbia and inquired if the typewriter in question was there, and that the agent at that place "replied in the affirmative," was supported by evidence offered by the plaintiff. It was also shown that the plaintiff was refused permission to see the machine; that he thereupon demanded possession of it, and offered to pay any transportation charges that might be held against it; that his request was refused, the agent of the company at the time stating that possession of the typewriter would not be relinquished unless the plaintiff would pay a claim which the company had against him, such claim being entirely independent of any charge which they had against plaintiff for transporting the machine.

It was further shown that the plaintiff shipped his typewriter from Central, S. C., to Huntingburg, Ill., on the 24th day of March, 1911; that by an error the machine was shipped to Huntington, Ill., and did not reach the plaintiff in due course of time; that from April, 1911, until April 20, 1914, plaintiff was constantly demanding the possession of his typewriter, and the defendant company through its officers and agents, including the superintendent located at Charlotte, N. C., steadfastly refused to deliver it unless he would pay certain claims which they held against him by reason of the difference between salary due him and certain charges, known as expense sheets, which they had found against him after he left their employ in 1911. It appears from the evidence that it was customary to charge against each office any failure to collect the proper amount of express or any loss caused the company by the act of the agent. It did not appear that there was anything unusual about this, and the plaintiff explained that he had always been willing to pay it, if they would give these expense sheets, as they customarily did, so that he might, as is usually done, put in his claim where it appeared from these sheets that the mistake was not his but that of some other agent.

It also appears that on the 24th day of April, 1914, the plaintiff, after having endeavored for some three years to get his typewriter, made a demand upon the express company at Columbia for the ma-

chine, and tendered the charges; that the defendant refused to surrender possession of the same. However, it was shown by the evidence of defendant's witnesses that they had no recollection of such demands or tender ever having been made.

The first question raised by defendant is that the learned judge who heard this case in the court below erred in charging the jury that the plaintiff was entitled to recover the value of the typewriter in any event. This raises the question as to whether the defendant was justified in holding the machine until the plaintiff had satisfied a certain claim which they had against him, such claim being in no wise connected with the transportation of the machine.

It fully appears that many demands were made upon the company by plaintiff for the possession of the typewriter, all of which were made by letter, except at the time that the demand was made by the plaintiff in person on April 24th, as hereinbefore stated. It further appears that at the time these demands were made by letter the plaintiff was met with the excuse that the officer upon whom such demand was made was not in possession of the machine, but that it was at some other point and in the possession of some other officer of the company, and that therefore the official upon whom such demand was made was not in a position to make such delivery. The plaintiff, in testifying as to what occurred at the time the last demand was made, said:

"Subsequently I was referred by the general officer of the Southern Express Company to Mr. Havis, the agent at Columbia. I went to see him, and he told me if I would pay him a certain amount of money he would arrange later for the delivery. I think at first he demanded a sum of money somewhere in the $60s, then I think he agreed to make it somewhere in the $30s. The first time I saw him I went to him by myself, before I employed Mr. Cappelmann. He then claimed about $62 and some cents, about the same amount that the man in Jacksonville had claimed. I told him please to hand me the proper receipts and I would send him the money; asked him to please give me the proper receipts, that the money was here. He said he would not do it. I asked him for my typewriter. He said he would not give it. I asked him to let me see it. He said I could not see it. After that I employed an attorney, Mr. Cappelmann. I went back to the office with Mr. Cappelmann and saw Mr. Havis, the agent. I made a demand on him for my typewriter. He said that I would have to pay them a certain sum of money, somewhere in the $30s; that I would have to pay him that difference before he would entertain any delivery of the machine at all. He said that the machine was there, but he did not show it to me.

"Q. You had been working for the Southern Express Company for a good many years previous to the time you left Central, had you not? A. Yes, sir.

"Q. Did you offer to pay him the money there that day? A. Yes, sir.

"Q. Pulled the money out? A. Yes, sir.

"Q. What was it you wanted him to give you before you paid him the $30 or $60, whatever he asked? A. I wanted him to give me the papers representing this amount of money, which would be my receipt.

"Q. You mean the file? A. Which showed that I had paid that money. They refused to give me the typewriter, and my attorney was present at the time. I offered to pay all charges for the shipment of the typewriter. I have never gotten my typewriter. I next brought suit."

Mr. Cappelmann's testimony was as follows:

"I called on the Southern Express Company with Mr. Reagin in regard to this typewriter in April of this year. I received a letter dated April 11, 1914:

"'Columbia, S. C., April 11, 1914.

"'Mr. F. W. Cappelmann, Attorney, City—Dear Sir: I have your favor of April 10th with reference to claim of B. J. Reagin. The typewriter has been sent to Columbia and Supt. Skaggs advised me that he would be in Columbia next week and handle the matter with you.

"'Respectfully, E. B. Havis, Agent.'

"I called at the express company with Mr. Reagin. We saw Mr. Havis when we got there.

"Q. What conversation passed between Mr. Havis and yourself and Reagin? State what took place. A. We went to the express office, and I told Mr. Havis we were coming to see about the typewriter matter. We asked if the typewriter was there, and Mr. Havis said that the typewriter was there in the office. I asked if we could see it. He said we could not see it, and I demanded the typewriter. He said: 'We will give you the typewriter if Mr. Reagin will pay us what is due us.' I made the statement that we considered the matter of the typewriter and the matter of what was due the Southern Express Company by Reagin as two separate matters entirely. He says: 'We cannot give you the typewriter unless Mr. Reagin pays.' Mr. Reagin pulled out a roll of bills and said: 'How much do I owe you?' He said: '$30.42.' Mr. Reagin started to count the money out, and he said: 'If I pay you I want those expenses.' 'Expenses' was the word he used, and I asked what he meant by that. Mr. Reagin said he meant the papers which showed where this money had to be paid by him, how many errors were paid, and Mr. Havis said he could not have them, and Mr. Reagin said he could not pay him unless he got those papers. I asked what was the benefit of Mr. Reagin having the papers. He said that if any other party had made a mistake in this connection he could then recover from the other party the money he had been forced to pay this company. I believe that is all that took place on this occasion.

"Mr. Reagin offered to pay all express charges, everything that was due them at all on the typewriter. We did not see the typewriter, but I understood from Mr. Havis that it was there, in the express office at Lady street. I had seen Mr. Skaggs on a previous occasion, not at that time. I called there individually, without Mr. Reagin, before that; saw Mr. Skaggs and Mr. Havis. Mr. Skaggs is superintendent of the express company. He came here from Charlotte. I demanded the typewriter from him. This was preliminary, though, this question of negotiation; he said he would be glad to take it up with us. That was before I got that letter. He did not give me the machine."

Mr. Havis, the agent for defendant company at Columbia, testified as follows:

"Witness: He said, 'I will pay the expense, no matter what the amount is, provided you give me the papers.' I told him the papers were the property of the Southern, that I would give him a receipt for what he paid, showing what it was for; he declined to pay on those grounds.

"Q. Anything else said? A. Mr. Cappelmann then asked me if I had the typewriter, and I told him, 'Yes.' He said, 'Let's see it.' I said: 'I can't do that; the box has never been opened; it is in the original box.' I don't think he demanded the typewriter; I don't recall that.

"Q. Have you any recollection whether or not he made a demand for the typewriter to be delivered then? A. I do not.

"Q. You mean to say that Mr. Cappelmann and Mr. Reagin did not come in there and offer to pay you the charges on the machine if delivered to them? A. No, sir; I don't remember.

"Q. Will you swear that they did not do that? A. No, sir."

From the foregoing it appears that the plaintiff demanded possession of the machine and tendered the charges thereon, and that the same were refused by the agent. The testimony of the plaintiff on this point

is positive, while the evidence offered by the defendant is negative, to say the most of it; the statement of the witness in reply to the question as to whether Mr. Cappelmann and the plaintiff went to the office and offered to pay the charges on the machine if delivered being, "No, sir, I don't remember," and, when further questioned as to whether he was willing to swear that the plaintiff and Cappelmann did not make the demand at that time, replied that he could not swear that such was the case.

[1-3] This testimony, when considered in connection with the correspondence contained in the record, clearly shows that the defendant refused to deliver the machine upon the payment of the transportation charges. Therefore the instructions of the court below to the effect that there had been a conversion by the defendant of the plaintiff's property in this instance, and that the jury must find for the plaintiff the value of the property thus converted, were eminently proper in view of the facts established by the evidence offered by the plaintiff. The rule as to what constitutes a conversion is so well settled by the courts, as well as by the text-writers, that we do not deem it necessary to enter into a discussion of the same further than to cite the following authorities: Bigelow, Torts, 428; 38 Cyc. p. 2005; Cooley on Torts, 448; 2 Greenleaf's Evidence, § 642; Abraham v. Southwestern R. Bank, 1 S. C. 441, 7 Am. Rep. 33; Reid v. Colcock, 1 Nott & McC. (S. C.) p. 592, 9 Am. Dec. 729.

[4] It is also insisted that the court below erred in refusing defendant's third request to charge, as follows:

"Exemplary or punitive damages are not recoverable against a principal in an action based on the act of an agent, where there is a total absence of evidence showing that the principal participated in the wrongful act, or that he expressly or impliedly authorized it, either before or after its commission."

This request was refused by the presiding judge in the following words:

"Refused as not applicable to this case. If there was a total absence of evidence I would not send it to the jury."

Counsel for plaintiff insists that this assignment is wholly without merit; that the plaintiff was endeavoring to get possession of the machine or the value of it; and that such was his purpose in applying to the officers and agents of the defendant company almost continually from the last of March, 1911, until the 20th of April, 1914.

During this period it appears that demands were made upon Superintendent Sadler, Charlotte, N. C.; the agent at Central, S. C.; Mr. Richardson, inspector, Atlanta, Ga.; Mr. Havis, agent at Columbia, S. C.; Mr. W. S. Langford, agent at Newberry, S. C.; Mr. Mullins, chief clerk for the superintendent, Charlotte, N. C.; and also to Mr. Warren, successor to Mr. Mullins, Mr. J. S. Holland, cashier, Columbia, S. C., and Mr. Skaggs, superintendent, Southern Express Company, Charlotte, N. C.

[5] Under these circumstances, we think that there was sufficient evidence to go to the jury on the question as to whether or not the willful act was ratified or approved by an officer of the company having

a right to ratify it. There being a conflict of evidence on this point, we think the action of the court below in refusing to grant this request was eminently proper.

It is further contended that the court below erred in refusing to instruct the jury that if the agent of the company wrote the directions on the tag at the request of the plaintiff, and the plaintiff himself then affixed the tag to the shipment, the misdirection of the same was the act of the plaintiff and not the defendant.

It is admitted by counsel for defendant that this point is not based upon exception to the failure of the court to charge as requested. However, it is insisted that it was the duty of the court to consider this as "a plain error not assigned" under rule 11 of this court (193 Fed. vii, 112 C. C. A. vii). An examination of the record discloses the fact that the court below in its charge with reference to this subject said:

"The receipt given on that day by the agent of the express company is for Huntingburg, but the machine was shipped to a different place called Huntington. Now, gentlemen, you have heard the testimony upon that point. That is peculiarly a question for the jury. The receipt made out in the handwriting of the agent himself is Huntingburg; the tag which he claims to have given out at the same time to be put upon the package is Huntington. Both are in his handwriting; the receipt and the tag are in the handwriting of the agent. The agent at or about the same time wrote in the receipt which he delivered to the shipper Huntingburg, and he claims that he wrote also on the tag which he mailed with the package that he wrote Huntington. He says he did that at the request of the shipper. If it was a mistake of the shipper, if he made the mistake, then the express company was not responsible if it went to the wrong place; but, if the agent of the express company was the party who made the mistake, then the express company would be responsible to this extent, that they would be bound to transport it to the proper place free of charge from the place to which it had been sent, or return it to the shipper. Now it is for you to say from the testimony by whom the mistake was made. I charge you, if the mistake was made by the express company, then the shipper was not responsible for the transportation charge to the wrong point different from what he ordered. If that was his mistake, he would be responsible. But, whether it was shipped to the wrong point or not, the typewriter still remained the property of Reagin, and upon his demand at the place or wherever it could be found he was entitled to it. He was entitled to it without the payment of any transportation charges if the shipment to the wrong place was the fault of the express company's agent, and he was entitled to it upon the payment of the transportation charges, wherever it was in the possession of the company; it remained his property."

After the court had given the foregoing instructions to the jury, attorney for defendant made the request upon which this contention is based, and in presenting the matter to the court said:

"Mr. Frierson: Will the court rule whether or not they find that Mr. Franklin wrote it down at the dictation of Mr. Reagin, and, if they find the further fact that Mr. Reagin attached it to the box himself, will the court rule that Mr. Franklin did not act as the amanuensis of Mr. Reagin?

"Court: I will not rule that he did or did not; I will leave it to the jury to say whether that was done under circumstances which showed that Mr. Reagin knew the direction was wrong and was acquainted with the fact that it was going to Huntington and not to Huntingburg."

[6, 7] It will be seen by the foregoing that the question as to whether plaintiff knew that the directions were improper was, among other things, submitted to the jury, and under the circumstances the refusal

of the court to grant the request in the form in which it was presented could not be deemed to be prejudicial to the rights of the defendant, inasmuch as it could only have been material to the question as to whether the company had a right to charge transportation, and as respects this matter it appears, as we have stated, that full transportation was tendered at the time the machine was demanded in Columbia, and in addition thereto the court in the general charge fully explained the rights of the defendant, in which it was stated, among other things, that if the mistake of direction was that of the shipper the express company was not responsible if it went to the wrong place, and if, on the other hand, it was the agent of the express company who made the mistake, the express company would be bound to transport it to the proper place free of charge, from the place to which it had been sent, or return it to the shipper.

For the reasons stated, the judgment of the lower court is affirmed.

SNYDER et al. v. UPPER ELK COAL CO.

(Circuit Court of Appeals, Fourth Circuit. September 14, 1915.)

No. 1359.

1. TAXATION ⟸849—TAX TITLES—PRIVITY BETWEEN HOLDER OF TAX TITLE AND FORMER OWNER.

Under the laws of West Virginia, there can be no privity between the former owner of land and one who pays taxes under a tax deed thereto, even though such deed be void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1665; Dec. Dig. ⟸849.]

2. JUDGMENT ⟸828—RES JUDICATA—STATE JUDGMENT—CONCLUSIVENESS IN FEDERAL COURT.

Where owners of land who had forfeited it to the state for unpaid taxes exhausted all their remedies to avoid such forfeiture in the state courts, the judgments of the state courts in the former owners' suits were conclusive upon the federal courts, so that the owners could not maintain a bill to remove the cloud from their title in such a court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504–1509; Dec. Dig. ⟸828.

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

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

Suit by George W. Snyder and others against the Upper Elk Coal Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

H. G. Kump, of Elkins, W. Va. (C. H. Scott, of Elkins, W. Va., and Byron Clark, of Omaha, Neb., on the brief), for appellants.

E. A. Bowers, of Elkins, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The learned judge who heard this case in the court below filed a memorandum at the time of the entry of the decree, and after stating the facts discussed the salient points involved in this controversy sufficiently, we think, to give a fair insight into the real questions involved herein. The statement in question is as follows:

"That they admitted in the suit of George W. Yokum, School Commissioner, v. Wm. Snyder and others, that they had failed to meet the legal obligation upon them to see to it that their land was entered upon the land books of Randolph county, wherein it was situate, and that the taxes were properly assessed agains it and paid by them for a period sufficiently long to operate a forfeiture of all their right and title thereto to the state. This admission was reiterated by them in the subsequent cause instituted by the state of West Virginia against them for the purpose of selling the tract as the state's property at public sale. In both of these proceedings they filed petitions making this admission of forfeiture and prayed that they might be relieved therefrom by being allowed to redeem by payment of all back taxes, damages, and costs. Such relief was actually decreed to them in the first proceedings, but the Supreme Court of Appeals reversed the decree solely because a new statute, passed just prior to the entry of the decree, provided for another and different form of action and procedure for the sale and redemption of forfeited and delinquent lands vested, by reason of forfeiture, in the state. Although made on technical ground, the reversal was complete, and this decree, authorizing the Snyders to redeem, became thereby null and void.

"In the second proceeding, under the new statute, the Snyders again filed their petition admitting forfeiture and again praying the privilege of redemption. Clearly by the final decree entered in this cause on the 9th day of February, 1915, this prayer was refused and redemption by the Snyders denied. The Supreme Court of Appeals, upon appeal by the Snyders, at first reversed this denial, but, upon petition for rehearing, reversed itself, and, finally, on December 22, 1908, affirmed the denial of redemption and the terms of this decree of the court below in toto. This, in my judgment, was the final action of the courts of this state having full jurisdiction in the premises, and whose peculiar province it was by the provisions of the statute of the state in such case made and provided, to determine whether or not the state's bounty in the way of permitting redemption was to be extended to the Snyders or denied. For it is too well settled to be longer questioned that, under article 13, sections 4, 5, and 6, of the Constitution of the state, a failure on the part of an owner of any real estate to 'cause the same to be entered upon the land books of the proper assessor and charged with the state taxes thereon' for five successive years causes such real estate to become absolutely forfeited. and such owner's title to be vested in the state. His interest in such case becomes solely in any surplus arising from a sale, if one be made by the state, over and above all taxes in arrear and unpaid, interest at 12 per centum, and costs of sale proceedings. The Supreme Court of Appeals of this state, in McClure v. Maitland, 24 W. Va. 561, 576, 581, says:

" 'The title to the land and all the right and interest of the former owner having thus, by his default, and the operation of the law, become absolutely vested in the state and become irredeemable, she, having thus acquired a perfect title to, and unqualified dominion over, the land, had the undoubted right to hold or dispose of it for any proper purpose, in any manner and upon any terms and conditions she might in her sovereign capacity deem proper without consulting the former owner or any one else; for after the forfeiture had become complete, as it had in the case before us, the former owner had no more claim to or lien upon the land than one who never had pretended to own it. In the exercise of this perfect dominion over her own property, the state saw proper to transfer and vest her title to so much of said land owned by her, in any person, other than those who occasioned the default, as such person may have been in the actual possession of, or have just title to, claiming the same, and was not in default for the taxes thereon chargeable to him. * * * And all the right, title, and interest of the former owner having

been completely divested, he has not a particle of interest in the land—no more than if he had never owned it. * * *

" 'The whole history as well as the express language of this constitutional provision proves that it was the intention to bestow upon the former owner whatever part of the proceeds of sale might be actually paid or liable to be paid into the state treasury, after the state had sold the land and paid all the taxes, costs, etc., out of the proceeds of the sale; and that it was clearly not intended to give him any interest in the land or its proceeds until a surplus should be ascertained by the proceedings conducted alone by the state through her officers. "Beggars must not be choosers," is a just maxim, and therefore it is the duty of the courts to see that the bounty of the state is not used to her detriment by giving to this provision of her Constitution a forced construction and one that could never have been intended.

" 'I am therefore of opinion that said fifth section of the Constitution did not confer upon the appellant, Maitland, any claim or interest in the land, or any interest or right to participate in the proceedings for its sale, his right to the surplus proceeds not arising until after the sale.'

"This quotation from McClure v. Maitland was cited approvingly by me in Fay v. Crozer [C. C.] 156 Fed. 486, in which my ruling was subsequently upheld by the Supreme Court of the United States upon appeal taken in the case. 217 U. S. 455 [30 Sup. Ct. 568, 54 L. Ed. 837]. See, also, State v. Jackson, 56 W. Va. 558 [49 S. E. 465], and State v. Garnett, 66 W. Va. 106 [66 S. E. 98].

"It, therefore, so far as this suit and those plaintiffs are concerned, matters not whether the defendant, Upper Elk Coal Company, is now claiming the land, or who may be claiming it; whether the state courts in their final determination decided justly or unjustly, rightly or wrongly, that the title was in Upton or otherwise. For by allowing the land to become forfeited the Snyders became strangers to and no longer interested in it, hence cannot maintain this or any other suit in relation to it. The state by the decree of February 9, 1905, through its court empowered to act for it in the premises, refused to extend the grace of redemption to these plaintiffs on account of their default, and that ended it, and this or any other court cannot now set aside or annul this action."

While we are of opinion that the ruling of the court below was eminently proper, nevertheless it is further insisted by counsel for appellants that the forfeiture to which the court below refers is "only apparent and not real, because defendant below merely holds the legal title to the land, with possession of the land itself, in privity with plaintiff below, and that the payment of taxes by defendant below, and those under whom it claims since 1870, has been for benefit of plaintiffs below and inures to their benefit and has actually prevented forfeiture, and in consequence plaintiffs can, by a decree of a court of equity, compel a transfer to them of defendant's title and possession, thus revesting full title in themselves, and leaving nothing in defendant but a mere right to be reimbursed for its money outlay for taxes and expenses incident thereto."

[1] In other words, it is insisted by counsel for appellants that the Cherry tax deed is void, and the subsequent payment of taxes by those who took under it inures to appellants' benefit, and that therefore appellants' title has not been forfeited, and, further, that the appellee holds this property as trustee for appellants' benefit. The rule invoked by appellants applies only where privity exists between the party who pays the taxes and the one who should have paid them, but, while such is the rule, it is well settled by the courts of West Virginia that there can be no privity between a former owner and one who pays taxes under a tax deed even if such tax deed be void.

In the case of Stockton v. Craig, 56 W. Va. 464, 49 S. E. 386, the Court of Appeals of that state, in the third syllabus, said:

"The payment of taxes by adverse claimants of land under fraudulent and void tax decrees and tax deeds does not inure to the benefit of the delinquent owner so as to prevent the forfeiture of his title, for nonentry on the land books."

Also in the case of Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484, the court, in a syllabus, said:

"An invalid sale of land to the state for nonpayment of taxes does not relieve the owner thereof from the duty of causing the same to be kept on the land books and charged with taxes, in order to prevent forfeiture of the title under section 6 of article 13 of the Constitution."

The Court of Appeals of West Virginia also passed upon the question in the case of Simpson v. Edmiston, 23 W. Va. 675.

"Privity," in the case of Boughton v. Harder, 46 App. Div. 352, 61 N. Y. Supp. 574, was defined as follows:

"Privity implies succession. He who is in privity stands in the shoes or sits in the seat of the owner from whom he derives his title, and thus take it * * * with the burden attending it."

In view of what we have said, we are at a loss to know upon what ground it can be contended that there was privity between appellee and appellants under the facts of this case.

There being no privity between the parties, it necessarily follows that no payment of taxes under the Cherry tax deed could support appellants' claim that they had not been deprived of their title. There being in this case a complete extinction of the equitable as well as the legal title, the appellants could not maintain a bill to remove the cloud from the title.

The court below in disposing of this case, among other things, said:

"It has always seemed to me, from my first reading of the record some months ago, that from an equitable standpoint of view a very great injustice was done the Snyders in the various judicial proceedings had in reference to their right to redeem this 1,000 acres of land. I think so still. I am nevertheless confronted with these facts."

We do not deem it necessary to express an opinion upon this point, feeling as we do that the questions sought to be raised here have already been determined.

It not infrequently occurs that suits of this character are instituted in both the state and federal courts. One would naturally suppose that, where such a considerable length of time had elapsed since the state in the first instance parted with its title to the land, the question as to the validity of such title would never arise; but such is not the case. While it is highly desirable that titles to real estate should be definitely settled, yet it should be remembered that this was not quite so important in the early stages of our history. Then there were no large investments in mining and other industrial enterprises such as we have to-day. The lands that were then considered practically valueless are to-day worth millions of dollars, and are usually

sold to parties who contemplate making heavy investments in buildings, machinery, etc.

At that time numerous tracts of land which were not considered valuable were purchased from the state. The titles to many of these were afterwards forfeited for nonpayment of taxes, and in some instances suits were begun for the recovery of certain of these tracts which would not have been instituted had it not been for the fact that these lands, at one time considered to be of little value, had, owing to the development of that section, become available for mining and other purposes, and, therefore, very valuable.

However, we do not wish to be understood as saying that such are the facts in this case, and, in so far as we know, these appellants, by bringing this suit, have simply sought to assert what they conceive to be a bona fide right.

[2] It clearly appears that appellants have exhausted all their remedies in the state courts of West Virginia. The questions sought to be litigated here were, or could have been, determined in the courts of that state under the pleadings filed therein. If the appellants were to institute a suit for the recovery of these lands in a court of West Virginia at this time, undoubtedly such court would hold that, the matters in controversy having already been adjudicated, any decree or judgment theretofore entered in such suit would be binding upon the parties, and therefore a bar to further proceedings. That the federal courts are bound by the decisions of the state courts in suits of this character is not, in our opinion, a debatable question. Therefore the appellants are not entitled to maintain this suit for the purpose of having questions determined that have been already adjudicated by the state courts of West Virginia.

We have carefully considered the cases cited by counsel for appellants, but are of opinion that they are not controlling in this case, nor do we deem it necessary to enter into a further discussion of the assignments of error inasmuch as we think they are without merit.

In view of the decisions of the Supreme Court of Appeals of West Virginia in the cases to which we have referred, we are impelled to the conclusion that the appellants' right of action is barred, and that therefore the judgment of the lower court should be affirmed.

CATHEY v. NORFOLK & W. RY. CO. et al.*

(Circuit Court of Appeals, Fourth Circuit. September 16, 1915.)

No. 1360.

INJUNCTION ⊜145—UNITED STATES COURTS—ISSUANCE OF INJUNCTION ON AFFIDAVIT—RULE OF COURT.

Under Equity Rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix), regulating the matter of issuance of preliminary injunctions in the federal courts, and providing that no preliminary injunction shall be granted without notice, etc., and that no temporary restraining order shall be granted unless it shall appear from the verified bill or by affidavit that immediate and irreperable loss will result, where a District Court issued an injunction restraining plaintiff in an action in the state court from proceeding in such court merely upon an affidavit of defendant's counsel in the state court, such issuance was improper, since the filing of a properly verified bill in the federal court is a necessary condition precedent to the issuance of an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 318, 321; Dec. Dig. ⊜145.]

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Action by Sam Cathey, by next friend, Homer J. Cathey, against the Norfolk & Western Railway Company and others. Defendants filed a transcript of the record in the District Court, and on affidavit secured an order restraining plaintiff from proceeding in the trial court. To an order continuing such restraining order in force, plaintiff excepted and appeals. Decree granting an injunction reversed, and cause remanded, with directions.

R. R. Williams, of Asheville, N. C. (Jones & Williams, of Asheville, N. C., on the brief), for appellant.

James G. Merrimon, of Asheville, N. C. (Merrimon, Adams & Adams and Martin, Rollins & Wright, all of Asheville, N. C., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. On the 7th day of February, 1914, plaintiff instituted an action for damages in the superior court of Buncombe county, state of North Carolina, against the defendants, Norfolk & Western Railway Company, Virginia-Carolina Railway Company, Callahan Construction Company, Dupont Powder Company, Lee J. Smith, R. Fain Smith, and Joe Jordan, for damages for personal injuries, and a summons was issued returnable at a term of court beginning March 12, 1914. This summons was not served, and on March 16, 1914, of the return term, the plaintiff secured an order for an alias summons, and an alias summons was issued on March 31st, returnable at a term of court beginning Monday, April 27th. On April 16th, more than ten days before the first day of the return term, this summons was served on Callahan Construction Company, Lee J.

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

*Rehearing denied December 13, 1915.

Smith, R. Fain Smith, and Joe Jordan. The service on the Virginia-Carolina Railway Company was defective, and there was no service on Norfolk & Western Railway Company, or Dupont Powder Company. On April 27th, the first day of the return term, an order for pluries summons was secured and pluries summons issued on April 27, 1914, returnable to a term of court beginning on Monday, May 18, 1914. On May 7th, this summons was served on Virginia-Carolina Railway Company, and on May 8th it was served on Norfolk & Western Railway Company. No service was made on Dupont Powder Company and it is no longer a party defendant.

On May 29th, within the first three days of the return term as to Callahan Construction Company, Lee J. Smith, R. Fain Smith, and Joe Jordan, the plaintiff filed his complaint against all the defendants, alleging that the Norfolk & Western Railway Company and Virginia-Carolina Railway Company were corporations engaged in the railroad business, and Callahan Construction Company, Lee J. Smith, and R. Fain Smith were engaged in the construction business and at the time of the plaintiff's injuries, December 15, 1913, the defendants were engaged in the work of constructing a railroad and railroad bed in Ashe county, N. C., and in blasting rocks and dirt for said operations; that, at the time of the injuries, Joe Jordan was an employé of the defendants, and through him the other defendants lighted in a negligent manner a fuse of the charge of dynamite, the explosion of which caused the injuries complained of, and handled the same in a negligent manner so as to cause the injuries, and negligently failed to notify the plaintiff and give him warning that the fuse had been lighted and of the dangers of the explosion of the dynamite, the injuries herein complained of being caused by the joint negligence of the defendants; that Joe Jordan was an incompetent and inexperienced and negligent coservant for the work in which he was engaged; that the other defendants knew that he was negligent and incompetent and negligently retained him in their service; that the plaintiff and Joe Jordan were to light two fuses for the purpose of blasting; that the plaintiff lit his fuse and was informed by Joe Jordan that the fuse which he was to light had not been lighted; that the plaintiff and Jordan left the place of blasting to await the explosion of the plaintiff's fuse; that they retired to a safe distance and did wait until the fuse which the plaintiff lighted had exploded; that afterwards, without fault on the part of the plaintiff, the plaintiff returned to light the other fuse, and just after he reached the fuse the dynamite exploded and seriously and permanently injured the plaintiff, making him totally blind.

The defendants Callahan Construction Company, Lee J. Smith, and R. Fain Smith, did not file an answer or petition to remove at any time during the return term which began on April 27, 1914, but came into court on the last day of the return term on May 14, 1914, and entered a special appearance and secured an order from the presiding judge allowing them 20 days in which to file a petition to remove. The plaintiff excepted to this order. The court adjourned on the same day that this order was secured, and the petition of the defendants Virginia-Carolina Railway Company, Callahan Construction Company,

Lee J. Smith, and R. Fain Smith, to remove the case to the federal court, was not filed until June 1, 1914.

At the April term, 1914, of the superior court of Buncombe county, a general order was made which, among other things, provides that:

"In all cases on the civil issue and summons dockets wherever the complaint has been filed, it is hereby ordered that the defendants have thirty days from date within which to file answer or demurrer."

The return term for the Norfolk & Western Railway Company and Virginia-Carolina Railway Company began on May 18, 1914, and adjourned May 21, 1914. No answer nor petition to remove was filed by these defendants during the return term as to them, but on May 19, 1914, the defendant Norfolk & Western Railway Company secured an order allowing it ten days after the adjournment in which to file its petition to remove, and the plaintiff excepted to this order. The petition of the Norfolk & Western Railway Company was not filed until May 31, 1914.

The defendants did not have a hearing upon these motions to remove within 30 days after the filing of the petition nor until the August term, 1914, although a regular term of court convened on July 13, 1914, and adjourned on July 25, 1914. No order allowing defendants time to answer was made at the term of court commencing May 18, 1914. At the August term, 1914, the court made an order denying the motion of the defendants to remove. The defendants thereafter filed a transcript of the record in the United States District Court for the Western District of North Carolina, and on November 12, 1914, plaintiff excepted. The plaintiff proceeded with his case in the state court, and on January 27, 1915, J. G. Merrimon, of counsel for defendants, made an affidavit in the case and secured a restraining order from the United States District Judge, restraining the plaintiff from proceeding in the state court. On February 15, 1915, the plaintiff served notice upon the defendants that on February 20, 1915, it would move before the United States District Judge to have the restraining order vacated, and on this date the motion was heard and refused and the restraining order continued in force. Plaintiff excepted, and the case comes here on appeal.

The sole question presented by this appeal is as to whether the court below, upon the affidavit filed by the appellee, had the power to grant a temporary injunction restraining the plaintiff from proceeding in the state court. The record discloses the fact that the affidavit in question was filed in the case pending on the law side of the docket.

It is insisted by counsel for appellant that the proceeding in the court below was irregular, and that therefore the injunction was improvidently granted. It is also insisted that if the court below had authority to grant the injunction it would be the duty of this court to pass upon the question as to whether the law case was properly removed from the state court. In other words, to determine as to whether the court below, in view of the facts, acquired jurisdiction over the same.

On the other hand, it is insisted by counsel for appellee that if the proceedings in the court below were not, technically speaking, proper,

nevertheless the affidavit should be treated as a bill for the purpose of this suit. It is further insisted that, if this court should treat the affidavit as a bill in equity, it would not examine the record in the lawsuit for the purpose of determining the question as to whether the court had jurisdiction.

Equity Rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix) embodies the principles long established and enforced by the federal courts in proceedings wherein injunctions are sought to be obtained. The rule in question is in the following language:

"No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."

In discussing this question, Hughes on Federal Procedure (2d Ed.) p. 428, among other things, says:

"Thus the theory as to issuing injunctions in the federal courts is simple, and thoroughly settled both by the statutes and decisions. It is, in the first place, the filing of the bill and the issuing of an order to show cause; in the next place, the issuing of a temporary restraining order in the exceptional cases where that order is necessary to preserve the status quo. * * *"

Thus it will be seen that a court of equity is without power to issue an injunction unless there is a properly verified bill upon which to base the same. That many of the assignments of error could have been determined by this court if the proceedings had been properly instituted in the court below by filing a bill for injunction is undoubtedly true, but owing to the state of the pleadings that court was without power to grant the injunction, and as a result this court is not in a position to pass upon the other questions sought to be determined by this appeal.

For the reasons stated, the decree of the lower court granting an injunction is reversed, and the case remanded, with instructions to proceed in accordance with the views herein expressed.

Reversed.

PIEPER et al. v. S. S. WHITE DENTAL MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. October 15, 1915.)

No. 2091.

1. PATENTS ⟸72—ANTICIPATION—PRIOR USE.

A prior structure, to constitute an anticipation by prior use, must be clearly and unmistakably identified with the structure of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 86–91; Dec. Dig. ⟸72.]

2. PATENTS ⟸157—CONSTRUCTION.

Unless it is unavoidable, a patent should not be given a construction that makes the patentee concede a broader and more explicit prior art than existed in fact.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229–232; Dec. Dig. ⟸157.]

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—ELECTRIC MOTOR REGULATION.

The Pieper and Pieper patent, No. 704,099, for electric motor regulation for alternating current dental engines, was not anticipated, and discloses patentable 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 Oscar H. Pieper, Alphonse F. Pieper, and Frank Ritter, doing business as the Ritter Dental Manufacturing Company, against the S. S. White Dental Manufacturing Company. Decree for defendant, and complainants appeal. Reversed.

Appellants failed in their suit to enjoin appellee as an alleged infringer of their patent for "electric motor regulation," No. 704,099, July 8, 1902, on application filed March 24, 1899, by Oscar H. and Alphonse F. Pieper.

"Our present invention," the applicants said, "relates to electric motors adapted for alternating currents and to certain improvements relating to and means for and method of controlling them, whereby they may be started with the necessary torque, and when the armature is under full speed it can be instantly stopped, and, if desired, its direction of movement reversed, without the use of clutches, brakes, or other mechanical holding devices."

"The invention, which is designed more particularly for small motors intended for operating dental engines or machines where accurate speed regulation is the leading requisite, relates to alternating current motors of the direct current type having the usual laminated field magnets and the windings designed for a relatively high electromotive force or relatively high self-induction, armature coils designed for a relatively low electromotive force or having a relatively low self-induction, commutator and commutator brushes arranged at the neutral point, said field and armature windings being connected in series; and the novel features of the invention relate to the control of such motors at any speed and with or without a load by a permanent shunt around the armature, and the accurate regulation of the motor is accomplished by the manipulation of a variable resistance interposed in said shunt."

Eight claims are stated in the patent and involved in the suit. No distinctions between the claims are insisted upon by the parties respecting either the validity of the patent or infringement. Claim 2 may be taken as typical:

"2. The combination in a motor for alternating currents, of field windings with relatively high self-induction and armature coils with relatively low self-induction, commutator and commutator brushes arranged on the neutral

point, all connected in series, as customary in continuous current motors, and a variable resistance in shunt with the armature."

In a prior suit against another alleged infringer, both the District Court (Pieper v. Electro Dental Mfg. Co. [C. C.] 156 Fed. 672) and the Court of Appeals for the Second Circuit (Id., 160 Fed. 930, 88 C. C. A. 112) held that no invention was required to produce the new combination.

This appeal was first presented to Baker, Seaman, and Mack, Circuit Judges. Appellants contended that new evidence gave a changed complexion to the issues. On behalf of the court Judge Seaman delivered an opinion in which the new evidence was held not to differentiate substantially the present from the New York case, and the decision in that case, without repeating the grounds thereof, was indorsed.

A petition for rehearing raised in the minds of the members of the court who joined in that opinion grave doubts respecting their apprehension of the true nature of the problem that confronted the patentees, and also respecting their having given due weight to evidence in the present record that was not adduced in the New York case. The petition was granted, the decision and opinion were set aside, additional briefs were received, and the questions were argued fully before Baker, Seaman, and Kohlsaat, Circuit Judges. Preparation of a new opinion was committed to Judge Seaman. But death intervened, and the cause is now taken on resubmission without further oral argument.

Charles A. Brown, of Chicago, Ill., and Robert S. Taylor, of Ft. Wayne, Ind., for appellants.

Edward Rector, of Chicago, Ill., and Henry N. Paul, of Philadelphia, Pa., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Appellee's expert essayed some distinctions between appellee's dental engine and the device of the patent; but the contention of noninfringement disappeared at the argument. If the patent is valid, it is infringed.

[1] Prior public use is presented as an additional defense. It is claimed that the Wagner Electric Company in 1891 installed the combination of the patent in the office of a dentist at St. Louis. Nothing physical except a motor was produced in evidence. As introduced it could operate only as a repulsion motor. If oral testimony relating to its original condition 20 years before be accepted to establish its then capacity as an alternating current series motor with brushes on the neutral point to be combined with a variable resistance shunt across the armature, such capacity would not prove that it had been so combined. Both direct and alternating currents led into the dentist's office, and on either the motor could be made to run. There were ways in which a variable resistance could be introduced into the motor circuit besides in shunt across the armature. We find in the oral testimony a failure to give a clear and unmistakable identification of the 1891 St. Louis structure with that of the patent. This defense must therefore be rejected. Deering v. Winona, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153; Emerson & Norris Co. v. Simpson Bros. Corporation, 202 Fed. 747, 121 C. C. A. 113; H. Mueller Mfg. Co. v. Glauber, 184 Fed. 609, 106 C. C. A. 613.

No other anticipation was asserted. There remains the question of invention in producing the new combination.

In the New York case the state of the art and the problem of the patentees were stated as follows:

"At that time (the filing of the application in March, 1899) there were in existence electric motors for dental purposes in all respects, save as to details of windings, the same as the one in suit, operating by direct current. There were also similar motors operated by alternating current, and regulated as to speed by frictional attachments. There were also small motors for alternating current, in which there was no regulation of speed, and which had the precise construction of laminated field and differing windings of field and armature that the patentees described. These were used as fan motors. * * * The direct current dental motors gave entire satisfaction and were capable of accurate and complete control in the manner indicated. It was not until alternating current came into extensive use that there was a demand for any other motor. When that time came, it was necessary only to apply to the small fan motors the regulating shunt with varying resistances which was already in successful use in direct current motors, without changing or modifying either element of the combination. Did this constitute invention? Would the means employed for regulating the alternating current motors, so that their speed would be controlled when operating with or without load, be obvious to one skilled in the art?"

Expert and counsel for appellee similarly limit the problem now. But on the present record it seems to us that such a statement of the problem is hardly broad enough. An electrical engine to meet satisfactorily the requirements of dentists had to have these capabilities: Of starting promptly on the closing of the circuit; of having several steps of speed, from about 1,000 revolutions a minute for the lowest step to about 4,000 for the highest; of maintaining at each step a substantially constant speed and energy either with or without load; of prompt reversal of direction; of equally efficient operation in either direction; and of instant stoppage. Such a dental engine for direct current was produced and on the market in 1893, 1894 and 1895. At least as early as 1896 many cities and towns were supplied with alternating current and that alone. Dentists in those places, seeing that their brethren in direct current cities were furnished with electrical dental engines, were making demands, and their demands pointed to a market, for alternating current dental engines. When the patentees started to meet this demand, there was then and had been for several years prior thereto quite a number of types of alternating current motors, among them the hysteresis, the repulsion, the induction, the series with the proportion of field and armature windings stated in the patent, and the series without that proportion. So the real problem was to supply the demand for an alternating current dental engine; and in perceiving and achieving the desired result, it was immaterial what prior art motor, if any, contained a partial combination of the total necessary new combination. True, in giving an answer the patentees are now found to have made a new combination, of which a partial combination of elements existed in certain prior fan motors. But whether several answers, one answer, or no answer to a propounded problem be forthcoming, that fact cannot alter the problem.

Nevertheless, if the given answer was obvious, the new combination was unpatentable.

Appellee puts on the patent a reading by which the patentees admit that an alternating current series motor with strong field and weak

armature was usual and customary among alternating current motors when they attacked the problem of designing an alternating current dental engine. No claim was made by the patentees of having invented an alternating current series motor of the specified relations of field and armature. Invention was stated in both specification and claims to consist of a new combination that produced a new and useful machine, namely, the combination, in an alternating current series motor, of field windings with relatively high self-induction, armature coils with relatively low self-induction, commutator, commutator brushes arranged on the neutral point, and a variable resistance shunt across the armature. By formulating only combination claims, the patentees, of course, admitted that the elements and various subcombinations thereof were old or open to common use. But a case in which an alternating current series motor with strong field, weak armature, and brushes on the neutral point stands as the usual and customary structure at the time the patentees were seeking to produce an alternating current dental engine, is one thing; while a case in which such a motor stands as one of many types of alternating current motors, and appears only as a relic long discarded from the field of use, may be quite another.

[2] Unless it is unavoidable, a specification should not be given a construction that makes the patentee concede a broader and more explicit prior art than existed in fact. And so the adjective "usual" in the second paragraph of the specification quoted in the statement of the case should be confined to "laminated field magnets," a method of building that accorded with the teachings of the art, and should not be carried forward to describe as customary the field windings having relatively high self-induction and the armature coils having relatively low self-induction, an arrangement that, although found in some prior fan motors, was counter, as will hereinafter appear, to the art's teaching of what was efficient in alternating current series motors.

[3] Patents of Davidson, No. 503,453, August 15, 1893, of Johnston, Browne and Davidson, No. 511,621, December 26, 1893, and of Richardson No. 523,444, July 24, 1894 (all owned and used by appellee in its dental supply business), and the prior public use of outfits made and sold by appellants, proved that the art possessed direct current engines that successfully met the requirements of dentists. Garhart's patent, No. 621,241, March 14, 1899, for an "electrical controller," showed a variable resistance, a rheostat, in shunt across the armature of a direct current motor. Patents of Siemens, No. 504,630, September 5, 1893, and of Offrell, No. 520,800, June 5, 1894, demonstrated that the armature of a direct current series motor could be made to revolve by alternating current, and that some of the troubles caused by the change of current could be obviated by laminating the field magnet. Westinghouse, Stanley, Holtzer-Cabot, and Wagner, each for a year or two between 1891 and 1895, built and marketed a few small desk fans (from 100 to about 2,000 each) that were operated by alternating current series motors having fields of relatively high self-induction and armatures of relatively low self-induction.

It is therefore obvious, so the argument runs, that an electrical engineer, skilled in the motor art, if called on in 1897, 1898, or 1899 to produce an alternating current dental engine, either would have taken the existing direct current dental engine and laminated the field magnet and proportioned the ohmic and live resistances in field, armature, and rheostat so as fully to meet the requirements, or he would have coupled the Garhart controller and, say, the Westinghouse fan motor. (This latter was done for illustrative purposes by appellee's expert. But Garhart testified that the controller so used had been changed from the condition in which he had put it on the market. Appellee's expert claimed that this modified union of Garhart and Westinghouse had all the characteristics of a successful dental engine; but the dentist with whom the experiments were performed was not produced. Oscar H. Pieper, one of the patentees, testified that this illustrative combination would rotate a dental drill, but failed to meet the known requirements of a dental engine; and the dentist with whom he worked verified the results. We might concede for the purposes of this case that an electrical engineer, versed in the motor art, if directed in 1899 so to do, might have modified Garhart and Westinghouse and proportioned them to each other in a way to produce a successful dental engine; and the question would still remain whether the direction so to do came from knowledge and skill of the art or from inventive thought and experiment.)

Fortification of the argument is alleged to be found in Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. 218, 28 L. Ed. 702, and similar cases, many of which are collated in Wisconsin Co. v. American Co., 125 Fed. 761, 60 C. C. A. 529. McMillin made the first steam-operated capstan. He did it by coupling a steam engine, which had theretofore been used in turning a windlass, to a capstan, which had theretofore been operated with handspikes. Was this an obvious thing to do? Yes, the court said, because it is the same engine doing the same work in the same way. But if there had been inherent differences between the rotativeness of a windlass and of a capstan, if the continuous force in one direction applied through the driving wheel of the steam engine would not work, or if there were valid reasons in mechanics to believe that it would not work, on a capstan in the same way as did the continuous force in one direction applied through the handspikes by the muscles of the seamen, then possibly the court might have doubted that the examiner was wrong in allowing the patent, and might have resolved the doubt by considering evidence in respect to the extent and persistency of the demand for steam-operated capstans, the unsuccessful efforts of others to meet the demand, and the history of the development of McMillin's device.

In looms and lathes the mechanical elements are old; the new combinations can be sensed by eye and hand; and the movements of parts can be made so slow that the courses and effects of the mechanical energy can readily be followed. But in considering the courses and effects of electricity and magnetism we are in the presence of the mysterious and intangible. Answering a cross-examining "How?" appellants' expert replied that:

"The ultimate 'how' could not be answered without a full knowledge of the ultimate constitution of electricity and magnetism, which thus far is beyond the range of human knowledge."

Appellee's expert, speaking in another case of the difficulties of producing a motor that would work effectively on alternating current, said:

"No one not familiar from actual experience with the state of the art at that time can possibly appreciate the difficulties encountered and the obscure character of the phenomena involved. Apparatus designed with the utmost care failed to give the results expected of it, often exhibiting characteristics quite the opposite of those intended; and the intangible character of the agent employed, together with the tremendous rapidity of its vibrations, made it extremely difficult to trace to their true causes the various phenomena observed." [1]

Westinghouse Electric Mfg. Co. v. Allis-Chalmers Co. (C. C. A., 3d Cir.) 176 Fed. 362, 100 C. C. A. 408, dealt with a patent for converting direct into alternating current. Defendant insisted that, inasmuch as the elements, a rotary converter and an auxiliary exciter, were old, the device of the patent was a mere assembling of those appliances, which did not involve invention. In rejecting the contention, the court, among other things, said:

"When we know that in its different phases electricity may affect, or be affected by, metals and appliances in different ways and with wholly different results, we must guard against being misled by the mere superficial resemblances of the appliances and machines used in connection with it; for from an electrical standpoint the real significance of such appliances lies, not in their material, external appearance, but in their working effect under the influence of diverse electrical factors."

Many obstructive electrical factors were run against in applying alternating current to series motors that were not present in using direct current. They came from the different natures of the currents. With direct there is a steady force in one direction. With alternating the force goes from zero to maximum, changes direction, falls to zero, proceeds to the opposite maximum, changes direction, comes back to zero, and so on in cycles. (Eye and hand are helpless; and the imagination is staggered in attempting to appreciate the results reported by delicate and complicated measuring instruments.) Sixty cycles a second, 120 reversals of direction, were usual; and higher frequencies were not uncommon. At each reversal resistance to the change occurs. This property is called self-induction. It tends to impede the introduction, variation, or extinction of a current passing through a circuit. In an alternating current series motor, the field windings must be designed with reference to the live resistances due to self-induction —the dead resistance of the wire, which alone governs in a direct current series motor, being of relative unconcern; the current and the

[1] Appellee objected to the competency of the expert's affidavit, given in another case, as evidence in this. We attach no weight to it as evidence, but adopt it, in connection with the quotation from the Westinghouse Case, 176 Fed. 362, 100 C. C. A. 408, as a clear statement of a fact that is proven by competent evidence in this case, namely, that in considering patents involving the combination and interaction of electrical forces we should not be deceived by the physical similarities of parts that are differently electrified and magnetized.

voltage of the field windings are out of phase, the current being retarded with respect to the voltage; the magnetism set up in the field magnet also has a slight retardation with respect to the phase of the current; the alternations in the field magnet tend to induce currents in the magnet core; the current through the armature has a retardation with respect to the voltage and also the magnetism of the field; the retardation of the armature current with respect to the phase of the field magnetism causes a reduction of torque, a loss of efficiency of the motor. These and other factors are affected by additional factors when a shunt across the armature is introduced. None of them is to be reckoned with in the direct current series motor.

These differences, encountered in the empirical development of the series motor, led the scholars, teachers, authors, practitioners, and inventors in this art to an understanding that efficiency in an alternating current series motor could best, or only, be obtained by combining a weak field and a strong armature. In this relation it was found that the effects of self-induction could be counteracted in the armature by means not applicable to the field; and so a given current would produce more working power than in other relations. At this point there is a sharp controversy between the experts. For appellee it is asserted (1) that the aforesaid understanding first appeared in the art in a patent to Lamme, No. 758,667, which postdates the labors of the Pieper brothers; and (2) that the exhibited fan motors prove what the prior teaching was. (1) Appellants' expert supports his position by citing Siemens, Eickemeyer, Stanley and Kelley, Hochhausen, Hutin and Le Blanc, Meston, Berg, and Averett, all of whom preceded the Piepers, and by pointing out that Lamme claimed improvement and not discovery of the relation. Counsel also refer to articles by Steinmetz in volume XXIII, page 10, of the "Proceedings of the American Institute of Electrical Engineers" and in his "General Lectures on Electrical Engineering," of later date, but tracing the history back into the 80's. (2) That some of the exhibited fan motors show a relation of strong field and weak armature is a fact; but that fact, in our judgment, does not establish a counter teaching—it merely proves that their makers went, like many men in many fields go, counter to teaching. Wagner Company's engineer, for example, knew better. He desired a stronger armature. But he found it inconvenient so to make an armature three inches in diameter. He was making his motors to operate desk fans, and little power was required. He was making them for ordinary householders, who might not know or care about waste of current and loss of energy, as users of larger sizes of the same motor for street railroads or factories would. Being built counter to correct teaching, naturally they fell by the wayside, were soon superseded for fan purposes by other and more efficient types of alternating current motors, and were found for defense purposes, as the identifying witness of the old Westinghouse fan motor admitted, "lying around in the old junk." Therefore we draw from this record the conclusion of fact that the teachings respecting the alternating current series motor, based on study and experiment and correct practice, and promulgated by the fathers of the art, were as stated at the opening of this paragraph.

Oscar H. Pieper testified that he and his brother spent more than two years in producing the alternating current dental engine of the patent. They gathered and studied all the publications, treatises, and patents relating to electrical motors. They themselves had had long experience in the art, and had put on the market a highly successful direct current dental engine.

Quite naturally the first thing they did was to try their direct current dental engine on alternating current. It rotated, but they could not make it satisfy the known requirements of a dental engine. Were they stupid? Were they purposely avoiding the obvious? Is the looking backward opinion of appellee's expert a better guide than their forward efforts? In our judgment the testimony of Rowland, professor of electrical engineering and director of the school of engineering at Drexel Institute, settles this point. Somebody, during the pendency of the New York suit, engaged him to demonstrate that a direct current dental engine could readily be modified so as to operate satisfactorily on alternating current. It does not appear who his client was or how appellants learned of his tests. He was brought in by subpœna, reluctant, feeling that it was not in accordance with ethics to testify about experimental work done for a former client. Though not directly stated, two facts are deducible from his testimony: That he was thoroughly versed in the teachings and practice of the electrical motor art preceding the work of the Piepers; and that when he made his tests he was unacquainted with the patent in suit. The first flows from the statements of his qualifications; the latter, from the requirements of his engagement as a proposed test witness. He was furnished a direct current dental engine of appellee's make. It had a laminated field magnet. This type was the one which it is now known could most easily be reconstructed to produce the results of the patent. When asked by his client if he could obtain the requested results, he at once agreed with the position of appellee's expert that of course it could be done. He tried it for three months. Contemporaneous records of his efforts are in evidence. Changes in the number of turns in the field windings were made; wires of different sizes were used; the armature was rewound; and other means of regulation besides the shunt across the armature were tried. He found it "impossible to modify the motor so it could be operated under any practical conditions with alternating current." "When at length I had to relinquish my efforts and acknowledge that it was a very difficult task, I had done everything that seemed to me possible, except to start out on original lines on a fresh design." As his client did not care to have him start out on original lines, his employment was ended.

Pieper brothers next experimented in turn with hysteresis motors, induction motors, repulsion motors. These types were efficient and well known. It seems not unnatural that the Piepers should have included these in their tests. With each they failed to secure by electrical means the regulation required in dental engines. No one has succeeded.

Thereafter they confined their efforts to trying to regulate alternating current series motors. During these experiments Oscar H. Pieper

went to Europe to investigate dental engines. He there found a type which was run by a one-speed induction motor and in which the regulating means were mechanical. Also during these experiments they tried to regulate a small Stanley fan motor. This had a relatively strong field and a relatively weak armature. Built contrary to requirements of efficiency, it had so little power that it would not operate a dental drill under working conditions. But, says appellee, if they had tried to regulate the larger sized Stanley fan motor or the Westinghouse fan motor, they would have attained success at once. Possibly; but the quality of such an act would then have to be determined. Possibly; but if they had hunted farther among the "old junk," they would as likely have spent their efforts on the Excelsior fan motor or the Ft. Wayne fan motor, in which the fields were relatively weak and the armatures relatively strong, and which now in the light of the patent are known to be unregulable for dental purposes. And so they found it necessary, like Rowland, to start out on original lines on a fresh design.

What they were seeking to do at this point was to design a combination of field, armature, commutator, commutator brushes, all connected in series, and a variable resistance in shunt across the armature, that would successfully operate as an alternating current dental engine. When a shunt across the armature is introduced, electrical factors have to be dealt with in addition to those that pertain to a subcombination of the other elements. The shunt modifies the retardation of the armature current with respect to the field magnetism; this modification of the retardation varies with the resistance of the shunt and the speed of the armature; in the armature there is a joint effect of voltage due to the rotation of the armature and of voltage due to the alternating field magnetism which is impressed on the armature; the self-induction of the field and of the armature has a marked influence on the amount of current flowing through the motor; the sum of the voltage measured between the terminals of the field winding and the voltage measured between the terminals of the armature is greater than the voltage measured around the whole motor; the sum of the currents in the armature and in the shunt is greater than the current measured in the field winding; the character of the shunt and the position of the controlling lever affect the divergence of the sum of the currents in the armature and in the shunt from equality with the current in the field winding. These and other factors pointed out by appellants' expert are all absent when a shunt is placed across the armature of a direct current series motor.

Materially there are five elements in the above stated combination; electrically, several times as many. In striving to balance the factors, so as to produce a successful alternating current dental engine, Pieper brothers, besides studying and experimenting, sought advice. Orally and by correspondence they consulted Averett, who was designing motors for the General Electric Company. He conformed to the teachings of the art by advising them to employ a weak field and a strong armature in their design of an alternating current series motor: suggested that they use fewer turns of heavier wire, so as to reduce

the self-induction as much as possible; doubted whether a motor built as he advised could be regulated for dental purposes by a shunt across the armature; and recommended that they insert the shunt in series with the main motor circuit. Another electrical engineer, Reed, gave them no better advice.

It was only by casting aside the teaching of the art and by disregarding the counsel of contemporary experts that they built the device of the patent. It was only by working away from efficiency in alternating current series motors that they obtained a regulable dental engine; and finally they so balanced conflicting factors that they obtained the necessary control. It may be easy now to see that, if a variable resistance shunt is applied to an armature of relatively high self-induction, changes of position of the controlling lever will so magnify the differences of phase, self-induction, mutual induction, and their consequences between the weak field and the strong armature that at each change of speed the device becomes in effect a different structure; while, if applied to an armature of relatively low self-induction, changes of position of the controlling lever will so minify the differences of phase and other conflicting factors between the strong field and the weak armature that the device always remains practically the same, with respect to both uniformity of speed within the different steps either with or without load, and constancy of torque at the different speeds. But the Piepers were the first to perceive that result either in imagination or in concrete form. And so we believe that in achieving the result the Piepers as electrical engineers had first to be informed by the Piepers as inventors. International Tel. Mfg. Co. v. Kellogg, 171 Fed. 651, 96 C. C. A. 395. Invention of a combination does not lie in gathering up the elements that are employed, but consists in first perceiving (through study or experiment or accident) that a new and desirable result may be attained by bringing about a relationship of elements which no one has before perceived and then going forth to find the things that may be utilized in the new required relationship. Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, — C. C. A. —.

That the discarded fan motors, so much relied on by appellee, may be shown to contain a part of the new combination of the patent, does not affect the merit of Piepers' discovery. Relationship in them of strong field and weak armature was accidental, or at least purposeless, except for cheapness and convenience of manufacture. Their makers never undertook to introduce a variable resistance shunt across the armature. They never sacrificed efficiency for the purpose of achieving regulability. This accidental or purposeless relation was no bar to the patent. Edison Electric Light Co. v. Novelty Incandescent Lamp Co., 167 Fed. 977, 93 C. C. A. 387; General Electric Co. v. Sangamo Electric Co., 174 Fed. 141, 98 C. C. A. 154.

What were others doing in the meantime to satisfy the demand for alternating current dental engines? Some strivers converted alternating current into direct and applied it to existing direct current dental engines. Others also confessed their inability electrically to regulate alternating current motors and secured changes of speed by mechani-

cal means. One or the other of these methods was adopted by appellee and other manufacturers of dental outfits. These meanderings of rivals, who felt the urge of gain, indicate that the progress of the patentees, instead of being obvious, was away from the open road.

Appellants' device has been a great commercial success. So far it has furnished the only answer to the problem. It has been followed in Europe as well as in this country. Imitators have fluttered around its light.

If the facts established by the present record do not affirmatively prove invention, they should at least create a doubt. In the file wrapper it appears that the examiner first rejected the application on references to patents for direct current dental engines, patents demonstrating that series motors of the direct current type could be made to run with alternating current, and patents for rheostats in general, and the Garhart controller in particular. His first impression coincided with the position afterwards taken by appellee. His final conversion should be allowed to operate as live resistance to a reversal of the public grant. Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, — C. C. A. —.

The decree is reversed, with directions to issue an injunction and order an accounting.

AURORA, E. & C. RY. CO. v. ECONOMIC ENGINEERING & CONSTRUCTION CO.

(Cifcuit Court of Appeals, Seventh Circuit. October 5, 1915.)

No. 2219.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—PNEUMATIC CONVEYOR.

The Bassler patent, No. 851,054, for a pneumatic conveyor, mainly for use in removing and cooling ashes from boilers, construed, and *held* not infringed.

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 Economic Engineering & Construction Company against the Aurora, Elgin & Chicago Railway Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 216 Fed. 637.

Appellee filed its bill to restrain infringement of claims 1, 2, 3, 4, 5, 6, and 8 of patent No. 851,054, for a pneumatic conveyor, issued April 23, 1907, to E. M. Bassler. The device of the patent, while claimed to be capabe of various uses, is mainly availed of for the removal and cooling of ashes from boilers. The defenses are invalidity and noninfringement. Claims 4, 5, 6, and 8 were sustained by the District Court, and injunctional relief accorded. The appeal involves only these four claims, which read as follows, viz.:

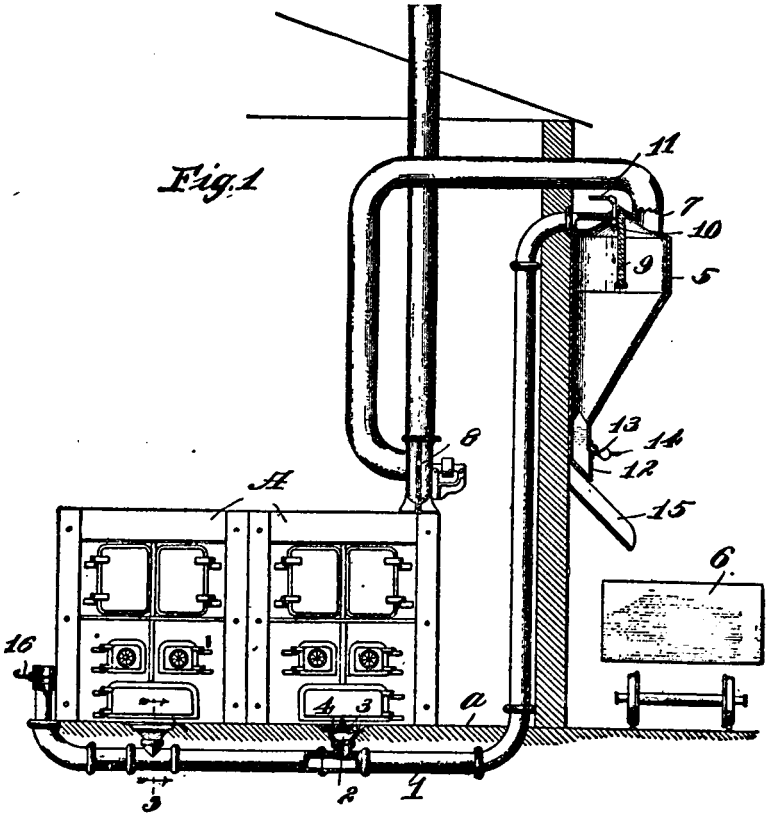
"4. In a conveyor, the combination of a conduit provided with an admission opening or openings, a receptacle into which said conduit discharges, said receptacle comprising an expansion chamber and being provided with an air-discharge opening, means to create a current of air through said conduit, means in said expansion chamber to interrupt the blast from said conduit, and means to discharge water across said blast substantially at the point at which it is interrupted.

"5. In a conveyor, the combination of a conduit provided with an admission opening or openings, a receptacle into which said conduit discharges, said receptacle comprising an expansion chamber and being provided with an air-discharge opening, means to create a current of air through said conduit, a baffle in said expansion chamber against which the blast from said conduit is directed and means to discharge water along the face of said baffle and across the blast from said conduit.

"6. In a conveyor, the combination of a conduit provided with an admission opening or openings, a receptacle into which said conduit discharges, said receptacle comprising an expansion chamber and being provided with an air-discharge opening, means to create a current of air through said conduit, a baffle in said expansion chamber between said conduit and said air-discharge opening against which the blast from said conduit is directed and means to discharge water along the face of said baffle and across the blast from said conduit."

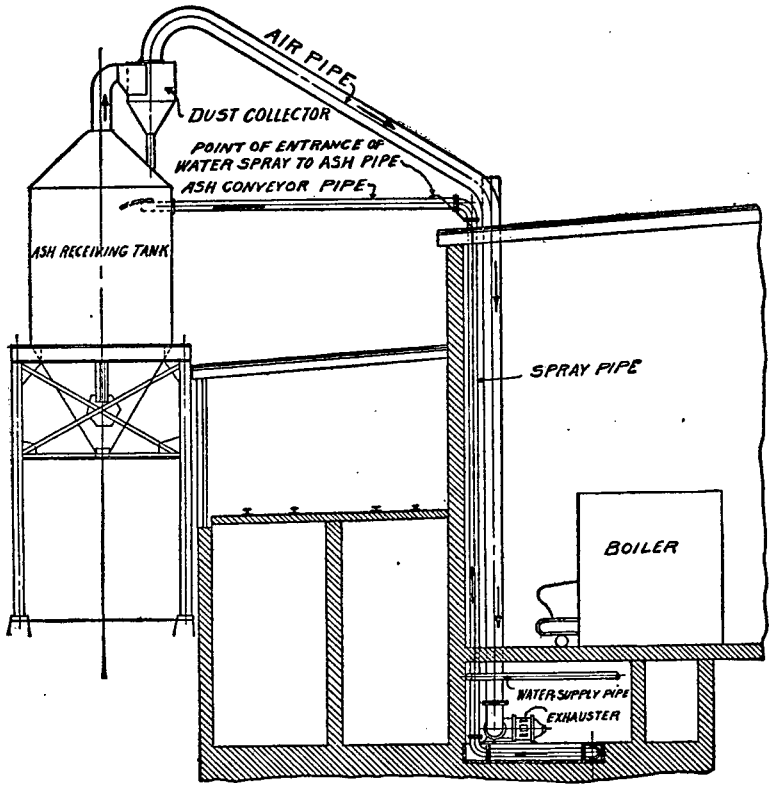
"8. In a conveyor, the combination of a conduit provided with an admission opening or openings, a receptacle into which said conduit discharges, said receptacle comprising an expansion chamber and being provided with an air-discharge opening, a fan or blower applied to said discharge opening, a baffle within said expansion chamber located between said conduit and air-discharge opening against which the blast from said conduit is directed and means to discharge water along the face of said baffle and across the blast from said conduit."

Fig. 1 of the drawings is here reproduced:



The conduit *1* has as many graded hopper-shaped openings as may be desired for the admission of ashes into it. Through this conduit the ashes are drawn by suction or other pneumatic propulsion into the upper part of tank *5*. This tank has its top portion divided through the center by a baffle *9*, against which the blast from the conduit is directed. The size of the tank is such that the face of the current of air, burdened with ashes, is rarified as it is discharged therein from conduit *1*, whereby the solid matter carried therein falls by gravity. Discharge opening *7* connects also with the top of tank *5*. This, together with baffle *9*, assists in arresting the force of the blast from the conduit, the baffle serving somewhat to retard the escape of the air through the opening. "My improved conveyer," says the patentee, "also comprises means for wetting the material delivered into the receptacle *5* from the conduit *1*. This is preferably accomplished by introducing jets or streams of water into the blast from said conduit; but my invention contemplates any suitable means for this purpose." Water pipe *10* extends across the top of baffle *9* on the side receiving the blast. Through openings or vents *11* therein water under pressure is discharged in jets "downwardly along the face of baffle *9* and across the blast from the conduit *1*." The water will serve to wash down the particles of ashes that may have lodged and extinguish any live coals. Velocity of current of air through the conduit can be regulated by "closing the gate or valve *16*." Ash discharge appliances from the tank are shown at *6*, *12*, *13*, *14*, and *15*. These are not in question. *8* is a fan or blower used in creating a vacuum in tank *5*. This produces the suction in conduit *1*.

The drawing of the alleged infringing device is set out in the record as follows, viz.:



This conveyor was used by appellant at its power plant at Batavia, Iowa. It has the conduit passing from the ash pit to a tank, an outlet conduit of larger size than the inlet conduit, which leads from the top of the tank to a fan or blower whereby the air is withdrawn from the tank, whereby the ashes are drawn up into the tank, and proper discharge devices. Defendant introduces water under pressure to settle the dust and extinguish live coals at a point in the conduit thereof some 30 feet distant from the discharge end of the conduit or tank. This end of the conduit is provided with what appellant calls a deflector projected beyond the end and directed into the line of the blast. This, appellant contends, serves to protect the walls of the tank from the injurious effect of the blast and ashes carried thereby. A dust collector is provided in the conduit, which, it is claimed, protects the fan from the projected ashes therethrough. The elbows of the conduit exposed to abrasion are made 'removable and of very durable material. The tank is provided with an automatic manhole, which lifts when the tank pressure grows excessive from gas generated by the hot ashes and water.

The assignments of error go to the decree of the court in sustaining claims 4, 5, 6, and 8, and in granting the injunction and accounting. No relief is asked as to claims 1, 2, and 3.

Thomas F. Sheridan and George L. Wilkinson, both of Chicago, Ill., for appellant.

Charles C. Bulkley and George E. Waldo, both of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). There was no novelty in driving the ashes through the conduit to the tank by means of pneumatic pressure, nor in the use of an expansion tank. What the patentee claimed was the forcible discharge of water under pressure into and across the blast substantially at the point at which it is interrupted by the baffle so that the water will flow downward along the face of the baffle. At that point the blast, consisting of the ash-laden column of air ejected from the conduit against the baffle, would necessarily be greatly agitated and diffused. The water applied at the point of contact between the blast and the baffle would necessarily intermingle with the ashes as spray and at the same time flow down the face of the baffle, serving, among other things, to prevent adhesion of ashes to the baffle. This idea in ash and other conveyors was new and possessed of merit.

Appellant contends that, by reason of the location of its application of water at a distance of 30 feet from the tank or expansion chamber, its device does not infringe the patent. The dust collector, movable elbow protectors, and automatic vent, in our opinion, are nothing more than improvements upon the main structure, if they amount to such. The so-called deflector is clearly the equivalent of baffle *9* of the patent. The mechanical arrangement of the two conveyors is practically the same, and the only substantial distinction between them is as to the place at which the water is delivered to the so-called blast. If appellee is confined to the apparent language of the patent, wherein it seems to be stated that the water must be applied to the blast after it leaves the conduit and near to the place of its impact upon baffle *9*, then it would also seem true that appellant's device would not infringe; the underlying principle of the two being different.

To these propositions we apply ourselves. Bassler's theory was that

the ash must not be saturated with water while in the conduit, because of its tendency to clog and choke the pipe. He contends that appellant's device applies the water in accordance with his patent at right angles to the line of travel of the blast, at a point so near the tank *5* as to effect the passage of the water to the discharge end of the conduit and insure its delivery, practically, as free water against the baffle or deflector, and before the ashes become saturated; that the blast travels at the rate of two miles per minute; that the time between the application of the water to the blast and its delivery to the baffle is negligible, and that during that time the ashes will not be saturated. This method, he asserts, delivers the water to the baffle and blast at their point of contact. If this were so, it would be essential to maintain that the application of the water across and at right angles to the blast 30 feet away from the baffle is the equivalent of the application thereof called for by claim 4 of the patent, viz., "substantially at the point at which it is interrupted."

In the operation of the device of the patent, in order to secure extinguishment of live coals, a large amount of water is required, which, besides being expensive, has other disadvantages. For the alleged infringing device it is claimed that the mixing of air, water, and ash in the conduit facilitates saturation. It appears that there is a limit to the distance from the end of the conduit of the application of the water, that limit being approximately 30 feet, in traveling which distance there is small tendency to clog on the part of the ashes. No other reason is shown. It is not satisfactorily shown that the delivery of the water, though under pressure, at a point in the conduit 30 feet away from the outlet thereof, crosses the line of travel of the blast, traveling at the rate of 176 feet per second, or whether it is not seized by the blast at its periphery and hurried against the baffle. In the latter case it would not be projected across the line of travel of the blast.

The specification, in describing the patent provision for wetting the material delivered into the tanks, by introducing jets or streams of water "into the blast from said conduit," adds, "But my invention contemplates any suitable means for this purpose." Claims 5, 6, and 8 each call for the discharge of water along the face of the baffle and across the "blast from said conduit," while claim 4, as above stated, calls for "means to discharge water across said blast substantially at the point at which it is interrupted."

We can come to no other conclusion than that the patentee intended to limit his application of water to the blast after its discharge from the conduit. The patent is by no means a broad one, and has but a narrow range of equivalents. Its whole trend corroborates the claim of appellant that the blast from the conduit must be delivered into the expansion chamber or tank in a dry condition. To hold infringement would strain the obvious meaning of the language of the claims. It was evidently the concept of the patentee that the ashes should be attacked by water while in a diffused condition, rather than when rushing through the conduit. We are not impressed with the suggestion that the principle is the same in both cases. We hold that the

means for an attack upon the blast after it leaves the conduit is an essential element of appellee's combination. That element not being present in appellant's device, infringement is not made out.

The decree of the District Court is therefore reversed, with direction to dismiss the bill.

INDEPENDENT DIE CO. et al. v. SAVELS et al.

(Circuit Court of Appeals, First Circuit. November 10, 1915.)

No. 1127.

PATENTS ⇐328—INVENTION—DIE FOR CUTTING LEATHER.

The Gimson patent, No. 709,008, for a die for cutting out leather, *held* void for lack of patentable invention, in view of the prior art.

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

Suit in equity by the Independent Die Company and others against Orvis M. Savels and others. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see 215 Fed. 122.

Nathan Heard, of Boston, Mass. (Frederick A. Tennant, of Boston, Mass., on the brief), for appellants.

Louis W. Southgate, of Worcester, Mass. (Charles T. Hawley, of Worcester, Mass., on the brief), for appellees.

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

ALDRICH, District Judge. This case has reference to the rights of the complainants under a patent known as the Gimson patent, which, it is urged, embodies improvements relating to knives, cutters, or dieing-out instruments employed for cutting out blanks for the various parts of boots, shoes, etc.; the object of the improvements, as it is claimed, being to reduce the weight, cost of material, and at the same time to increase the strength of such instruments. The letters patent are numbered 709,008 and dated September 16, 1902.

The complainants allege infringement, and the defendants do not dispute the fact of infringement, if the patent in suit is sustained and broadly construed.

As showing the state of the art prior to the Gimson patent, the so-called Walker die, among other things, was in evidence, and there was considerable discussion in respect to the differences between the new and the repaired dies of the Walker type; but, in the view which we take of the case, we have no occasion to discuss such differences. So far as such questions are of consequence, they were sufficiently covered by the court below. It is not perceived that it is at all material whether the grooves or the corrugations of the Walker die were in the original construction or in those repaired. It is only im-

portant to know that grooved or corrugated dies were used in the art prior to the Gimson.

Upon the record and the arguments the only question with which we are concerned is whether, in view of the prior art, the supposed Gimson improvements embody patentable invention, and we think they do not. Indeed, the Gimsons, through their specification, concede that cutting instruments, in the form of a sole with a beveled cutting edge, have been long employed; but they say that when such knives are placed under the press they cannot be manipulated by the operator. This is explained upon proofs and arguments as meaning that the die cannot be manipulated by the operator continuously, and with safety, under the rapid movements of the beam of the cutting machine, and so they say that by making one or more ribs or corrugations in the material this defect in respect to safety under long-continued operation is cured; but it remains to be said that the idea of corrugations in sheet iron and zinc was not only present in the older art and in various situations, but was present in the particular field in question.

Another feature of the Gimson claim is that the cutting edge of the die is in line with the interior walls thereof; but this was true of the Walker die.

Judge Morton found that the idea of corrugations or grooves was present in the art prior to the Gimson application, especially in the Walker device when repaired, and we think the evidence sustains this view. The view of the court below was that it did not occur to any one prior to the Gimsons that a plurality of corrugations would minimize the dangers involved in handling the die, or that its weight thereby might be lessened without reducing its structural strength. That court deemed the Gimson suggestion a valuable one, but one pointing out a use or function embodied in something old, rather than one involving patentable invention. We think this view the correct one, and—

The decree below is affirmed, with costs of this court.

ENNIS-BROWN CO. v. CENTRAL PAC. RY. CO. et al. (and fifteen other cases).

(District Court, N. D. California, Second Division. December 1, 1915.)

Nos. 88–95, 101–103, 126–130.

1. COURTS ⟸262—FEDERAL COURTS—EQUITY JURISDICTION—SUITS TO QUIET TITLE.

To sustain a suit in equity to quiet title in a federal court, when complainant is out of possession, the land must be unoccupied land, so that complainant is without an adequate remedy at law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. ⟸262.]

2. COURTS ⟸262—FEDERAL COURTS—EQUITY JURISDICTION—SUITS TO QUIET TITLE.

A suit in equity to quiet title cannot be maintained in a federal court against a railroad company with respect to land alleged to be in the ac-

tual possession of defendant and used by it for railroad purposes on an allegation that a portion of the land is not required or needed for such use; the issue so tendered not being one cognizable in equity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. ⟸262.]

3. EMINENT DOMAIN ⟸284—UNAUTHORIZED TAKING OF LAND BY RAILROAD COMPANY—RIGHT OF ACTION FOR DAMAGES.

A right of action against a railroad company to recover damages for the wrongful taking of land for railroad purposes is in the person holding the legal title at the time of the original wrongful entry.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 789, 790; Dec. Dig. ⟸284.]

In Equity. Suit by the Ennis-Brown Company against the Central Pacific Railway Company and the Southern Pacific Company, heard with 15 other cases against the same defendants. On motions to dismiss bills. Motions sustained.

Burrell G. White, of San Francisco, Cal., for complainant.

J. E. Foulds, of San Francisco, Cal., and Devlin & Devlin, of Sacramento, Cal., for defendants.

VAN FLEET, District Judge. This is one of several actions (the numbers of which are above shown) of a precisely similar character, commenced at the same time against these defendants, affecting the title to contiguous portions of the river front in the city of Sacramento. Excepting only as to the name of the plaintiff and the particular parcel of land involved, the bills are in all respects uniform in their averments, and a statement of the facts set forth in the instant bill will serve for all. In form the action is one to quiet title, and, omitting the jurisdictional averments and description of property, the material facts set up in the amended bill are in substance these:

That the complainant "is and at all the times herein mentioned was the owner in fee simple" of the property described, and that the defendants and each of them claim an estate or interest in such property adverse to the plaintiff, which claim is without right, and defendants have not, nor has either of them, any estate, right, title, or interest in or to the property or any portion thereof; that the defendants are, and each of them is, engaged in the general business of railroad corporations as common carriers of passengers and freight; "that the defendant Central Pacific Railway Company is not in possession of the premises involved or any part thereof," but the defendant Southern Pacific Company "is now and at all the times herein mentioned was in possession and using the land hereinabove described"; that it "maintains upon and over a portion of the property described in the amended bill herein a railroad main track, over and upon which it operates trains in the exercise of its said business," and "to prevent the maintenance and operation of said railroad track would interfere with the service of said defendant Southern Pacific Company to the general public"; that on the other portions of said property "said Southern Pacific Company maintains other railroad tracks, which are switching tracks, and a large structure known as the 'Sacramento

Freight Sheds,' and sheds used as a wharf bordering upon the Sacramento river." It is then alleged that "the public interest neither of the inhabitants of the city of Sacramento nor of the county of Sacramento, nor of any other community, requires the maintenance or continuance of said last-mentioned tracks or said sheds by said Southern Pacific Company. All of said tracks herein mentioned and sheds are used exclusively by the defendant Southern Pacific Company, and said company claims that, as a public service corporation, it is entitled to the continuous and exclusive use of said tracks, sheds, and the land upon which the same are situated." Then follows an averment, the materiality of which has not been suggested and is not perceived, as to the location of the property involved with reference to the main business streets of the city of Sacramento and its importance, as a part of the water front for shipping purposes, in the commerce of the city, and "that the public interest of the citizens of the city of Sacramento and of the county of Sacramento and thereabouts requires that said property should not be used exclusively by said defendant Southern Pacific Company," but that such use "is subordinate to the requirement of the public interest that the land upon which said sheds are built should be open to use by others than said defendant."

The amended bill was filed in response to an order of the court, made in each case on motion of defendants, directing that the cause be transferred to the law side unless plaintiff should so amend its bill as to disclose a cause of action cognizable in equity; the court being of opinion that the original bill was lacking in that respect. The material changes in the bill in its amended form are the averments as to the character of the defendants as common carriers or public service corporations, the nature and purpose of the occupation of the premises by the defendant Southern Pacific Company, and the last averment of the bill above adverted to.

The defendants now move to dismiss the bill as amended on the ground that it fails to state a cause of action as against either defendant cognizable either in equity or at law—the objection as to the defendant Central Pacific Railway Company being that, while it is alleged that that defendant is not in possession of the premises in dispute, it appears that the Southern Pacific Company is in such possession, and that an action to quiet title will not lie unless the plaintiff is in possession or the defendants are out of possession; and as to the defendant Southern Pacific Company: (1) That, upon the facts alleged, an action to quiet title will not lie because that defendant is in possession; (2) that, being in possession as a public service corporation, the only remedy is for damages for the value of the property at the time it was taken; and (3) that the bill fails to disclose that plaintiff is the party entitled to maintain the latter form of action.

It may be remarked preliminarily that, while permissible under the statute of the state, it is not readily to be perceived from the face of the pleading why the two defendants are united in the same action. It will be at once observed that, upon the facts alleged, the case made against one is essentially different in its legal aspects from that against the other, in that, while it is alleged that the defendant Southern Pa-

cific Company is in possession of the premises in dispute, using them for its purposes as a public service corporation, it is alleged that the Central Pacific Railway Company is not in possession, and there is nothing in the bill tending to disclose any privity in estate, right, or claim as between the latter and its codefendant. It is true that, at the argument, the fact was adverted to, and not controverted, that the Southern Pacific Company is holding and operating the railroad tracks and structures occupying the premises as the lessee of its codefendant; and if this fact were alleged the joining of the two would obviously be logical and proper, since the possession of the lessee would be that of the lessor. But the fact is not alleged, and as it is not one of a character, however notorious, of which the court may take judicial cognizance, its existence cannot aid us in solving present questions, which must be determined from a consideration alone of the facts stated in the bill. The motion must accordingly be disposed of upon the assumption that there is no such privity or community of interest between the two defendants.

[1] So far, then, as the case made against the Central Pacific Railway Company is concerned, it may be somewhat briefly disposed of. While it is conceded by plaintiff that, being out of possession, the facts would not, under the general doctrine prevailing in the federal courts as to the requisites of a suit to quiet title, authorize it to there maintain an action of that impression, the theory upon which the bill proceeds as to this defendant is that the facts make a case falling within an exception to the general rule given recognition by the Supreme Court in Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52. That was an action brought in the federal court in Nebraska, under a local statute similar to the Code provision of this state (C. C. P. § 738), authorizing an action in the nature of a suit to quiet title by one holding the legal title to land, whether in or out of possession, to have such title cleared of adverse claims. The bill disclosed that neither the plaintiff nor the defendant was in possession, but that the land was vacant, unoccupied, and unimproved. Against the objection that the action could not be maintained, the Supreme Court held that it could, declaring in substance that, while the state statute enlarged the right ordinarily existing in the federal courts to maintain such a suit, there was nothing in the facts to take the case out of the domain of equity as there administered; that in an instance such as that presented by the bill, where both parties were out of possession, and the land vacant and unoccupied, no relief could be had at law, and as the settlement of such controversies and the improvement of the property resulting therefrom was desirable, as conducive to the best interests of the state, there was no good reason why the federal courts should not entertain the suit and enforce the right given.

But the doctrine applied was confined strictly to instances where, as there, the premises involved were not held in possession adverse to the plaintiff, but were vacant and unoccupied, and where consequently the remedy afforded by the state statute would not trench upon the fundamental distinction controlling these courts as between actions at law and suits in equity; it being made plain that, in any case where

the law will afford a plain, adequate, and complete remedy, equity will not—indeed, may not—take jurisdiction. Thus the court say:

"No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to the possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity. It does not follow that, by allowing in the federal courts a suit for relief under the statute of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There can be no controversy at law respecting the title to or right of possession of real property when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking."

And this limitation of the effect of that case is definitely stated by the distinguished author of the opinion, in explaining what is there held, in the later case of Whitehead v. Shattuck, 138 U. S. 146, 155, 11 Sup. Ct. 276, 278 (34 L. Ed. 873) where, after an extended comment upon the character of the former case and the principles there announced, he says:

"All that was thus said was applied simply to the case presented where neither party was in possession of the property. No word was expressed, intimating that suits of the kind could be maintained in the courts of the United States where the plaintiff had a plain, adequate, and complete remedy at law; and such inference was specially guarded against."

A like construction is given the case by Mr. Justice McKenna, then Circuit Judge, in Southern Pacific Co. v. Goodrich (C. C.) 57 Fed. 879, where, commenting upon Holland v. Challen and Whitehead v. Shattuck, he concludes:

"These cases, therefore, must be held to establish that to sustain a suit in equity to quiet title in the federal courts, when the plaintiff is out of possession, the defendant must also be out possession; in other words, *the land must be unoccupied land.*"

It is quite apparent that that case can have no application to one like the present, where the disputed premises are not only held in adverse possession, but are fully occupied and improved; and that, too, as we shall presently see, for a purpose which precludes such possession being disturbed.

[2] As to the case of the defendant Southern Pacific Company. Ordinarily, where a defendant has taken possession of real property and is holding adversely to the owner of the legal title, the remedy of the latter is at law, in ejectment, for the possession and damages for the detention, and this constitutes a complete and adequate remedy. Whitehead v. Shattuck, supra. But where the party in possession is holding and using the property in the character and for the purposes of a public utility—a servant of the public—and has established thereon and is operating instrumentalities to that end, then the remedy in ejectment will not lie, by reason of the interest of the

public in having its service uninterrupted. In such a case, if the owner has permitted his land to be taken possession of and devoted to the purposes of a public service without first securing compensation, public policy demands that he be not permitted to oust the holder and retake his land, but that he be relegated to his remedy for the damages suffered through the invasion of his property. Roberts v. Railroad Co., 158 U. S. 10, 15 Sup. Ct. 756, 39 L. Ed. 873; Gurnsey v. No. Cal. Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185; 2 Wood on Railroads, 994; Elliott on Railroads (2d Ed.) § 1000.

Plaintiff recognizes the correctness of these principles in their general application, but his contention is that they do not control in a case where the circumstances are such as that the remedy at law is not full and complete, and this he conceives to be such a case. This is based upon the averment in the bill that the land taken and occupied by this defendant is more than its necessities as a public utility and the service of the public demand; and the contention is that plaintiff may invoke the aid of equity to inquire into the extent to which the land is being necessarily used for that purpose and restore to it such portions of the disputed premises as are not justly required therefor; that, until such determination is had, there is no adequate basis upon which to fix the damages for the land necessarily employed in the service of the public; and that to require plaintiff to resort to an action for damages without such determination would compel the concession that all the land taken and occupied by the defendant is essential for its purposes as such utility.

But this contention involves a misapprehension of the nature of the inquiry tendered by this feature of the bill. A little consideration will show, I think, that the subject presents no real or substantial element of equitable cognizance. This will be perceived more readily by a comparison of the question here presented with that involved in the case of Stuart v. U. P. R. R. Co., 178 Fed. 756, 103 C. C. A. 89, upon which plaintiff relies as presenting a controlling analogy. The bill in that case sought to quiet the plaintiff's title to a tract of 160 acres of land patented to it by the government, across which extends the right of way of the defendant railroad. Except as occupied by the defendant for the purposes of its right of way, the land was not in possession of either party. Plaintiff's bill asserted title to the entire tract, while the answer, not disclaiming as to the larger parcel, set up specifically title in defendant to a strip 400 feet wide over the entire tract as a right of way claimed to have been granted it and its predecessor under the "Pacific Railroad Acts," so called; but the evidence, while disclosing a pronounced dispute as to the extent of the actual occupancy and use of the defendant, showed that it was confined to a width of 100 feet, 50 feet on either side of its track, which was fenced and improved and in the actual possession of defendant at the commencement of the action. The lower court dismissed the bill, on the ground that plaintiff's remedy under the facts was at law for damages and not in equity. The Supreme Court reversed this ruling, and in giving its reasons said:

"It is true, generally speaking, that in the courts of the United States a suit to quiet title cannot be maintained by a complainant who is not in possession against a defendant who is in possession; and this is so because there is a plain, complete, and adequate remedy at law [citations.] But is also is true that in exceptional cases, where there is no such remedy at law, the general rule does not apply. In our opinion this is such a case. What really is the subject of the adverse claims of the parties is a strip 400 feet in width along the appellee's railroad. Part of this is in the actual possession of the appellee, is occupied by permanent and costly railroad structures, and is being used as a right of way for strictly railroad purposes. * * * In addition, there is a pronounced and bona fide dispute as to how much of the tract has been occupied and used as a right of way; the appellants insisting that this occupancy and use have been confined to 25 feet or less on either side of the center line of the railroad, and the appellee insisting that they have extended to 50 feet or more on either side. In these circumstances it is apparent, as we think, that the appellants are entitled to a hearing and decision as to what extent the appellee is entitled to occupy and use the tract as a right of way, that they are not entitled to oust the appellee from its actual possession or to interrupt the operation of its railroad, and that their rights can be completely and adequately determined by a suit in equity in the nature of one to quiet title, but not otherwise. * * * There may be cases in which an action for compensation or damages under the statute would afford a plain, complete, and adequate remedy; but this is not such a case, for, in the absence of a prior determination of the dispute respecting the width of the strip actually occupied and used as a right of way, such an action could not be maintained without either conceding the greater occupancy and use asserted by the appellee or risking a recovery of less than the actual damages. A remedy cannot be regarded as plain, complete, and adequate when to pursue it is to jeopardize a part of what is claimed, irrespective of the merits."

It will thus be seen that the sole ground upon which the case was held a proper one for equity was because of the dispute and uncertainty over the extent of the actual possession of the defendant and the limits of its right of way under the congressional grant—entirely proper subjects for equitable consideration, since, defendant not being in possession of the entire premises, until the extent of its possession was ascertained ejectment would not lie, and until the determination of the limits of its right of way, an action for damages would, for the reasons stated, have been inadequate as a remedy.

It will be readily perceived, however, that the present bill involves no such question as there considered. There is no controversy here over the extent of the defendant's actual possession of the premises in dispute; that is alleged in the bill to extend to the entire parcel. What plaintiff claims, and all that he claims, is that, although defendant is occupying and using the entire premises for its purposes as a common carrier, such occupancy and use are in excess to some extent not alleged of its actual necessities for railroad purposes; and he asks that a court of equity proceed to inquire and determine to what extent, if any, his property has thus been unnecessarily appropriated to a public use—in other words, to investigate and adjudicate as to how far the disputed premises are actually essential to the necessities of the defendant as a public service corporation in carrying on its railroad business, with all its "necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, turntables, and water stations"—for these are all recognized as proper and necessary adjuncts to the business. Stuart v. Union Pac. R. Co., supra, 178 Fed. 758, 103 C. C. A.

89. Such an inquiry, if available to plaintiff in any form (Roberts v. U. P. R. Co., supra, 158 U. S. 12, 15 Sup. Ct. 756, 39 L. Ed. 873), is not and never was a subject of equitable cognizance. Plaintiff's rights as against this defendant are not in any respect different in kind, whatever the difference in form of remedy, than if defendant were seeking to take the property in the first instance for the use to which it is now being put. In such an action, plaintiff would be entitled, under proper measure, to the damages he would suffer from the taking. Such an action would be in form one in eminent domain to condemn the property. That action has never been of equitable cognizance, but is purely one at law. Kohl v. United States, 91 U. S. 367, 376 (23 L. Ed. 449). As there said:

"The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court."

The same is true under the statute of this state; the action is at law, and the parties have a right to have the damages assessed by a jury. The court in such a case must determine whether the use to which it is sought to subject the property is one authorized by law and that the taking is necessary to such use (C. C. P. § 1241), which essentially includes the right to determine to what extent the proposed taking is necessary—the precise question which plaintiff presents by the present bill. The bill merely shows that plaintiff has permitted his property to be taken without first requiring compensation. A public use having intervened for which his property is occupied, he cannot retake it, but must have recourse to his action for damages. Such an action is in legal effect the counterpart or complement of the action to condemn. It proceeds upon the theory of an implied contract by defendant to pay for the land taken, or for damages for its taking, but in either form it is in its essential nature an action at law, pure and simple; and with complete jurisdiction in the court to determine the question of necessary extent of use, if, as suggested, that question is now open to plaintiff's challenge.

[3] This conclusion would send the case as to this defendant to the law side of the court, but for one obstacle. There is no averment in the bill as to the date of defendant's taking of the land, nor as to who was the owner of the legal title at the time of such taking. It is settled that the right of action for damages in such an instance is in the party holding the title at the time of the original wrongful entry. Roberts v. No. Pac. R. R., supra; Stone v. Waukegan, 205 Fed. 495, 123 C. C. A. 563; Kindred v. U. P. R. R. Co., 225 U. S. 582, 32 Sup. Ct. 780, 56 L. Ed. 1216.

There is, therefore, a failure to state any cause of action in favor of the present plaintiff. This being so, in view of what has been said, the bill must be dismissed as to both defendants. A like order will be entered in each of the cases, the numbers of which are above given.

WATERBURY GASLIGHT CO. v. WALSH, Collector of Internal Revenue.

(District Court, D. Connecticut. October 30, 1915.)

No. 1809.

1. GAS ⊜6—POWERS—LEASE OF PROPERTY.

A lease by a gas company of its physical property for a term of years, the business to be carried on by the lessee, is not ultra vires, in the absence of anything in its charter or the laws of the state prohibiting it, although not expressly authorized by such charter or laws.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 1; Dec. Dig. ⊜6.]

2. INTERNAL REVENUE ⊜9—EXCISE TAX ON CORPORATIONS—"CARRYING ON OR DOING BUSINESS."

A gas company, which has leased its plant and all other physical property for a term of years, the business for which it was incorporated being carried on by its lessee, is not "carrying on or doing business," within the meaning of Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, § 6300), and subject to the tax thereby imposed, although it retains its franchise and organization, and receives and disburses its income, and under the terms of the lease bears the expense of alterations, improvements, and additions to its plant made during the term, and also during the term has applied for and obtained from the Legislature amendments to its special charter.

[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, Carrying on Business.]

At Law. Action by the Waterbury Gaslight Company against James J. Walsh, as Collector of Internal Revenue for the District of Connecticut. On demurrer to answer. Demurrer sustained.

Henry J. Hart, of New Haven, Conn., for plaintiff.

Thomas J. Spellacy, U. S. Dist. Atty., and Frederick A. Scott, formerly U. S. Dist. Atty., both of Hartford, Conn., for defendant.

THOMAS, District Judge. This case arises upon plaintiff's demurrer to defendant's answer. The action is brought to recover excise taxes assessed by the Department of Internal Revenue against the Waterbury Gaslight Company for the years ending December 31, 1910, 1911, and 1912, respectively, under the provisions of section 38 of the act of Congress passed August 5, 1909, entitled:

"An act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes."

The plaintiff is a Connecticut corporation, chartered for the purpose of manufacturing, selling, and distributing gas, with all the necessary powers and authority incidental and appertaining thereto, by a special act of the General Assembly of Connecticut enacted in 1854 (Special Laws of Conn. vol. 3, p. 591), and subsequently amended in 1895 and 1897 (Special Laws of Conn. vol. 12, pp. 17, 386, 673), in 1903 (Special Laws of Conn. vol. 14, p. 53), and in 1911 (Special Laws of Conn. vol. 16, pp. 640, 646). The defendant is collector of internal revenue for the district of Connecticut, appointed under the provision

of the Corporation Tax Act, for the purpose of collecting all taxes due under the act. The taxes were paid by the plaintiff's lessee, as hereafter stated, under protest, and under the provisions of the law the construction of which is involved in this demurrer.

The complaint alleges that on March 30, 1894, the plaintiff leased all of its premises and property, real and personal, of every name and nature (excepting its charter and corporate organization and the right to receive and disburse income), to the United Gas Improvement Company, a Pennsylvania corporation, for the term of 20 years from April 1, 1894, in consideration of an annual rental reserved in the lease, and thereupon the lessee assumed and took possession of the same under and pursuant to the terms of said lease. The lease contained the further provision that during its continuance the lessee is to have the right to demand and receive for its own use and benefit all tolls, income, issues, and profits to be derived from the said demised property and franchises and from the operation and use thereof. The complaint further alleges that the United Gas Improvement Company has continued in the possession and occupation thereof up to and including the date of the writ.

The defendant has answered, and the parts of this answer, the legal sufficiency of which the plaintiff's demurrer challenges, are the sixth, seventh, and eighth paragraphs, which are as follows:

"Sixth. For further answer, the defendant says that the plaintiff corporation was chartered and organized to build and operate gas works, and sell gas products, but was not empowered by its charter or any amendment thereto to lease away its property or franchise, and the lease described in the complaint has never been authorized by any specific act of the General Assembly of the state of Connecticut, nor in any other manner, and that so far as the United Gas Improvement Company carried on the business of the Waterbury Gaslight Company, as set forth in said complaint, the United Gas Improvement Company carried on said business as the agent of the Waterbury Gaslight Company.

"Seventh. At divers and sundry times since April 1, 1894, being the date of the lease described in the plaintiff's complaint, the Waterbury Gaslight Company applied for and obtained the passage of special acts by the General Assembly of the state of Connecticut, amending its charter, which acts explicitly recognized the Waterbury Gaslight Company, and not the United Gas Improvement Company, as the active corporation engaged in the business which the Waterbury Gaslight Company was organized and chartered to perform.

"Eighth. By the terms of the lease described in the complaint, the Waterbury Gaslight Company bears the expense of alterations, improvements, and additions to its plants, mains, meters, and appurtenances, and continues actively in the management and maintenance of its property and the conduct of its business."

The plaintiff demurs to these allegations on three grounds:

(1) Because "the defendant is not concerned with the plaintiff's right to execute its lease to its lessee or the legality of such lease. If there is a lease de facto it cannot be attacked in a collateral proceeding of this character."

(2) Because "the mere fact that charter amendments were applied for by the plaintiff and granted to it by the General Assembly of the state of Connecticut does not constitute the carrying on or doing of business, within the meaning of the act of Congress of August 5, 1909."

(3) Because "the mere fact that the expense of alterations, improvements, and additions, introduced into the plaintiff's complaint by its lessee, are ulti-

mately borne by the plaintiff, does not constitute the carrying on or doing business, within the meaning of the said act of Congress of August 5, 1909."

As the lease in question is set out as an exhibit attached to the complaint, and as this court is bound to take judicial notice of the several special acts referred to, the various allegations in the parts of the answer excepted to as to the legal effect of the lease and the special acts of the General Assembly of the state of Connecticut may be regarded purely as conclusions of law, which the demurrer does not admit. The vital questions, therefore, are: (1) Whether the lease in question was an ultra vires act upon the part of the lessor, so as to warrant it being held void in this proceeding; and (2) whether the plaintiff was "carrying on business," within the meaning of the Corporation Tax Act.

[1] I. I am unable to agree with the proposition that the execution of the lease was an ultra vires act, at least so far as to permit its invalidity to be successfully attacked collaterally. There is always extreme difficulty and confusion in defining the validity, effect, rights, and remedies of an ultra vires act, and the only satisfactory way of dealing with the subject when it arises is by a process of elimination. The lease in question did not work a change in the business, but only a change in its management, and it recites that its execution was duly authorized by a vote of its directors. Moreover, it has been partly performed, and its validity and good faith, for aught that appears on the record, have never been challenged by stockholders or creditors. There was neither abandonment or extension of the original undertaking of the lessor, nor is it alleged that the lease obstructed the carrying on of the original proceedings.

In Featherstonhaugh v. Lee Moore Porcelain Clay Co., L. R. 1 Eq. 318, 336, in a case where minority stockholders of a corporation sought to have set aside a lease of the entire property, Vice Chancellor Wood said:

"Have the company, by this act which they intend to carry into effect, * * * either, on the one hand, abandoned their purposes, * * * or, on the other hand, exceeded their purposes? Have they done either one or the other? It appears to me they have not abandoned the purposes of the company. They have granted a lease for 21 years, and, so far, they have agreed to take a rent for their property, instead of working it themselves and taking the profit. At the end of 21 years they are to have the whole of the property back, and, as it appeared to them (that is the true way to put it, for they are the sole judges on that part of the case), they would have it back in a more profitable condition. * * * They have not exceeded their powers, because nobody can contend that parting with their property for a certain time is exceeding their powers, beyond this, that during all that time they are not carrying on the business."

And the general rule, indeed, may now be considered well settled that, when there is no restraining clause in the charter of a corporation or the statutes of the jurisdiction in which the lessor corporation is located and the property situated, the capacity to make such a lease as the one at bar cannot be questioned, where its good faith is not assailed and it is not unprofitable or injurious to the corporation concerned or its stockholders. In other words, the question of ultra vires in a given case is one which grows, not out of the nature of the corporation, but

of its needs and exigencies, and of the particular circumstances of the case. While the general scope of a corporation may be restricted, its methods of efficient management may not, so long as a breach of trust is not involved. Simpson v. Westminster Palace Hotel Co., 8 H. L. Cas. 711, 720; Temple Grove Seminary v. Cramer, 98 N. Y. 121; Dupee v. Boston Water Power Co., 114 Mass. 37; Bartholomew et al. v. Derby Rubber Co., 69 Conn. 521, 38 Atl. 45, 61 Am. St. Rep. 57.

This view of the law is fully borne out in the very recent case of Cambria Steel Co. v. McCoach, 225 Fed. 278, decided by the District Court for the Eastern District of Pennsylvania on July 28, 1915, where the precise question here involved was argued and decided. That was a suit against the collector of internal revenue to collect taxes assessed against the plaintiff's lessor, which the latter had paid under protest. The defendant contended that the lease was ultra vires, because it lacked legislative authority. The court held (page 281) that while the lease was not made without authorization of law, for a Pennsylvania statute justified it, yet no such legislative authority was necessary to empower the lessor to make such a lease, and relied upon the law as stated by Mr. Justice Sharswood in Ardesco Oil Co. v. North American Oil & Mining Co., 66 Pa. 382, as follows:

"Corporations, unless expressly restrained by the act which establishes them, or some other act of assembly, have and always have had an unlimited power over their respective properties, and may alienate and dispose of the same as fully as any individual may do in respect to his own property."

Had the lease of the United Gas Improvement Company purported or attempted to demise the plaintiff's franchise and its correlative public duties, a more serious question would arise, and the case would probably fall within the rule contended for by the learned district attorney, and within the condemnation of Pittsburgh & Connellsville R. R. Co. v. Bedford & Bridgeport R. R. Co., 81 Pa. at page 111, referred to in the opinion in the Cambria Steel Company Case; but no such attempt is contained in the lease. The distinction between the franchise of a corporation and its corporate property was clearly in the mind of the draughtsman who prepared the lease in question.

[2] II. The defendant's contention that the plaintiff in the last 11 years has obtained the passage of various special acts amending its charter, which recognized the plaintiff, and not its lessee, as the active corporation engaged in the business which the plaintiff was organized and chartered to perform, and that by the terms of the lease the plaintiff bears the expense of alterations, improvements, additions to its plants, mains, meters, and appurtenances, and continues actively in the management and maintenance of its property and the conduct of its business, is not sustained by the terms of the lease nor by the special acts themselves. As I have already indicated, the construction and legal effect of the lease and these special acts must be drawn from the documents themselves, which are before the court, and not from the defendant's statements of their effect and construction. I am convinced, from a careful reading of the adjudged cases, that the plaintiff was not "carrying on or engaged in business" within the meaning of the statute. Since this act went into effect, numerous cases have arisen in-

volving the constitutionality and construction of the statute in question. As bearing upon the precise question here involved, the following may be referred to as decisive of the view taken by the courts: The Supreme Court decisions of the Corporation Tax Cases, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428, McCoach, Collector, v. Minehill & Schuylkill Haven R. R., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, United States v. Whitridge, 231 U. S. 144, 34 Sup. Ct. 24, 58 L. Ed. 159, and United States v. Emery-Bird-Thayer Realty Co., 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825; the decisions of the Circuit Court of Appeals in Anderson v. Morris & E. R. Co. (Second Circuit) 216 Fed. 83, 91, 132 C. C. A. 327, New York Cent. & H. R. R. Co. v. Gill (First Circuit) 219 Fed. 184, 185, 134 C. C. A. 558, Lewellyn v. Pittsburgh, B. & L. E. R. Co. (Third Circuit) 222 Fed. 177, — C. C. A. —, Miller v. Snake River Valley R. Co. (Ninth Circuit) 223 Fed. 946, — C. C. A. —, and Traction Companies v. Collectors of Internal Revenue (Third Circuit) 223 Fed. 984, — C. C. A. —; and the decisions of the District Court for the Eastern District of Pennsylvania in Philadelphia Traction Co. v. McCoach, 224 Fed. 800, and Cambria Steel Co. v. McCoach, supra.

In the Whitridge Case, supra, it was held, as has been previously pointed out by the Supreme Court in former decisions, that Congress by the act in question did not impose a tax upon corporate rights or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation itself, and that the income derived by receivers of a corporation in their official management did not come within the terms of the act.

In the Minehill Case, supra, it was held that a railway corporation which had leased its lines to another company, the latter operating the railroad exclusively, but the lessor maintaining its corporate existence and collecting and distributing to its stockholders the rental from the lessees and also dividends from investments, is not "carrying on business" within the meaning of the act in question. Mr. Justice Pitney, in delivering the opinion of the court (228 U. S. at page 305, 33 Sup. Ct. at page 423 [57 L. Ed. 842]), said:

"We cannot, however, agree with the contention made in behalf of the government that because the Minehill Company retains its franchise of corporate existence, maintains its organization, and holds itself ready to exercise its franchise of eminent domain, or other reserved powers, if and when required by the lessee, and ready to resume possession of the property at the expiration of the lease, it is therefore to be treated as doing business, in respect to the railroad, within the meaning of the Corporation Tax Law."

In the Emery-Bird-Thayer Case, supra, a realty corporation which simply collected and distributed rent from a specified parcel of land was not held to be "carrying on business," within the meaning of the statute. In the opinion of the court, delivered by Mr. Justice Holmes (237 U. S. at page 32, 35 Sup. Ct. at page 501 [59 L. Ed. 825]), he said:

"The question is rather what the corporation is doing than what it could do."

In the Anderson Case, supra, Judge Rogers, writing for the Circuit Court of Appeals for this Circuit, held that where a railroad corpora-

tion had leased its property for the whole term of its charter, the lessee having sole control of its property and the possession of its road, the fact that the lessor retains its primary franchise of corporate existence, maintained its organization, held an annual meeting of its stockholders, elected directors, and amended its by-laws, and that its directors held a special meeting, elected officers, and appointed an executive committee, was insufficient to show that it was "engaged in business," within the Corporation Tax Act, and furthermore that its issuance of bonds would not be regarded as making it "engaged in business," and in the opinion (216 Fed. at page 91, 132 C. C. A. at page 335) said that the lessor in doing the acts referred to—

"was not 'carrying on or doing business,' within the meaning of the Corporation Tax Act. The meaning of the words 'carrying on or doing business' and 'engaged in business' must be given their ordinary and natural signification, and, given that signification, the act done is not within the meaning of the statute. The lessor company was not an actively operating concern. Under the terms of this lease the lessor corporation had practically gone out of business and was disqualified from any activity respecting the operation and management of the railroad business which it had been incorporated to carry on."

In the Gill Case, supra, Judge Putnam, who delivered the opinion of the court, referred to the statement in Judge Rogers' opinion just quoted from as—

"a sensible interpretation of the statute, and one in harmony with its general terms and purposes."

The Gill Case held, as also did the Lewellyn Case, supra, that the fact that the lessor continued to have its franchise right of eminent domain for the benefit of the lessee did not make it a corporation "carrying on or engaged in business," within the meaning of the Act. In the Gill Case the lessor had, on certain occasions, taken steps at the lessee's request in exercise of its right of eminent domain to obtain additional land necessary for the proper operation of the leased railroad, and in the Lewellyn Case properties in considerable number were not only purchased, but acquired by condemnation proceedings instituted and concluded by the lessor companies pursuant to resolutions by their board of directors, proposed and passed in conformity with the statutes of Pennsylvania.

It of course must be assumed in the case at bar that, if the right of eminent domain was exercised or property was purchased by the lessor, all properties in whichever way acquired would be immediately delivered into the possession of the lessee company, to be exclusively used by it in operating the demised plant under the terms of the lease. In the Cambria Steel Company Case, supra, the lease in question was for 999 years of all the property constituting the manufacturing plant, sites, mines, roads, and coal and other lands of the lessor, together with an assignment to the lessee of all its cash, contracts, and entire business, in consideration of a rental equal to 4 per cent. on the outstanding stock of the lessor, payable directly to its stockholders, together with an additional amount to pay the cost of maintaining its organization. It was held that after the lease the lessor merely existed as landlord of the

lessee, and had no other income than the rent, and was not doing business within the meaning of the Corporation Tax Act.

The authorities cited fully dispose of the defendant's contention that the lease from the plaintiff to the United Gas Improvement Company created the relation of principal and agent between lessor and lessee, and the rationale of all the cases is well summed up in the Traction Companies Cases, supra (223 Fed. at page 988, —— C. C. A. at page ——), as follows:

"The true test of distinction must be, as applied to corporations of this class, whether they are continuing the body and substance of the business for which they were organized and in which they set out, or whether they have substantially retired from it and turned it over to another. If the latter appears, then their tax exempt status must be tested by the further query whether they have, during the critical period, done only such acts as are properly and normally incidental to the status of a mere lessor of such property, or whether they have exercised their peculiar corporate franchises outside of and beyond the fair scope of that status."

As is pointed out in the Traction Companies Case, there is a helpful analogy in observing an individual. It is not usually hard to decide, as the court there says, whether an individual is still "in business" or has retired; "and, if the latter, he does not lose that character because here and there, in the receipt of his income, he does an item of business."

I am convinced, from a careful study of the lease and of the charter of the plaintiff, and the various amendments referred to, that the plaintiff is within the criterion stated and that the demurrer should be sustained.

Decree accordingly.

In re WEGMAN PIANO CO.

(District Court, N. D. New York. December 4, 1915.)

BANKRUPTCY ⊂⊃210—COURTS—JURISDICTION.

Where a court of bankruptcy has jurisdiction over a bankrupt's property, its trustee having possession thereof, the court has jurisdiction to determine all conflicting claims to the property by reason of its jurisdiction over the res.

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

In Bankruptcy. In the matter of the bankruptcy of the Wegman Piano Company. Petition by the trustee for an order to show cause, requiring the Commercial Credit Company of Baltimore, Md., and others, to establish their rights to property in the possession of the trustee. Petition referred to master.

See, also, 221 Fed. 128.

The trustee in bankruptcy has filed a petition in this matter, in which it is alleged that he has in his possession certain personal property, money, notes, and accounts which belong to and form a part of the estate and property of the bankrupt; also that other parties, especially Commercial Credit Company of Baltimore, Md., makes certain claim thereto and asserts certain rights therein. The object of the order to show cause granted thereon was to enable this court to ascertain and determine the claims of the parties and their rights

in and to such property, alleged to be in the possession and under the control of such trustee appointed by this court; he being and residing in the Northern district of New York, where the Wegman Piano Company, the bankrupt, resided and had its principal place of business, and in which district it was adjudicated a bankrupt.

On the return of the order to show cause, etc., the said Commercial Credit Company appeared specially and objected to the jurisdiction of this court on certain grounds specifically stated in writing and placed on file. Leave was asked to file further affidavits, etc., which was granted. Since that time, not waiving any right, but for the purpose, it is claimed, of showing that this court has no jurisdiction in the premises, the said Commercial Credit Company has filed an affidavit or statement, signed by A. E. Duncan, its president, taking issue with and denying many of the material allegations of the said petition of the trustee, and on the petition and such answer and objections demands that the petition be dismissed, that the order staying certain action in relation to such property heretofore granted by this court be vacated, and the trustee thereby remitted to a plenary action in the proper jurisdiction, which is claimed to be the state of Maryland.

Wm. K. Payne, of Auburn, N. Y., for trustee in bankruptcy.

Leo Oppenheimer, of New York City (Henry R. Follett, of Norwich, N. Y., of counsel), for Credit Commercial Co.

RAY, District Judge (after stating the facts as above). It is of course true that the Commercial Credit Company has the right to have it determined whether or not this court has jurisdiction of this matter and jurisdiction to grant all, or any, of the relief prayed for in the petition of the trustee. To this end that company may deny material allegations of the petition and present additional facts, and this court will ascertain the truth, what the facts are, so far as they bear on the question of jurisdiction. The Commercial Credit Company asserts that it is a corporation of the state of Delaware, has its place of business or office in the state of New York, and has not filed any certificate with the secretary of state to enable it to do business in the state of New York, and is not doing any business in the state of New York. At the same time it refers to a certain agreement between the Wegman Piano Company and itself, a copy of which it has presented and filed in this proceeding, and the purport of which is that the property referred to (some of it having been converted into money) was sold by the Wegman Piano Company to the Commercial Credit Company prior to the bankruptcy proceedings, and that the said Commercial Credit Company by such agreement also made, appointed, and constituted the Wegman Piano Company its agent to collect and receive amounts due on the notes and accounts, etc., for it, and that the possession of the Wegman Piano Company was the possession of the Commercial Credit Company. The said property, notes, and accounts are in the Northern district of New York, it is claimed, and many of them owed by parties residing in said district. If so, it is difficult to understand why the Commercial Credit Company was not doing business in the Northern district of the state of New York. If it purchased of the Wegman Piano Company notes and accounts belonging to that company, and by the instrument of purchase authorized and empowered that company, residing and having its place of business in said district, to *act as its agent* in New York, and there collect money on notes and

accounts owing by parties residing in New York (Northern district), it would seem that by and through its agent it was doing business in New York. But, however this may be, issue has been raised on material matters going to the jurisdiction, facts asserted to exist by the one party and denied by the other, appearing specially.

This court cannot decide the jurisdictional questions until it knows what the facts are, and as the facts are not conceded, but are in issue, proof must be taken. When the facts bearing on jurisdiction are before the court, it will decide that question. It will hardly be contended that property situated in the Northern district of New York, and in the possession of the bankrupt company at the time of the adjudication, and claimed by it, and which has passed from it directly into the possession and control of the trustee appointed by this court, and which the trustee claims to own, is not within and subject to the jurisdiction of this court. It will hardly be contended that, for the reason the Commercial Credit Company in good faith *claims* that *such* property belongs to it, therefore this trustee must go to Baltimore, Md., to have title and claims thereto adjudicated. If the property itself is in the actual possession of the Commercial Credit Company in the state of Maryland, and that company claims ownership, the trustee undoubtedly will be compelled to go there to obtain it. Herbert v. Crawford, Trustee, and Leblanc, 228 U. S. 204, 33 Sup. Ct. 484, 57 L. Ed. 800, and Murphy v. Hoffman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, and Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, would seem to be conclusive of the proposition that where the bankrupt has possession of the property, and such possession passes to the trustee, this possession gives to the bankruptcy court control of the res and authority to administer it; and of course authority to administer it includes the power to ascertain and determine *all* conflicting claims thereto, whether the claimants reside in the district where such bankruptcy proceeding is pending or in some other state. Same cases.

In Herbert v. Crawford, Trustee, and Leblanc, supra, Moore and Bridgeman planted a crop of rice. July 16, 1906, they filed their voluntary petition in bankruptcy, and adjudication followed, and one Leblanc was duly appointed trustee. Leblanc was later succeeded by Crawford as trustee. June 15, 1906, and 30 days prior to the filing of the petition in bankruptcy, Moore and Bridgeman executed and delivered to the firm of Beaumont Mills a bill of sale of such rice, and, as they claimed, took possession and employed Moore and Bridgeman to harvest it. Leblanc, soon after being elected trustee, used the teams and machinery of the bankrupt to harvest the crop of rice. The Beaumont Mills paid said trustee, Leblanc, for such services in harvesting and handling the rice and delivering it to them at their warehouse under their claim of title. Leblanc turned over the rice without any order of the court. The creditors of the bankrupt Moore and Bridgeman claimed that the rice belonged to the bankrupt and bankrupt estate, and that Leblanc had converted same to his own use and that of Beaumont Mills. Such creditors instituted summary proceedings against the trustee, Leblanc, to determine title and charge Leblanc with the

value. Leblanc was a member of the firm of Beaumont Mills. The District Court entertained the summary proceedings, and held that the rice belonged to the bankrupt and came into the hands of Leblanc as trustee, and that he improperly delivered it to the Beaumont Mills, and charged him with its value, $11,651, and directed that he pay that sum into court within 10 days. Leblanc was without funds to make the payment, and claimed the right to withdraw that amount of money from the funds of the Beaumont Mills, which he did against the protest and objection of the other members of that firm, and deposited same in the registry of the bankrupt court. Prior to Leblanc's withdrawal of the money the other members of the firm of Beaumont Mills instituted a suit in the state court to enjoin Leblanc from withdrawing such funds to pay into court, and the state court granted the injunction prayed for. Leblanc acted in defiance of this injunction. Leblanc either resigned as trustee or was removed, whereupon Crawford was elected trustee of the estate in bankruptcy. Further facts are stated in the opinion of the court as follows:

"The Beaumont Mills, at once, filed a supplemental petition in the state court, making the bank and Crawford, trustee, defendants, and praying judgment against both of them for the partnership money in their hands, and for other and further relief. Crawford, in turn, immediately brought this bill, in the bankrupt court, to enjoin the Beaumont Mills from prosecuting their suit against him in the state court. He insisted that the bankrupt court had jurisdiction of the res, and was alone authorized to determine his right to retain the $11,651 paid over to him as trustee. He contended, also, that the order of December 17, 1907, in the summary proceedings, was not only conclusive that the bankrupt court had jurisdiction of the res, but he also insisted that, as the Beaumont Mills had taken part in that litigation, they were bound by the finding that the crop belonged to Moore & Bridgeman. A decree was rendered in Crawford's favor by the District Court."

The Circuit Court of Appeals affirmed the District Court, and on appeal to the Supreme Court of the United States it was held that whatever the legal and equitable rights of Beaumont Mills in the rice, Moore and Bridgeman, and later Leblanc, as trustee, engaged in gathering, threshing, hauling, and delivering the rice, and that this *physical* possession gave the bankrupt court control of the res and authority to administer it, along with all other property in their physical possession when the petition was filed; that "that petition operated as an attachment and brought the rice into the custody of the bankrupt court." The court then quoted from Murphy v. Hoffman Co., 211 U. S. 562, 569, 570, 29 Sup. Ct. 154, 53 L. Ed. 327, and said:

"Under these decisions the *physical* possession of the crop brought the property within the *exclusive* jurisdiction of the bankrupt court."

As to the use by Leblanc of the partnership funds to pay his obligation to the bankrupt estate the court held that, as he had no right to take the money from the firm's assets, he had converted *its* funds and was accountable in the state court, as the $11,651, value of the rice, had not been marked or set apart as a specific fund to represent the rice, or shown that Leblanc withdrew the specific money received by Beaumont Mills for the rice. As Crawford, who succeeded Leblanc, received the money from Leblanc with notice as to where it

came from, it was held he could be sued in the state court therefor, it not being the money or property of the bankrupt estate, but that the state court could not determine the right to the rice or its proceeds, and that Crawford could proceed in the United States District Court against the Beaumont Mills to recover the rice or its proceeds or value.

It is clear, therefore, that if these notes and accounts, books of account, and cash received by the Wegman Piano Company are to be considered as in the physical possession of that company at the time the petition was filed, and as having passed to the physical possession of the trustee, the District Court for the Northern District of New York has full and complete jurisdiction, as its trustee is within its jurisdiction with the res and was appointed by it. Indeed, the trustee has no right to surrender them until ordered to do so by this court.

Before passing on the question of jurisdiction, it is essential that this court know who had the actual physical possession of the property in question and all the facts bearing on that question. In Murphy v. Hoffman Co., 211 U. S. 562, 568, 569, 29 Sup. Ct. 154, 156 (53 L. Ed. 327), the court said and held:

"But where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, federal or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. Wabash Railroad v. Adelbert College, 208 U. S. 38, 54 [28 Sup. Ct. 182, 52 L. Ed. 379]. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court. Whitney v. Wenman, 198 U. S. 539 [25 Sup. Ct. 778, 49 L. Ed. 1157]."

It may be a question whether some of this property or some of these property rights were "property in the possession of the bankrupt." In 2 Remington on Bankruptcy, § 1810, p. 1704, it is said:

"Mere rights of action for money judgments or decrees in personam, and for debts owing to the bankrupt, etc., where no tangible property is involved, cannot be said to constitute property in the bankrupt's possession at the time of bankruptcy, and therefore the bankruptcy does not necessarily draw litigation in relation thereto into the forum of the bankruptcy court."

No case or authority is cited. But money and promissory notes are tangible property. Book accounts are or may be evidences of an indebtedness, and can it be said that the trustees in bankruptcy does not have possession of the accounts of a bankrupt when he has in his possession the books and evidences of the indebtedness? Is not this constructive possession? In 2 Remington, § 1820, p. 1715, it is said, citing authority:

"No matter in what capacity the bankrupt may be holding, if he have actual possession, custody, or control, it is the bankruptcy court to which resort must be had."

At page 1698, § 1807, vol. 2, the same author says:

"Possession by the bankrupt may give jurisdiction to the bankruptcy court, even if the possession is not exclusive, and regardless of the capacity in which he holds, whether in his own right or *as agent* for another."

Herbert v. Crawford, 228 U. S. 204, 33 Sup. Ct. 484, 57 L. Ed. 800, above cited and quoted, is cited as authority. In Re Smith (D. C.) 3 Am. Bankr. Rep. 95, 100 Fed. 795, the bankrupt was actually in possession of the property as agent of his wife, but the bankruptcy court directed the property turned over to the trustee, subject to the right of the wife *in that court* to establish her title. In O'Dell v. Boyden, 150 Fed. 731, 80 C. C. A. 397, 10 Ann. Cas. 239, 17 Am. Bankr. Rep. 756, the question was as to the actual possession of a seat or membership in a Stock Exchange, and whether or not it was such possession as gave the bankruptcy court exclusive jurisdiction to determine questions of lien, etc. The court said:

"The 'seat' or 'membership' continued to be the 'seat' of Henrotin, and was a pecuniary asset which passed to his trustee. It was as much in his custody and possession as such a species of property is capable of. To deny the trustee's possession would be to deny the capability of possession of a chose in action or other incorporeal right or equity. The possession may be constructive, and not manual; but it is only so because such property is not capable of a more tangible custody. Only through a court of equity can the pecuniary value of such an asset be realized to creditors or assignees. Only by decree in personam compelling the bankrupt member can such a transfer of membership be effectuated as will put the buyer in the place of Henrotin as a member. Over him for that purpose the bankrupt court has exclusive control, and in this sense, also, may it be said that the 'seat' or 'membership' was in custodia legis when the trustee sought the aid of the court to adjudicate the claims and liens asserted by O'Dell."

Is or is not the possession of the books of account, orders, correspondence, bills, etc., made out by the bankrupt and passing to the trustee the necessary "constructive possession"? When this court is informed as to what the property consists of, the evidence of its existence, possession of money and of books, papers, etc., relating thereto, and the nature and character of claimant's evidence of ownership, etc., if any, it will be able to determine the questions of possession and jurisdiction.

There will be an order referring the petition, answering affidavits, and questions involved to Irving Bacon, Esq., of Auburn, N. Y., as special master, to take all evidence offered by the respective parties bearing on the question of jurisdiction, with directions to report same to the court with all convenient speed, together with findings of fact

UNITED STATES v. LAKE DRUMMOND CANAL & WATER CO. et al.

(District Court, E. D. North Carolina. November 19, 1915.)

NAVIGABLE WATERS ⇐26—ACTION TO REQUIRE REMOVAL OF OBSTRUCTION—OWNERSHIP OF BRIDGE.

The United States *held* not entitled to a writ of mandamus to compel defendants to remove the remains of a bridge from a canal which now constitutes a navigable public waterway; it appearing from the evidence that neither of defendants has or ever had any title to or interest in either the canal or the bridge.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 133–166; Dec. Dig. ⇐26.]

Application by the United States for a writ of mandamus commanding the Lake Drummond Canal & Water Company or C. L. and W. E. Hinton to remove obstructions to navigation from Turner's Cut, a navigable stream in the state of North Carolina. Proceeding dismissed.

Francis D. Winston, U. S. Dist. Atty., of Windsor, N. C.

Ward & Thompson, of Elizabeth City, N. C., for defendant Lake Drummond Canal & Water Co.

Aydlett & Simpson, of Elizabeth City, N. C., for defendants Hinton.

CONNOR, District Judge. An inspection of the pleadings and records introduced upon the hearing discovers the following facts relevant to the controversy between the government and the defendants:

Pursuant to a charter granted by the General Assemblies of the states of North Carolina and Virginia (Session 1790, 2 Rev. Stat. [N. C.] p. 217), the Dismal Swamp Canal Company, during the latter years of the eighteenth century, cut a canal for the purpose of navigation, extending from the Elizabeth river in the state of Virginia to the Pasquotank river in the state of North Carolina and operated said canal in accordance with the provisions of its charter until the year 1880. Pursuant to the joint action of the courts of pleas and quarter sessions of the counties of Camden and Pasquotank, during the year 1847, a public road was ordered to be constructed between the said counties, and a rate of tolls fixed to be charged for persons and vehicles passing over said road. The work of constructing and operating the road and the right to charge tolls for the use thereof was leased or farmed out to Wm. R. Abbott for the term of 100 years. The road was constructed by said Wm. R. Abbott, pursuant to said contract with the counties of Camden and Pasquotank, and operated by him until the 15th day of November, 1850, when he conveyed and assigned to Thomas F. Grandy and Willis S. Grandy all of his right, title, and interest in said road, with all of the privileges, easements, and emoluments appertaining thereto, and they assumed all of the duties incident thereto. By mesne conveyances all of the right, title, and interest in said road and bridge, on November 6, 1909, passed to and vested in defendants C. L. and W. E. Hinton, and they are now the owners thereof. On January 7, 1851, W. H. Riggs and others executed a paper writing, in which it is recited that:

"The undersigned, understanding that it is contemplated to cut a canal from the southern terminus of the Dismal Swamp Canal, to a point on the Pasquotank river near what is called 'Sawyers Landing,' and owning the land through which said canal must pass, do hereby agree (in consideration of the anticipated benefit that may accrue, not only to themselves, but to the public generally, from the construction of said canal) to convey by deed to the president and directors of the Dismal Swamp Canal Company so much land not exceeding 300 feet in width as may be required for the construction of said work."

Pursuant to this agreement the persons who signed this paper writing on September 12, 1851, executed a deed conveying to the Dismal Swamp Canal Company a strip of land 300 feet wide "following the tract recently cleared for the purpose to enter the Pasquotank river, near what is called 'Sawyers Landing.'" Shortly after the execution of this deed the Dismal Swamp Canal Company caused a canal to be cut through said strip of land, about 60 feet wide and 3 miles long, and known as "Turner's Cut." This canal crossed the public toll road hereinbefore referred to. A bridge was built over the "Cut," where it crossed the road, by the Dismal Swamp Canal Company, with a draw for the purpose of allowing boats to pass. The testimony in regard to the construction and maintenance of the bridge is not very clear, but tends to support the contention, made by defendants C. L. and W. E. Hinton, that it was by the Dismal Swamp Canal Company. The purpose of cutting the canal or "Turner's Cut" was to avoid the necessity of passing around a bend of Pasquotank river known as "Moccasin Track." Its name sufficiently indicates its character. W. J. Spence, 80 years old, says that he knows "Moccasin Track." It is a little part of the Pasquotank river. Before "Turner's Cut" was dug, they went through there into the Dismal Swamp. Another witness says that it is very narrow, crooked, shallow, and impassable. It appears from the record that the Dismal Swamp Canal Company, on July 1, 1867, for the purpose of securing the payment of a bonded indebtedness of $200,000, executed to James Cornick and others, trustees, a deed conveying—

"all and singular that work of internal improvement, the property of said company, known as and called the Dismal Swamp Canal, with all and singular the lands, tenements, hereditaments, and appurtenances adjoining, belonging to, or connected with the said canal, or belonging to said company."

By successive conveyances, all of the property conveyed by said deed, on the 30th day of July, 1892, vested in the defendant the Lake Drummond Canal & Water Company by deed executed by Theodore S. Garnett, trustee, to said company. It appears that, on August 4, 1884, Henry Roberts, superintendent of the Dismal Swamp Canal Company, in a report to Capt. E. A. Hinman, Corps of Engineers, referred to "Turner's Cut" as having—

"been built by the Dismal Swamp Canal Company, at a cost of $50,000, for free navigation to avoid 'Moccasin Track,' which is unnavigable, and to better connect the Dismal Swamp Canal with deep water in Pasquotank river. No one claims it, but the Dismal Swamp Canal Company has maintained it to date. There is no deed of it on record."

On August 27, 1884, Capt. Hinman made a report to the Chief of Engineers, U. S. A., in regard to proposed improvements by the gov-

ernment, recommending "Turner's Cut" as "worthy of improvement." He says:

"It is presumed that the ownership of it is not in question for this purpose."

Pursuant to an act of Congress the government deepened and widened "Turner's Cut," treating it as a part of Pasquotank river, without any objection on the part of the Dismal Swamp Canal Company, or its successor in title to the canal. The bridge across "Turner's Cut" was permitted to fall into decay and finally "went down."

At the Fall term, 1912, of the superior court of Camden county, the defendants C. L. and W. E. Hinton, the owners of the "toll road" hereinbefore referred to, instituted an action against defendant Lake Drummond Canal & Water Company, alleging that, as successor in title to the Dismal Swamp Canal Company, said company was the owner of "Turner's Cut" and under obligation to maintain and keep in repair the bridge over said "Cut," alleging the failure to perform its duty in that respect, and praying for a mandatory injunction commanding it to repair said bridge. The defendant company, in its answer to the complaint, denied that it was the owner of, or was operating "Turner's Cut," or any part thereof, or had any interest therein. Upon the trial of said action it was adjudged by the court, and upon appeal to the Supreme Court held and decided that:

"While the Dismal Swamp Canal Company, predecessor in title of defendant, cut the waterway known as 'Turner's Cut,' it was not a part of the property which it held under its franchise, but was merely an adjunct or convenience which it operated. The title to said 'Turner's Cut' was not a part of the franchise and did not pass by the defendant's purchase. The United States subsequently took it over, and for 30 years has been expending money upon it as a part of the navigable waters of the state, and the defendant has not been charging toll or exercising control over it." Opinion of Clark, C. J., in Hinton v. Canal Co., 166 N. C. 484, 82 S. E. 844.

While two of the justices dissented from this opinion, a petition to rehear has been filed and denied. It is therefore the final determination of the law of the case. From this construction of the deeds under which defendant Canal Company owns the Dismal Swamp Canal, it logically follows that "there is no obligation, express or implied, requiring it to maintain the bridge." This construction of the deeds appears to be the same which the officers of the Lake Drummond Canal Company put upon it. W. B. Brooks says:

"I was elected president of the Lake Drummond Canal & Water Company at the time of its incorporation in 1892, and continued as president until October 26, 1906, and am now one of the directors of the company. Throughout the whole history of the company I have had direction of its construction and operation, and am familiar with all the conditions relating to its ownership. * * * At no time since the company owned the canal has it claimed to own that canal called 'Turner's Cut.' * * * The government had charge of 'Turner's Cut.' It has appropriated large sums of money for its maintenance, and has same, and the defendant company, not only has exercised no rights over same, but has never claimed any right, title, or interest in 'Turner's Cut,' or any part thereof."

M. K. King, the present president of the company, testifies to the same effect. It is conceded that the bridge across "Turner's Cut" has fallen into decay, and, with the exception of the abutment and a por-

tion of the structure extending some distance into the water, has disappeared. The government alleges, in its petition for the writ of mandamus, that this portion of the structure is a menace to and endangers the safety of boats passing through the "Cut." This is true. The government demands that either the defendant Lake Drummond Canal Company, or defendants C. L. Hinton and W. E. Hinton, be commanded to remove the structure, or such parts thereof as remain standing.

The Supreme Court of the state having decided that the Lake Drummond Canal & Water Company is not the owner of "Turner's Cut," and therefore has no legal relation to the "Cut," and therefore owes no duty to maintain the bridge, it is difficult to perceive upon what principle of law or right it is under any obligation to remove a structure which it never placed in or over the "Cut," or claimed any right to use. Assuming that the government acquired the right to control and use "Turner's Cut" as a navigable waterway by improving it, widening its banks, and deepening its channel, and that this was done prior to the purchase by the defendant Lake Drummond Canal & Water Company of the property of the Dismal Swamp Canal Company, no duty devolved upon the defendant corporation to remove the structure. It makes no claim to ownership, or objection to the appropriation by the government of the "Cut" as a public highway. If "Turner's Cut" was, as it would seem, the property of the Dismal Swamp Canal Company, and, as held by the Supreme Court, did not pass to the defendant corporation, the title, unless divested by appropriation by the government, in regard to which no opinion is expressed, is still the property of the original owner. When the government assumed control of the "Cut," the bridge was standing. No one, it seems, has ever objected to its removal, or is now objecting to the removal of the portion of it claimed to be an obstruction to navigation. The Lake Drummond Canal & Water Company is under no obligation to remove a structure which it never constructed, nor maintained, over a canal which it never owned or operated, and in regard to which it never claimed nor exercised any control.

It is insisted that, if the duty to remove the structure is not upon the Lake Drummond Canal & Water Company, then it must be upon defendants C. L. and W. E. Hinton. The case, as to them, is very simple. A public toll road was established by competent, lawful authority during the year 1848, and leased to the predecessor in title to defendants. In 1857 the Dismal Swamp Canal Company dug "Turner's Cut" across the road; and while it does not very clearly appear, it is quite evident, as it was in duty bound to do, it constructed a bridge across the "Cut," and for many years maintained it in such manner as to enable boats to pass through and persons and vehicles to pass over the "Cut." When the Canal Company sold its other property and ceased to operate the canal and the "Cut," its successor in title to the Dismal Swamp Canal having no interest in the "Cut," and therefore no duty being imposed upon it to maintain the bridge, it fell into decay. Defendants C. L. and W. E. Hinton, the owners of the "toll road," supposing that the Lake Drummond Canal & Water Company

was under obligation to maintain the bridge, appealed to the court for a mandatory injunction compelling it to do so, or, if not entitled thereto, to a judgment for damages for the breach of duty to maintain the bridge. The court decided that they were not entitled to either, for the reason hereinbefore stated. The defendants C. L. and W. E. Hinton are deprived of their property; the "toll road" is destroyed—cut in two; the government has appropriated "Turner's Cut"; the court has held that the title to the "Cut" is not in the Lake Drummond Canal & Water Company; the defendants C. L. and W. E. Hinton never constructed nor maintained any bridge over or across "Turner's Cut." It is difficult to perceive how they are under any obligation to remove such portion of it as may remain.

Neither of the defendants are making any objection to the assumption by the government of control of "Turner's Cut" as a navigable highway, or claiming any right to or interest therein. Accepting the decision of the Supreme Court of North Carolina as a correct view of the law, as the parties are compelled to do so, the title to "Turner's Cut" is either in the Dismal Swamp Canal Company or it has been acquired by appropriation by the government. From neither view are either of the defendants under any obligation to remove the structure. So far as they are concerned, there is no reason why the officers of the government should not proceed to do so.

The proceeding will be dismissed, at the cost of the plaintiff.

In re LINCOLN.

(District Court, E. D. New York. November 19, 1915.)

1. EXTRADITION ⇐17—PROCEEDINGS—REVIEW—CERTIORARI AND HABEAS CORPUS.

The writ of certiorari furnishes the court no wider range of determination, on the sufficiency of the facts shown to warrant a holding for extradition, than does the writ of habeas corpus.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 20; Dec. Dig. ⇐17.]

2. HABEAS CORPUS ⇐92—EXTRADITION PROCEEDINGS—REVIEW—EVIDENCE.

Questions as to the weight and credibility of competent evidence on an examination for extradition will not be considered on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. ⇐92.]

3. EXTRADITION ⇐14—INTERNATIONAL—EVIDENCE OF CRIMINALITY—"SIMILAR PURPOSES."

As regards the criminality of one for whom extradition is demanded by Great Britain, it is enough that under Act Aug. 3, 1882, c. 378, § 5, 22 Stat. 216 (Comp. St. 1913, § 10116), it offers documents, authenticated as certified by the American ambassador, so as to entitle them to be received "for similar purposes"—that is, as evidence of his criminality—in the tribunals of that country, and that under Treaty of Aug. 9, 1842, art. 10 (8 Stat. 576) amended by Treaty of July 12, 1889 (26 Stat. 1508), there

be competent evidence to make a prima facie case of the crime as known in this country.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. ⊂⊃14.

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

4. CONSTITUTIONAL LAW ⊂⊃73—JUDICIAL POWERS—EXTRADITION—QUESTION FOR SECRETARY OF STATE.

Whether a demanding country may be trusted to live up to its treaty obligation, that one whose extradition is demanded shall not be tried or punished for a political offense, is a question for the Secretary of State.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 134–137; Dec. Dig. ⊂⊃73.]

In the matter of the application for extradition of Ignatius T. T. Lincoln. Hearing on writs of habeas corpus and certiorari after holding for extradition.

Pratt, Koehler & Boyle, of New York City (Addison S. Pratt and Morris Cukor, both of New York City, of counsel), for petitioner.

Charles Fox, of New York City, for demanding government.

CHATFIELD, District Judge. The petitioner has been held by a judge of this court, sitting as commissioner, to await the action of the Department of State, upon an application to extradite him to the county of London, England, in the kingdom of Great Britain and Ireland, upon charges of forgery and obtaining money on false pretenses through the utterance of paper known to him to be forged. He has been brought before this court upon a writ of habeas corpus and also a writ of certiorari, and return has been made to both writs by the production of the petitioner in court, and by presentation of the various papers and warrants constituting the record of the hearing up to and including the order of the judge as commissioner.

Upon this return, the petitioner has asked for his discharge, alleging certain defects which he claims appear upon the face of the record, but traversing none of the facts, and the matter has been therefore submitted upon the record without additional testimony. The grounds urged by the petitioner will be referred to in order.

The petitioner claims that the record does not contain sufficient proof of the charges of forgery, the uttering of forged papers, or the obtaining of moneys thereby, to make possible the finding that a crime has apparently been committed.

[1] No distinction has been made in arguing the writs between the writ of habeas corpus and the writ of certiorari, and it is not considered that the writ of certiorari furnishes to the court any wider range of determination, upon the sufficiency of the facts shown, than does the writ of habeas corpus in this sort of a proceeding.

[2] It has been decided in In re Luis Oteiza v. Cortes, 136 U. S. 330, 10 Sup. Ct. 1031, 34 L. Ed. 464, and In re Krojanker et al. (C. C.) 44 Fed. 482, that upon a writ of habeas corpus questions as to the weight and effect of competent evidence will not be considered. In Grin v. Shine, 187 U. S. 191, 23 Sup. Ct. 98, 47 L. Ed. 130, the Supreme Court of the United States looked into the entire record, in

order to see if there was competent evidence to support each proposition found by the commissioner, and whether these propositions comprised the necessary essentials of the crimes charged. But although thus going into the evidence, the court held merely that each conclusion was based upon some evidence, and that the weight and credibility thereof could not be collaterally attacked under a writ of habeas corpus.

In the present case the court has examined the record, and it appears that the conclusions of the commissioner, in all the essential elements of his finding, were based upon some evidence which was competent for the purpose, and which he had the right to treat as credible, in his discretion. His finding, therefore, that there is reasonable cause to hold that the crimes charged were apparently committed in the county of London, England, is conclusive upon that point in this proceeding.

Nothing has been urged to show that these crimes are not to be considered as comprising the same essential elements which are denoted by the words "forgery," etc., in the sense in which they are used in this country and in this district; and there is therefore no error of law which is apparent upon the face of the record in the conclusions from the facts presented.

The petitioner questions the sufficiency of the evidence as to identity. Again, this is a question of fact, and should be clearly and definitely determined. Similarity of name, handwriting, and photograph, coupled with direct identification thereof, and with uncontradicted statements as to the whereabouts of the accused and his history, which in general coincide with what is known of the defendant petitioner, furnish sufficiently strict proof, if found credible by the commissioner. The record fails, furthermore, to show any actual contradiction or plea that the defendant is not the person wanted.

[3] The petitioner objects to the sufficiency of the documents produced and offered in evidence from the courts in London, as authenticated by the Under Secretary of State for the Home Department and by the American ambassador, and this point was passed upon by the commissioner upon objection at the hearing.

The case of In re Behrendt (C. C.) 22 Fed. 699, decided in this circuit in 1884, and In re Luis Oteiza y. Cortes, supra, recite the statutes and pass upon the sufficiency of a certificate by the principal diplomatic officer of the United States to make the documents admissible in this country as evidence upon the question of probable cause as to the commission of a crime in the country to which extradition is asked.

In the present case, as in the cases cited, the words "similar purposes," when limited to an attempt to prove a charge of forgery or uttering of forged instruments, refer to the crimes so denominated in the Treaty of July 12, 1889 (26 Stat. 1508), amending article 10 of the Treaty of August 9, 1842 (8 Stat. 576), and not to an extradition hearing in the country making the demand.

Section 5 of the laws of August 3, 1882 (22 Stat. 215, c. 378) which provides for the certificate referred to, is evidently based upon section 5271, R. S. (Comp. St. 1913, § 10111). Section 5271, which is repealed by section 6 of this law, uses the words "similar purposes" with direct

reference to "evidence of criminality of the person so apprehended," and the meaning of the later statute is plainly the same.

Section 5270, R. S. (Comp. St. 1913, § 10110), provides that the person charged shall be committed to jail, if held, "there to remain until such surrender shall be made." Under section 5273, R. S. (Comp. St. 1913, § 10119), he may be released, however, upon application to a judge, unless delivered up and conveyed out of the United States within two calendar months after such commitment.

The order of the court, under section 5270, is to be made if the evidence is deemed "sufficient to sustain the charges under the provisions of the proper treaty." The charges before the court are the accusations of crime. The action of the Secretary of State is "according to the stipulations of the treaty."

This gives full effect to article 10 of the Treaty of August 9, 1842, providing that only upon sufficient competent evidence to make out a prima facie case of the crime charged in the place where the hearing is held shall the defendant be held for extradition. The certificates attached show the papers certified to be sufficient to make out the crime as known in the foreign jurisdiction, and the conclusions of the magistrate, where the hearing is held, must also be based upon evidence sufficient to make out the crime as known in *that* jurisdiction. The rights of the alleged criminal will thus certainly be protected, even though the definition of the crime itself or the necessary requisites to make up the charge may differ slightly between the two places.

As to this objection, therefore, the question must be disposed of in precisely the same manner as those previously considered, and the conclusions of the judge sitting as commissioner upheld, for the evidence presented, as found by the judge upon the hearing, makes out a prima facie case of the crimes as known in this jurisdiction and also in the county of London, England.

[4] But one other point is raised, and this might be more difficult of determination if it could be considered by this court. At the end of the hearing, the accused asked an adjournment in order to produce evidence to show that he was being extradited for political reasons. It was admitted upon the record by the accused that the treaty with Great Britain made it impossible for Great Britain, while giving full force and effect to the treaty, to try or even to detain or arrest the accused upon any other charge than those for which extradition had been asked. It was also admitted that the treaty was in force, and that the courts of Great Britain must be assumed by the courts of the United States and the Department of State of this country to be exercising the same jurisdiction as at other times, and that the state of war existing between Great Britain and other nations had not interfered with the administration of justice in the civil courts. Nor did the accused suggest that there was likelihood of interference with the civil courts of Great Britain before his case should be disposed of, if extradition should follow. But the accused did offer, as a reason why extradition should not be granted, that the so-called criminal charges had not been urged against him until after certain matters of a political nature, particularly incited by publications of

his in the United States, had led the government of Great Britain to desire his punishment and to seek to interfere with his further public utterances. He therefore asked leave to prove that, even if extradited upon a criminal charge and tried therefor, the prosecution would be animated by the endeavor to make him endure punishment from political motives, and that no criminal proceedings were desired or had been set in motion, except as a cloak for reaching him upon charges that were not an extraditable offense. He bases this upon the language of article 2 of the Treaty of July 12, 1889, which is as follows:

"A fugitive criminal shall not be surrendered, if the offense in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character." 26 Stat. 1509.

It does not seem that this question can be disposed of or should be disposed of by the court. The application for extradition is made to the government of the United States through the Department of State. The warrant of extradition must actually be executed by the Department of State, until the prisoner is delivered to the proper officer of the demanding government. The court is concerned solely with the question of the charge of crime, and that crime, as has been said, must be one known as a crime in the place where the hearing was held. If it be shown that the acts charged as crime indicate a *political* offense, and not a *criminal* one, as known to the jurisdiction holding the hearing, then certainly the court could not find that there was probable cause as to the commission of a crime. This would involve considering whether the offense as charged is political or criminal.

But it is not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith. Such matters should be left to the Department of State. The government of the United States, through the Secretary of State, should determine whether the foreign government is in fact able to exercise its civil powers, and whether diplomatic and treaty relations are being carried out and respected in such a way that it is safe to surrender an alleged criminal under a treaty.

It is thought by the court that application to the Secretary of State of the United States will furnish full protection against the delivery of the accused to any government which will not live up to its treaty obligations, and that the Secretary of State will be fully satisfied (before delivering the accused to the demanding government) that he is wanted (in the legal sense of that term) upon a criminal charge, that it is not sought to secure him from a country upon which he is depending as an asylum because of political matters, and that the treaty is not actually used as a subterfuge.

If adjournment is necessary to allow the accused in this case to investigate the propriety of his extradition, that application should be made to the Department of State, and not to the court.

In re ARNOLD.

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

1. BANKRUPTCY ⟸409—GROUNDS FOR REFUSING DISCHARGE—FAILURE TO KEEP BOOKS.

The natural result of the failure of a bankrupt to keep books showing his business transactions being to conceal his financial condition, such may be presumed to have been his intention; but the presumption is subject to rebuttal, and if the court is of the opinion, either from evidence or from the circumstances of the case, that he did not intend concealment, he should not be denied a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752–757; Dec. Dig. ⟸409.]

2. BANKRUPTCY ⟸414—GROUNDS FOR REFUSING DISCHARGE—FAILURE TO KEEP BOOKS.

A bankrupt was engaged in business as a building contractor in a small way for six months, during which time he built three small buildings, on which he worked himself; the only indebtedness contracted in so doing being to subcontractors, who were secured under the mechanic's lien law. *Held*, that under such circumstances his failure to keep books did not evidence an intention to conceal his financial condition, which should deprive him of his right to a discharge.

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

In Bankruptcy. In the matter of Walter Arnold, bankrupt. On exceptions to and motion to confirm report of special master recommending discharge. Exceptions overruled, and discharge granted.

Howard H. Williams, of New York City, for trustee and objecting creditor.

De Meza & Crane, of Plainfield, N. J., for bankrupt.

HAIGHT, District Judge. The only specification of objections to the bankrupt's discharge which needs more than a passing consideration is that dealing with his failure to keep books of account or records. It would require a vivid imagination to conclude that payments of small sums from time to time, from wages, on account of overdue board bills, and payments to materialmen, who were secured by the mechanic's lien law of New Jersey, were made with intent to hinder, delay, or defraud the bankrupt's creditors. Nor can I find any such inconsistency in the bankrupt's testimony as to warrant a finding that he made a false oath in the bankruptcy proceedings.

[1] The bankrupt was in business for about six months as a building contractor, and during that time was engaged in executing three small building contracts, one of which was with his father. He admittedly kept no books of account whatever, except one in which he recorded the time on the various jobs. He had no bank account during the time that he was in business, and apparently the only records of indebtedness which he retained at all during that time were unpaid bills. Bills which were not paid in cash were apparently paid by his father's checks. Such work as he did not do himself on these contracts was performed by subcontractors. The latter gave him bids

in writing, which he accepted by letters. He kept no copy of the letters. The above constituted the only records to which resort could have been had for the purpose of ascertaining his financial condition. I will assume that from them alone such condition could not have been ascertained. The Bankruptcy Act (section 14b) provides that a bankrupt shall be refused a discharge if he has *"with intent to conceal his financial condition,* destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained." Comp. St. 1913, § 9598.

The important consideration is, therefore, whether the bankrupt's failure to keep books of account or more complete records was with an intent to conceal his financial condition. The natural and probable consequence of such failure would be to conceal his financial condition, for manifestly, if there were no books or records from which it could be ascertained, it would be concealed. The Circuit Court of Appeals of this circuit has recently held (In re Janavitz, 219 Fed. 876, 135 C. C. A. 546) in respect to this provision of the Bankruptcy Act that a bankrupt is properly chargeable with intending the natural and probable consequences of his own acts and omissions, but that testimony is competent to refute the presumption. No testimony was offered in this case to show why the books and more complete records were not kept, which would have been the most direct way to overcome the above-mentioned presumption. I do not think, however, that direct evidence is essential to overcome the presumption, but that if, in the absence of such evidence, the court, from all the facts and circumstances, is of the opinion that the bankrupt's failure to keep books and records was not with intent to conceal his financial condition, then a discharge should not be denied him.

[2] The bankrupt's business, as the special master found, was not such as would necessarily require him to keep books of account. In fact, it is very common for builders operating in country districts, on a small scale as this bankrupt was, not to keep books of account. The contracts which he had were small, he was in business for only a short time, and as to one of the contracts his only real financial connection was in respect to the labor on the carpenter work. As to the other contracts, the bids which he received from subcontractors constituted the extent of his pecuniary obligations, and as all such contractors were secured by the mechanic's lien law of New Jersey (Act June 14, 1898 [P. L. p. 538]), his financial condition would have been of little concern to them. The business which he conducted was of such a nature and so small in amount that I am convinced that his failure to keep books or more complete records was not with any intent to conceal his financial condition.

The master's report will accordingly be confirmed, and the bankrupt granted a discharge.

UNITED STATES v. BLAIR-MURDOCK CO. et al.

(District Court, N. D. California, First Division. October 27, 1915.)

No. 5750.

1. CONSPIRACY ⟸28—PROCURING ENLISTMENT IN FOREIGN SERVICE.

The Bristish consul general in San Francisco, by direction of his government, published a notice calling to actual service the Royal Naval Reserve. Some 600 men responded, but few of whom were in fact reserves, but all were registered. The consul general procured the services of defendants, who organized a voluntary association under the name of British Friendly Association and established an office. The register of names was turned over to such association, with instructions (1) to send only British subjects who had had military training; (2) to make no engagements of any description whatever; (3) to give no pay or advance; (4) to make no solicitation; (5) not to send more than 50 men at a time; (6) to require such proof of British nationality as such men were usually able to give; (7) to give no information as to pay, allotments, etc.; and (8) to examine the men to see if they were physically suitable. These instructions were obeyed by defendants, who communicated with the persons whose names were on the register, paid the board and lodging of those who responded until their examination, sent those found "suitable" to New York, and paid their transportation and sustenance on the way. All funds were furnished by the consul general. It was the expectation of defendants that the men would proceed from New York, under direction of the consul general there, to England, and there enlist in the British service, and such was the intention of most of the men. *Held*, that defendants were guilty of a conspiracy to violate Criminal Code (Act March 4, 1909, c. 321) § 10, 35 Stat. 1089 (Comp. St. 1913, § 10174), which provides that "whoever, within the territory or jurisdiction of the United States, * * * hires or retains another person to * * * go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board of any vessel of war," etc., shall be guilty of a criminal offense; that, while the arrangement was probably designed to evade the letter of the statute, it was clearly the intention to violate it in substance.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. ⟸28.]

2. NEUTRALITY LAWS ⟸3—OFFENSES—"HIRE OR RETAIN."

The phrase "hire or retain," as used in Criminal Code, § 10, making it a criminal offense to hire or retain any person to go beyond the limits of the United States with intent to be enlisted in a foreign military or naval service, defined.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 3–8; Dec. Dig. ⟸3.]

Criminal prosecution by the United States against the Blair-Murdock Company, Ralph K. Blair, Thomas Addis, C. D. Lawrence, Harry G. Lane, and Kenneth Croft. Judgment of conviction against defendants Blair and Addis, and of acquittal as to all other defendants.

John W. Preston, U. S. Atty., of San Francisco, Cal.

J. J. Dunne, J. R. Jones, H. G. W. Dinkelspiel, and George A. McGowan, all of San Francisco, Cal., for defendants.

On Motion to Direct Verdict.

DOOLING, District Judge. The defendants are charged in two counts with having conspired to violate section 10 of the Criminal Code, and with having performed certain overt acts in furtherance of such conspiracy and to effect and accomplish the object thereof. It is charged generally in the first count that they conspired to hire and retain within the territory of the United States certain persons in the indictment named, in number 25, and divers other persons to the grand jury unknown, to go beyond the limits and jurisdiction of the United States, with the intent on the part of such persons to enlist and enter into the service of a foreign prince, to wit, the king of Great Britain and Ireland, as soldiers. The second count avers the same facts, except that it is therein stated that the intent of such persons was to enlist in the service of the king of Great Britain and Ireland as marines and seamen on board a vessel or vessels of war.

Upon the impanelment of the jury, as you will remember, the case took a rather unusual turn. An agreed statement of facts was presented, with the stipulation that the court might consider such facts and the law applicable thereto, and, in the language of the stipulation, "instruct the verdict which the jury shall render in said cause." Thereupon the facts agreed upon as being the facts in the case were presented to the jury, and the jury was then excused until such time as the court would be prepared to "instruct the verdict," as provided for in the stipulation. Thereafter counsel for the respective parties argued the matters involved herein before the court, in the absence of the jury, and the court having fully considered all the facts agreed upon, and the law applicable thereto, is now prepared so "to instruct the verdict which the jury shall render herein."

[1] The defendants are charged with conspiracy. The section of the Criminal Code under which this charge is laid is as follows:

"Sec. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both." Comp. St. 1913, § 10201.

The offense against the United States which the defendants are charged with having conspired to commit is that denounced by section 10 of the Criminal Code. This section, in so far as applicable here is as follows:

"Whoever, within the territory or jurisdiction of the United States, * * * hires or retains another person * * * to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district or people, as a soldier, or as a marine or seaman on board of any vessel of war, shall be fined not more than one thousand dollars and imprisoned not more than three years."

The jury will observe that the indictment does not aver that defendants violated this section, but that they conspired to violate it. It may

not be amiss to state at the outset that section 10 is designed to protect the sovereignty of the United States, and could be violated as well at a time of universal peace, as it could be at a time of almost general war. In other words, it is not essential to a violation of this section that war should exist anywhere at the time of such violation, although in times of war among other nations with which this government is at peace a violation of the section on behalf of one of the belligerents, by hiring or retaining men here to go abroad with intent to enlist in the army or navy of such belligerent and assist in carrying on the war against other nations with which this government is upon friendly terms, might well be regarded by the government with greater gravity, as rendering more difficult its position as a neutral power.

With these preliminary observations, it may be well now to glance briefly at the facts that are complained of here. It is stipulated: That the kingdom of Great Britain and her allies were at all the times mentioned, and at all times subsequent to August 1, 1914, in a state of war with the German empire and her allies, and that the king of Great Britain and Ireland was, at all the times mentioned, desirous of the return to Great Britain of British subjects for employment in the army and navy and in the various branches of the national service of all kinds. That Great Britain has no laws providing for compulsory military or naval service, and that the men named in the indictment concerning whom the defendants are said to have conspired were not reserves of the British army or navy. That A. Carnegie Ross, the British consul general at San Francisco, at the outbreak of the war, caused to be published in the Examiner and Chronicle of this city the following notice:

"Notice.

"His Majesty, King George the Fifth, has issued a proclamation ordering that the Royal Naval Reserve be called into actual service.

"Notice is hereby given that all men in the Royal Naval Reserve who are absent from the British Islands are liable to serve in the British Navy if called upon by the officer commanding any of His Majesty's ships.

"Royal Naval Reserve men serving in merchant ships abroad are to report themselves to the senior British Naval Officer at whatever port they may be at; failing that, to the first British Naval Officer they may meet or to the nearest Registrar of Naval Reserves on arrival in the British Isles.

"Royal Naval Reserve men abroad not serving in merchant vessels are to report themselves to the nearest British Naval, Consular or Colonial Officer forthwith.

"August 2, 1914. A. Carnegie Ross, H. B. M. Consul-General."

And that at the same time a news item appeared in said papers as follows:

"The news that the government of Great Britain had summoned all naval reserves to immediately report for duty excited the greatest interest and patriotism yesterday amongst the many thousands of Great Britain's subjects who are resident in San Francisco. Great numbers of naval reservists reported within a few hours at the consulate in the Hansford building in Market street.

"The order for mobilization of the reserves was received by Consul General A. Carnegie Ross at noon and was immediately published in the extra editions of the newspapers. The instructions received take the form of a special admiralty order calling on all reserves of the Royal British Navy immediately

to report to their senior British naval officer, or failing that, to the first British naval officer they meet. Those not aboard a ship are to report forthwith to the British Consulate."

That a large number of people responded to said notices, only about six of whom were reserves. That said consul general, on or about March 15, 1915, procured the services of defendants Blair and Addis, and of one Harris, who rented and furnished a room in San Francisco as an office, under the name of the "British Friendly Association," the furniture therefor being rented from Indianapolis Furniture Company, and that thereafter Blair and Addis removed said office to another place in San Francisco, and returned said furniture. That Harris was in charge of said office until its removal, and Blair thereafter. That letter heads were printed for the use of said Association, and were used by Harris, with the knowledge of Blair and Addis, in its correspondence and other business transactions. That the British Friendly Association was an unincorporated concern, organized with the consent of said consul general, and composed of Blair, Addis, and Harris, and the expenses of said organization were paid from the funds of the British government through said consul general. That said Association had no other business, and was organized for no other purpose, than to facilitate the transportation to New York of British subjects, sound in body and limb. That at all times between August 1, 1914, and March 18, 1915, the said consul general kept a register upon which was entered the name and address of persons calling at the consulate to inquire concerning military service, and when said association opened its office the said register was by said consul general, to the knowledge of defendants Blair and Addis, intrusted temporarily to said Harris, accompanied by the following instructions:

"1. To send only British subjects who had had military training.
"2. To make no engagements of any description whatever.
"3. To give no pay or advance.
"4. To make no solicitation.
"5. Not to send more than 50 men at a time.
"6. To require such proof of British nationality as such men are usually able to give.
"7. They were to give no information as to pay, allotments, etc.
"8. The men were to be examined to see if they were physically suitable."

That said register remained continuously in the possession of Harris until about May 27, 1915, when he left the state, at which time it was turned over to defendant Blair, in whose possession it remained until he returned it to the said consul general, who has voluntarily produced it here in court.

It appears from an inspection of said register that it is made up of 23 sheets of paper, containing listed the names and addresses of something over 600 persons, together with a column indicating the nature of their previous military or naval services. The sheets are fastened together at one corner. Three of the sheets bear the heading "Volunteers"; eight are headed "Army Volunteers"; one is headed "Volunteers—Army"; three are headed "Army Volunteers and Ex-Soldiers"; two are headed "Army Reserve"; one is headed "'Royal

Naval Reserve"; one bears the heading "Naval Reserve"; two are headed "Royal Navy Volunteers"; and two are headed "Volunteers for Nurses."

The name of the defendant Blair appears under the head of "Volunteers," and that of defendant Addis under the head of "Volunteers for Nurses." It is further stipulated that Harris, to the knowledge of defendants Blair and Addis, opened correspondence and communications with the persons named in said register; that the said consul general and the attachés of the consulate referred inquiring individuals to the defendant Blair, giving them the address of the said Association; that there were printed for the use of said Association blank receipts in the following form:

"$..... San Francisco, ... 1915.

"Received from R. K. Blair $..... for sustenance while in San Francisco awaiting departure and $9.10 for sustenance during trip to New York.

"....."

—and also blank cards as follows:

"Name .....No.....
"Address .....Age.....
"Birthplace .....
"Present occupation .....
"Previous occupation and experience at home or elsewhere.....
.....
"Have you any family here?....."

That the defendant Blair, with funds of the British government, furnished through the said consul general, purchased at various times railroad tickets to New York aggregating 83, for which he paid in all $5,373.80, and that all of said tickets were used in transporting men claiming to be British subjects, and who claimed to have served in time past in either the army or navy of Great Britain, and who had passed a physical examination by defendant Addis, a physician, and that some of the tickets were used for transporting to New York the men whose names are set forth in the indictment. That the British Friendly Association caused to be transported in this manner 155 men. That each of the men named in the indictment signed a receipt as follows:

"Received from R. K. Blair $——— for sustenance while in San Francisco, awaiting departure, and $9.10 for sustenance during trip to New York."

That the amounts set out in said receipts varied as to the sustenance in San Francisco, but all of them recited the receipt of $9.10 for sustenance during the trip to New York. That for each of said men named in the indictment there was filled out one of the cards heretofore mentioned, and all of said cards showed some previous service, either in the navy or in some military organization. That pending physical examination, and after examination and pending transportation, board and lodging were provided for the men, and the expense thereof paid by the British government in the same manner that the other expenses were paid, and that for such purpose defendant Blair, prior to the transportation of the men named in the indictment, made a contract with a firm at 735 Harrison street, in San Francisco, to

board and lodge men at the rate of $3.50 per week, and defendant Lane, claiming to act for defendant Blair, also made arrangements with a Mrs. Lee at 735A Harrison street to lodge men—as many as 20 or 25 at a time—at $1.25 each per week. That some of the men named in the indictment boarded and lodged at these places, and the expense thereof was paid by the British government in the same manner. That defendant Croft was designated by defendant Blair to hold the tickets and sustenance money of 27 men, among whom were those named in the indictment, transported as aforesaid, and who left on June 16, 1915, destined for New York. That one Seamens performed a similar service upon a prior occasion. That the sum of $9.10 advanced to each man for sustenance while on the trip to New York was not paid to the men directly, but was delivered in bulk to the defendant Croft, who gave it out to the men 50 cents and $1 at a time during the trip to New York. That this party was detained at Chicago by special agents of the United States, but afterwards proceeded to New York. That while in Chicago defendant Croft sent the following telegrams, which were received by defendant Blair:

"B146 CH 22 Chicago, Ill., 19—11:21 a. m.

"R. K. Blair, British Friendly Ass., 68 Fremont, San Francisco: Held up here by federal authorities for investigation need further funds for parties sustenance wire hundred Room eight five nine Federal Building.

"Kenneth Croft."

"297 D 11 Collect Chicago, Ills., 4:12 p. m. 19.

"R. K. Blair, British Friendly Association, Sixty-Eight Fremont Street, San Francisco, Calif.: Party twenty-three strong proceeded New York three P. M. Following later."

"C274 CHVN 5 ONL SP Chicago, Ills., June 20, 1915.

"R. K. Blair, 68 Fremont St., San Francisco, Cal.: Looked for word responding my wires reporting detention and final satisfactory dispatch of party papers here full of matter and news sent New York mentioning me prominently making procedure through New York impossible for me owing to personal matter I spoke about consequently remaining here till can make arrangements will write fully. Croft 1047P."

That the party arrived in New York on June 22, 1915, and on the next day some of them appeared before a man called Captain Roche at the British consulate, where a second physical examination was had, and where those passing such examination received an envelope which was to be exchanged at the dock for a steamship ticket to Liverpool, England. That all British soldiers and seamen, colonial or otherwise, receive a daily pay and may receive pensions and allotments when their service is terminated. These facts were known both to defendants and the men transported, except that the rate of daily pay, or whether the same had been increased, was not known to any of the defendants. That it was a fact that defendants Blair and Addis supposed, believed, and presumed that the transported men would enlist in the military or naval service of Great Britain, and it was the individual intent of a majority of said transported men to enlist in such service. That among the letters written by Harris was one which was here produced. It is as follows:

"British Friendly Association, 59 Sherwood Building, 21 Pine Street,
"San Francisco, California, Wed., 31st March, 1915.

"Dear Sir: I have just heard from the doctor, asking me to cancel the appointments made for this evening, as he is unable to attend. I am very sorry to have to put you off; but if I do not hear to the contrary, I shall take it for granted that you will be along to-morrow (Thursday) evening, at eight o'clock—Pine street entrance.

"Faithfully,
W. K. Harris.

"Mr. Herbert Ernest Dakin, 2418 Washington Street, San Francisco."

That Cook, one of the men named in the indictment, was an American citizen, but falsely stated to defendants Blair and Addis that he was a British subject, and had served in a military organization in England. That Stables, another of such men, was a British subject, but an enlisted man of the American army, which latter fact he concealed from said defendants. That Robert Johnson was formerly enlisted in the American navy under the name of Watson, but is a British subject, and was a deserter from the British navy. That all the others, so far as known, are British subjects. That the defendants also are all British subjects, but none of them are reserves. That no proof of the military or naval service of the men named in the indictment was required or produced, other than what appears from the statement furnished by the men and shown on the cards before mentioned. That in the German empire, the French republic, the Austria-Hungarian empire, the kingdom of Italy, the Russian empire, and the kingdom of Servia there have been at all the times mentioned laws enforced for the compulsory service of their subjects in their armies and navies, and the subjects of those countries in the United States have heretofore, and during the times mentioned in the indictment, returned freely from the United States to their countries for military service as required by their respective laws, and have been aided and assisted thereto by their respective consular and diplomatic officers. That at none of the times mentioned in the indictment was it expressly said by defendants, or any of them, in words, to any of the men transported to New York, that they, the said transported men, should enlist or enter themselves in the service of Great Britain as soldiers, sailors, or marines.

These, then, briefly stated, gentlemen, are the facts that are before us. It remains now to consider them in the light of the law. That some of the defendants, and particularly Blair and Addis, were acting in concert and with a well-defined purpose on their part to accomplish some certain things, does not admit of doubt. Together they formed the British Friendly Association, the purpose of which was to transport to New York British subjects sound in body and limb. It is not to be conceived, and, indeed, all of the circumstances negative any such conception that they expected the journey of the men so transported to end at New York. The ultimate destination of these men was some point in the British empire, and the defendants knew it, and were jointly engaged in sending them there. This phase of the case, therefore, presents no difficulty. The grave question is whether the defendants in doing what they did were engaged in a

criminal conspiracy. They had associated themselves together to transport to New York British subjects, sound in body and limb, whose ultimate destination was England, and at least a majority of whom intended to enlist there in the military or naval service, and all of whom the defendants supposed, believed, and presumed would so enlist. The language of the statute is:

"Whoever within the territory or jurisdiction of the United States * * * hires or retains another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince," etc.

[2] It is not necessary for us to inquire here just what is meant by the words "to enlist," as it is stipulated that it was the intent of a majority of the men transported to enlist, and this must be taken to mean "to enlist" in the sense used in the statute, whatever that may be. The only difficulty that really presents itself is to determine what is meant by the words "hires or retains another person to go beyond the limits or jurisdiction of the United States." And, indeed, as it was the manifest purpose and intention of defendants that those sent by them from San Francisco should go beyond the limits of the United States, and as it was equally the purpose of the men so sent to go beyond such limits, our inquiry is narrowed to the ascertainment of the meaning of the words "hires or retains," as used in the statute, and to determining whether such meaning applies to the things for the doing of which the defendants were associated. To hire in its ordinary signification, and we should here seek no other, means:

"To contract for the labor and services of, for a compensation; to engage the services of, employ for wages, salary, or other consideration; to engage the interest of, agree to pay for the desired action or conduct of."

And this has been the meaning of the word since it was first used in the statute in question and its predecessors. It is not essential to a hiring that the consideration be pecuniary, or that it be paid at once. In a case tried in 1855, involving the construction of this statute (United States v. Hertz, Fed. Cas. No. 15,357), the court instructed the jury as follows:

"The hiring or retaining does not necessarily include the payment of money on the part of him who hires or retains another. He may hire or retain a person with an agreement that he shall pay wages when the services shall have been performed. A person may be hired or retained to go beyond the limits of the United States, with a certain intent, though he is only to receive his pay after he has gone beyond the limits of the United States with that intent. Moreover, it is not necessary that the consideration of the hiring shall be money. To give a person a railroad ticket, that cost $4, and board and lodge him for a week, is as good, as a consideration for the contract of hiring, as to pay him the money with which he could buy the railroad ticket and pay for his board himself."

And in an exhaustive opinion rendered by Attorney General Cushing in that same year is found the following:

"It is possible that he may have supposed that a solemn contract of hiring in the United States is necessary to constitute the offense. That would be a mere delusion. The words of the statute are 'hire or retain.' It is true our act of Congress does not expressly say, as the British act of Parliament

does, 'whether any enlistment money, pay, or reward shall have been given or not'; nor was it necessary to insert these words. A party may be retained by verbal promise, or by invitation, for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting, to pay recruiting money in fact, but under the name of board, passage money, expenses, or the like, it would be idle to pass acts of Congress for the punishment of this or any other offense."

I have adopted these quotations because they seem to me to state accurately the meaning of the law, to be well within its terms, and to afford the only construction that will render it effective for the purpose for which it was intended.

It must be observed that the prohibition of the statute is not aimed at the hiring or retaining by or of citizens of this country alone, but at the hiring or retaining by any person whomsoever of any other person. It is to be observed, further, that the hiring or retaining must be to go without the limits of this country with intent to enlist. The fact that other countries, having laws for compulsory military service, have assisted their subjects in this country to return to their native land, is a false quantity here, and one with which we have nothing to do. It throws no light upon the questions which we are to consider. The case on trial must be determined upon its own particular facts, without regard to what has been done either here or elsewhere by persons not included in the present indictment. Nor is there here involved any question as to the right of individuals to go from this country either singly or in groups to another country with intent there to enlist. The sole question here is: Do the facts before us show a conspiracy on the part of defendants to violate the statute which we have been considering?

What are the salient facts? The king of Great Britain and Ireland was desirous of the return to his kingdom of British subjects for employment in the army and navy and in various branches of the national services of all kinds, and the British consul general at San Francisco caused to be published a notice calling into actual service the Royal Naval Reserve. A large number of persons responded, few of whom were in fact reserves. The consul general, however, kept a register of all persons calling on him to inquire concerning military service, and upon this register were the names and addresses of over 600 individuals under various headings, such as "Volunteers," "Army Volunteers," "Army Volunteers and Ex-Soldiers," "Army Reserve," "Royal Naval Volunteers," and "Volunteers for Nurses." The defendants Blair and Addis, with one Harris, with the consent of the consul general, organized the British Friendly Association, and these lists were turned over to Harris, who was in charge of the office of the Association, and who with the knowledge of Blair and Addis opened correspondence with the persons whose names were upon the lists. After Harris left the lists were in the custody of Blair, whose name appeared on one of them under the heading "Volunteers." The men who came to the Friendly Association's office were examined as to their physical condition by defendant Addis, who is a physician, and whose name is on the list of "Volunteers for Nurses." All the ex-

penses were paid with the money of the British government, furnished through the consul general, who, when he turned the lists over to Harris, accompanied them with the instructions:

"To send only British subjects with military training;" "to make no engagements of any description whatever; to give no pay or advance;" "to make no solicitation;" "not to send more than 50 men at a time;" "to require such proof of British nationality as such men are usually able to give;" "to give no information as to pay, allotments, etc.;" and "to examine the men to see if they were physically suitable."

It would be taxing credulity to the utmost to urge that, with the lists and instructions, the defendants did not know that what was sought by the consul general was men who would go to England there to enlist in the military or naval service. They were "to give no pay or advance." It is not stated, "Pay or advance for what?" They were "to make no engagements of any description whatever." It is not stated in the instructions what they were to do in this regard, but they were to examine the men to see if they were suitable, and to send them on, not more than 50 at a time. Evidently, while under the instructions they could make no engagements, they certainly could come to some understanding with the men that they should be sent forward for some purpose for which, after a physical examination, they were found to be "suitable." They were "to give no information as to pay, allotments, etc." "Pay or allotments" for what? The instructions do not state, but the facts show that all British soldiers and seamen receive a daily pay and may receive pensions and allotments after their service is terminated, and that this was known both by defendants and by the men transported. The men, pending and after examination, were kept at boarding and lodging houses until a sufficient number was assembled for "orderly transportation." All this was designed, and defendants knew it, to secure men to return to Great Britain and enlist. They examined the men, boarded them, lodged them, transported them in squads to New York, where they expected them to report to the British consul for further examination and further transportation. Defendants knew what they expected the men to do, and the men in turn knew what was expected of them. Defendants, in the language of the stipulation, supposed, presumed, and believed that the men would go to England and there enlist in the military or naval service, and a majority of the men intended to do so. They were furnished board, lodging, and transportation for that reason alone. The offer of defendants was, even though never put into words:

"If you men, having been found after examination physically suitable, will go to England and enlist, we will furnish you with board and lodging while you are here awaiting examination and transportation, and we will furnish you with transportation to New York, and sustenance during the trip."

And this offer the men accepted by submitting to examination, by accepting board, lodging, sustenance, and transportation, with the intent in the majority of them, at least, to do the thing desired. It would be to look only to the form, in utter disregard of the substance, to accept as a sufficient response to all these facts the statement that at

no time did defendants, or any of them, expressly say in words to any of the men that they should enlist in the service of Great Britain as soldiers, sailors, or marines, just as it would be to regard the form alone, and disregard the substance, to believe, in view of all the facts, that when the consul general turned over to Harris of the Friendly Association the lists of so-called "Volunteers," with the manifest intention that they should be used, the instructions accompanying them were designed for any other purpose than to secure here men to go beyond the limits of the United States for enlistment, without appearing to have violated the law—to accomplish in fact the results against which the statute is directed, and to do the things therein forbidden without appearing to do so. While, therefore, it may be true that they believed they were acting within the law, I am of the opinion, for the reasons stated, that some of the defendants did enter into the conspiracy as charged in the indictment, and that defendant Blair, for the purpose of effecting the object thereof, committed some of the overt acts charged.

There is no evidence to connect defendant Blair-Murdock Company or defendant Lawrence with this conspiracy. The defendants Croft and Lane participated in it, but the government does not ask for a verdict against them, and it was so stated in open court. Because of such statement, the case was not argued for them by their counsel. Under these circumstances it would be manifestly unfair to direct a verdict against them. There is before the court a motion on behalf of all the defendants to direct a verdict in their favor. This motion will be granted as to Blair-Murdock Company and C. D. Lawrence for lack of evidence, and as to Harry G. Lane and Kenneth Croft for the reasons above suggested. As to defendants Ralph K. Blair and Thomas Addis it will be granted as to the second count and denied as to the first; this, for the reason that, while defendants are charged in two counts, there was in reality but one conspiracy. As it appears that most of the men named in the indictment claimed to have formerly served in the army, I shall confine the adverse verdict to the first count.

The jury will therefore, in accordance with the stipulation of the parties and these instructions, render a general verdict of not guilty as to defendants Blair-Murdock Company, C. D. Lawrence, Harry G. Lane, and Kenneth Croft. As to the defendants Ralph K. Blair and Thomas Addis you will return a verdict of guilty upon the first count and not guilty upon the second.

Ex parte WHITE.

(District Court, D. New Hampshire. November 30, 1915.)

No. 173.

1. DOMICILE ⟸4—CHANGE—INTENT.

Assuming that a member of the army may change his domicile, and establish it at any place he sees fit, if not inconsistent with the military situation, his intention to change must be clear, and must be associated with something fixed and established as indicating such a purpose.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 5–23; Dec. Dig. ⟸4.]

2. TAXATION ⟸106—PERSONS SUBJECT TO POLL TAX—"INHABITANT"—"DOMICILE."

Laws N. H. 1913, c. 82, § 1, provides that a poll tax of $2 shall be assessed on every male inhabitant of the state within certain ages. Pub. St. N. H. 1901, c. 2, § 2, provides that words and phrases, except technical words and words which have acquired a peculiar meaning, shall be construed according to the common usage of the language, and section 6 provides that the word "inhabitant" may mean a resident or person dwelling and having his home in any city, town, or place. An officer in the Coast Artillery branch of the Army, who had a parental domicile in New York, where he returned at the expiration of each term of enlistment, and where, after the death of his parents, he had a room with his sisters, was stationed at Ft. Stark. After his marriage to a New Hampshire woman he maintained an apartment in the city of Portsmouth because of the lack of facilities at the fort, and by special military authorization spent several nights a week there. *Held*, that he was not subject to the poll tax, even assuming that a member of the army is so far independent that he may for certain purposes establish a domicile or residence away from his military locality, as there is no substantial difference between domicile and inhabitancy, and statutes using the word "inhabitant" in imposing a poll tax mean "domicile" in its ordinary sense, which presupposes an element of more or less permanency, and that the military situation was inconsistent with any supposed permanency of domicile in the city of Portsmouth and away from the officer's station of duty.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 204; Dec. Dig. ⟸106.

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

Petition by John P. White for a writ of habeas corpus. Petitioner discharged.

Fred H. Brown, U. S. Atty., of Somersworth, N. H., for petitioner.
J. R. Waldron, of Portsmouth, N. H., for respondent.

ALDRICH, District Judge. In 1915 the city of Portsmouth assessed a poll tax against the petitioner, which he refused to pay, upon the ground that he was an officer of the United States army in actual service, having residence in New York, and not in Portsmouth. Upon

such refusal he was taken into custody, upon a warrant of the city collector, and was thereafterwards committed to the Rockingham county jail, from which custody he seeks relief through a petition for habeas corpus, upon the claim that his detention is unlawful. At the time the tax was assessed the petitioner was a sergeant in the Coast Artillery branch of the United States Army stationed at Ft. Stark, in the town of Newcastle, in New Hampshire. Ft. Stark is a subfort of Ft. Constitution, both having been ceded to the United States for military purposes.

The petitioner was born in New York City, where he lived with his parents until he enlisted in 1899. His first service was at Ft. Ethan Allen; then in the Philippine Islands; afterwards re-enlisting from New York City and serving at Ft. Terry, in New York, and Ft. Warren, in Massachusetts. He has remained in the service a very large part of the time since his enlistment in 1899, and at the expiration of each enlistment term he has returned to New York. After his service at Ft. Warren he went to New York and remained out of service for nine months, when he again re-enlisted in 1909 for a term of three years and was ordered to Ft. Constitution. At the expiration of his three-year term he re-enlisted, and was given a ten days furlough and went to New York. At the expiration of his term in 1915 he again re-enlisted, and was given a furlough in order that he might go to New York and New Jersey for a period of twenty days. After the death of his parents he had a room with his sisters in New York, which he in part furnished.

While there is no specific finding of the fact of residence, inhabitancy, or domicile in New York, the findings are substantially to that end, and we infer for the purposes of the decision here that such was the fact, unless his New York domicile has been terminated by his marriage to a New Hampshire woman, whose residence before marriage was at North Conway, N. H. Since such marriage the petitioner himself has had quarters at the fort, and has used his government allowance for subsistence there. It is said by the master that he is entitled to quarters for himself and wife at the fort, but because of the lack of facilities there he has maintained a home for her in a tenement in the city of Portsmouth.

The findings of the master exclude the idea that the arrangement for the apartment in Portsmouth is permanent, with the intention of making Portsmouth the petitioner's home. The petitioner's service at the fort is constant, except that he spends three or four nights a week at the apartment upon special military authorization.

It is apparent that the master in his findings was influenced somewhat by the view that the military service at Ft. Stark was temporary, subject to change under orders from superior officers at any moment, when service of the military arm was needed at other places. That view must be perfectly correct, as a general proposition, for the reason that, from the very nature of the duty which they have assumed, members of such service are constantly subject to orders.

Counsel on both sides have ably covered various phases of possible

questions, and have cited authorities having special reference to the power of the general government to protect its military arm, as a necessary instrumentality for the protection of rights, and as an instrument of government defense.

It is quite sufficient to say that the authorities and the reasoning upon the subject abundantly establish the general proposition that the government arm, as a necessary government instrumentality, may and should be protected from unreasonable and unwarrantable interference.

The general proposition that the presence of the army in a particular locality is not of its own volition, and is presumably only temporary, is probably subject to the qualification that actual residence of members of the army in a given locality may be of such a fixed and permanent character as to exclude altogether the idea of domicile or residence in any other locality, and to the further qualification that, though one in the military service is subject to the orders of superior officers, the circumstances may be such that he remains so far sui juris, as to matters not involved in his military duties, that he may, if he so desires, change his domicile and establish it at any place he sees fit. Thus it is apparent that there is no hard and fast rule governing all cases.

[1] Assuming the proposition that a member of the army may change his domicile, if not inconsistent with the military situation, to be one based upon reason, and established by the authorities, it still remains that the intention to change must be clear, and must be associated with something fixed and established as indicating such a purpose, and the circumstances in this case are against such an idea.

Questions as to local taxation of a member of the United States Army cannot be disassociated from considerations of public policy. The Court of Appeals for the First Circuit, in deciding against the United States in Gill, Collector, v. Bartlett, 224 Fed. 927, 928, — C. C. A. —, was simply stating a plain proposition with reference to government power to tax private rights when, in speaking of property rights, it said that:

> "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."

The principle that the intention must be clear applies as well to personal taxation as to property taxation.

While the United States attorney, who represents the petitioner, does not contend against the idea that a soldier may have a domicile apart from the federal station where his service is being rendered which may subject his property to State taxation, and that he may change it, he does strongly contend that a soldier in actual service is a government instrumentality, and therefore not subject to restraints incident to the imposition and collection of a poll tax.

It is urged that the power of the United States government to pro-

tect its soldiers from arrest and imprisonment for a poll tax is an inherent, essential, and necessary power, and that the recognition of the right of local governments to imprison its soldiers for nonpayment of a poll tax would tend to inefficiency, and to the destruction of the independence of the federal military arm; that the residence of a soldier in such a sense must be referred to the military station over which the United States exercises exclusive jurisdiction; that there can be no residence elsewhere for purposes of personal taxation; and, therefore, that considerations with respect to domicile do not enter at all into the question of the right of the paramount government to protect its military arm from restraints of liberty and burdens, not incident to crime, but from burdens and restraints, affecting personal liberty, imposed by local governments through their taxing powers for local money purposes.

It is quite probable that, under logical analysis, the authorities sustain such contention. Webster v. Seymour, 8 Vt. 135, 138, 139; Opinion of Justices, 1 Metc. (Mass.) 580, 583; 1 Cooley on Taxation, 84, 130; 2 Story on the Constitution, §§ 1224, 1227; Com. v. Clary, 8 Mass. 72, 77; Company v. Lowe, 114 U. S. 525, 534, 5 Sup. Ct. 995, 29 L. Ed. 264; McCulloch v. Maryland, 4 Wheat. 316, 429, 4 L. Ed. 579; Weston v. City Council, 2 Pet. 449, 7 L. Ed. 481; Society v. Coite, 6 Wall. 594, 18 L. Ed. 897; Thompson v. Railroad, 9 Wall. 579, 19 L. Ed. 792; Railroad v. Peniston, 18 Wall. 5, 21 L. Ed. 787; Dobbins v. Commissioner, 16 Pet. 435, 10 L. Ed. 1022; Searight v. Stokes, 3 How. 151, 11 L. Ed. 537; Bank v. Comm., 9 Wall. 353, 19 L. Ed. 701; Collector v. Day, 11 Wall. 113, 20 L. Ed. 122; Pundt v. Pendleton (D. C.) 167 Fed. 997; Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745; Hylton v. U. S., 3 Dall. 171, 1 L. Ed. 556; 5 A. & E. Ency. 142; 6 Cyc. 349; 14 Cyc. 849.

[2] While not questioning the broad and apparently essential theory that a soldier is a government instrumentality whose personal residence, or status, when viewed in respect to restraints of personal liberty, not based upon a charge of crime, must be referred to the station at which the government service is being rendered, I am not quite sure that any of the cases cover a situation precisely like the one in question here, because the theory of the city of Portsmouth is that the petitioner was permissibly and authoritatively away from the military station under leave granted by his superior officers, not in defiance of military authority, but under such circumstances that he might establish and maintain a domicile or inhabitancy outside the military station and away from his original domicile in New York. Therefore I am inclined to dispose of this case under the question whether the petitioner in fact had a domicile in the city of Portsmouth.

Having assumed that the federal government may protect its army against unreasonable interference, whether it results from unwarrantable local taxation or from any other unreasonable interference, and having assumed, on the other hand, that a member of the army is so far sui juris and so far independent that he may for certain purposes establish a domicile or residence away from his military locality, pro-

vided it does not interfere with his military service, it only remains for purposes of decision to consider the question whether the New Hampshire statutes should be construed as intending and authorizing a poll tax within the limits of New Hampshire under the facts and the domiciliary circumstances of this case.

It is quite true that the original New Hampshire statute is general. It declares that:

"All male polls from twenty-one to seventy years of age are liable to be taxed, except paupers, insane persons, and others exempt by special provisions of Law." P. S. N. H. c. 55, § 1.

Still, notwithstanding the sweeping terms of the older New Hampshire statutes, if they were the statutes upon which the present rights should depend, it would hardly be urged that they were intended to cover itinerant male persons who happened to be in a given New Hampshire locality on the day on which taxes are required to be assessed, and this without regard to whether they were in the military service or not.

The reasonable view would be that the idea of the right to tax a person presupposes some substantial element of permanency, and New Hampshire judicial expression, and the judicial reasoning and expression elsewhere, are that way.

The New Hampshire statutory right to tax must, of course, be determined with reference to the constitutional provision which gives the Legislature power to tax, and thus the statute of 1830, which did not use the constitutional designation of all the inhabitants of and residents within the state, but the designation of each male poll, was construed by the justices, though dealing with a question in respect to aliens, as having reference to the constitutional term inhabitants and residents, as used in their ordinary sense, and not as including all residents. Opinion of Justices, 8 N. H. 573. See also Davis v. School District, 44 N. H. 398, 405; Orr v. Quimby, 54 N. H. 590, 620, 637; Herriman v. Stowers, 43 Me. 497; Jacobs Law of Domicil, § 51.

Moreover, the Legislature of New Hampshire, apparently recognizing the idea that the right to assess a tax upon polls should rest upon explicit and practical statutory designation, rather than upon judicial interpretation under the Constitution, expressly embodied the term every male inhabitant of the state, in the statute of 1913, which is the statute under which the tax in question was assessed (chapter 82, § 1, Session Laws 1913), and it should not be forgotten that chapter 2, § 6, of the Public Laws of New Hampshire, a chapter on the construction of statutes, declares that the word "inhabitant" may mean a resident or person dwelling and having his home in any city, town or place, and it should also be borne in mind that the preceding section 2 of the same chapter declares that words and phrases shall be construed according to the common and approved usage of the language, except as to technical words of a peculiar meaning.

It is clear that since the interpretation of the statute of 1830, and especially since the broadened provision of the statute of 1913, that

there has been no New Hampshire purpose to arbitrarily tax each male poll regardless of the question of inhabitancy, and that the idea of inhabitancy is to be accepted in the ordinary sense. It is also clear that the term "inhabitancy" has reference to that of domicile, and that the question of domicile is largely controlled by intention with more or less residence (Moore v. Wilkins, 10 N. H. 452, 456), and that such residence must at least have a permanency beyond that involved in a temporary purpose, and an inhabitancy which is necessarily subordinate to an authority which at any moment may terminate it, and move the person to other parts of the national domain.

Passing the difficulty of giving the term "domicile" a definition (Jacobs, Law of Domicil, §§ 57–77) which shall cover all cases, it is safe enough to assume that in the New Hampshire sense, and in the federal sense as well, domicile and inhabitancy are synonymous, and that the New Hampshire view of inhabitancy, like that of Massachusetts (Borland v. City of Boston, 132 Mass. 89, 93, 42 Am. Rep. 424), is that there is no substantial difference between domicile and inhabitancy, and that statutes which use the word "inhabitant" in establishing the right to impose a poll tax mean domicile in its ordinary sense, with the idea recognized everywhere, whether the term "domicile" or "inhabitancy" is used, that it at least presupposes an element of more or less permanency. See Stockton v. Staples, 66 Me. 197; Woodard v. Isham, 43 Vt. 123; Parsons v. City of Bangor, 61 Me. 457; Crawford v. Wilson, 4 Barb. 504, 519; Culbertson v. Board of Commissioners of Floyd County, 52 Ind. 361, 367; Cooley on Taxation (3d Ed.) 641; Desty, 293; Judson on Taxation, 529, 530.

The idea of permanency and situs is recognized in the tax laws with respect to property in quasi situations of transit, and the property principle has, of course, analogous bearing. Lumber Co. v. Columbia, 62 N. H. 286; Coe v. Errol, 62 N. H. 303; Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715.

Coming now to the facts of domicile, or inhabitancy, and to that phase of the contention that the inhabitancy or domicile in the city of Portsmouth was under authority or permission of the federal government, rather than in defiance of its authority, it must be said that there is nothing in the record, or in the circumstances, which warrants the assumption that the government intended a local domicile or inhabitancy, away from the military station, which should become permanent, in the sense that military usefulness should be subordinated to local personal taxation.

Now, as to the main fact of the intention on the part of the petitioner. It is clear that there was no definite purpose to make the Portsmouth residence, such as it was, a permanent residence. The petitioner had a parental domicile in New York, and to establish a change for any purpose the intention must be clear. Here the military situation was altogether inconsistent with the element of any supposed permanency in the city of Portsmouth and away from the station of duty. Under such circumstances, the domicile of the husband would

not follow that of the wife under an arbitrary rule; and maintaining the apartment in Portsmouth that his wife might live there, and that he might visit her under leave when the circumstances should permit, must be accepted as a mere incident of his military status, and one entirely subordinate to his duty to the government, when viewed in respect to personal taxation and the restraints of personal liberty, involved in the enforcement of a personal tax, which necessarily would interfere with the free performance of a paramount duty.

The petitioner should be discharged from custody under city and state authority; and it is so ordered.

In re MOCK.

(District Court, S. D. Mississippi. June, 1915.)

BANKRUPTCY ⊂⊃348—LIENS—STATUTORY LIEN OF LANDLORD.

Under Civ. Code La. art. 2705, giving a landlord a lien for rent on the movable property of the lessee on the premises, which under subsequent articles is of higher privilege than wage claims, where the landlord of a bankrupt distrained for rent before the bankruptcy, the property being later turned over by the sheriff to the trustee, the latter took it subject to the lien, and only the surplus, if any, is subject to distribution and to the preferred claims of wage-earners.

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

In Bankruptcy. In the matter of Vernon Mock, bankrupt. On review of order of referee allowing petition of landlord. Affirmed.

The finding of facts and conclusions of law of Referee West were as follows:

Mrs. Mary D'Antoni, the landlord distrained for rent in arrears in the proper state court of Louisiana, and the sheriff of Concordia parish, in that state, levied upon the property of the bankrupt in his business as a saloon keeper in Vidalia, La., and took possession of the same, and held it until after adjudication of bankruptcy in Mississippi, where the debtor resided, when he delivered it to the trustee in bankruptcy of this court. The controversy here presented is whether the wage-earners shall be paid prior to the landlord, as is provided by section 64 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [Comp. St. 1913, § 9648]), or whether, because of the distraint before the bankruptcy, the landlord is first to be paid. There are not sufficient funds with which to pay both classes of the creditors mentioned; so, if the landlord is first to be paid, nothing will be in hand for the wage-earners, and vice versa.

Section 64 of the act provides what debts shall have priority, and recites the order of distribution; and as to the two classes here mentioned, the wage-earner is entitled to priority over the landlord. The proposition here for determination is one that has caused considerable difficulty in the administration of bankruptcy estates, for it presents the controversy of "priority versus liens." Section 67 of the Act (Comp. St. 1913, § 9651) provides that an

adjudication of bankruptcy within four months shall render invalid liens obtained through legal proceedings within that time. If the lien had in the instant case is one obtained through legal proceedings, then the question here presented is easy of solution, for then the wage-earner would clearly be entitled to priority of payment over the landlord.

The Supreme Court of the United States, in the case of Henderson v. Mayer, 28 Am. Bankr. Rep. 387, 225 U. S. 630, 32 Sup. Ct. 699, 56 L. Ed. 1233, recently held that such a lien had under the statute of Georgia was not obtained through legal proceedings, and was not set aside by the adjudication of bankruptcy. The statutes of Louisiana are as liberal in their protection to landlords as are those of Georgia and Mississippi, referred to in that case. It is my judgment, therefore, that, the lien not being set aside by the adjudication, the property passed to the trustee charged with the lien already fixed upon it by the distraint.

Collier on Bankruptcy (10th Ed.) 1914, p. 885, says: "Many cases seem to hold the broad doctrine that these priorities (costs, taxes, debts due states, wages, etc.) are superior to valid liens. This may be doubted, even where property vested in the trustee is sold free and clear of incumbrances. Section 64b has been construed as referring to the disbursement of the proceeds of unincumbered property, and not to the proceeds of property incumbered by valid liens." On page 886 on the same authority it is said: "It is true that the whole estate is or may be marshaled and administered and liens paid through the trustee. But the rule that the bankrupt's assets come to his trustee charged with all bona fide liens, even if within the four months' period, seems to negative the doctrine of the cases cited at the beginning of this paragraph. The question is often one of extreme difficulty. * * * The lien creditor is prior in right, and should therefore, unless directly benefited by the acts or disbursements for which priority is claimed, be prior in distribution." Referring to the payment of wages the same authority says, on page 901: "But such claims are not usually prior to valid vested liens." Again, on page 908: "Where a priority is sought under a state statute it must be determined under the laws of that state. If the state law gives a lien, and it continues after bankruptcy, the priority exists in effect, though not in name; the property becomes charged with the lien, and paragraph 64, strictly speaking, does not apply. In connection, too, paragraph 67, on liens avoided by the adjudication, should be consulted. It must be remembered, too, that this subdivision has no application where the state statute gives priority to a class already given priority by the bankruptcy law. The Bankruptcy Act not only controls the state law in case of absolute conflict, but by its express regulation of these priorities excludes the state law altogether. Subject to these exceptions, if the state law gives a priority the same must be recognized in the bankruptcy proceedings. The Bankruptcy Act expressly recognizes the existence of state statutes, and makes them the basis for allowing priority of payment to certain classes of claims. The priority should be clearly evidenced by some statutory provision, or by a judicial rule so definitely established as to have the force of a statute."

Article 2705 of the Civil Code of Louisiana provides: "The lessor has, for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased. * * * And in the case of houses and other edifices, it includes the furniture of the lessee, and the merchandise contained in the house or apartment, if it be a store or shop." Articles 2706 and 2707 extend the right to the movables of third parties contained in the premises by their own consent. Article 3190 provides that privileges are either general or special on movables; and article 3191 states what these general privileges are, and gives their rank, among which will be found "the salaries of clerks, secretaries, and other persons," etc., ranking as class No. 6. The landlord's privilege is not mentioned in those articles, as being a general one, for the reason that it is provided for in a subsequent article as being a "special one."

Article 3218 provides: "The right which the lessor has over the products of the estate, and on the movables which are found on the place leased, for his rent is of a higher nature than a mere privilege. The latter is only enforced on the price arising from the sale of the movables to which it applies. It does not enable the creditor to take or keep the effects themselves specially. The lessor, on the contrary, may take the effects themselves and retain them until he is paid." Special privileges, therefore, outrank general privileges; the landlord being in the former class, and a wage-earner in the latter. Article 3254 says: "If the movable property, not subject to any special privilege, is sufficient to pay the debts which have a general privilege on the movables, those debts are to be paid in the following order: * * * 6. Salaries of clerks, secretaries, etc."

A reading of the articles mentioned, together with others upon the same subject, convinces me that the landlord has a lien, or special privilege, as it is called in Louisiana; and if he enforces that special privilege by a distraint, then he has done everything in his power to fix the same. It clearly appears to me, therefore, that Mrs. D'Antoni should be paid in advance of the wage-earners; and, the property having come to the trustee charged with this valid lien, she is to be paid accordingly, instead of as provided in section 64 of the act.

A. H. Geisenberger, of Natchez, Miss., and Calhoun & Reeves, of Vidalia, La., for petitioner.

Charles F. Engle, of Natchez, Miss., opposed.

NILES, District Judge. I find no error in the finding of the referee, and his conclusions are affirmed.

UNITED STATES v. KRUEGER.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1915.)

No. 4439.

PUBLIC LANDS ⇐138—SUIT FOR CANCELLATION OF PATENT—FRAUDULENT ENTRY—BONA FIDE PURCHASER.

A tract of land was patented under an entry which was fraudulent, in that it was supported by false affidavits that the land was unoccupied, unimproved, and not claimed adversely, whereas in fact it was then and had been for many years occupied under a conveyance from a railroad company as land passing under a grant and was highly improved. The affidavits that the land was unoccupied were required by the rules of the department, and the acceptance of the entry was based thereon. While under the later rulings of the Land Department the land did not pass under the grant because of a then subsisting valid pre-emption thereon, subsequently abandoned, the occupant under the deed from the railroad company was given by Act March 3, 1887, c. 376, § 5, 24 Stat. 557 (Comp. St. 1913, § 4899), a preferred right to purchase the same at the government price, but he was not notified and given an opportunity to exercise such right on the holding that the land did not pass under the grant, as required by the rules of the department, because of the false affidavits that there was no adverse claim. *Held*, that defendant, who purchased the land under the entry, was not protected as a bona fide purchaser, but was charged by the adverse occupancy, and the recorded conveyances under which it was held, with notice of the fraudulent character of the entry, and that the United States was entitled to a cancellation of the patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 368; Dec. Dig. ⇐138.

Cancellation of patent to public lands, see note to Hartman v. Warren, 22 C. C. A. 38.]

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

Suit in equity by the United States against Emma T. Krueger. Decree for defendant, and complainant appeals. Reversed.

J. I. Hollingsworth, Asst. U. S Atty., of Denver, Colo. (Harry B. Tedrow, U. S. Atty., of Boulder, Colo., and E. B. Lacy, Asst. U. S. Atty., of Denver, Colo., on the brief).

William V. Hodges, of Denver, Colo. (L. J. Williams, of Denver, Colo., on the brief), for appellee.

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

CARLAND, Circuit Judge. This is an action by the United States to cancel for fraud a patent for the west half of the northeast quarter, section 17, township 5 north, range 69 west, Larimer county, Colo., issued June 6, 1910, to William E. Moses. Appellee had judgment below, and appellant appeals.

The following facts appear from the record:

On September 2, 1909, one William E. Moses filed in the local land office at Denver, Colo., an application to enter the land above

described by the use of soldiers' additional homestead scrip. In said application the applicant stated that he was not acquainted with the character of the land, but that the same was unoccupied and unimproved by any person claiming the same other than himself. The application was accompanied by the nonmineral affidavit of one John A. McIntyre, who in said affidavit made oath that he was well acquainted with the character of the land, and that it was not in any manner occupied adversely to the selector. Moses made the application to enter the land at the request of one Charles M. Krueger to whom Moses had sold the soldiers' additional scrip on which the land was entered for $780. Moses never had any interest in the land and conveyed the same to Krueger April 15, 1910.

On April 22, 1910, Charles M. Krueger conveyed an undivided one-half interest in the land to Emma T. Krueger, his wife, the defendant herein, and the other undivided one-half interest to Mary N. McIntyre, the sister of Emma T. Krueger and wife of John A. McIntyre, who made the nonmineral affidavit at the time the land was entered. On April 22, 1913, Mary N. McIntyre conveyed her undivided one-half interest in the land to said Emma T. Krueger. Other conveyances affecting this land are as follows:

April 5, 1871, John Evans, trustee for the Denver Pacific Railway & Telegraph Company, conveyed the land to James Langston. By mesne conveyances the apparent title to the land vested in Perry C. Benson on April 6, 1904. Benson paid $1,375 cash for the land. When Benson acquired the same about five acres thereof had been cultivated. There was a fence around all of the land except a small portion on the mountain side. Benson began improving the land as soon as he bought it, by getting the timber off and grading down the ridges. He constructed ditches and headgates for the irrigation of the land at an expense of $35 to $50 an acre. He moved the house and barn from one portion of the land to a more desirable portion at quite an expense. He built an implement shed, barn, henhouse, cave, and cistern. These improvements were all completed before September 2, 1909. All the improved land has been cultivated since Benson owned it, sometimes by himself, and at other times by renters. The land was all under irrigation prior to 1909, aside from a few high places. There was a house on the land when Benson bought it. The occupants vacated when he took possession; another man moved in as his tenant. The house on the land was occupied in 1907 and 1908. All the improvements were on the land in 1909 and are still there. Emma T. Krueger, the defendant, brought suit to eject Benson from the land which suit is still pending. On or about August 3, 1907, Benson received from Charles M. Krueger the following letter:

"August 3, 1907.

"Mr. P. C. Benson, Loveland, Colorado—Dear Sir: Upon a search of the records, I find that you are the present owner of the W. ½ N. E. ¼, Sec. 17, Tp. 5 N., R. 69 west of the 6th P. M., and that the title thereto is imperfect. If you are sufficiently interested, I would be pleased to correspond with you relative to the matter and assist you in curing the defect. My charges will be reasonable. As to who I am, I would refer you to Messrs. Foote, Riner, Barthholf, James and others of your city.

"Respectfully, Chas. M. Krueger."

Benson has paid the taxes upon the land ever since he bought it. The people living in the house on the land had beds, tables, chairs, and what a person not of the wealthy class ordinarily would have. Benson testified he saw such things in the house. He conversed with the people in the house during 1904, 1905, 1906, 1907, 1908, and 1910. When he bought the land in 1904 the agent of the company from which he bought the land was living there. At the trial it was stipulated as follows:

"By act of Congress of July 2, 1862 (12 Stat. 489), Congress granted to the Leavenworth, Pawnee & Western Railroad Company, a right of way over certain public lands, and also certain public lands to aid in the construction of said railroad. That under and by virtue of a certain act of Congress of March 3, 1869, the Denver Pacific Railway & Telegraph Company became the owner of and entitled to all the rights and benefits so granted and conferred by said act of Congress of July 2, 1862, and said company selected and definitely located its said right of way on August 20, 1869, and so selected and definitely located and fixed its said right of way as to bring the lands involved in this suit within the primary limits of said grant. On April 13, 1866, Robert W. Woodward filed a certain valid pre-emption declaratory statement, numbered 2094, as provided for in the act of Congress dated September 4, 1841 (5 Stat. 455), for the lands hereinabove described (unoffered lands), upon which final proof and payment was never made. That said declaratory statement was a valid and subsisting claim on August 20, 1869, and all rights under and by virtue of said pre-emption filing of said Woodward expired by operation of law on July 14, 1872, up to which date said filing was a valid and subsisting filing."

The defendant Emma T. Krueger testified that she paid Charles M. Krueger, her husband, $800 for an undivided one-half interest in the land; that she paid Mary N. McIntyre $1,500 for the other undivided one-half interest; that the $1,500 was paid by check dated April 22, 1913. The defendant also testified that at the time of making these payments she had no knowledge of the facts or circumstances connected with the application to enter the land; that the first time she saw this land was on March 27, 1913. The witness testified that she did not think it was necessary to send any one to look at the land before she bought it. The $400 paid her husband was in cash. John A. McIntyre testified that Charles M. Krueger was his attorney and acted for him in the matter of entering the land. There was other testimony given at the trial which it is not necessary to here produce. We are satisfied from an examination of all the evidence that the land was in the open and notorious possession of Benson at the time Moses applied to enter the same with soldiers' additional scrip; that the statement in the application and the nonmineral affidavit that the land was unoccupied, and not in the adverse possession of any person other than the selector, was false, to the knowledge of the persons applying to enter the land. We are of the opinion, therefore, that the patent should be set aside for the fraud committed against the United States, unless the defendant has shown that she is an innocent purchaser without notice of the fraud. United States v. Iron & Silver Mining Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110.

No actual notice of the fraud has been shown, but counsel for the United States insist that the defendant had constructive notice by

reason of the possession and occupancy of Benson, and the record of the chain of title from the Denver Pacific Railway & Telegraph Company to Benson, as the same appeared in the office of the county clerk and recorder of Larimer county, Colo., at the time she purchased an undivided interest from her husband, and also at the time she purchased the other undivided interest from Mrs. McIntyre. The claim of counsel for the United States may be stated in this way: By act of Congress of July 2, 1862 (12 Stat. 489), Congress granted to the Leavenworth, Pawnee & Western Railroad Company, a right of way over certain public lands, and also certain public lands to aid in the construction of said railroad. By act of Congress of March 3, 1869, the Denver Pacific Railway & Telegraph Company became the owner of and entitled to all the rights and benefits so granted and conferred by said act of Congress of July 2, 1862, and said last-named company selected and definitely located its right of way on August 20, 1869, and so selected and definitely located and fixed its said right of way so as to bring the land involved in this litigation within the primary limits of the grant.

On April 13, 1866, Robert W. Woodward filed a valid pre-emption declaratory statement No. 2094, as provided for in the act of Congress, dated September 4, 1841 (5 Stat. 455), for the land involved in this suit, upon which final proof and payment was never made, that said declaratory statement was a valid and subsisting claim on August 20, 1869, and remained so until up to July 14, 1872. The pendency on August 20, 1869, of this pre-emption filing of Woodward prevented title to said land from vesting in the railroad company on that date. Kansas Pac. Ry. Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122. Prior to this decision the Land Department in construing the grant of July 2, 1862, and other like grants had held that under circumstances similar to the case at bar title to such land vested in the railroad company immediately upon the cancellation or failure of such filing. Wagstaff v. Collins, 97 Fed. 3, 38 C. C. A. 19; United States v. Winona, etc., R. R. Co., 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789. It is claimed that relying upon this land office practice the beneficiaries under the grant, namely the Denver Pacific Railway & Telegraph Company, sold the land in suit to one James Langston on April 5, 1871, and by subsequent conveyances the apparent title was vested in one Perry C. Benson as hereinbefore stated. By section 5 of the act of Congress of March 3, 1887 (24 Stat. 556), it is provided as follows:

"That where any said company shall have sold to citizens of the United States, * * * as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns."

It is claimed that under and by virtue of said section 5 Benson, the last holder of the title derived from the railroad company, had

the right to purchase the land in question from the United States at the ordinary government price, on learning that his title from the railroad had failed, and that he could not know this until the Land Department had determined that the land had been excepted from the operation of the grant. The third paragraph of rule 8 of the regulations of the Land Department for carrying into effect section 5 of the act of March 3, 1887, reads as follows:

"No entry will be allowed under this section until it shall have been finally determined by this department that the land was excepted from the grant." Act March 3, 1887; 8 Land Dec. Dept. Int. 348; Miller v. Tacoma Land Co., 29 Land Dec. Dept. Int. 633.

The Commissioner of the General Land Office did not determine that the land in suit was excepted from the operation of the grant of July 2, 1862, and March 3, 1869, until April 8, 1910, when he decided that Moses was entitled to enter the land under his application of September 2, 1909. Until said date Benson had a right to assume that the land was his by virtue of his purchase from the railroad company. This being so, there was no duty cast upon him to secure a further title by purchase from the government. Ramsey v. Tacoma Land Co., 196 U. S. 360, 25 Sup. Ct. 286, 49 L. Ed. 513; Miller v. Tacoma Land Co., 29 Land Dec. Dept. Int. 633. The Land Department had no means of knowing that any one was occupying or claiming the land in suit under a deed from the railroad company or otherwise, unless and until such facts should be brought to its attention. To cover such situations the rules and regulations of the Land Department in force at the time Krueger caused to be filed in the land office the application of Moses required such applicant to make a showing as to whether or not any one was occupying the land applied for or claiming the same adversely to the selector. 36 Land Dec. Dept. Int. 278. And the Land Department had a right to rely upon the applicant for this information. Leonard v. Lennox, 181 Fed. 761, 104 C. C. A. 296; United States v. Minor, 114 U. S. 238, 5 Sup. Ct. 836, 29 L. Ed. 110. Therefore, if the application of Moses to enter the land had stated that Benson was in possession or occupied the land, Benson would have been given notice of the application and he would have had the right to purchase the same under section 5 of the act of March 3, 1887. Miller v. Tacoma Land Co., 29 Land Dec. Dept. Int. 633; Fox v. Petrun, decision by the Secretary March 12, 1914. It is further claimed that defendant was chargeable with the notice of the Act of March 3, 1887. Gertgens v. O'Connor, 191 U. S. 237, 24 Sup. Ct. 94, 48 L. Ed. 163; Ramsey v. Tacoma Land Co., 196 U. S. 360, 25 Sup. Ct. 286, 49 L. Ed. 513.

It is now claimed that if the defendant, before taking title to the land in suit and paying therefor, had inquired of Benson or his tenants, she would have learned the fact that Benson claimed the land under a chain of title from the railroad company. Following up this information, as it is claimed she was bound to do, she would have learned the basis of the railroad company's claimed title—the grant of July 2, 1862, and the amendment thereto. She would have thereby come to a knowledge of the fact that Benson was not a trespasser

upon the land, but that under the terms of section 5 of the act of March 3, 1887, he was lawfully entitled to retain possession of such land until it should have been determined by the Land Department that title thereto had not passed to the railroad company, and that, upon the determination by the Land Department that the title to this land had not vested in the railroad company, Benson would have had under the terms of said section 5 a preferential right to purchase the land from the government. Gertgens v. O'Connor, supra. It is claimed she would have further learned that the patent under which she was taking title had been issued without Benson being notified of the failure of his claimed title, and that in the application upon which such patent was based, and in the affidavit which accompanied and supported it, it had been represented and stated that the land in question was at the date of such application not occupied adversely to the selector, and that it was unoccupied, unimproved, and unappropriated by any one other than the selector. This she would have already learned was contrary to the real facts. It is claimed that by reason of Benson's adverse possession defendant is chargeable with knowledge of all the facts above stated, and therefore is chargeable with a knowledge of the fraud upon the government perpetrated by Krueger through Moses in the acquirement of the patent. Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; 2 Pomeroy's Equity Juris. § 615; Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463; Tate v. Pensacola G. L. & D. Co., 37 Fla. 439, 20 South. 542, 53 Am. St. Rep. 251; Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463.

Of course, if the defendant can be charged with notice with all the facts above stated, including the regulations of the Land Department and the decisions thereof construing section 5 of the act of March 3, 1887, she could not be held to be an innocent purchaser. The difficult question in this case, however, is to determine how far Mrs. Krueger was obliged to travel into the transactions of the Land Department in her investigation of the title which she was about to purchase. In the consideration of this question we must not lose sight of the fact that Benson is not before the court asserting any right to the land in controversy. He has no controversy with the defendant Krueger in this action. The action is not brought by Benson, and on the face of the pleadings nothing appears that it is brought in his behalf. The facts hereinbefore stated as constituting the claim of counsel for the United States were not introduced in evidence for the purpose of showing that Benson had any right to relief in this action, but for the sole purpose of showing that the defendant Krueger had constructive notice of the fraud committed by her husband and his associates upon the government when they entered the land. Consequently it is not necessary to determine whether the rights of Benson as set up and claimed in this action are valid or not. The question to be decided upon this branch of the case is simply how far the occupancy of the land by Benson and the record of his chain of title would be constructive notice on the part of the defendant Krueger of the fraud committed in the entry of the land. She would, of course, by the possession and occupancy of Benson

and the record of his title, be chargeable with constructive notice of all of Benson's rights, whether she knew of his possession and occupancy as a matter of fact or not. But Benson is not asserting any right to the land in this action, and so his rights, whatever they are, are immaterial to the decision of this case.

Let us concede that the defendant Krueger must be charged with constructive notice of all of Benson's rights as claimed by counsel for the United States. Can she by reason of that fact be charged with constructive notice that a regulation of the Land Department required proof that the land was unoccupied at the time of making entry thereof, and that Moses and McIntyre had sworn falsely before the land office at the time the land was entered. In Wood v. Carpenter, supra, the rule is stated as follows:

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. * * * The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."

If the contest here was simply between the defendant, Krueger, and Benson, it would not be difficult to determine the question. The defendant would be held to have had constructive notice of Benson's rights, but the difficulty arises when we come to use the occupancy of Benson, who is not here claiming any interest in the land, as a fact to charge Mrs. Krueger with the knowledge of the fraud in obtaining the patent. Although the question is not entirely clear, we are of the opinion that as the burden of proof rests upon the defendant to make out the defense of innocent purchaser (Boone v. Chiles, 10 Pet. 177–212, 9 L. Ed. 388; Wright-Blodgett Co. v. United States, 236 U. S. 397–405, 35 Sup. Ct. 339, 59 L. Ed. 637; Stonebraker-Zea Cattle Co. v. United States, 220 Fed. 99, 135 C. C. A. 96), Mrs. Krueger at the time she purchased must be held to have had constructive notice of facts which, if investigated, would have led to a knowledge of the fraud.

The decree below is reversed, and the case remanded, with instruction to enter a decree as prayed by the United States.

GUINN et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1915.)

No. 3736.

1. CRIMINAL LAW ⇐1032—APPELLATE PROCEEDINGS—REVIEW—FINDING AND FILING OF INDICTMENT.

The objection that it does not appear from the record that an indictment was returned by the grand jury in open court cannot be made for the first time in an appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2627, 2628, 2642; Dec. Dig. ⇐1032.]

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

2. CONSPIRACY ⊂⊃45—EVIDENCE—CIVIL RIGHTS LAW.

On the trial of defendants, charged with violation of section 19 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1092 [Comp. St. 1913, § 10183]), by conspiring to deprive certain citizens of the right to vote at a congressional election on account of their race and color, it was not error to exclude from evidence an opinion of the Supreme Court of the state holding valid a provision of the state Constitution imposing restrictions on the right of suffrage; it not being shown that defendants had read such opinion, and where the jury was charged that if defendants acted in good faith in rejecting the votes as election officers in the belief that they were illegal there could be no conviction.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 100–104; Dec. Dig. ⊂⊃45.]

3. CONSPIRACY ⊂⊃47—EVIDENCE—CIVIL RIGHTS LAW.

Evidence *held* to sustain a conviction of defendants for violation of the Civil Rights Law (Rev. St. § 1980 [Comp. St. 1913, § 3933 (3)]), by conspiring to prevent colored persons from voting on account of their race and color.

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

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Criminal prosecution by the United States against Frank Guinn and J. J. Beal. Judgment of conviction, and defendants bring error. Affirmed.

Charles B. Stuart, of Oklahoma City, Okl. (C. G. Horner, of Guthrie, Okl., and W. A. Ledbetter, Norman Haskell, and Stuart, Cruce & Gilbert, all of Oklahoma City, Okl., on the brief), for plaintiffs in error.

George F. Zimmerman, Asst. U. S. Atty., of Guthrie, Okl. (Isaac D. Taylor, U. S. Atty., of Guthrie, Okl., and John Embry, Sp. Asst. U. S. Atty., of Oklahoma City, Okl., on the brief), for the United States.

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

SMITH, Circuit Judge. The plaintiffs in error were defendants in the District Court and will be hereafter so styled here. They were charged with a violation of section 19 of the Criminal Code, which is as follows:

"Sec. 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the constitution or laws of the United States."

The indictment in substance charged that the two defendants named and divers other persons to the grand jury unknown conspired in violation of section 19 of the Criminal Code on November 8, 1910, to injure, oppress, and intimidate C. W. Stephenson, Alfred M. Keel,

Green Baucom, Sam Fort, Fred McCann, Oliver Andrews, Thomas Pettis, W. T. Smith, colored persons, and divers other colored persons to the grand jury unknown, citizens of the United States, on account of their race and color in the free exercise and enjoyment of their right and privilege secured to them by the Constitution and laws of the United States, namely, the right and privilege to vote in the election of a member of Congress in Union township election precinct in Kingfisher county in said congressional district. The defendants were tried, convicted, and sentenced to serve terms in Leavenworth penitentiary, and sued out a writ of error to this court.

Prior to the election in question there had been adopted in the state of Oklahoma the following amendment to the state Constitution:

Section 4a, art. 3: "No person shall be registered as an elector of this state, or be allowed to vote in any election held herein, unless he be able to read and write any section of the Constitution of the state of Oklahoma; but no person who was, on January 1st, 1866, or at any time prior thereto entitled to vote under any form of government, or who, at that time, resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write."

In the trial in the court below the court told the jury that:

"In the opinion of this court, the state amendment which imposes the test of reading and writing any section of the state Constitution as a condition to voting to persons not on or prior to January 1, 1866, entitled to vote under some form of government, or then resident in some foreign nation, or a lineal descendant of such person, is not valid."

This court certified to the Supreme Court the question as to the correctness of this instruction, and the Supreme Court in this case on June 21, 1915, held that the amendment of the Constitution of Oklahoma in question was void.

[1] Many questions, however, remain for determination by this court. It is first suggested in argument that it does not affirmatively appear from the record that the indictment was returned by the grand jury in open court. The printed record before us shows that the indictment was filed in the District Court on June 13, 1911, and was there indorsed:

"No. 647. United States District Court, Western District of Oklahoma. The United States v. J. J. Beal, Frank Guinn. Indictment for Conspiracy. A true bill. E. D. Walton, Foreman Grand Jury. Filed June 13, 1911. C. E. Hunter, Clerk, by A. C. Dolde, Deputy."

On September 19, 1911, it further appears the defendants were arraigned and filed a demurrer to the indictment, which was overruled, and they pleaded not guilty. By a motion, supported by the affidavits of the defendants and their attorneys, it is recited that they first heard that the indictment had been found on September 18, 1911.

The government has filed a supplemental typewritten transcript, which it claims shows affirmatively that the indictment was returned by the grand jury in open court. Ignoring this, the point is not well taken on the printed record. No motion to quash, or plea in abatement, or motion in arrest of judgment, was ever filed on this ground, and

this question was never in any way presented to the District Court. There was no reference to it in the assignment of errors, and there is no specification of error in this court upon this ground. Defendants now rely chiefly on Renigar v. U. S., 97 C. C. A. 172, 172 Fed. 646, 26 L. R. A. (N. S.) 683, 19 Ann. Cas. 1117, and Angle v. U. S., 97 C. C. A. 184, 172 Fed. 658.

The most casual reading of these cases will show a broad distinction between them and this. In those cases the question was raised and relied on in the lower court; in this case it is sought to be raised in argument for the first time in this court. True, if it appear that the court below committed a plain or manifest error in this case, it being a criminal one, we would review the case upon that question; but neither the facts nor the law applicable is either plain or manifest, and we are asked to indulge in a presumption that the indictment was not returned in open court by the grand jury. Had a showing been made to that effect, the facts would at least be plain and manifest; but we are asked to indulge in a presumption without a showing, and doubtless in conflict with the facts. As showing that this suggested error is not either plain or manifest, see State v. Grate, 68 Mo. 22; State v. Lord, 118 Mo. 1, 23 S. W. 764; Cooper v. State, 59 Miss. 267; State v. Crilly, 69 Kan. 802, 77 Pac. 701; People v. Lee, 2 Utah, 441; Miller v. State, 40 Ark. 488; Robinson v. State, 33 Ark. 180; State v. Mason, 32 La. Ann. 1018; State v. Beebe, 17 Minn. 241 (Gil. 218); State v. Weaver, 104 N. C. 758, 10 S. E. 486; People v. Blackwell, 27 Cal. 66. But it is generally held, although the indictment may have been properly brought into court and the record may not sufficiently set out that fact, yet the defendant may waive the objection by not seasonably raising it. Russell v. State, 33 Ala. 366; Douglass v. State, 8 Tex. App. 520; Jinks v. State, 5 Tex. App. 68; Alderson v. State, 2 Tex. App. 10; Kerr v. State, 36 Ohio St. 614; State v. Ledford, 133 N. C. 714, 45 S. E. 944; Gallaher v. State, 17 Fla. 370.

It has been held that upon a suggestion of this kind in the court below the record could have been amended nunc pro tunc to show that the indictment had been presented in open court. Johnson v. State, 24 Fla. 162, 4 South. 535; Halbrook v. State, 34 Ark. 511, 520, 36 Am. Rep. 17; Felker v. State, 54 Ark. 489, 16 S. W. 663; Long v. State, 56 Ind. 133; Waterman v. State, 116 Ind. 51, 18 N. E. 63. And in any event it is held that the sufficiency of the return of the indictment cannot be questioned for the first time on appeal. Westcott v. State, 31 Fla. 458, 12 South. 846; State v. Sharpe, 119 Mo. App. 386, 95 S. W. 298. It is manifest that this question cannot be considered by us.

The first specification of error is that the court erred in not sustaining the demurrer filed to the indictment. It is stated in argument that:

"The attack upon the indictment was predicated largely upon two grounds: First. Because section 5508 of the federal statute (being section 19 of the Criminal Code) upon which this prosecution is based is unconstitutional. Second. Because the matters and things charged in the bill of indictment against these defendants were not within the purview of said section 5508."

"It is not open to question that this statute is constitutional. Ex parte Yarbrough, 110 U. S. 651 [4 Sup. Ct. 152, 28 L. Ed. 274]; Logan v. U. S., 144 U. S. 263, 293 [12 Sup. Ct. 617, 36 L. Ed. 429]." U. S. v. Tom Mosley and Dan Hogan, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. Ed. 1355, decided June 21, 1915.

And in the last-named case the Supreme Court disposed of all the other questions made under this specification adversely to the defendants.

[2] The second specification is that the court erred in excluding, when offered in evidence, the opinion of the Supreme Court of Oklahoma in Atwater v. Hassett, 27 Okl. 292, 111 Pac. 802, sustaining the validity of the amendment to the Constitution of Oklahoma, popularly known as the "grandfather clause." The court below instructed the jury:

"But it is an essential element of the proof resting upon the prosecution, before a conviction is warranted, that the conspiracy of the defendants, if it existed, was corrupt; that is, willful, and with evil intent to injure, oppress, or intimidate the colored voters with respect to their right of suffrage. The charge is that they corruptly conspired against the voters on account of their race and color. The law which governed the rights of the voters has been stated to you—the state laws and the federal Constitution and laws securing to citizens the right to be exempt from discrimination on account of race or color. The question is, then, whether the defendants corruptly combined in purpose to accomplish the end charged on account of the race or color of the voters, or their purpose was an honest one, as they believed it to be in the exercise of their duties as election officers. Such officers are intrusted with the exercise of judgment in the discharge of the function of receiving votes, and they are protected from criminal responsibility in so doing, for honest mistakes. In the opinion of this court, the state amendment, which imposes the test of reading and writing any section of the state Constitution as a condition to voting to persons not on or prior to January 1, 1866, entitled to vote under some form of government, or then resident in some foreign nation, or a lineal descendant of such person, is not valid; but you may consider it, in so far as it was in good faith relied and acted upon by the defendants, in ascertaining their intent and motive. If you believe from the evidence that the defendants formed a common design and co-operated in denying the colored voters of Union Township precinct, or any of them, entitled to vote, the privilege of voting, but this was due to a mistaken belief sincerely entertained by the defendants as to the qualifications of the voters—that is, if the motive actuating the defendants was honest, and they simply erred in the conception of their duty—then the criminal intent requisite to their guilt is wanting, and they cannot be convicted. On the other hand, if they knew or believed these colored persons were entitled to vote, and their purpose was to unfairly and fraudulently deny the right of suffrage to them, or any of them, entitled thereto, on account of their race and color, then their purpose was a corrupt one, and they cannot be shielded by their official positions."

In pursuance to the thought of these instructions the defendants were permitted to show all the communications they had had with various persons on the subject of the enforcement of the grandfather clause, and the advice they had received; but there is no evidence that they had ever seen the opinion of the Supreme Court of Oklahoma, or had ever heard of its contents. For this reason alone it was properly rejected, without reference to the question as to whether the court would take judicial notice of the opinion, so as to preclude its introduction in evidence. That question is unnecessary to determine, and no opinion on it is expressed.

The specifications 3 to 13, inclusive, are with reference to the refusal of the court to give certain instructions asked. So far as correct, they are substantially given in the charge of the court. It is claimed in this connection that, this being a charge of conspiracy, one defendant cannot be convicted without the other. This would undoubtedly be true, if they were charged to be the sole persons in the conspiracy; but the indictment charges the defendants, together with divers other persons to the grand jury unknown. The defendants were both convicted, and no question is presented as to what would have been the effect if one had been convicted and the other acquitted. It is claimed that if any wrong was done it was by the defendant Beal, and not by the defendant Guinn. This contention is sought to be sustained by a showing that Mr. Guinn urged that Stephenson should be allowed to vote; but this very fact shows that Guinn thought he had a right to vote on whether persons should be rejected or not, and in every other case he appears to have acquiesced in what Beal did. That Guinn had the right he supposed he had is also shown by the third paragraph of the constitutional amendment in question. The precinct in question is not one in which registration was required, and the amendment provides that:

"Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers when electors apply for ballots to vote."

It is claimed that the defendants were absolutely bound to obey the laws of Oklahoma until declared unconstitutional, and the jury should have been instructed:

"That the mere general purpose to carry into effect the election laws of the state does not constitute conspiracy."

Of course, this is literally correct, but the Constitution of the United States provides that:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." Const. U. S. art. 6.

The laws of Oklahoma provided for county election boards, which selected all precinct boards within their respective counties. Each precinct election board consisted of three persons, an inspector, judge, and clerk, and each of these officers was required to take an oath of office that he would support, obey, and defend the Constitution of the United States. The grandfather clause of the state Constitution is in direct conflict with the Fifteenth Amendment to the Constitution of the United States. Guinn and Beal v. United States, 238 U. S. 347, 35 Sup. Ct. 926, 59 L. Ed. 1340.

Can it be claimed that, if a state statute was baldly unconstitutional, as, for example, it openly re-established slavery, a local inspector or judge of election would be absolutely justified in holding a person thus declared a slave not eligible to vote? We are not disposed to weaken the rule laid down by the Supreme Court of Oklahoma in State v. Cease, 28 Okl. 271, 114 Pac. 251, Ann. Cas. 1912D, 151; but

where a state statute is flagrantly in conflict with the supreme law, and that fact is known to the election officers, they cannot be justified in defying the supreme law upon the ground that what is in form a state law, but in fact is no law at all, pretends to authorize their action. The utmost the defendants were entitled to was fully given by the court when it gave the instructions heretofore quoted.

[3] It is claimed that there was no evidence of the guilt of the defendants. While this question has not been raised as required by the rules, if it were manifestly based upon the truth, we would in a criminal case consider it; but there is abundant, but in some cases contradicted, evidence upon which the jury had the right to infer the conspiracy as charged, even assuming the defendants thought the grandfather clause was valid. The precinct election board was constituted by the county election board, composed of J. J. Beal, inspector, Frank Guinn, judge, and C. W. Stephenson, clerk. Mr. Stephenson was a colored man, he had served in the township as trustee and ex officio assessor for 4 years, had been justice of the peace for 8 years, and postmaster for more than 12 years, and had served on the election board with both of the defendants in prior years. Both of the defendants must have known that he complied with all the requirements of the grandfather clause, even if it had been valid, and Beal said to Stephenson: "I know you can read and write just as good as I can." But they excluded him from his position in the board, at least temporarily, and until after he offered to vote, and his vote was received by the board. They, although well knowing he was entitled to vote, rejected his vote the first two times he offered to vote, and never restored him to the election board. They finally allowed him to vote without any showing. Their action in excluding him from the election board was lawless. The same reason existed for excluding themselves, as they also had to make a showing that they could read and write any section of the state Constitution, or that they or their ancestors were within the exceptions of the grandfather clause, if any showing was necessary by Stephenson. There was exactly the same reason for excluding the whole board that there was to exclude Stephenson.

Mr. Beal excluded from voting, apparently with the approval of Mr. Guinn, J. Hilyard, a colored man, who was a graduate of Alcorn A. & M. College, Mississippi, of Lincoln University, Pennsylvania, and the Bryant & Stratton Institution at Buffalo, N. Y. He was at the time, and had been for three or four years, principal of the Cimarron Industrial Institute, located in the very township where the election was held, and where one of the defendants had lived 22 years and the other 19. There is not the slightest room for doubt as to whether he could vote, even under the grandfather clause, if valid. There seems no room for doubt that the defendants knew that fact.

Mr. G. I. Curran, a colored man, testified that his grandfather was Tommy Curran, was an Irishman and voted. Mr. Curran had been a member of the Legislature for that county, and had been deputy United States marshal. He would have been entitled to vote on his ancestry, and also because of his ability to read and write, and these

facts must have been known to the defendants; but he was excluded from voting.

Oliver Andrews, a colored man, applied to vote, and he was interrogated as to his ancestry, and could not rightfully vote if the grandfather clause had been valid upon his ancestry. He then asked "if I can vote if I can read and write the Constitution?" and was told without examination, "No, you can't read or write at all; go on out."

Thomas Pettis, a colored man, applied to vote. He was interrogated as to his ancestry, and, not being able to qualify upon that, he was not given the opportunity to qualify under the educational test. Told he could not vote, he testified he could read and write the Constitution.

T. J. Adkins, a colored man, swore he was the son of a white man. If this was true, and the grandfather clause was valid, he was entitled to vote on his ancestry. Notwithstanding this fact, he was told he must take the educational test. When he came to write a section of the Constitution, he missed a couple of words, and himself called the inspector's attention to that fact, and was told: "You might as well stop; you won't pass."

After some 40 or 50 negroes had been rejected, because they failed to qualify under the grandfather clause, upon the advice of three citizens of the county, John P. Bradley, Jr., J. A. Banker, and Harvey Utterback, who came to the voting place and advised the negroes to offer to read and write any section of the Constitution, eight or more of the negroes went back to the polls and made this offer, although no one was voting and no one voted at the election after that time. Though more than half an hour elapsed before the polls closed, Mr. Beal announced that they had tried to vote earlier in the day, as they had, and had failed to qualify, and did not think they were entitled to another test or another opportunity. He then called Mr. Guinn, who was also deputy sheriff, and he came to the door, and, without specifying who he was talking to, the persons attempting to vote or the three gentlemen who were advising them, said: "Get back, you sons of bitches; if you don't get back, I will have every one of you arrested."

Mr. Guinn was as much a member of the election board as Mr. Beal, and except in the case of Mr. Stephenson never dissented from anything Mr. Beal did. There was abundant evidence, even assuming that they both thought the grandfather clause of the Constitution was valid, that they had formed a conspiracy to prevent colored persons within its exceptions, or who were able to comply with its terms from voting, and there is no error shown, and the case is affirmed.

WILLARD, District Judge, having departed this life, took no part in the decision of this case.

PARLIN & ORENDORFF IMPLEMENT CO. et al. v. MOULDEN.

In re ANDREWS.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1915. Rehearing Denied January 4, 1916.)

No. 2817.

BANKRUPTCY ⟸399—HOMESTEAD—EQUITABLE LIEN.

A bankrupt, whose stock in trade was destroyed by fire a short time before the bankruptcy, wrote his principal creditors that as soon as he could collect his insurance it would be used in paying his debts. *Held*, that he thereby created an equitable lien on the fund in favor of his creditors, and could not hold as a homestead property which he bought with the insurance money.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⟸399.]

Petition to Superintend and Revise from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

In the matter of A. B. Andrews, bankrupt; R. L. Moulden, trustee. Petition by the Parlin & Orendorff Implement Company and others to revise an order allowing a homestead exemption to the bankrupt. Reversed.

Francis Marion Etheridge, Joseph Manson McCormick, and Henrie Louie Bromberg, all of Dallas, Tex., for petitioners.

R. R. Neyland, of Greenville, Tex. (R. C. Merritt, of McKinney, Tex., and N. E. Peak, of Greenville, Tex., on the brief), for respondent.

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

WALKER, Circuit Judge. On May 6, 1913, prior to the institution of the bankruptcy proceedings, the bankrupt's stock of merchandise was destroyed by fire. It was insured to the amount of $5,000, but the bankrupt then owed more than this amount. He had previously assigned the policies to a bank to secure his indebtedness to it of about $1,560. Immediately after the fire the bankrupt communicated with his principal creditors by telephone and by letter, made mention of the fire and of the insurance he held, and stated that as soon as he got the insurance money he would pay his creditors as far as it would go. In a short time he collected $4,950.10 on the policies, and used the part of that amount remaining after the payment of the debt to the bank in the purchase of a homestead. The referee stated his conclusions as follows:

"The evidence discloses that immediately after the fire the bankrupt by phone and by letter notified his creditors thereof and caused them to believe that as soon as he collected his fire insurance he would settle with them in full or in part at least. The creditors rested upon this belief and took no steps to fix a lien by process of law upon the debtor's assets. The bankrupt testified at this time it was his intention to apply his insurance upon his

debts, and there is nothing in evidence to contradict this, except his failure to carry it out, but that later he and his wife decided to invest a larger part of the money as a homestead."

It was adjudged by the court that the real estate so purchased by the bankrupt was his homestead, that it was not a part of the bankrupt estate, and that it could not be subjected to the payment of his debts.

The bankrupt's communications with his creditors after the fire had reference to specific personal property of which he was the owner, and clearly manifested his agreement to charge that specific property with the payment of his debts. As matters stood when these statements were made, it was open to the creditors by attachment or garnishment proceedings to subject the policies of insurance, or the amounts payable on them, to liens in their favor. The debtor's voluntary undertaking to dedicate to the payment of his debts the collections to be made on those choses in action was calculated to induce his creditors to forego legal proceedings looking to the same end. What he did stands upon a different footing from a mere promise by him to pay his debts, unaccompanied by a reference to specified property and a manifestation of an intent to charge it. Under familiar principles, a court of equity gives to an agreement that certain property shall be appropriated to the payment of an indebtedness the effect of creating a charge upon that property:

"The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, voluntary assignees, and purchasers or incumbrancers with notice. Under like circumstances a mere verbal agreement may create a similar lien upon a personal property. The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, 'Equity regards as done that which ought to be done.' In order, however, that a lien may arise in pursuance of the doctrine, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness an intent that the property so described, or rendered capable of identification, is to be held, given, or transferred as security for the obligation." 3 Pomeroy's Equity Jurisprudence (3d Ed.) § 1235.

The above statement was quoted with approval in the opinion rendered in the case of Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865, and the doctrine announced was there so applied as to lead to the holding that certain bonds were subjected to a charge for the payment of debts owing by a third party as a consequence of a statement made with reference to them by their owner in a letter to the creditor which did not more clearly indicate that they were to stand as security for such debts than the above referred to statements of the bankrupt indicated that the collections on his insurance policies were to be applied to the payment of his debts. The same doctrine was applied in the case of Fourth Street Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855, with the result that it was

there held that the circumstances of the giving of a check by one bank to another were such that the transaction had the effect of creating an equitable assignment of or lien upon the deposit against which the check was drawn, and was not governed by the general rule that a check, drawn in the ordinary form, does not, as between the maker and the payee, constitute an equitable assignment pro tanto of an indebtedness owing by the bank upon which the check has been drawn. In the course of the opinion rendered in that case it was said:

"Whilst an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if in the transaction connected with the delivery of the check it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice." Fourth Street Bank v. Yardley, supra, 165 U. S. page 644, 17 Sup. Ct. 440, 41 L. Ed. 855.

The frequency of the application in the federal courts of the doctrine in question is indicated by the citations which accompany the above-quoted and the two succeeding sections of Mr. Pomeroy's text. In the section of that work (section 1234) which is referred to in the above quotation as containing a statement of the ultimate grounds and motives of the doctrine it is said:

"In a large class of executory contracts, express and implied, which the law regards as creating no property right, nor interest analogous to property, but only a mere personal right and obligation, equity recognizes, *in addition to the personal obligation*, a peculiar right over the thing concerning which the contract deals, which it calls a 'lien,' and by means of which the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing. The theory of equitable liens has its ultimate foundation, therefore, in contracts, express or implied, which either deal with or in some manner relate to specific property, such as a tract of land, particular chattels or securities, a certain fund, and the like."

That the bankrupt's agreement with his creditors as to the application of the amounts to be collected on his insurance policies was such a contract as is described in that statement seems plain. What he did amounted to an unequivocal dedication of the proceeds of the policies, so far as they were subject to his control, to the payment of his debts. This had the effect of conferring upon the creditors with whom he communicated a right over the thing concerning which the contract dealt, and of enabling them, in a court which applies equitable doctrines, to follow the identical thing, and to enforce the bankrupt's obligation by a remedy which operates directly upon that thing. In other words, those creditors were entitled to have the proceeds of the insurance policies applied as the bankrupt agreed that they should be applied—to treat that as having been done which had been agreed to be done. This right existed against those proceeds when they were by the bankrupt, in violation of his agreement, invested in real estate. See Goodnough Mercantile & Stock Co. v. Galloway (D. C.) 171 Fed. 940; Wilder v. Watts (D. C.) 138 Fed. 426. The homestead rights acquired by the bankrupt and his wife in that property were subordi-

nate to the rights of the creditors in the fund made use of in making that investment. The assertion of the homestead rights cannot be allowed to defeat the prior and superior rights of the creditors to follow the fund into the property in which it was so improperly invested, and to subject that property to the charge to which the money used in the purchase was subject when the purchase was made.

It follows that the prayer of the petition to superintend and revise should be granted, and the ruling presented for review reversed; and it is so ordered.

ROSENMAN v. COPPARD.

(Circuit Court of Appeals, Fifth Circuit. November 26, 1915. Rehearing Denied January 4, 1916.)

No. 2758.

1. BANKRUPTCY ⊜303—ACTION BY TRUSTEE TO RECOVER PREFERENCES—EVIDENCE.

In an action by a trustee in bankruptcy to recover preferences, the admission in evidence against defendant, on the question of insolvency, of the ex parte appraisement of the bankrupt's property, made several months after the alleged preferences, and of applications made for insurance by the bankrupt, including statements as to the value of her property, with neither of which the defendant had anything to do, *held* error.

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

2. BANKRUPTCY ⊜166—PREFERENCES—KNOWLEDGE OF CREDITOR.

Mere suspicion that a debtor may be insolvent is not sufficient to render payments received by a creditor voidable as preferences, but he must have such a knowledge of facts as to induce a reasonable belief of insolvency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⊜166.]

In Error to the District Court of the United States for the Western District of Texas; William B. Sheppard, Judge.

Action at law by M. Coppard, trustee in bankruptcy of Rachel Kaufman, against Ike Rosenman, individually and as a member of the firm of Ike Rosenman and Saul Rosenman, copartners doing business as the New York Jobbing House. Judgment for plaintiff, and defendant brings error. Reversed.

C. A. Keller, of San Antonio, Tex., for plaintiff in error.

Henry A. Hirshberg and Harry M. Rosenblum, both of San Antonio, Tex., for defendant in error.

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

SPEER, District Judge. Mrs. Rachel Kaufman conducted two mercantile establishments, one in San Antonio and the other at Mission. Ike Rosenman and Saul Rosenman conducted a jobbing house, and, while this bore the name "New York Jobbing House," it also was

situated in San Antonio, and not very remote from Mrs. Kaufman's place of business. The Rosenmans (particularly Ike) were intimate friends of Mrs. Kaufman in a business and social way as well. Mrs. Kaufman was a regular purchaser from their wholesale stock. She paid them many sums, and occasionally, when there was a stringency in the currency, she would return their goods for which she had been unable to pay. Finally, however, on the 1st day of July, 1913, she filed a voluntary petition in bankruptcy, M. Coppard was elected trustee, and early in the ensuing year filed a suit against the Rosenmans, alleging that Mrs. Kaufman did, between the 1st day of January, 1913, and the 1st day of July of the same year, while hopelessly insolvent, make to the defendants sundry payments and sundry transfers of merchandise, which constituted a preference, for that the defendants knew or had reasonable grounds to believe that Mrs. Kaufman was insolvent. The trustee prayed for a recovery of $1,151.24 from Ike Rosenman and Saul Rosenman, doing business as "the New York Jobbing House," and for the other legal and equitable relief to which he was entitled. Saul Rosenman was never served with process, and for this reason perhaps he, like another Gallio, "cared for none of these things." Certain it is that he did not appear.

The defendant Ike Rosenman answered, and the cause was tried in January, 1915; the jury returning a verdict for the plaintiff for the amount sued for. Judgment followed. To the conduct of the trial, counsel for Rosenman presents here not less than 20 assignments of error. All of these, however, it does not seem essential to consider. A few are important.

[1] The burden of proof is usually on the plaintiff. This is peculiarly true where it is asserted that in bankruptcy a preference has been made. The legality of the evidence offered to sustain this burden must, of course, be determined by the usual rules. Now Rosenman was no party to the bankruptcy proceedings, and whether Mrs. Kaufman was solvent or insolvent, so far as his rights are involved, must be determined at the date of the payments to them, which were alleged and found to be preferences. The payments impugned were respectively, April 10, and May 9, 16, and 20, 1913. While the proceeding in bankruptcy was filed July 1, 1913, the appraisement was not made until August 6th of the same year. Now Rosenman was not a party to the appraisement; he had no opportunity, by cross-examination or otherwise, to test its accuracy. It was wholly ex parte, and yet its apparent official significance must have gravely impressed the jury. It is well known, by those having experience, that the appraisements of bankrupt stocks are not always precisely accurate.

The seventh assignment of error is distinctly important. It presents the exception that the court erred in admitting in evidence the original application and policies of insurance, with the Merchants' & Bankers' Fire Underwriters, of Rachel Kaufman, offered by the plaintiff, and in permitting plaintiff to read to the jury that portion of the application which indicated that her average stock at Mission was $6,000, that the cash value of her other property was $6,000, and that she had $1,000 other insurance on the Mission stock in the State Mutual Insurance Company of San Antonio. This evidence was sup-

plemented with the testimony of the insurance agent, Baker, who issued the policies. It is not pretended that Rosenman was present or in any way participated in this statement, or that he had any knowledge of the facts. As to him it is purely hearsay and res inter alios acta. Therefore, while Mrs. Kaufman may have been insolvent, we think that incompetent evidence has been admitted to sustain this charge.

[2] As to whether Rosenman had reasonable cause to believe that Mrs. Kaufman was insolvent, it may be well to bear in mind the language of Mr. Justice Bradley in Grant v. National Bank. Said that learned justice, speaking for the Supreme Court of the United States, 97 U. S. 81, 24 L. Ed. 971:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule."

This learned justice continues:

"The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they knew anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided. Hence the act, very wisely, as we think, instead of making a payment or security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditors should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

This was the rule under the act of 1867. It is the rule now. In view of these considerations, the court is of opinion that the verdict and judgment should be set aside, and a new trial awarded.

And it is so ordered.

BISON STATE BANK v. BILLINGTON et al.

(Circuit Court of Appeals, Fifth Circuit. December 3, 1915.)

No. 2774.

1. LIMITATION OF ACTIONS ⊜127—TIME OF COMMENCEMENT OF ACTION—AMENDMENT OF PLEADING.

An amendment of a petition, permitted by a federal court for the sole purpose of alleging necessary jurisdictional facts, and which does not introduce any new cause of action, relates back to the time the suit was commenced, for the purposes of the statute of limitations.

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

2. BILLS AND NOTES ⇐345—BONA FIDE PURCHASER—NOTICE OF DEFECTS.
That notes made in one state are offered for sale in another is not a badge of fraud which puts a purchaser for value before maturity on inquiry as to any infirmity not appearing on their face, and only actual notice or bad faith can impeach his title.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 849-852; Dec. Dig. ⇐345.]

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action at law by the Bison State Bank against B. J. Billington, E. B. Williams, and J. A. Dunn. Judgment for defendants, and plaintiff brings error. Reversed.

Jamison, Hutchison & Ostergard, of Kansas City, Mo., Kirby & Davidson, of Abilene, Tex., and Theodore Mack, of Ft. Worth, Tex., for plaintiff in error.

John M. Wagstaff, of Abilene, Tex., for defendants in error.

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

SPEER, District Judge. On September 4, 1911, the Bison State Bank, a corporation and citizen of the state of Kansas, brought an action against B. J. Billington, E. B. Williams, and J. A. Dunn. The defendants are citizens of the district in which the suit was brought. The suit was on two notes, for $1,000 each and dated June 3, 1907. They became due at different dates, namely, 15 months and 27 months, respectively. It was alleged by the plaintiff that it had purchased the notes from the payee, one W. F. Thero, for value, in due course of trade, and before maturity.

The original declaration was defective, in that it did not allege that the original payee of the notes was a nonresident of the state of Texas. To cure this the plaintiff was allowed to file an amendment on March 25, 1914. For defense it was alleged in the answer that the notes were fraudulently procured by the payee, Thero, and fraudulently put into circulation. For the same purpose it was denied that the bank was an innocent purchaser. The evidence having been concluded, both the plaintiff and defendants requested the court to direct a verdict. Argument was heard, and the court instructed the jury to return a verdict for the defendants.

[1] The record does not clearly disclose why the court gave this direction, but it was alleged in the briefs and upon argument here that the court based its direction on the ground that the period of limitation, which in such actions in Texas is four years, had expired anterior to March 25, 1914, when the amended petition was filed. There is a distinct assignment of error on this ground. The instruction of the learned District Judge was apparently based on the theory that the amendment made subsequently to the expiration of the statutory period could not cure this defect; in other words, that the defendants were never before the court until the amendment was filed. This subject is treated with care in Bowden v. Burnham, 59 Fed. 752, 8 C. C. A.

248, in a decision of the Eighth Circuit Court of Appeals. There the court declared:

"But the court very properly granted the plaintiffs leave to amend their complaint, * * * and it was amended. Nevertheless the plaintiff in error asserts that as the complaint, at the time the attachment was issued, did not contain the necessary jurisdictional averments, every step taken in the cause prior to the amendment was void, and that the amendment of the complaint could not impart vitality or validity to anything done before the amendment was made. This contention is wholly untenable. It is everyday practice to allow amendments of the character of those made in this case, and when they are made they have relation to the date of the filing of the complaint or to the issuing of the writ of process amended, When a complaint is amended, it stands as though it had originally read as amended. The court in fact had jurisdiction of the cause from the beginning, but the complaint did not contain the requisite averments to show it. In other words, the [amended complaint] did not create or confer the jurisdiction; it only brought on the record a proper averment of a fact showing its existence from the commencement of the suit."

In Carnegie, Phipps & Co. v. Hulbert, 70 Fed. 209, 16 C. C. A. 498, a case before the same court, the precise question is determined as in the case at bar, in the following words:

"Where the judgment of a federal court is reversed on error because the complaint does not show the diverse citizenship necessary to sustain the jurisdiction, and thereafter an amendment is allowed below, which cures this defect, without introducing any new cause of action, the suit is deemed to have been commenced at the date of its original institution, and not at the date of the amendment."

This is our view also. It would have been an idle thing to allow the amendment, if the contrary was true. The court in fact had jurisdiction of the parties and subject-matter on the case made. Since this is true, the plaintiff will not be denied his constitutional right to bring his action in the court of the United States when the amendment made would save that right.

[2] The fraud upon which defendants rely is assigned upon the following facts: Thero approached three of the defendants, one of whom is now dead, with a view to organize a company to buy a stallion which Thero had for sale, for the price of $2,000. The two notes were signed by the defendants, for $1,000 each, upon condition that the horse was to be sold in shares of $200 each, and that the entire 10 shares should be subscribed before the notes would be delivered to Thero. The parties to the notes also agreed that the transaction was not to be considered as binding until a satisfactory pedigree was furnished with the horse. The notes were left in the hands of Billington, one of the defendants. The understanding was that he was to hold them until the entire amount should be subscribed and the pedigree furnished.

It is also urged for the defense that Thero came to Billington, and suggested that the notes be turned over to him for the purpose of getting Dunn, one of the defendants, to subscribe and sign them, agreeing to return them to Billington, to be kept until the whole transaction was completed. It is alleged that Thero, after getting Dunn's signature, instead of returning them to Billington, left that part of the country, and subsequently sold the notes to the plaintiff bank, with

which he was doing business. The price he got was the face value of the notes less six months' interest. The notes themselves did not disclose any evidence of the agreement between the makers and the payee, and were negotiable.

It was shown upon the trial that the bank had purchased the notes before maturity, for value, and without any notice whatever of any oral agreement between the parties thereto. There is no evidence to controvert this. There is a suggestion running through the entire argument of defendants' counsel to the effect that, because the notes were signed by parties out of the state of Kansas, this was sufficient to put the bank on inquiry, and that by such inquiry they would have discovered the oral agreement between the parties to the notes. We do not think, however, that because a note is made in one state, and is offered for sale before maturity in another, it is in any sense a badge of fraud or a ground of suspicion. In Swift v. Smith, 102 U. S. 442, 26 L. Ed. 193, the Supreme Court of the United States declares:

"One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. * * * He can lose his right only by actual notice or bad faith."

Here the evidence does not disclose even any ground of suspicion. See, also, Hotchkiss v. National Bank, 21 Wall. 354, 22 L. Ed. 645; Murray v. Lardner, 2 Wall. 121, 17 L. Ed. 857. Again, in 192 Fed. 829, 113 C. C. A. 153, Young v. Lowry, the Third Circuit Court of Appeals declares:

"Proof, and not merely suspicious facts, is required * * * to impeach the title of the holder of negotiable paper, acquired for value and before maturity."

In King v. Doane, 139 U. S. 166, 11 Sup. Ct. 465, 35 L. Ed. 84, Mr. Justice Harlan for the United States Supreme Court, expresses the rule with the usual force and clarity of that great jurist:

"He [the party claiming to be the bona fide purchaser] cannot have judgment unless it appears affirmatively from all the evidence, whether produced by the one side or the other, that he in fact purchased for value. * * * In the case supposed he must show that he paid value. That fact being established, he would be entitled to recover, unless it is proved that he purchased with actual notice of defect in the title, or in bad faith, implying guilty knowledge or willful ignorance."

In the instant case, under the evidence, the bank was a bona fide purchaser, and had neither notice nor knowledge of any equities between the makers and the payee nor of any unfulfilled conditions. Since, under the evidence, the bank acted in good faith and without any sort of notice of stipulations which did not appear on the face of the notes, since it bought before maturity and paid value, it is clear that it, rather than the defendants, was entitled to a verdict.

Under these considerations, the case is reversed, and the cause is remanded, with instructions to grant a new trial.

In re NEW YORK COMMERCIAL CO.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 8.

BANKRUPTCY ⊂=140—RECLAMATION OF PROPERTY BY SELLER.

A material false representation, made by a bankrupt in the purchase of goods, which is relied on in extending credit, entitles the seller to rescind, and there is no requirement of proof that the bankrupt did not intend to pay.

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

Petition to Revise Order of, and Appeal from, the District Court of the United States for the Southern District of New York.

In the matter of the New York Commercial Company, bankrupt. From an order denying the petition of Francis H. Robinson and Thomas A. Desmond to reclaim property, they appeal and file petition to revise. Affirmed.

W. Roberts, of New York City, for appellants.

John W. Ingram and J. M. Hartfield, both of New York City (James J. Porter, of New York City, of counsel), for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. Desmond & Robinson had been for some two years selling crude rubber to the New York Commercial Company for cash. The company's course of business with others was to buy on credit for ten days after delivery, which was also the custom of the trade. For two months immediately preceding the sale now in question, Desmond & Robinson had sold the company 26 lots of rubber, of the aggregate price of some $330,000, or an average price of each lot of about $13,000. These transactions, though perhaps large from the point of view of Desmond & Robinson, were small in the business of the Commercial Company.

January 15, 1913, the last sale was for ten tons of rubber at ten days' credit after delivery, and February 8th there were delivered on account of it about two tons, of the value of $4,469.12. February 15, 1913, the company was put into the hands of a receiver in a judgment creditor's action in a court of the state of Virginia, who was subsequently made ancillary receiver by the Supreme Court of the state of New York. May 14, 1913, the company was adjudicated a bankrupt in a voluntary proceeding instituted in the District Court for the Southern District of New York and trustees were duly elected.

Desmond & Robinson demanded a return of the rubber sold, both of the state receiver and of the trustees in bankruptcy, and filed this petition of reclamation on the ground that an officer of the Commercial Company, well knowing its insolvency, fraudulently represented to the claimants that it was solvent, and thereby induced them to sell the rubber on credit, instead of for cash. The contract was made over the

telephone in a conversation between Desmond and a representative of the company named Dunbar. Desmond testified that Dunbar asked for credit and represented the solvency of the company; whereas Dunbar testified that Desmond proposed the sale on credit, and that no representation at all was made as to the company's solvency.

The referee, being of opinion that each witness was giving an honest recollection of the conversation, was driven to decide the question upon the probabilities of the case, and decided it in favor of Desmond's account. He found that Dunbar had recklessly made a representation of the company's solvency. The District Judge, on the other hand, upon consideration of the probabilities, came to the conclusion that Dunbar did not ask for any change in the course of business and did not make any representation as to the company's solvency.

In discussing the law as to rescission the District Judge fell into the same error as to the proof necessary to rescind a contract where a false representation has been made as in Re Levi & Picard (D. C.) 155 Fed. 262. It results from confusing rescission in cases where there has been no representation whatever with cases where a false representation has been made. In the former, it is necessary to prove the insolvent buyer's intent not to pay when he contracts for the goods. In the latter, the ground of rescission is complete whenever the buyer has made a material misrepresentation which is relied on, whether he made it fraudulently or not, there being no requirement of proof that he did not intend to pay. He said:

"So far as the law is concerned, however, I do not think that counsel for the petitioners have sufficiently considered the decisions in this circuit. It is true that in Re American Knit Goods Mfg. Co., 173 Fed. 482 [97 C. C. A. 486], it was said by our Circuit Court of Appeals that in equity intentional misrepresentation by the bankrupt was not necessary, and that misrepresentation of a material fact relied upon by the other party was, even if innocent, good ground for rescission. It is not necessary to criticize or comment upon this statement, but the case in which it was said did not require the discussion to go any further. That petitioner was defeated on the ground that no material misrepresentation had been made. It is also true that in Ellet-Kendall Shoe Co. v. Ward, 187 Fed. at page 983 [110 C. C. A. 321], the Circuit Court of Appeals for the Eighth Circuit declared that it was error to hold that, 'to constitute a fraud authorizing rescission of a sale, the financial statement by the bankrupt must have been with intent not to pay.' This remark was obiter, as the decision shows; but it was also erroneous, for in our own appellate court it has been held in a case exactly like this: 'The petitioners must establish three propositions to enable them to rescind the sale in question: (1) That the bankrupt was insolvent at the time of the purchase of the matting; (2) that the bankrupt concealed its insolvency from the petitioners; (3) that the bankrupt intended not to pay for the goods.'"

The observations criticized in both cases were unquestionably right. The District Judge was misled by relying upon decisions where no representation whatever had been made and the buyer's intention not to pay had to be proved. Donaldson v. Farwell, 93 U. S. 631 [23 L. Ed. 993]; Re Levi & Picard (D. C.) 148 Fed. 654; In re Sol Aarons, 193 Fed. 646, 113 C. C. A. 514; In re Marks, 218 Fed. 453, 134 C. C. A. 253. To prevent any misapprehension, we said, in the American Knit Goods Case, "in equity at least," because in an action for deceit at law a plaintiff cannot recover damages without showing not only that the

representation made was false, but also that it was made knowingly or so recklessly as to constitute legal fraud. Pittsburg Co. v. Northern Central Co., 148 Fed. 674, 78 C. C. A. 408; Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651.

Because we concur with the District Judge in holding that no representation at all was made as to solvency, the order is affirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. (and four other cases).

In re SECOND AVE. R. CO. IN CITY OF NEW YORK et al.

(Circuit Court of Appeals, Second Circuit. October 8, 1915.)

No. 317.

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

On petition for rehearing in Use and Occupation and Motor Proceedings. For former opinion, see 225 Fed. 734, —— C. C. A. ——.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. In controversies between the receiver and third parties as to indebtedness and the amount of it, if any, the receiver represents general creditors. All outstanding questions of exoneration in favor of one fund out of another and claims of priorities of creditors should be disposed of upon the final accounting when all parties are before the District Court. The motion made on behalf of tort creditors to resettle the mandate is denied.

NATIONAL DUMP CAR CO. v. PULLMAN CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1915.)

No. 2212.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—DUMP CAR.

The Ditchfield patent, No. 890,224, for a dump car, while for a slight improvement in an old art, was not anticipated, and discloses novelty and patentable 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 the National Dump Car Company against the Pullman Company. Decree for defendant, and complainant appeals. Reversed.

Appeal from a decree dismissing bill for accounting and injunction based on the alleged infringement of claims 4, 5, and 9 of Ditchfield patent, No. 890,224, for a dump car. The claims in issue relate to the door-closing mechanism of a bottom drop general service car and read as follows:

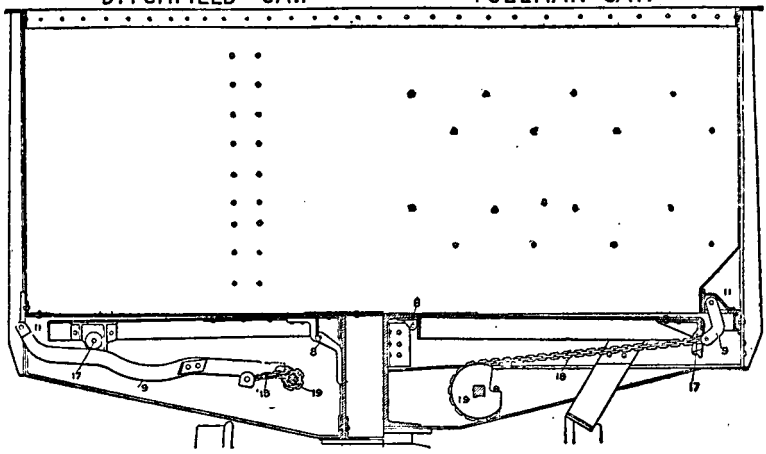
"4. In a car of the class described, a hinged dumping door, a lever pivoted near the outer end of said door, a contact member secured to said door, and adapted to rest on the lever, a shaft mounted near the inner end of said door, and means for operating said lever to open or close the door.

"5. In a car of the class described, a hinged dumping door, a lever pivotally mounted near one end of said door, a slidable contact member connecting said door and lever, and a flexible mechanism for operating said lever to open or close the door."

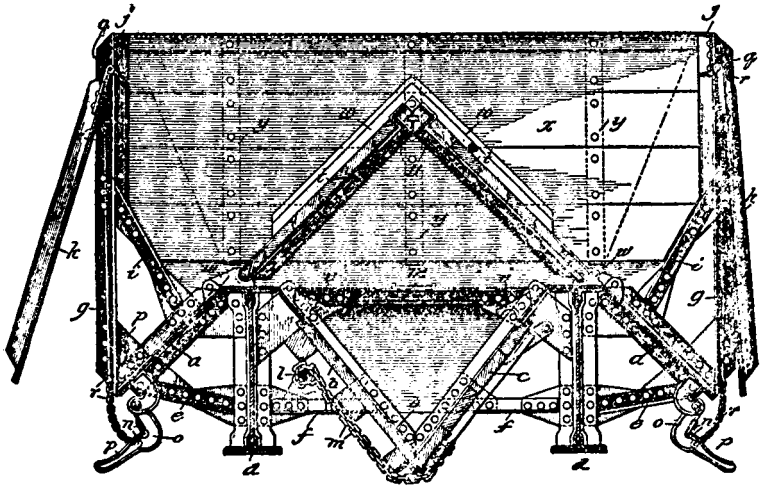
"9. A dumping mechanism for cars and the like comprising a hinged door, a pivoted member mounted adjacent one end of said door, a contact member forming a slidable connection between the door and said pivoted member, a rotatable shaft mounted adjacent the opposite end of said door, and a flexible connection between the shaft and said pivoted member."

The alleged infringing cars were made pursuant to a shop right under Pearson patent, No. 986,309. The following diagrams sufficiently illustrate the Ditchfield, Pullman, and Hart & Meissner cars:

DITCHFIELD CAR PULLMAN CAR



HART & MEISSNER PATENT.



Appellee's position is that, if Ditchfield is to be confined to his exact construction, there is no infringement; if his claims are broad enough to include the Pullman device, then he is anticipated.

George L. Wilkinson, of Chicago, Ill., for appellant.
Charles C. Linthicum, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge (after stating the facts as above). The art is old; general service cars—that is, cars serviceable as flat or gondola cars and also as dump cars—have been in use a number of years; and the elements requisite to their operation are very much older. Furthermore, various types of door-operating mechanism have been and are in successful use; indeed, most of the patents covering them are owned by appellant. Ditchfield's construction is not in general use; only two cars have been made; whether this is because it is not as efficient as others, or because the business conditions during the past few years would not have justified the attempt, expensive even to appellant since it acquired the patent, and more so to the inventor before that time, to get railroad systems to substitute it for other equipment that was working well, is immaterial. The two cars demonstrated the operativeness of Ditchfield's combination, despite some possible difficulties in releasing the creeping shaft and opening the doors under a load.

We shall consider the several objections in their order:

(1) Invalidity. As a subcombination without locking means, it is asserted by appellee to be invalid because—

(a) Inoperative;

(b) Anticipated;

(c) Not the result of inventive genius, but only of mechanical skill.

(2) Noninfringement.

1 (a). Inoperativeness. It is urged that, apart from any question of prior art, the claims now in issue, which on their face do not cover the entire structure, as they do not limit the shaft to one that creeps under the lever for the purpose of finally locking the closed door, describe a device that is practically inoperative, and therefore, unless the locking mechanism be read into them, the claims cannot be supported as covering a valid subcombination. If the locking device is necessarily implied in these claims, then there clearly is no infringement. Ditchfield locks by causing the shaft through a final winding to creep up under the lever, while Pullman pushes in a cam-locking bar behind the series of elbow levers.

It is quite true that, without some kind of a locking device, a service car built in accordance with these claims alone would not be adopted in practice; it does not follow, however, that the subcombination without the locking element is therefore invalid. If, in and of itself, that combination of elements has a distinct operative function of practical utility, it must be upheld, unless invalidated by the prior art. And, in our judgment, the testimony fully demonstrates that, even without the locking device, the combination as described in the claims in issue does effectuate a new and practical result. For, while it is intended both in the Ditchfield and Pullman cars that the doors, when closed, should be held locked, and that, when locked, the entire strain theretofore exerted on the chain by the weight of door and load should

be released, neither locking mechanism is automatic. A human agency, with its defects, must intervene; carelessness and forgetfulness on the part of the employé will continue, as in the past, to let many a car go on its way unlocked. When this happens, the strain on the door-supporting mechanism, Ditchfield's short chain and long lever, Pullman's long chain and short elbow lever, caused by the weight of the door and its load, remains; but to the extent that a rigid element, the lever, replaces one or more links of the chain, the strain on the chain itself, the weak member of the mechanism, is reduced, and this is true, whether the levers have been made fully to perform their leverage function of pressing the doors shut, or whether because some doors are warped, or the chains have become of unequal length, all the doors are not absolutely closed. For even such a car is capable of service for some freight, and, while not intended so to be used, it nevertheless is actually used until the condition is discovered. In such a case, the door-holding mechanism would inevitably wear out faster and stretch much sooner under the strain, if it were a continuous chain, instead of, like Ditchfield and Pullman, part chain and part rigid lever. Thus, without the locking element, even if that be essential, not only to lock, but also to insure a complete closing of all the doors, the subcombination of these claims described a device, operative in actual service, and securing definite results, independently of the additionally desirable elements.

1 (b). Anticipation. In this connection it is to be noted that the lever has other functions than that just considered. It diminishes the strain on the chain, not only when holding and supporting the closed, but unlocked, or the incompletely closed doors in place, but also while the door is being raised into a horizontal position, and when the pull designed to effectuate a complete closing is exerted.

Again, the lever permits the use of locking devices which, after the doors are closed, will wholly relieve the chains from strain. Furthermore, it acts, not merely as a rigid substitute for chain links, but as a true lever in multiplying the power required to overcome the resistance in finally closing an ofttimes warped door.

Concededly, the Hart & Meissner device, patent No. 764,355, is the nearest in construction and conception to Ditchfield's, and especially, in view of the size of the lever element, to Pullman's. All of the elements are present: the projecting fingers of the L-shaped bars, to which the chain is attached, is designed to catch the side door, almost closed by gravity, and, acting as a lever, to exert and multiply the power necessary to close it. In thus functioning, it anticipates both Ditchfield and Pullman. But it is not intended to, and it obviously cannot, relieve any strain exerted on the chains by the weight of the door and the load in raising, closing, or supporting the doors, because there is no such weight, and consequently no such strain, on the Hart & Meissner chains. They do not pass around the doors; they extend down between the doors to become attached to the levers. They do not raise the door, and only in the sense that they exert the final pull on the lever can the chains be called a part of the door-closing mechanism. The Hart & Meissner lever, therefore, acts only as a true lever. Structurally, it is no rigid substitute for chain links. It does not form with

the chain attachment a door raising or holding mechanism. It cannot function as a strain-reducing element. The Hart & Meissner construction, therefore, shows no anticipation.

Other devices especially relied upon are Lindstrom and Streib, No. 791,348, Christianson, No. 828,458, and Swanson No. 727,487. The first has no lever; the second, a sliding lever; and the third, a catch which defendant calls a lever. These levers, however, have no strain reducing function. Confessedly, all of these devices differ both structurally and operatively from Ditchfield's and Pullman's.

Anticipation has not been shown.

1 (c). Invention. Perhaps the best evidence that the conception of this subcombination, with this function for general service car having bottom drop doors, was not obvious to the skilled mechanic, but required the exercise of inventive genius, is the failure of Hart and Meissner to apply it to their bottom doors. It will be noted that the Hart & Meissner cars have both side and bottom drops; but their bottom doors have only the old chain. No lever is attached thereto, though, for them, too, it would have had the additional functions secured both by Ditchfield and by Pullman. While the Ditchfield improvement is concededly a comparatively slight one in an old art, it is both useful and novel, and, in our judgment, the result of invention.

2. Infringement. Ditchfield's claims in issue are not expressly limited to the long lever, as shown in his drawings; they read as well on Pullman's short lever. The former has certain advantages; while both act not merely as rigid substitutes for chain links and as true levers, the long lever functions as such from the very beginning of the door raising operation, whereas the short one comes into play only when the door is already raised to within an inch or two of the horizontal position. But, when it does operate, it, too, acts both as rigid substitute for chain links and as a lever. It relieves the strain on the chain both in the last moments of the door-raising and door-closing acts, and subsequently in holding the unlocked closed, or nearly closed, door. By the pull of the chain, it functions as a lever, in closing, or nearly closing, the door. That neither Ditchfield nor Pullman can completely close all doors, if some are badly warped or if the chains have become uneven in length, and that, to accomplish this, the noninfringing cam bar latch, in Pullman, or the additional winding that carries the creeping shaft up under the lever, in Ditchfield, each designed primarily for locking the doors, is brought into action, does not diminish or destroy the functional similarity of the two levers. Concededly, all of the other elements read on the Pullman device. It therefore includes all of the elements of Ditchfield's claims in issue, with at least some of their functions, both new and old, and operating by practically like mechanical means. There is thus complete equivalency and infringement.

The decree must be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

DANIEL O'DONNELL, Inc., et al. v. RISCAL MFG. CO. et al.

(District Court, S. D. Iowa, C. D. September 21, 1915.)

1. PATENTS ⊂=328—INFRINGEMENT—SPARK GAP.
The Knorr patent, No. 1,111,963, for a spark gap to be mounted on the spark plug of an internal combustion engine, *held* infringed; its validity being conceded.

2. PATENTS ⊂=245—INFRINGEMENT—IMMATERIAL CHANGES.
Infringement is not avoided by adding to a patented device a simple contrivance to strengthen a part, or by a change of form or use of a different material, where neither affects the functions performed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 386; Dec. Dig. ⊂=245.]

In Equity. Suit by Daniel O'Donnell, Incorporated, and the Notamiss Spark Gap Company against the Riscal Manufacturing Company, a partnership composed of August Salm and John H. Richter, August Salm, John H. Richter, and George R. Meissner. On final hearing. Decree for complainants.

Orwig & Bair, of Des Moines, Iowa, for complainants.
Roe & Roe, of Des Moines, Iowa, for defendant.

WADE, District Judge. The complainants charge defendants with infringement of United States letters patent No. 1,111,963, for an improvement in spark gaps, issued to Gottlieb Knorr, September 29, 1914. The invention is designed to be mounted on a spark plug of an internal combustion engine. The art is not new. The patent is a combination of known elements. The validity of the patent is not denied, and the sole question relating to the patent is whether the defendants infringe. There is also presented the question of unfair competition in trade, arising out of the use of the words "Notamiss" and "Nevermiss," as applied to spark gaps.

[1] Observing the structure described in the patent in suit, we find a cylindrical shell about an inch long, formed of a glass cylinder; one end being closed by a metal cap, the other end being formed by a flange upon the cylindrical body of insulating material inclosed within the glass cylinder. In each end there is a hole which admits the small threaded metal electrodes which pass into the body of insulating material inclosed in the cylinder. These metal rods also form exterior means of attachment to the spark plug and to the conducting wire. The complainants, in manufacture, have varied this construction by eliminating the flange upon the end of the inclosed cylindrical body, and have formed both ends of metal caps. The same construction has been used by the defendants, and it is the contention of the defendants that this avoids infringement, and that the complainants themselves are not manufacturing the article for which the patent was issued.

This is the first and principal question to be determined. In behalf of the complainants it is contended that the substitution of a metal cap for the flange is merely the use of a mechanical equivalent, and that

the use thereof by the defendants, with the other elements discribed in the patent in suit, constitutes an infringement. It is contended by defendants that the patent in suit, being a combination patent of well-known elements, is held strictly to the form described, and is not entitled to protection against mechanical equivalents; but I think the patent comes fairly within that class described by Justice Sanborn in National Hollow Brake Beam Company v. Interchangeable Brake Beam Co., 106 Fed. 693, 45 C. C. A. 544, in the following language:

"But the great majority of patents falls between these two extremes. They are neither for pioneer inventions nor for improvements so slight as to be almost immaterial. While they do not evidence the first or the last step in the progress of the art to which they relate, they often mark signal advances and protect useful improvements. The doctrine of mechanical equivalents conditions the construction of all these patents, and in determining questions concerning them the breadth of the signification of the term is proportioned in each case to the character of the advance or invention evidenced by the patent under consideration, and is so interpreted by the courts as to protect the inventor against piracy and the public against unauthorized monopoly [citing cases]. The doctrine of mechanical equivalents is governed by the same rules and has the same application when the infringement of a patent for a combination is in question as when the issue is over the infringement of a patent for any other invention [citing cases]. Mere changes of the form of a device or of some of the mechanical elements of a combination secured by patent will not avoid infringement, where the principle or mode of operation is adopted, unless the form of the machine or of the elements changed is the distinguishing characteristic of the invention."

The flange described in the patent in suit served no function, except as a cap for the end of the hollow cylindrical body. The substitution therefore of a metal cap is to my mind clearly the substitution of a mechanical equivalent, in so far as the same forms a closure or cover for the end of the glass cylinder. It involves no invention to substitute the one for the other.

[2] It is contended by counsel that the metal cap substituted for the flange possesses the additional function of a clamp holding the ends of the inclosed cylindrical body in case the same be split. There is no proof sustaining this claim. The metal cap does not fit closely around the edges of the inclosed cylindrical body. It fits around the glass cylinder, and the glass cylinder fits loosely over the cylindrical body, so that, in case it splits, it would be the glass cylinder which would hold it together, if anything; and if the cylinder should break, the space between the flange of the metal cap and the inclosed cylinder is so great that it could not possess the power of holding the body together. Even if it had such function, it would be a simple, well-known device which any workman would think of applying for such purpose, and it cannot be held that a complete patented device can be taken by an unauthorized and unlicensed person, and, by adding somewhere a well-known simple contrivance to strengthen some part thereof, acquire the right to the use of the patented article, and avoid infringement thereof.

Taking the spark gap manufactured by the defendants, and the spark gap described in the patent in suit:

"There is no difference in the mode of operation or in the result of the operation of the two devices. They operate on the same principle and in the same way and produce the same results."

This quotation is from the opinion of Sanborn, J., in the National Hollow Brake Beam Case, supra. He adds the following:

"The only difference between them is in the form of the caps and in the devices used to prevent these caps from rotating on the brake beams and brake heads. Can the appellee take the principle of the appellant's combination, the only valuable thing Hein invented, every condition that distinguishes their brake beam from the inferior devices it supplanted, and then escape liability by this slight change of the form of one of its elements?"

This question is answered in the negative. The metal cap performing the same function as the flange, even if it performed an additional function, it would not authorize defendants to absorb the entire patent granted to Knorr, and deprive him of the rights conferred by the government. Walker on Patents (4th Ed.) page 309.

In the recent case of Smart v. Wright, 227 Fed. 84, —— C. C. A. ——, decided by the Court of Appeals of the Eighth Circuit, September term, 1915, the court quotes with approval the following pertinent language from Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935:

"Except where form is of the essence of the invention, it has but little weight in the decision of such an issue; the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result. Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained. Inquiries of this kind are often attended with difficulty; but if special attention is given to such portions of a given device as really does the work, so as not to give undue importance to other parts of the same which are only used as a convenient mode of constructing the entire device, the difficulty attending the investigation will be greatly diminished, if not entirely overcome. Cahoon v. Ring, 1 Cliff. 620 [Fed. Cas. No. 2292]."

I am compelled to hold that the substitution of a metal cap for the flange does not avoid infringement.

The contention that the use of "translucent" material for "transparent" material to form the hollow cylindrical body avoids infringement cannot be sustained. The functions of both are the same. There is no pretense that one has advantage over the other, and, if advantage did exist, it is clearly an equivalent which any shopman would supply.

It is seriously contended that the substitution of a fiber body made of four pieces for the cylindrical body described in the patent in suit avoids infringement. The functions of the fiber cylinder and the cylindrical body formed of four pieces are exactly the same. The only difference is in the size and form of the opening through which the spark may be observed as it passes between the terminals. The form adopted by defendants is different from the form described in the patent and the

form used by complainants in manufacture; but a mere change in the form which does not affect the functions performed—does not avoid infringement. It is apparent that the form used by defendants may have advantages over the form used by the complainants; but the change in form and the additional advantages are simply an extension of the principle and function inherent in complainants' device, which extension involves no inventive genius.

The patent in suit contemplates "a transverse opening extending through it." In manufacture, complainants use a round hole; but the patent does not limit or describe the form of the opening or its size. The purpose of the opening being to enable an observation to be made, the patent certainly contemplates that such opening may be used as will serve its purpose most effectually. It may be round or square, large or small. The cylinder may be so cut away as to leave but the form of two standards, as is used by the defendants, without departing from the language of the patent.

It being admitted that this patent is valid, it must be apparent that the cylinder used by defendants is clearly an infringement. The fact that a round hole is indicated in the specifications cannot be held to limit the words used in the claims approved by the Patent Office. Other slight differences in structure cannot be held to avoid infringement.

"One who appropriates a new and valuable patented combination cannot escape infringement by uniting or operating its elements by means of common mechanical devices which differ from those which are pointed out for that purpose, but which are not claimed in the patent." National Hollow Brake Beam Co., supra; Deering v. Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153; City of Boston v. Allen, 91 Fed. 248, 33 C. C. A. 485; Schroeder v. Brammer (C. C.) 98 Fed. 880.

In the attempt to evade complainants' patent, defendants have clearly invaded it. Complainants are entitled to an injunction as prayed, and to an accounting, if desired.

Unfair Competition in Trade.

Complainants have employed the trade-name "Notamiss" in its sale of spark gaps. The defendant Meissner has employed the trade-name "Nevermiss." It is not disputed that the names for trade purposes are so much alike that their use would constitute unfair competition. The sole question involved is, which is entitled to the use of the name, and this depends upon which party first established a trade reputation or good will in the manufacture and sale of spark gaps under one or the other of these names.

Without reviewing the evidence, it is sufficient to say that I am convinced that in equity the complainants are entitled to the use of the name employed by them, and that the defendant Meissner is not entitled to use the trade-name "Nevermiss."

A decree will be prepared by counsel for complainants and submitted to counsel for defendants, who will have five days in which to file objections thereto, and the matter can then be submitted to the court for settlement, if agreement is not had. Such decree will reserve exceptions to the rulings of the court as expressed in the decree.

THE ENTERPRISE.

(District Court, D. Connecticut. March 9, 1915.)

No. 1865.

1. TOWAGE ⇐11—LIABILITY FOR LOSS OF TOW—PROXIMATE CAUSE.
A tug, under contract to tow barges laden with stone from the quarry to a breakwater, in the construction of which the stone was being used, became disabled by an injury to her rudder, and the barges, after unloading, were compelled to anchor, and several hours afterward, while so anchored and in a high wind, one of them sank. There was no negligence on the part of her crew, and she was in good condition, and could have been towed to a place of safety. *Held*, that the breaking of the tug's rudder was the proximate cause of the loss.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. ⇐11.]

2. TOWAGE ⇐3—CONTRACT—IMPLIED TERMS.
In a contract of towage there is an implied obligation that the tug shall be efficient and properly equipped for the service, from which the owner is relieved only when a breakdown is from causes which could not have been discovered and prevented.
[Ed. Note.—For other cases, see Towage, Cent. Dig. § 3; Dec. Dig. ⇐3.]

3. TOWAGE ⇐11—LIABILITY OF TUG FOR LOSS OF TOW—DEFECTIVE EQUIPMENT.
A tug under a continuing towage contract broke her rudder, and as a result one of her tows was lost. She was inspected six months before, but it was shown that the rudder was not properly tested to discover any defect in the iron casing, which broke. *Held*, that such inspection did not relieve her from liability under the towage contract.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. ⇐11.]

4. TOWAGE ⇐15—LIABILITY FOR LOSS OF TOW—INEVITABLE ACCIDENT—BURDEN OF PROOF.
The burden rests on a tug to establish the defense of inevitable accident, to exonerate her from liability for the loss of a tow through the breaking of her rudder.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 30–38; Dec. Dig. ⇐15.]

In Admiralty. Suit by Peter Beattie and John Beattie, Jr., executors of the estate of John Beattie, deceased, against the steam tug Enterprise. Decree for libelants.

Samuel Park, of New York City, for libelants.

George Whitefield Betts, Jr., and Francis H. Kinnicutt, both of New York City, for claimants.

THOMAS, District Judge. This is a libel in rem to enforce a claim for damages against the steam tug Enterprise, arising from the breach of a towage contract entered into between the libelants, who are contractors, with quarries at Leete's Island, on the Connecticut shore of Long Island Sound, and the claimants, who are owners of the Enterprise.

The charter party is contained in two letters, dated, respectively, November 28, 1912, and November 29, 1912; the first letter being from

the claimant's managing owner to the libelants, and the second being the libelants' reply thereto. In the latter letter the libelants impose the condition that the Enterprise, which had been selected by the claimants for the purpose of the charter party, shall be "capable of doing our work."

This charter party called for the transportation of stone, at an agreed price, from the libelants' quarries to a breakwater off Kelsey's Island, to the eastward of Leete's Island some 12 miles on the Connecticut shore of Long Island Sound, which the libelants were constructing under a contract with the United States government. The breakwater extended from the north shore of Long Island Sound in a southerly direction out into the Sound. After the execution of the charter party and pursuant thereto, the claimants began the work of transporting stone from the quarries to the breakwater with three schooner barges, viz., the John L. Gilmore, the American Eagle, and the Tom Beattie, all owned by the libelants. None of these boats were equipped with sails (excepting a small jib on the Eagle and the Tom Beattie), and all of them were entirely dependent upon the steam tug for motive power.

The steam tug was under the exclusive control and possession of the claimants, with a crew employed by them. Each of the schooner barges had her own crew, employed by the libelants for the purpose of loading and unloading the barges. The loading and unloading of the barges and the movements of the barges and the tug were subject to the instructions of libelants' superintendent.

The work of transporting stone from the quarries to the breakwater continued without interruption until January 31, 1914. About 4:25 in the morning of that day the Enterprise, with the three schooner barges mentioned, laden with stone, left Leete's Island, and arrived at the breakwater about two hours later.

On arriving at the breakwater, the Gilmore was left on the east side, where she commenced to discharge her cargo, making fast to the breakwater with two lines. At that time the wind was from the east, but soon veered to the southeast, and later freshened considerably, blowing harder at 11 o'clock, and held there until 3 or 4 o'clock in the afternoon. About 10 o'clock the Gilmore was shifted from the east to the west side of the breakwater, in order to get protection from the wind afforded by the breakwater. After the tug had shifted the Gilmore, she anchored to a buoy on the west side of the breakwater, where she encountered considerable wind and sea coming in around the end of the breakwater, which, according to the testimony of three of claimant's witnesses, was enough to have the water come up over the scuppers of the Enterprise as she lay in the trough of the sea.

There is some contrariety between the testimony of libelants' and claimant's witnesses as to the varyings and force of the wind, but it is not of sufficient importance to affect the vital issues in the case.

Some time before 1 o'clock in the afternoon, after the tug had anchored, she broke loose from the buoy twice; the first time being due to the breaking of the hawser attached to the buoy, and the second time to the slipping of the line. On the first occasion the tug drifted

only long enough to turn around and come back, but the second time she drifted possibly a quarter of a mile away from the breakwater. The captain of the tug then discovered that her rudder was disabled, whereupon she backed up under the lee of the breakwater, about 600 feet therefrom, and well inshore, after vainly trying to repair the damage to the rudder. This time is fixed as about 1 o'clock in the afternoon.

In the interim the barges had finished their unloading and were anchored off the breakwater. The Eagle was the most southerly, the Gilmore next, and the Beattie the most northerly; the Gilmore being nearer the breakwater than the others, and, according to the testimony of the libelants' superintendent, a distance of about 250 or 300 feet from it at that time. Thereupon (the barges having finished unloading) the libelants' superintendent hailed the captain of the Enterprise and ordered him to take the barges back to Duck Island, a distance of not quite 2 miles from the breakwater. He was then informed by the captain of the Enterprise that this was impossible, owing to the disablement of the tug's rudder. The captain of the tug was unable to give satisfactory information as to the cause of the breaking of the rudder.

Later in the afternoon, between 3:30 and 4 o'clock, the wind changed from the southeast to the southwest, and with this change of the wind the Gilmore swung in from her anchorage nearer to the breakwater, so that, according to her captain, she was only 50 feet from it. Her crew then payed out a line to one of the buoys to make her more secure, but her small anchor chain parted, so that she had only one line and one anchor out. Between 5:30 and 6 o'clock of the same afternoon the captain of the Gilmore and her crew left the Gilmore in a yawl, and after picking up a man on the Enterprise rowed ashore, and the captain returned to his home at Leete's Island. The Gilmore remained above water until early the next morning, when she sank. Later in the morning of February 1st the Beattie and the Eagle were towed back to Leete's Island by a wrecking tug, which had been summoned by the libelants from New London for that purpose.

Three defenses are interposed by the claimants: (1) That the unseaworthiness of the Gilmore and negligence upon the part of her crew were the proximate causes of the loss and damage complained of; (2) that the tugboat was not a common carrier, and is liable only for the lack of ordinary care, and that not only have the libelants failed to prove lack of ordinary care, but the claimants have proved ordinary care by showing an inspection in June, 1913, when no defect in the rudder was found; and (3) that the breaking of the rudder was an inevitable accident, upon which no liability can be predicated.

[1] I. The charge that the unseaworthiness of the Gilmore and the negligence of her crew were the proximate causes of the loss and damage complained of is not sustained by the evidence. It clearly shows that the Gilmore was not in any worse condition in respect of leaking than barges carrying large quantities of stone naturally would be or usually are. Her condition in that respect was that which would naturally be expected of a barge subjected to the strain of heavy cargoes

of stone and was in no respect dangerous. The crucial question is whether the sinking of the Gilmore was occasioned by the negligence of the crew which was in the employ of the libelants, or by the breaking of the rudder on the Enterprise. This is largely a question of fact, dependent upon the circumstances. It is clear from the evidence, that, until the rudder of the Enterprise had given out, she was under complete control, and the evidence makes it equally clear that the breaking of the rudder preceded the disability of the Gilmore by a considerable time, and that the Gilmore could have been extricated from her position of danger and saved from sinking by the Enterprise, if the latter's rudder had not given out. The conclusion is therefore inevitable that the proximate cause of the loss and damage sustained by the libelants was the breaking of the rudder.

"'Cause' and 'consequence' are correlative terms. One implies the other. When an event is followed in natural sequence by a result it is adapted to produce, or aid in producing, that result is a consequence of the event, and the event is the cause of the result." Monroe v. Hartford Street Railway Co., 76 Conn. 201, 207, 56 Atl. 498, 501.

Another definition of proximate cause equally apt is that given by Chief Justice Baldwin in Smith v. Connecticut Railway & Lighting Co., 80 Conn. 268, 67 Atl. 888, 17 L. R. A. (N. S.) 707. On page 270 of 80 Conn., on page 889 of 67 Atl. (17 L. R. A. [N. S.] 707), he said:

"That only is a proximate cause of an event, juridically considered, which, in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which that event would not have occurred. It must be an efficient act of causation separated from its effect by no other act of causation."

With these clear definitions as a guide, all the more is the conclusion imperative that the negligence of the crew of the Gilmore was not the proximate cause of the loss. Moreover, the evidence does not seem to sustain the claimant's contention that the management of the Gilmore by her crew in any way contributed to her sinking. She was without motive power, and there is sufficient evidence to justify the conclusion that she was not abandoned until it was apparent that she could not remain above water, and the abandonment took place about six hours after the rudder on the Enterprise was disabled. In brief, there was no negligence on the part of the crew of the Gilmore of such a character and so related to the resulting injury as to be considered an efficient or proximate cause of her sinking. And it is immaterial whether the form of recovery is in contract or in tort, for the steam tug is liable in either case for the acts and defaults of her owners, or those who are her lawful agents or representatives.

[2] II. The claimant's second contention is not well taken. In view of the established facts, the case does not fall within the well-known principle invoked by them. The law is well settled that in a contract of towage there is an implied obligation that the tug shall be efficient and properly equipped for the service, provided, of course, that the breakdown did not arise from causes which ordinary care could have discovered and prevented. The Undaunted, 11 Prob. Div. 46, 5 Aspinall's Reports (New Series) 580; and The Ratata, [1897] Prob. Div. 118, 8

Aspinall's Reports (New Series) 427, affirmed on appeal [1898] App. Cas. 513. It is of no importance that the libel contains no allegation of a warranty and a breach thereof. The tug's liability is one of contract. The Ratata, [1897] Prob. Div. 130, supra.

The Undaunted, supra, is apposite. It was an action by a tow against the tug for a serious delay in the delivery of the tow's cargo, occasioned by an inadequate supply of coal, and it was held that in a towage contract there is an implied obligation that the tug shall be efficient and properly equipped for service. Sir Charles Butt, of the admiralty court, in pronouncing judgment against the tug said (page 48):

"It is important that owners of steam tugs should not be released from the obligation to send them to fulfill the service they have undertaken, adequately and properly equipped. The breach by tug owners of this obligation may give rise to most serious consequences to vessels intrusted to their care."

The Ratata, supra, is equally instructive and in point. It was there held that it was an implied term of the contract between a tug and her tow that the former had taken reasonable care to supply a properly equipped leading tug, so as to enable the string of barges attached to her to get safely to their destination. In the Court of Appeal, Lord Esher said (pages 127, 128):

"I therefore put this case on the ground that they owed that duty to each of these vessels. They were paid for that duty, and they were bound to see that the operation was properly conducted. There is evidence to show that it was not properly or efficiently conducted, and that threw the burden upon the defendants to show that they had taken every reasonable precaution to prevent a breakdown. Under that burden they fail; and therefore judgment must go against them, and they must be made liable to the plaintiff for what happened."

Lord Justice Lopes said (page 128) that the undertaking of the defendants was that:

"They will use reasonable care in the case of each vessel that there shall be a tug efficient in hull, in equipment, and in crew."

And Lord Justice Chitty said (page 130):

"The case against the defendants cannot be rested upon any warranty on their part, but it is one of contract, and the question is: What is the nature of the duties the contract imposed upon them? In my opinion, in conducting this towage operation, it was the duty of the defendants to take all proper and reasonable measures to insure that the vessel should be safely towed up on the occasion in question."

[3] The claimants argue that as this was practically a continuous voyage, going back to the date of the charter party, no implied duty rested on the claimants to make an examination before each trip. They further contend, and the evidence shows, that an examination of the tug had been made in June, 1913, when she was hauled out on the marine railway at New London, and that this inspection showed that the rudder was then in a reasonably safe condition. The rubber construction was unusual. As the description is somewhat technical, I quote from claimant's brief:

"The rudder itself and stock were of wood, and were inclosed for the most part in an iron casing. Down to the point where the rudder stock joined the

blade of the rudder, the casing consisted of a cylinder made of wrought iron five-sixteenths of an inch thick. At the point where the top of the rudder joined the stock the cylinder was opened up, and iron plates were attached to either flange, which made a casing or hood extending out over the rudder proper. This case or hood was reinforced and strengthened by an iron collar or band riveted on at the top of the rudder proper where it joins the stock. The collar was put on to strengthen the rudder post. The break in the cylinder occurred at a point below the water line and just below or practically level with the place where the rudder joined the stock and where the casing was reinforced by the iron collar."

There was no fastening through the iron cylinder and into the rudder stock to make it secure. As the rudder stock runs up through the rudder port it was not exposed to a visual examination. When the iron cylinder broke, the rudder was useless and the tug unmanageable.

That the examination or inspection made at New London, in June, 1913, was visual and superficial, is fully borne out, not only by the testimony of those who made the examination, but by the testimony of Clarence C. Perry, a well-known expert of Hartford, editor of The Locomotive and special inspector for the Hartford Steam Boiler Inspection & Insurance Company. In answer to the question, "What would be necessary to make a proper examination of this flange, if she was hauled out in the marine yard?" The examination having been made while the tug was on the marine railway, Perry said:

"The first thing to do would be to go over it with a light hammer and determine whether the corrosion had extended deeply or not, by the ability to shell off the corrosion, scale, the iron oxide, with the light hammer. If that shelling off, in little scales of corroded iron, indicated that the corrosion had penetrated far into the iron, there would be two courses open: One might take a chisel and attempt to find by soundings of the corroded surface, which would be a bad thing to do from the standpoint of the metal, because it would expose the piece to further rapid corrosion; or one might chisel deeper, which has become the practice in boiler works, and actually measure the thickness of the iron, chipping a little hole and filling it with a plug, no injury being done."

And again he testified:

"An air hammer is taken with a rather blunt and chisel pointed tool, and by repeated small but very rapid blows of this air hammer or hand hammer with this chisel pointed peon the corrosion and paint and so on are scaled from the metal, leaving it as nearly clean as possible."

This witness further testified that the method referred to by him is the one pursued in navy yards upon boats of the navy and navy tugs. The superintendent of the marine railway at New London, where the Enterprise was hauled out in June, 1913, for inspection, admitted that he did not use a hammer on the cylinder to ascertain whether there were any breaks in it, and that he did not put a hammer on the cylinder or examine the cylinder closely to ascertain whether there were any flaws or breaks in it.

Another witness, McCarthy, produced by the libelants, testified that he never before saw a rudder constructed like this, and that it was impossible visually to make a proper examination of the iron covering this rudder had, and that a satisfactory examination could be made only with a hammer.

The fact, if it be a fact, that the defect in the rudder, whereby the loss and damage were occasioned, was latent, and unknown to the claimants, is no excuse. Such is the established law, as is set forth in The Edwin I. Morrison, 153 U. S. 199, page 215, 14 Sup. Ct. 823, 829 (38 L. Ed. 688), where in the opinion of the court, delivered by Chief Justice Fuller, it is said:

"The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure. Their warranty that the vessel was seaworthy in fact 'did not depend on their knowledge or ignorance, their care or negligence.' The burden was upon them to show seaworthiness, and if they did not do so, they failed to sustain that burden, even though owners are in the habit of not using the precautions which would demonstrate the fact. In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate, if loss occurred through their displacement."

The fact that libelants' reply letter to the claimants under date of November 29, 1912, imposed on the charter party the provision "that the crew of said tug shall at all times follow the orders given by us, provided the safety of said tug Enterprise is not impaired" is not material. In The Undaunted, supra, it was held that a provision in a contract of towage that the owners of the tug would not be responsible for the default of her master did not release them from the implied obligation to supply an efficient tug, that is to say, one properly equipped and properly supplied; and it must be taken as a fair intendment of the charter party that for the purposes of navigation the tug was under the exclusive control of the claimants, with a crew employed and paid by them, and fully responsible for the navigation of the tug until such time as the libelants interfered by giving their positive orders or instructions.

[4] III. The claimants have failed to prove that the breaking of the rudder was an inevitable accident. The onus of proof rested on them; the libelants having, in the first instance, established a prima facie case either of neglect or of want of seaworthiness.

The law laid down in The Merchant Prince, [1892] Prob. Div. 188, 7 Aspinall's Reports (New Series) 208, leaves no doubt on this point. This was an action for damages, by collision, in which it appeared that the plaintiff's vessel was at anchor in broad daylight in the Mersey, when the defendants' steamer ran into her. The defense was that the steam steering gear of the defendants' vessel failed to act, in consequence of some latent defect, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of the defendants, and that the resulting damage was caused by inevitable accident. The steam steering gear in question was good of its kind. It had never previously failed to act, and the cause of the defect in the machine or in its working could not have been discovered by competent persons. Part of the gear, including some portion of the chain, running between the wheel and the rudder, had been recently renewed, and it was admitted that new chain was liable to stretch. It was also proved that, before the vessel left her anchorage and proceeded on her voyage, the whole of the gear had been tested and found in good order, and that the chain had been tightened as occasion required. It was held by

the Court of Appeal, reversing the Admiralty Court, that the defendants were liable, as they had not discharged themselves of the burden cast on them by the prima facie case. Lord Esher said (page 188):

"If he [the defendant] cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid?"

Lord Justice Fry said (page 189):

"The burden rests on the defendants to show inevitable accident. To sustain that the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident."

The Circuit Court of Appeals of this circuit has cited and quoted with approval from The Merchant Prince, supra, in The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552, and again in The Bayonne, 213 Fed. 216, 129 C. C. A. 560, where it was said by Judge Ward, delivering the opinion of the court, that the conclusion of inevitable accident—

"should only be adopted if either the cause * * * is shown and that it was unavoidable, or else all possible causes must be shown to have been unavoidable."

If this is the law in collision and negligence cases, there is equal, if not more, reason why it should obtain in the case of a towage contract, where there is an implied obligation of seaworthiness, and where, as stated by Kennedy, L. J., in the Court of Appeal in The West Cock, [1911] Prob. Div. 208, on page 231, 12 Aspinall's Reports (N. S.) 57:

"The burden of proof * * * lies upon the tug owner to show that it was as reasonably fit and proper a tug for use as skill and care could make it."

The court cannot, by approving a resort to mere conjecture as to the cause of the defect in the rudder, relax the important and salutary rule in respect of seaworthiness. The Edwin I. Morrison, 153 U. S. 215, 14 Sup. Ct. 823, 38 L. Ed. 688; The Alvena (D. C.) 74 Fed. 252, 255; The Phœnicia (D. C.) 90 Fed. 116, 119.

The libelants are entitled to a decree adjudging the Enterprise in fault, with a reference to a commissioner to ascertain the amount of damage sustained by them.

Decree accordingly.

In re PILCHER & SON.

(District Court, M. D. Alabama, S. D. November 30, 1915.)

(Syllabus by the Court.)

1. BANKRUPTCY ⊂=196—PREFERENTIAL LIEN—LEVY OF EXECUTION—RECORDED JUDGMENT.

A plaintiff who had obtained a judgment in the state court against his debtor, and had recorded said judgment more than four months prior to the filing of a voluntary petition in bankruptcy by his debtor, and who had levied an execution founded upon such judgment upon the property of his debtor, has a valid and subsisting preferential lien; and, for the preservation of this lien, it was not necessary under the Alabama statute (Code Ala. 1907, § 4157) for the plaintiff to have his judgment recorded in Geneva county after the property was removed there from Houston county.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. ⊂=196.]

2. BANKRUPTCY ⊂=211—JURISDICTION—STATE AND BANKRUPTCY COURT—PROPERTY SUBJECT TO PREFERENTIAL LIEN.

The rule that the court which first obtains rightful jurisdiction over a subject-matter is not to be interfered with by any other court is applicable in the court of bankruptcy, and where a state court had first obtained rightful jurisdiction over a subject-matter through liens created by the rendition and recording of judgments of such court more than four months prior to the filing of the petition in bankruptcy by the defendants in the state court, and where it was shown that such judicial liens aggregated $2,186.74 (besides interest), and that the value of the property levied on by the sheriff in the enforcement of the liens was only $1,500, and that the sheriff was pursuing his lawful right and duty in levying the executions, such property, taken from the sheriff by a receiver in bankruptcy, will be turned back into the custody of the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. ⊂=211; Courts, Cent. Dig. § 1331.]

3. BANKRUPTCY ⊂= 194—PROPERTY SUBJECT TO PREFERENTIAL LIEN—VALIDITY OF ORDER.

An order of a referee in bankruptcy, directing a receiver in bankruptcy to take charge of and administer, as a part of the assets of a bankrupt estate, certain property upon which another, more than four months before the filing of the petition in bankruptcy, had obtained a valid judicial lien in the state court, was improvidently granted; and, on timely application, such order will be vacated, and the property turned back into the custody of the officer of the state court, from whom it was taken by the receiver in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 287, 289; Dec. Dig. ⊂=194.]

4. BANKRUPTCY ⊂=211—PROPERTY SUBJECT TO JUDICIAL LIEN—CLAIMS OF THIRD PERSONS—DETERMINATION.

In such case the court will not consider the suggestion that parties other than the claimants in the bankruptcy court (plaintiffs in the state court) have made claims to certain fixtures, a part of the goods levied on, while in the custody of the receiver in bankruptcy, but will leave such third parties to whatever rights they may have by demand upon the sheriff, or other appropriate action in the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. ⊂=211; Courts, Cent. Dig. § 1331.]

In Bankruptcy. In the matter of Pilcher & Son, bankrupts. On petition of R. L. Towles and others for an order vacating order of referee. Ordered according to opinion.

Farmer & Farmer, of Dothan, Ala., for claimants.
Sollie & Sollie, of Ozark, Ala., for receiver in bankruptcy.

HENRY D. CLAYTON, District Judge. This cause, coming on to be heard, is submitted for order and decree upon the petition of E. R. Porter and others for an order vacating the order of the referee, heretofore made, authorizing and directing R. L. Towles, as the receiver appointed in the above bankruptcy matter, to take charge of and administer, as a part of the assets of the bankrupt estate, a certain stock of goods, wares, merchandise, store furniture, etc., located in the town of Hacoda, in Geneva county, Ala.

It appears that E. R. Porter Company on May 1, 1915, obtained a judgment in the circuit court of Houston county, Ala., against the bankrupts in this case, for the sum of $609.03; that the Dothan Grocery Company on said May 1, 1915, also obtained a judgment against the bankrupts, defendants in the state court, for the sum of $1,547.71; that on May 3, 1915, W. A. Brown, as clerk of the circuit court of Houston county, issued certificates of judgments—one in favor of E. R. Porter and against the defendants, bankrupts here, and the other in favor of said Dothan Grocery Company and against the bankrupts, as provided by section 4156, Code of Ala. 1907—and that said certificates of judgments were filed in the office of the judge of probate of said Houston county on May 4, 1915, and were duly recorded; that the recording of said judgments in the office of the judge of probate of Houston county created a lien under the laws of Alabama on all the property of the defendants, later the bankrupts in this case, located in Houston county, which was subject to levy and sale under execution; that on the date of the recording of said certificates of judgments the bankrupts owned a stock of goods, wares, merchandise, fixtures, etc., located in the city of Dothan, Houston county, Ala.; that on or about July 27, 1915, the said stock of goods, fixtures, etc., were removed by the said bankrupts from said city of Dothan, Houston county, Ala., to the town of Hacoda, in Geneva county, Ala.; that on October 21, 1915, the said certificates of judgments issued by the said W. A. Brown, as clerk of the circuit court of Houston county, Ala., were recorded in the office of the judge of probate of Geneva county, Ala.; that on October 13, 1915, executions, one in favor of E. R. Porter Company and against the bankrupts, and another in favor of Dothan Grocery Company and against the bankrupts here, were issued by said W. A. Brown, clerk aforesaid, and placed in the hands of G. W. Griffin, sheriff of Geneva county, and levy under said executions was made by said sheriff on the said stock of goods, wares, merchandise, fixtures, etc., belonging to the said bankrupts, defendants in the state court, located at Hacoda, in Geneva county, Ala.; that on or about the 1st day of November, 1915, two or three days before said stock of goods, fixtures, etc., were to be sold by the said sheriff of Geneva county under the said executions, a voluntary petition in bankruptcy was filed by the said Pilcher & Son, W. C. Pilcher, and Clay Pilcher, and on said date the referee appointed one R. L. Towles as receiver; that said Towles, as such receiver, went to Hacoda and there

seized and took possession of the said stock of goods, fixtures, etc.; that the inventory cost of said property, so seized by the sheriff and receiver, amounted to the sum of about $2,900; and that all of said property is not worth more than the sum of $1,500.

Upon this hearing the facts set forth in the petition filed by E. R. Porter Company and others were established to the satisfaction of the court; indeed, they were admitted in the argument, by the attorney for the receiver, to be true.

[1] 1. Thus it is established that the claimants have valid and subsisting preferential liens on this property—judgment liens—and were attempting to enforce those liens by levy of executions from the state court upon the stock of goods here involved, when the same were taken by the receiver of this court from the sheriff. Section 4157, Code of Ala. 1907, relating to judgment liens, is in the following language:

"Every judgment or decree, when filed as provided in the preceding section, shall be a lien on all the property of the defendant in the county where filed, which is subject to levy and sale under execution, and such lien shall continue for ten years from the date of such judgment. The filing of the judgment or decree shall be notice to all persons of the existence of the lien."

And the Alabama statute, relating to the levy of executions for the enforcement of judgments, is in the following language:

"The party in whose favor a judgment is rendered, whether for debt, damages, or costs, for the satisfaction thereof, may, within a year thereafter, have a writ of fieri facias against the lands and goods of the party against whom such judgment is rendered; and when the judgment is for specific property, or the alternate value, or for the possession of lands, appropriate writs of execution may issue for the satisfaction thereof;" etc. Code 1907, § 4077.

And the judicial liens in this case were created or obtained prior to four months before the filing of the voluntary petition in bankruptcy. Of course, by the removal of the stock of goods, fixtures, etc., from the county of Houston to the adjoining county of Geneva, the judgment liens of the claimants were not invalidated, and it was not necessary for the claimants to have recorded their judgments in the county of Geneva (which they did) in order to preserve their liens upon the property. Street, Ex'r, v. Duncan, 117 Ala. 572, 23 South. 523; McMahan v. Green, 12 Ala. 71, 73, 46 Am. Dec. 242.

It is settled law that liens obtained by a judgment prior to four months before bankruptcy are valid, and are so recognized by the bankruptcy court. 1 Loveland on Bankr. 926, and authorities cited in note 14. It is equally settled law that the statute of the state upon which the lien depends will govern. Loveland on Bankr. 928, 929. See footnote 19. As it was said in Rankin v. Scott, 12 Wheat. 179, 6 L. Ed. 592:

"The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant."

See, also, Howard v. Railroad Co., 101 U. S. 837, 845, 25 L. Ed. 1081.

[2] 2. The rule that the court which first obtains rightful jurisdiction over a subject-matter is not to be interfered with by any other court is applicable in this case, because the state court had first acquired rightful jurisdiction over the subject-matter by the liens created by the judgments obtained, and recorded as provided by the Alabama statutes, four months prior to the filing of the voluntary petition in bankruptcy in this court. In Blair v. Brailey, 221 Fed. 1, 136 C. C. A. 524, by Walker, Circuit Judge, it is said:

"The general rule prevails to prevent any interference even by a court of bankruptcy with another court's control over property which rightfully has been subjected to its jurisdiction, if that jurisdiction attached more than four months before the petition in bankruptcy was filed. Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128. It is not 'all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent,' which, under the provisions of section 67 of the Bankruptcy Act [Act July 1, 1898, c. 541, 30 Stat. 564 (Comp. St. 1913, § 9651)], are to be deemed null and void, but only such levies, judgments, etc., so obtained 'at any time within four months prior to the filing of a petition in bankruptcy.' Where a valid judicial lien or levy has been secured or made four months or more prior to the bankruptcy, proceedings to enforce the same may be prosecuted to the end. Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; In re Koslowski (D. C.) 153 Fed. 823."

And further it is said:

"When a court having jurisdiction of the parties and the subject-matter has taken property into its possession, such property is thereby withdrawn from the jurisdiction of all other courts, and the court so in possession has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property, though that court is not one of bankruptcy, and though the property so in its possession is part of the estate of one who was adjudged a bankrupt on a petition filed in a court of bankruptcy after the first mentioned court's possession was acquired. Murphy v. John Hofman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327; Wabash Railroad v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379; In re Antigo Screen Co., 123 Fed. 249, 59 C. C. A. 284."

And in the same case, it was also said:

"* * * Two of the prime aims of the Bankruptcy Act are to make provisions for the application to the satisfaction of an insolvent's debts of so much of his property as is subject to be so applied, and to afford him the opportunity, conditioned upon his compliance with the requirements of the act, of securing a discharge from the liabilities which his debts imposed. Congress took notice of the fact that courts without bankruptcy jurisdiction may be, and constantly are, resorted to for the enforcement of the demands of creditors, and specified the extent to which what may have been done to that end in such other courts should be avoided by an adjudication of bankruptcy. So far as the first above mentioned object of the Bankruptcy Act is concerned, the jurisdiction of the court of bankruptcy is not made so paramount that an adjudication of bankruptcy terminates the right of another court to continue to administer property which, four months or more before the filing of the petition in bankruptcy, had been brought within its grasp under its process for the satisfaction of demands duly asserted against the party subsequently adjudged bankrupt. As has been shown above, the act withholds from the court of bankruptcy the right to draw to itself the administration of property * * * which is so situated. We are referred to the ruling made in Bank of Andrews v. Gudger, 212 Fed. 49, 128 C. C. A. 505, as supporting a conclusion at variance with the one just stated. It was held in that case that the right of the court of bankruptcy to the custody and administration of property of the bankrupt was superior to that of another court

which had acquired possession of the property by proceedings to which no creditor of the bankrupt was a party, the rights in the property of all who were parties to the suit being plainly subordinate to those of the bankrupt's creditors. In the course of the opinion * * * in that case it was said: 'Such a case is entirely apart from those cases in which a creditor has gone into the state court and established or acquired by his suit a legal or equitable lien on the property in the hands of the court four months before the filing of the petition in bankruptcy. In such cases the courts have held that the creditor is entitled to enforce his lien in the first court that acquired jurisdiction.' Bank of Andrews v. Gudger, 212 Fed. 54, 128 C. C. A. 510."

[3] 3. It therefore appears to me that the order of the referee taking the stock of goods, fixtures, etc., out of the hands of the sheriff and putting the same into the possession of the receiver in bankruptcy was improvidently granted, must be vacated, and the property turned back to the sheriff, who was in the rightful custody of it. The application to vacate such order of the referee should be timely made. Here the application was so made. The order of the referee was not entered until November 1, 1915, the receiver had done nothing with respect to the property except to care for it, and the application to vacate the order was filed November 22, 1915.

It is clear that the judgment liens on the property were created more than four months prior to the filing of the petition in bankruptcy; that the liens aggregate $2,186.74, besides interest; that the stock of goods and fixtures are only of the value of about $1,500, $686.74 less than the amount of the judgment liens; and that the sheriff was pursuing his lawful right and duty in levying the executions for the enforcement of such prior judgment liens.

[4] 4. It was insisted in the argument that certain parties, other than the claimants here, had made claims in the above bankruptcy matter to certain fixtures or furniture, a part of said stock of goods, which the sheriff advertised for sale under the executions issued pursuant to said judgments, and that this court ought now to pass upon such claims. It is manifest that the action of this court is not requisite in that regard. Those other claims, which have just been mentioned, can be asserted, if valid, by demand upon the sheriff, or by other appropriate action in the state court.

The order will be accordingly entered.

JEBSEN v. A CARGO OF HEMP.

(District Court, D. Massachusetts. June 9, 1915.)

No. 995.

1. SHIPPING ⊂=154—CARRIAGE OF GOODS—LIEN FOR FREIGHT.
A ship has a lien for freight on the cargo rightfully aboard, whether or not she is under charter, and without regard to whether the owner or a charterer is entitled to the benefit of the lien.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 516–520; Dec. Dig. ⊂=154.]

2. SHIPPING ⊂=49—TIME CHARTER—RESERVATION OF LIEN ON CARGOES.
Libelant, as owner, let a steamship by a time charter, which was not a demise of the vessel, but required libelant to man, victual and

navigate her and keep her in effective condition and repair. The charter provided that the hire should be paid monthly in advance, gave the charterer the option to sublet, and authorized the charterer or subcharterer to load with such cargo, at such rates of freight, and for such ports, within specified limits, as he saw fit, and to require the captain to sign bills of lading therefor. It further provided that "the owner shall have a lien on all cargoes for freight or charter money due under this charter." The charterer sublet by a similar time charter in which it was named as "time charterer." The subcharterer paid the charterer, but the latter did not pay the owner, who thereupon libeled a cargo being carried for hire by the subcharterer. *Held*, that the charter left libelant in possession during the charter term, with the right to the benefit of the ship's lien on all cargoes carried, whether or not the charterer had any interest therein; that, as against the subcharterer, which took subject to such right, the lien was enforceable, although the subcharterer had paid in full under its own charter; but that, as against the owners of the cargo, the lien was enforceable only to the extent of unpaid freight.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 187–200, 202; Dec. Dig. ⟸49.]

3. SHIPPING ⟸49—TIME CHARTER—SUBCHARTER—OWNER'S LIEN FOR CHARTER HIRE—"ALL CARGOES."

A time charter of a ship containing a provision giving the owner a lien on "all cargoes" for charter hire, with a further provision giving the charterer the right to sublet, has the effect of giving the owner the benefit of the ship's maritime lien for freight on all cargoes, whether carried by the charterer or a subcharterer, although such right might otherwise be deemed to have been waived by other provisions, such as one requiring payment of the charter hire at stated times in advance.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 187–200, 202; Dec. Dig. ⟸49.]

4. SHIPPING ⟸49—TIME CHARTER—SUBCHARTER—OWNER'S LIEN FOR CHARTER HIRE.

Where such charter, however, authorizes the charterer or subcharterer to load the ship with such cargoes at such rates of freight as may be agreed upon with shippers, and to require the captain to sign bills of lading therefor, the owner's lien is limited to the amount of freight so agreed upon and which remains unpaid by the shipper.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 187–200, 202; Dec. Dig. ⟸49.]

In Admiralty. Suit by Wilhelm Jebsen against a cargo of hemp ex steamship Symra and the freight thereon; the Munson Steamship Line, claimant. Decree for libelant.

Convers & Kirlin, of New York City, and Blodgett, Jones, Burnham & Bingham, of Boston, Mass. (John M. Woolsey, of New York City, of counsel), for libelant.

Haight, Sandford & Smith, of New York City (John W. Griffin, of New York City, of counsel), for claimant.

MORTON, District Judge. This is a libel by the owner of the steamship Symra against the cargo and freight, to recover the balance alleged to be due for the hire of the steamer under a charter to the Canadian-Venezuelan Ore Company. I shall speak of that company as the Ore Company, and of the charter to it as the charter.

The charter was on what is known as the government form, and was "for the time of about thirty-six calendar months from the day of her

[the steamship's] delivery" to the charterers. The charterers were to have the disposal of "the whole reach of the vessel's holds, decks, and usual places of loading and passenger accommodations of the ship, * * * reserving only proper and sufficient space for the ship's officers, crew, tackle, apparel, furniture, provisions, and stores." The libelant was to man, victual, and navigate the vessel, and keep "her in a thoroughly efficient state in hull and machinery for the service." The charterers were "to pay for the use and hire of said vessel at the rate of ten hundred and fifty pounds (£1,050) sterling per calendar month," "payment to be made in cash monthly in advance at New York."

It was further provided that "the owner shall have a lien upon all cargoes for freight or charter money due under the charter." The charterers were "to have the option of subletting the steamer." The captain was to be under the orders and directions of the Ore Company "as regards employment, agency, or other arrangements," and was to sign bills of lading at rates of freight as directed by the Ore Company; and the Ore Company was to "indemnify the owner for all consequences or liabilities that may arise from the captain so doing." The charter also contained numerous other provisions.

The Ore Company sublet the steamer to the Munson Line, the claimant, under a charter similar to that from the libelant to the Ore Company. In the charter to the Munson Line, the Ore Company were described as "time charterers" of the steamship. The Munson Line loaded the vessel at Progresso, Mexico, for Plymouth, Mass., with a cargo of hemp consigned to Henry W. Peabody & Co. The rate of freight was agreed upon between the Munson Line and Peabody & Co. The bill of lading was on a Munson Line form, and was signed by the captain as master. The freight was payable on delivery.

Before loading with the hemp at Progresso, the vessel had been at or near Havana, Cuba, with a cargo of coal shipped under a Munson Line bill of lading, on which the freight was also payable on delivery. There was at that time a balance due to the libelant for the hire of the steamer, and counsel for the libelant threatened to enforce by proceedings at Havana the lien for such balance which he claimed the libelant had under the charter on the cargo of coal and freight. Thereupon counsel for the Munson Line gave an undertaking which was satisfactory to counsel for the libelant, and the steamer was allowed to proceed on her voyage. Subsequently a stipulation was entered into between the parties, the object of which was and is to put the parties, without prejudice to the rights of either, in the same position as they would have been in, if the cargo here in question had been in the vessel's hold with the freight unpaid at the time of the filing of the libel, and both had been duly attached.

The Munson Line has accounted for and paid over to the Ore Company, directly and through garnishee proceedings in New York instituted by the libelant, all that was due from it to that company for the hire of the steamer under the subcharter from the Ore Company to it. It does not appear, if material, whether these payments were before or after notice was given by the libelant of his intention to enforce his alleged lien; and no question has been raised as to the effect

one way or the other of such payments. The Ore Company having defaulted in its payments to the owner, he seeks by these proceedings to recover the balance due from it to him, out of the freight money agreed to be paid by Peabody & Co. to the Munson Line. In effect he contends that he is entitled to have his loss, from the charterer's failure to pay, made good at the expense of the subcharterer; in other words, that under the terms of the charter and subcharter his right to the freight money in question is superior to that of the Munson Line.

[1] A ship has a lien on the cargo rightfully on board for the freight or carriage. This is the general rule. It is not necessary now to inquire into the origin of it. See Wellman v. Morse, 76 Fed. 573, 22 C. C. A. 318. It is ancient and well-settled law in admiralty, and is so treated by the parties. So far as the lien itself is concerned, the fact that the ship is under a charter is immaterial. As to the person, who is or may be entitled to the benefit of the lien, whether the owner or the subcharterer, there may be a question.

[2] Whether the charterer should be regarded in the present case as the owner pro hac vice depends on the terms of the charter party. It is plain, I think, that the charter party did not constitute a demise of the ship, and that, therefore, neither the charterer nor the subcharterer can be regarded as the owner for the time being. The Volunteer, 1 Sumn. 551 [Fed. Cas. No. 16,991]; Reed v. United States, 11 Wall. 591, 20 L. Ed. 220; United States v. Shea, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403; Clyde Commercial S. S. Co. v. West India S. S. Co., 169 Fed. 275, 94 C. C. A. 551; Dunlop S. S. Co. v. Tweedie Trading Co., 178 Fed. 673, 102 C. C. A. 173; The Volund, 181 Fed. 643, 666, 104 C. C. A. 373. The claimant has not, indeed, contended that it did, though if that were the case it would seem to furnish a short and easy answer to the libelant's demands. What was let was the cargo and passenger carrying capacity of the vessel, not the vessel itself. That remained in the possession of the libelant, and was victualed, manned, navigated, and managed by him. The captain was subject to "the orders and directions of the charterers as regard employment, agency, or other arrangements," but not otherwise. This provision was explained by Mr. Robinson, manager of the operating department of the Munson Line, as meaning, so far as the trade understanding of the word "employment" was concerned, the trade in which the steamer shall be employed, the ports to which she shall go, and the cargo she shall carry, and, so far as the word "agency" was concerned, the agents to whom she should be consigned at the ports to which she traded. No definition was given of the words "other arrangements"; but their significance must correspond with the connection in which they are used.

This gave the charterers, as the charter was no doubt intended to do, such control of the ship as was necessary for the passenger and freighting business for which they chartered her, but left the ship itself in the possession and management of the libelant, with the result that he thereby had such possession of the cargo as if possession is one of the things necessary to a lien on the cargo—as it undoubtedly is—was

sufficient for that purpose. Mere possession, however, is not enough, of itself, to establish a lien. The party claiming one is bound to show that he is entitled to it under the rules prevailing in admiralty.

[3] The question then is: Has the libelant shown that he is entitled to a lien on the cargo for the balance of the charter money which is alleged to be due? And the answer to this question depends also, it seems to me, on the terms of the charter party. It was a time charter party, and contained provisions as to the time and place of payment of the charter money, which were inconsistent with, and would operate as a constructive waiver of, a lien (Raymond v. Tyson, 17 How. 53, 15 L. Ed. 47), unless prevented from so doing by the provision that "the owner shall have a lien on all cargoes for freight or charter money due under this charter." The claimant contends that the lien thus provided for is limited to cargoes shipped by the charterer. But the language is "all cargoes"; and the provision as to subletting shows that it was within the contemplation of the parties that other cargoes than those belonging to the charterer might be carried. It needs no argument to show that the construction of the clause cannot be affected by the expectation of the parties that the vessel would in fact be used to transport ore and coal for the Ore Company. As Mr. Richards, the manager of the ship brokerage department of Bowring & Co., testified, the Ore Company had the right to use the vessel in any other trade.

Not only is there nothing in the charter limiting in terms the cargoes on which a lien was reserved to those shipped by the charterer, but I think that such a construction would not be warranted as matter of law. It is said, in American Steel Barge Co. v. Chesapeake & O. Coal Co., 115 Fed. 669, 53 C. C. A. 301, of the clause similar to this:

"Neither the origin nor the history of the clause * * * can be clearly traced. * * * That, however, it was not framed simply with reference to furnishing a lien on a cargo belonging to a charterer, seems to follow from Paul v. Birch, 2 Atk. 621, where, as early as 1743, it was held sufficient to bind to the owner of the ship a cargo in which the charterer had no interest."

And in Portland Flouring Mills v. Portland Steamship Co. (D. C.) 145 Fed. 687, it was held that the lien referred to in a similar clause in a bill of lading was the maritime lien as understood in the jurisprudence of the United States, and that the effect of it was or might be to preserve the lien where it might otherwise be deemed to be waived by other provisions relating to the time and manner of paying the freight. Whatever, therefore, may be the true ground on which the provision rests, it is clear, it seems to me, that in the present case it gives to the libelant the benefit of the lien which the ship has for its carriage on the cargo as security for the payment of the charter money.

[4] But it does not follow that the libelant is entitled to enforce the lien to the full extent of the balance due for charter money, regardless of the amount agreed upon for freight between the Munson Line and Peabody & Co. and still unpaid. The charter authorizes the charterer or subcharterer, as the case may be, to load the vessel with such cargo, at such rates of freight, for such ports within the specified limits, as he sees fit or may be able to do, and to require the captain to sign

bills of lading therefor, with the result that the libelant can enforce his lien only to the extent of the freight agreed upon between the charterer or subcharterer and the shipper; and if the freight has been paid in whole or in part in good faith by the shipper to the charterer or subcharterer without actual notice on the part of the shipper of the claim of the libelant, then the lien can be enforced only to the extent to which, if at all, the freight remains unpaid. American Steel Barge Co. v. Chesapeake & O. Coal Agency, supra, 115 Fed. 672, 53 C. C. A. 301, and cases cited. In the present case no part of the freight had been paid, and the owner, having possession through the captain of the ship and the cargo, could direct the captain to refuse to deliver the cargo, except upon payment of the freight money to him, and upon receiving the money to apply it pro tanto to the payment of so much of the charter money as was due or unpaid, accounting for and paying over any balance to the Munson Line; or the owner could bring a libel in rem (as he has done) against the cargo and freight. It is true, as the Munson Line strongly contends, that the contract for the carriage of the goods was made by it with the shipper, and that in signing the bill of lading the captain acted as its agent, and that the freight belongs to it and is payable to it. It is true, also, that if the Ore Company were solvent and had paid the charter money as it fell due, and the shipper had for any reason failed or neglected to pay or secure the payment of the freight or tender on delivery of the cargo, the Munson Line would have been entitled to the benefit of the lien for the purpose of enforcing, as Mr. Robinson testified it would have done, the payment of the freight. But, as already observed, the Munson Line must be deemed to have taken with notice of and subject to the reservation of the lien on the cargo for the charter money due to the owner, the libelant; and the insolvency of the Ore Company, far from divesting the libelant of the lien and entitling the Munson Line by subrogation or otherwise to the benefit of it, furnishes occasion for resort by the libelant to the security afforded by the lien which he expressly reserved, and which it is not contended that he has ever done anything to waive.

The fact that the claimant has paid the Ore Company what was due from it to that company does not create an equity in its favor. The Ore Company was described in the subcharter as a "time charterer." In addition, Mr. Robinson, previously referred to, testified that he knew that the Ore Company had a time charter of the vessel and was not the owner. The Munson Line was bound, as a matter of prudent business conduct, to examine the charter of the Ore Company, and to govern itself by the provision therein reserving to the owner a lien on "all cargoes" for the charter money. See Gracie v. Palmer, 8 Wheat. 616, 5 L. Ed. 696. The payment by the Munson Line to the Ore Company must, I think, be deemed to have been made at its risk.

It follows that the libelant is entitled to maintain and enforce the lien on the cargo for the purpose of enabling him to recover the charter money due from the Ore Company. See The Albert Dumois (D. C.) 54 Fed. 529; Wehner v. Dene Steam Shipping Company, Ltd., [1905] 2 K. B. 92. As incidental to that, he has a right to pursue the freight,

not because he has a lien upon it, but because it represents the sum to be paid for the use of the ship in the carriage of the cargo, for which he has a lien on the cargo. He is entitled to be compensated, either by the payment of the charter money, which represents the use of the ship, or, failing that, by resort to the sum agreed to be paid by the shippers as freight.

The remaining question relates to the amount which the libelant is entitled to recover. It is in substance agreed that that is $1,635.62, with interest and costs, unless that amount should be proportionately reduced by the withdrawal of the vessel by the libelant from the charter to the Ore Company on February 2, 1914, at 3 p. m., as alleged by the claimant, instead of on February 5th, as alleged by the libelant. The charter provided that, on default of the Ore Company in the payment of the charter money when due, the libelant could withdraw the vessel from its service. There was a monthly payment due from the Ore Company to the libelant on January 5, 1914, for the month ending February 5th, which was not paid when due. It is the balance of this payment which the plaintiff seeks to recover.

According to the deposition of Capt. Handeland, the master of the ship, she arrived at Plymouth on January 28, 1914, with a cargo of hemp from Progresso, and commenced to discharge at 11 o'clock a. m., and finished discharging at 5 p. m. on the 29th, the next day, when the ship was redelivered by the Munson Line, the charterers of that voyage, to the Ore Company. The vessel sailed from Plymouth for New York February 2d at three p. m., and it is a fair inference from the deposition of Capt. Handeland that he sailed pursuant to orders which he had from his owners to proceed to New York for orders. On February 4th a formal notice of withdrawal from the charter for nonpayment of the last monthly installment was served on the Ore Company by Bowring & Co. of New York, acting for the owner. This recited that:

> The "steamer is now at Plymouth, having completed the discharge of her outward cargo there, and thus ended her charter with the Munson Steamship Company, and, as it becomes necessary to arrange further employment, and inasmuch as you have not paid the last installment of hire due, and have advised us that you cannot continue the vessel under your charter and continue to pay hire for her, the owners notify us to inform you that they accordingly withdraw the boat immediately from the charter with you. * * *"

Mr. Richards, referred to above, testified that the vessel was withdrawn February 5th. The recital in the notice that the "steamer is now at Plymouth," on which the notice was based, was manifestly an error. Although the notice was not given until after the steamer had left Plymouth, it is plain, I think, that the intention was to withdraw the steamer from the charter when she had finished discharging her cargo at Plymouth, and had thus terminated her charter from the Ore Company to the Munson Line. When the captain sailed from Plymouth to New York on February 2d, pursuant to orders from his owners, as he deposed, the vessel was in fact withdrawn from the service of the Ore Company. It follows that the sum claimed should be proportionately reduced.

Decree accordingly.

MARCY v. GUANAJUATO DEVELOPMENT CO. et al.

(District Court, D. New Jersey. December 1, 1915.)

1. CORPORATIONS ⟸430—VOIDABLE CONTRACTS—PARTICIPATION OF DIRECTORS IN BENEFITS.

A contract of a corporation, in the benefit of which one or more of its directors participates without the consent of the corporation, is voidable at the option of the latter, exercised within a reasonable time.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1660–1663; Dec. Dig. ⟸430.]

2. CORPORATIONS ⟸318—CONTRACTS BETWEEN CORPORATIONS HAVING COMMON DIRECTORS—VALIDITY.

The fact that the same persons are members of the boards of directors of two corporations does not give a dissenting stockholder an arbitrary right to avoid a transaction between them, but does give him the right to subject it to the scrutiny of the court, and casts upon the corporation or the directors concerned the burden of showing that the transaction is fair and absolutely free from fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893–1898; Dec. Dig. ⟸318.]

3. CORPORATIONS ⟸487—LIABILITY IN RESPECT TO CONTRACTS ULTRA VIRES.

Under the rule approved by the Supreme Court of the United States, money or property obtained by a corporation through an ultra vires contract may be recovered back; but the corporation is not liable, where the money or property was received by a third party, although incidentally benefited thereby.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893–1898; Dec. Dig. ⟸487.]

4. CORPORATIONS ⟸318—TRANSACTIONS BETWEEN—VALIDITY—COMMON DIRECTORS.

A note given by one corporation to another, and secured by a pledge of collateral, *held* based on a valid indebtedness, and valid; and the action of the creditor in selling the collateral also *held* within its rights, and not impeachable by stockholders of the debtor corporation, on the ground that the two corporations had common directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1363, 1364; Dec. Dig. ⟸318.]

In Equity. Suit by Henry O. Marcy against the Guanajuato Development Company and the Securities Corporation, Limited. On final hearing. Decree for defendants.

Crocker & Wickes, of New York City, for plaintiff.

Decker, Allen & Storm, of New York City, for defendant Guanajuato Development Co.

HAIGHT, District Judge. The plaintiff sues, in a representative capacity, as a stockholder of the defendant the Securities Corporation, Limited (which will hereafter, for convenience, be referred to as "Securities Corporation"), to set aside and cancel a demand promissory note given by it to the defendant Guanajuato Development Company (which will hereafter be referred to as "Development") dated September 1, 1911, for $350,634.08; a sale made by Development of the securities pledged as collateral for the payment of the note; an assignment of a claim of Securities Corporation against a corporation known

as the "Refugio Syndicate"; for an accounting; and an injunction against the Development Company voting certain of the stock so sold. At the time the transactions complained of took place, seven of the nine directors of each company were the same persons, and the personnel of the executive committee of each board was the same. This is the main ground upon which the plaintiff rests his right to recover in this action. He, of course, contends that the actions complained of were detrimental to Securities Corporation. It is necessary, therefore, to determine at the outset the rule which governs courts of equity in scrutinizing and passing upon transactions between corporations having boards of directors each composed, in part, of the same persons.

[1] It is the settled rule in New Jersey (the place of incorporation of both of these companies) that a contract of a company, in the benefit of which one or more of its directors participates, without the consent of the cestui que trust, is voidable, at the option of the latter, exercised within a reasonable time. Stewart v. Lehigh Valley R. R. Co., 38 N. J. Law, 505; United States Steel Corp'n v. Hodge, 64 N. J. Eq. 807, 54 Atl. 1, 60 L. R. A. 742. The same rule has the sanction of the United States Supreme Court (Thomas v. Brownsville, etc., R. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018), and is supported by the great weight of authority. There is, however, no evidence in this case that any of the common directors had any personal beneficial interest in any of the transactions complained of. This rule, however, has not been generally applied to transactions between corporations, where the only vice is the identity of one or more members of the respective boards of directors.

[2] Without attempting to review the authorities on this point, I think that the rule which is supported, both by reason and the weight of authority, is that the presence of directors on both sides of a transaction does not give a dissenting stockholder an arbitrary right to avoid the transaction, but does give him the right to subject it to the scrutiny of the court, and casts upon the corporation or directors concerned the burden of showing that the transaction is fair and absolutely free from fraud. Robotham v. Prudential Insurance Co., 64 N. J. Eq. 673, 709, 53 Atl. 842; Leavenworth v. Chicago, etc., R. Co., 134 U. S. 688, 707, 10 Sup. Ct. 708, 33 L. Ed. 1064; Geddes v. Anaconda Copper Mining Co., 197 Fed. 860, 865 (D. C. Montana); Smith v. Chase & Baker Piano Mfg. Co., 197 Fed. 466 (D. C. E. D. Mich.); Evansville, etc., Co. v. Bank of Commerce, 144 Ind. 34, 42 N. E. 1097; Gasquet v. Fidelity Trust & Safety Vault Co., 75 Fed. 343, 346, 21 C. C. A. 382 (C. C. A. 5th Cir.); Davidson v. Mexican Nat. R. Co., 58 Fed. 653, 663 (C. C. E. D. N. Y.). See, also, Cook on Corp'ns (7th Ed.) vol. 3, § 658, and cases there cited; Thompson on Corp'ns, vol. 7, § 8502. The transactions complained of in this suit will, therefore, be examined in the light of this rule.

The note in question was given as evidence of what was considered an indebtedness due from Securities Corporation to Development. The stocks pledged as collateral security for the payment of the note, together with an assignment of a claim of Securities Corporation against the Refugio Syndicate, constituted practically all of the assets of Securities Corporation. The debt was of long standing, and the pledged

securities of very uncertain value. If the debt was legally due and owing, there was nothing unfair or fraudulent on the part of the directors representing Development in demanding the note and security, or on the part of the same directors, representing Securities Corporation, in complying with the demand. The mere fact that there were common directors would not change the clear right of the creditor to demand, and the debtor to give, not only evidence of the indebtedness, but collateral security for its payment. The stockholders of Securities Corporation were not entitled to any greater rights than they would have had, had the directors of Securities Corporation been entirely independent. If they had been independent, it is hardly conceivable that they would not have given the note and the security, if demanded; nor is it conceivable that the directors of Development, when the existence of an indebtedness of that size and the financial condition of Securities Corporation was brought to their attention, would not have demanded the note and the security. If their demand had not been complied with they would have been at liberty to and probably would have instituted suit, recovered judgment, and subjected the property of the debtor to satisfaction of the judgment. Although there does not appear to have been any investigation by the directors at the time the note was given as to whether the alleged indebtedness was correct, other than the reports in respect thereto made by the financial officers of the Securities Corporation, still I think that Development has met the burden cast upon it by the rule above stated, which required them to show the existence of an enforceable indebtedness.

It would serve no useful purpose here, and would unduly lengthen this opinion, to discuss at length the evidence in respect to the indebtedness. I have carefully examined it, and reached the conclusion that the Development Company has established the existence of the indebtedness and that it could have been enforced in an action at law. A part of this indebtedness represents moneys loaned by Development to Securities Corporation directly, and moneys of Development used by Securities Corporation for its own purposes. Moneys were also advanced by Development for and used in connection with a project known as the Refugio-Ore Grande Mines matter, and these moneys were charged on Development's books to Securities Corporation and credited on the latter's books to Development. The circumstances under which these payments were made were, briefly, as follows:

Securities Corporation had entered into a contract with the Refugio Syndicate (which, in turn, had secured, by contract, certain rights from another corporation, known as the Ore Grande Mines Company) to sell certain of the stock of the Ore Grande Mines Company. As a consideration for selling this stock Securities Corporation was to receive a cash commission on the sales, a large amount of common and preferred stock of the Ore Grande Mines Company, and the cancellation of an indebtedness which Securities Corporation owed to the Refugio Syndicate. Securities Corporation guaranteed to sell $800,000 par value of such stock. The moneys collected on the sales of stock, after deducting the cash commissions, were to be remitted by Securities

Corporation to Refugio, which in turn was to apply part of them in liquidation of obligations necessary to secure the title to certain of the properties of the Ore Grande Mines Company and certain other obligations. Securities Corporation did sell a considerable amount of the Ore Grande stock, but did not remit to Refugio all of the moneys collected on such sales which it was obligated to remit. A large part of the moneys necessary to discharge the above-mentioned obligations and to operate the Ore Grande properties, or get them in condition to operate, was advanced by Development and charged to Securities Corporation. These advances were made at the direction of the officers of Securities Corporation, who were also officers of Development.

I think it clear that some part of the indebtedness of Securities Corporation to Development, which went to make up the amount of the note in question, represents moneys advanced by Development in the Ore Grande Mines matter in excess of the moneys which Securities Corporation was under obligation to remit to Refugio; but the amount thereof is not entirely clear, and I think that only a careful audit by an expert accountant could definitely fix it. If I were convinced that Development could not legally recover this excess from Securities Corporation, I think that the note would have to be set aside, because, if substantially all of the indebtedness which it purported to evidence was not legally enforceable, then manifestly the giving of the note was unfair, and in law, under the circumstances of this case, fraudulent. It appears satisfactorily that the greater part of the indebtedness represented by the note arose through loans made directly to Securities Corporation and moneys of Development used by Securities Corporation for its own purposes. As to these moneys there can be no doubt of Securities Corporation's legal obligation to repay them. Nor can there be any doubt of Securities Corporation's obligation to repay any moneys advanced by the Development Company on the Ore Grande project to the extent of the moneys which Securities Corporation was under an obligation to transmit to Refugio, for this would be merely the paying of Securities Corporation's debt at its request. Strictly speaking, any moneys advanced by Development for the Ore Grande project in excess of Securities Corporation's obligation to Refugio were moneys loaned to Securities Corporation.

Viewed in this light, there could be no doubt of Securities Corporation's obligation to Development for them, because the former unquestionably had the power to borrow money. But, in view of the existence of the common officers and directors, I propose to treat such excess as if the moneys were advanced by Development to Ore Grande, and the payment thereof was guaranteed or assumed by Securities Corporation. I do this because, as there were common directors and officers, Development must be charged with notice when the moneys which were being advanced by it for Ore Grande exceeded the obligation of Securities Corporation to Refugio, and that advances in excess thereof were not really loans to Securities Corporation, but rather loans to Ore Grande or Refugio. The question then arises whether, as to such excess, if a suit had been instituted by Development against Securities Corporation to recover it, the latter could have successfully interposed the defense that the guaranteeing or assuming of such loans

to Ore Grande or Refugio was beyond the corporate power of Securities Corporation. During all the time that these advances were being made, Securities Corporation, Refugio, and the Ore Grande Company were practically without funds or convertible assets, but Development was in receipt of a considerable income. The latter derived no benefit from the advances to Ore Grande, but Securities Corporation did. It was of the utmost importance to Securities Corporation that payments, necessary to be made in order to secure title to the properties of the Ore Grande Mines Company, should be made when due, and that other moneys should be expended on behalf of the Ore Grande Mines Company, not only in order to effect the sale of the latter's stock, and thereby earn its (Securities') commission and enable it to fulfill its guaranty, but to make the stock of Ore Grande which Securities Corporation had acquired by virtue of its contract with Refugio, of any value whatever. Neither Refugio nor Ore Grande was in a position to advance these moneys, nor, for that matter, was Securities Corporation. Consequently, all companies being controlled by the same persons, resort was had to the funds of Development. Under these circumstances, it would seem unjust to deprive the stockholders of Development of moneys which were in reality advanced for the benefit of Securities Corporation, and which advancement the domination of Development by Securities had made possible.

[3] But, notwithstanding this, if it be assumed that the guaranty or assumption of these excess advances by Securities Corporation was ultra vires, I think that Securities Corporation could have availed itself of such a defense. In reaching this conclusion, I have not felt at liberty to follow the rule adopted by the courts of New Jersey, to the effect that a corporation is estopped to set up the plea of ultra vires with respect to a transaction for which the corporation has received the consideration, where the status quo ante cannot be restored (Camden & Atlantic R. R. Co. v. Mays Landing R. R. Co., 48 N. J. Law, 530, 7 Atl. 523; Chapman v. Iron Clad Rheostat Co., 62 N. J. Law, 497, 41 Atl. 690; Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 61 Atl. 167, affirmed 71 N. J. Eq. 304, 71 Atl. 1135; Camden Trust Co. v. Citizens' Cold Storage Co., 69 N. J. Eq. 718, 61 Atl. 529; Whitehead v. American Lamp & Brass Co., 70 N. J. Eq. 581, 62 Atl. 554), although this rule is said to be supported by the weight of authority (Thompson on Corporations, vol. 7, §§ 8321 and 8322). My reason for declining to follow that rule is because it has been disapproved by the Supreme Court of the United States. Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; Union Pacific Ry. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 581, 16 Sup. Ct. 1173, 41 L. Ed. 265; McCormick v. Market Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; California Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198.

The expressions in the opinion of Mr. Justice Brewer in Eastern, etc., Ass'n v. Williamson, 189 U. S. 129, 23 Sup. Ct. 527, 47 L. Ed. 735, are but a concurrence of the Supreme Court in the statement by the state court of the law of that state. The Supreme Court, however, has, while refusing to maintain any action upon an ultra vires

contract, permitted property or money, parted with on the faith of such unlawful contract, to be recovered back, or compensation to be made for it, upon the theory of an implied contract to return or make compensation for property or money which a corporation has obtained, and which it has no right to retain. Central Transportation Co. v. Pullman's Car Co., supra; Pullman's Car Co. v. Central Transportation Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; Aldrich v. Chemical National Bank, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611; McCormick v. Market Bank, supra; Citizens' National Bank v. Appleton, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443; Rankin v. Emigh, 218 U. S. 27, 30 Sup. Ct. 672, 54 L. Ed. 915.

But this rule, as I interpret the above-cited cases, is applicable only when the corporation setting up the ultra vires contract has itself received and enjoyed the property or money, and not when it has been received and enjoyed by a third party, although the defendant corporation may have been incidentally benefited thereby. In McCormick v. Market Bank, supra, speaking of this rule, Mr. Justice Gray said that an action could not be supported "to recover anything beyond the value of what the defendant has actually received and enjoyed." In Rankin v. Emigh, supra, recovery was permitted to the extent only of the plaintiffs' property which had been received and appropriated by the bank, of which the defendant was a representative. In the later Pullman Car Case, recovery was limited to the value of property transferred to and used by the corporation setting up ultra vires. The same applies to Aldrich v. Chemical National Bank, supra.

[4] In the case at bar, the excess money was not received and used by Securities Corporation, although it was incidentally benefited by the advancement. Hence there could be no recovery by Development upon the above principle. In order to maintain an action, it would be necessary to resort to the unlawful contract. But I think that the guaranteeing or assumption of these excess advances may be properly considered, in view of the express powers of Securities Corporation, as one of its incidental powers, and hence not ultra vires, under the principle adopted by Vice Chancellor Bergen in Whitehead v. American Lamp & Brass Company, 70 N. J. Eq. 581, 62 Atl. 554, and the Court of Appeals of New York in Holmes v. Willard, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170. The only business in which Securities Corporation was engaged at the time these advances were made was promoting the Ore Grande project. It was to receive for doing so a very large compensation. Unless the moneys were advanced, the whole project must have been abandoned. This would have entailed a considerable loss to Securities Corporation, not only in rendering practically valueless the large amount of the stock of the Ore Grande Company, which it had received or was to receive by virtue of its contract with Refugio, but also would deprive it of the commissions which it hoped to earn on the sale of Ore Grande's stock. As it was handling all of the money received on the sale of stock, it would have reimbursed itself for all advances made by Development from such moneys. It was benefited proportionately by the advancement of these moneys more than any other concern. I therefore conclude that, if Develop-

ment had instituted suit to recover the indebtedness evidenced by the note, Securities Corporation could not have successfully interposed the defense of ultra vires to that part which represented moneys advanced by Development in excess of Securities Corporation's obligations to Refugio.

In February, succeeding the giving of the note, Development sold the securities pledged for its payment in accordance with the terms of the pledge, and later, having acquired a note given by Securities Corporation to a third party and the securities pledged for its payment, sold the latter. It is sought to set aside these sales. Neither the validity of the latter note nor of the pledge of the securities for its payment is questioned. If the former note and the pledge of securities for its payment were valid, clearly Development had a legal right to sell as it did. But, because of the common directors in both companies, the question arises whether, under the rule above stated, the sale was fair and free from fraud? In determining this question, the fact that the directors owed a duty to Development, as well as Securities Corporation, must not be lost sight of. They owed a duty to Development to realize upon the assets so pledged whenever, in their sound business judgment, the same was necessary to properly protect it. As directors of Securities Corporation, they owed it a duty to protect it in so far as they could; but they did not owe it any greater duty than if they had constituted an independent board of directors of Securities Corporation. The query at once arises, therefore: What could an independent board of directors have done? The indebtedness having been established, as well as the clear legal right of Development to collect the same, an independent board of directors of Securities Corporation could have done nothing more than attempt to raise money to pay the indebtedness or secure an extension. The conclusion that they could not have raised money, when the then existing state of the market as respects the stock such as Securities Corporation owned is considered, is quite inevitable. Securities Corporation owed other moneys than those due to Development, and for a period of several months a stockholders' committee endeavored to secure a loan from Development to pay the other indebtedness, as well as to secure an extension, for the payment of the debt due Development. In this they were unsuccessful.

In my judgment, it is not sufficient proof of bad faith or unfair dealing on the part of these directors to show that they, as directors of Development, had power to extend the time for the payment of the indebtedness and to postpone the sale of the assets of Securities Corporation, and that they did not do so, because I think that in this respect they owed no greater duty to Securities Corporation than if they had had no connection with it. Although there is some evidence that the assets which were sold had a potential value greatly in excess of the amount of the indebtedness, still it is quite clear that these assets brought at the sale all that they could be reasonably expected to bring in the then existing market. They were sold with full notice to the stockholders' committee of Securities Corporation, in accordance with the terms of the pledge and in the way in which stocks and bonds pledged as collateral security for indebtedness are commonly and usu-

ally sold. I cannot find in this transaction any fraudulent or unfair dealing. The most that can be said regarding it is that Development was not as lenient as it might have been.

The views here expressed regarding the note and the giving of the collateral apply equally to the assignment to Development of the indebtedness due from the Refugio Syndicate to Securities Corporation. This conclusion makes it unnecessary to consider whether the plaintiff has made sufficient efforts to secure action on the part of the corporation, in whose right he sues, to entitle him to bring this action in a representative capacity.

It follows that the bill must be dismissed.

ARNOLD et al. v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES (ARNOLD et al., Interveners).

(District Court, S. D. Iowa, C. D. September 20, 1915.)

1. INSURANCE ⟸400—LIFE POLICY—INCONTESTABLE CLAUSE.

A policy of life insurance contained a clause that "this policy becomes incontestable * * * one year from its date of issue." A statute of the state provided that misrepresentation of the age of the insured without fraud in fact should entitle the insurer only to a deduction from the amount of the policy of the difference between the premiums paid and those which would have been payable if the true age had been given, with interest. *Held*, that the incontestable clause precluded the insurer from making a defense on account of a misstatement of the age of the insured in the application, not only as to all, but to any part, of its liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1086; Dec. Dig. ⟸400.]

2. INSURANCE ⟸585—LIFE INSURANCE—BENEFICIARIES.

The beneficiaries named in a policy of life insurance, which contains no provision giving the insured authority to change the beneficiaries, are entitled to the proceeds of the policy, notwithstanding a different disposition made by the will of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1461–1468; Dec. Dig. ⟸585.]

At Law. Action by Henry A. Arnold and N. P. Christansen, executors of the will of Lois G. Stuart, deceased, against the Equitable Life Assurance Society of the United States, in which Belle J. Arnold and others intervened. Judgment against defendant, and in favor of interveners.

J. H. Ross and S. C. Kerberg, both of Audubon, Iowa, for plaintiff.

Henry & Henry, of Des Moines, Iowa, and J. M. Graham, of Audubon, Iowa, for defendant.

F. O. Hinkson, of Stuart, Iowa, W. R. Green, of Council Bluffs, Iowa, and Sullivan & Sullivan, for interveners.

WADE, District Judge. This is an action upon a policy of life insurance for $10,000 issued to Lois G. Stuart April 17, 1897, in lieu of a policy for the same amount issued October 18, 1890, which was returned to the company. This exchange of policies was made at the request of the insured in order to change the beneficiaries.

The plaintiffs are the executors of the estate of the insured, who bring this action because the insured devised the proceeds of the policy to certain persons not named therein as beneficiaries. The interveners are the beneficiaries named in the policy, and by their petition of intervention contend that the provisions of the will of the insured, changing the beneficiaries of the policy, are void and of no effect.

The defendant admits the execution of the policy, and does not deny liability thereon for a portion of the policy; but it alleges that, in the application by the insured, she represented her date of birth as December 22, 1830, when in fact she was born December 22, 1829, and because of this misstatement the defendant claims that it is only liable for the face of the policy, less the amount which would represent the difference between the premium paid and the premium which she should have paid, at her true age, which, together with interest, amounts to $1,793.79, or at most that it should be liable only for the amount of insurance which could have been purchased with the premium actually paid.

Plaintiffs and interveners contend that by the terms of the policy it is made incontestable after one year, and therefore that the defendant is liable for the full amount thereof, and cannot rely upon the partial defense pleaded. They also contend that the defendant cannot plead the misrepresentation, because of the failure to attach a copy of the application to the policy, as required by section 1741 of the Code of Iowa, and they plead a settlement effected at the end of the tontine period, and they further allege an estoppel.

[1] The policy issued contains the following statements prominently displayed thereon:

"This policy becomes incontestable, and grants freedom of residence, travel, and occupation one year from its date of issue."

"*Incontestable and 'unrestricted' after one year.*"

No question is made that these statements upon the policy form part of the contract between the parties. The application for the original policy, which was exchanged for the policy in suit, contained the following clause:

"*Incontestability.*—After two years from the date of issue, the only conditions which shall be binding upon the holder of the policy are that he shall duly pay the premiums, and observe the regulations of the society as to age and service in war. In all other respects, if the policy matures after the expiration of two years, the policy shall be *indisputable.*"

It will be observed that after the issuance of the first policy in 1890, and before the issuance of the policy in suit in 1897, the defendant company had reduced its period of incontestability to one year, and made it absolutely unconditional. At the time the policy was issued, Code, § 1813, was in force, and is as follows:

"*Misrepresentation of Age.*—In all cases where it shall appear that the age of the person insured has been misstated in the proposal, declaration or other instrument upon which any policy of life insurance has been founded or issued, then and in such case the person or company issuing such policy shall, upon the discovery of such misstatement, be permitted to demand and collect the difference of premium, if any, which would be due, with interest not to

exceed six per cent. per annum, and payable on account of the true age of the assured, from year to year, according to the rates of premium of such person or company upon which such policy was issued; or such person or company so issuing the policy may, after the decease of the assured, deduct from the amount payable by such policy the difference of premium, if any, with interest, which would so have been payable from year to year, by reason of any difference of age at time of issuance of such policy; and no other defense or deduction by such person or company issuing such policy shall be permitted, after the death of the person assured, on account of such misstatement of age of the assured, notwithstanding any warranty of such statement of age by terms of policy or otherwise, except when it be shown by the person or company insuring that the policy was procured by fraud in fact."

There is a controversy in the case as to whether the policy in suit is an Iowa contract, or New York contract; but upon this question it becomes immaterial, because there is a presumption that the New York law is the same as the law of Iowa. Born v. Home Insurance Co., 120 Iowa, 299, 94 N. W. 849; Marden v. Hotel Insurance Co., 85 Iowa, 584, 52 N. W. 509, 39 Am. St. Rep. 316; Sieverts v. National Benefit Association, 95 Iowa, 710, 64 N. W. 671.

Does the "incontestable clause" in this policy prevent the defendant from making the partial defense pleaded herein? These clauses have been uniformly upheld, and uniformly construed against the insurer. It has been seriously contended that such clauses should not be effectual as against actual fraud; but, even as to the most gross frauds, it is now well settled that the incontestable clause is effectual. One of the leading cases upon this question is Massachusetts Benefit Life Association v. Nora Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261, which reviews the authorities fully, and concludes:

"It would seem therefore to be the rule that, in regard to every matter which would have the effect of defeating or destroying the contract, the incontestable clause would be controlling, and stipulations in the policy to the contrary must yield."

In Great Western Life Insurance Co. v. Snavely, 206 Fed. 20, 124 C. C. A. 154, 46 L. R. A. (N. S.) 1056, the Circuit Court of Appeals, Ninth Circuit, says:

"The incontestable clause in the present policy is very general, excepting nothing from its scope, and by the strong current of authority precludes any defense after the expiration of one year on account of false statements, warranted to be true, although they may have been made for a fraudulent purpose. This is true as spoken of the original policy. The grounds for its support are that insurance companies, in order to obtain business, represent that they will issue policies incontestable as to certain matters after a designated period, and individuals negotiate with them on that basis. Furthermore, the clause constitutes in effect a short period of limitation, which it is perfectly competent for the parties to agree upon. While it is true that fraud vitiates all contracts, yet in contracts of the kind, where the beneficiaries are placed at a disadvantage because the dead cannot speak, it is not contrary to public policy for the parties to agree that the company shall be precluded upon the subject after some specified time, reasonable, within which to make investigation. The clause lends stability to the contract, and renders life insurance of greater value to the insured and beneficiary. The subject is exhaustively and ably discussed in Massachusetts Life Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261. See also Wright v. M. B. L. Ass'n, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; Teeter v. United Life Ins. Ass'n, 159 N. Y. 411, 54 N. E. 72; Austin v. Mutual Reserve Fund Life

Ass'n (C. C.) 132 Fed. 555; s. c., 142 Fed. 398, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064; 25 Cyc. 872."

In Wright v. Mutual Benefit Ass'n, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749, the Court of Appeals of New York, says:

"No doubt the defendant held it out as an inducement to insurance by removing the hesitation in the minds of many prudent men against paying ill-afforded premiums for a series of years, and in the end, and after the payment of premiums, the death of the insured, and the loss of his and the testimony of others, the claimant, instead of receiving the promised insurance, is met by an expensive lawsuit to determine that the insurance which the deceased has been paying for through many years has not, and never had, an existence except in name. While fraud is obnoxious, and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that, if cause be not found and charged within a reasonable and specific time, establishing the invalidity of the contract of insurance, it should thereafter be treated as valid."

In Mutual Reserve v. Austin, 142 Fed. 398, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064, the Circuit Court of Appeals, First Circuit, says:

"To free the mind of the applicant for life insurance from apprehension raised by these numerous conditions and warranties, and to assure him that his beneficiary shall have a clear and incontestable right, is the ostensible purpose of the incontestable clause. Read as an independent clause, it is a strong inducement to the applicant. A construction which reads into it as permanent provisions the very conditions which apparently it was designed to terminate makes it not only inoperative, but exceedingly deceptive."

Under the terms of the policy in suit, no one would contend that the defendant could make an absolute defense upon the ground of misrepresentation as to age, or upon any other representation or warranty. Now, if the defendant could not make a defense to the whole policy, how can it make a defense to it in part? The policy is for $10,000. The defendant denies liability for $10,000, but admits liability for a smaller sum, and its denial of liability is based upon misrepresentation in the application for insurance. It is agreed that this misrepresentation was made, but it is contended that, under the terms of the policy, such misrepresentation cannot now be taken advantage of. It will be observed that the language upon this policy is as strong as it is possible to make it:

"This policy becomes incontestable * * * one year from its date of issue."

But this was not strong enough to express the intention of the insurer. Prominently displayed upon the policy are the words:

"Incontestable and 'unrestricted' after one year."

"Incontestable" is not strong enough; it is "unrestricted"—absolutely without limit or condition. Is it possible that, under such language, the defendant reserved the right to make a partial defense, but that it bound itself not to make a defense to the entire amount. In Simpson v. Life Co., 115 N. C. 393, 20 S. E. 517, under an incontestable clause, the

court held that the defendant could not make a defense which affected only the amount. Burwell, J., says:

"The quality of incontestability could with no propriety be predicated to this contract of insurance if it was still allowed to the insurer to dispute its liability to the insured for the 'amount of the insurance.' * * * If this can be done, the policy is certainly not incontestable."

It must be borne in mind that, under the authorities, the language of the contract is to be construed most strongly against the defendant—

"and when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted." Goodwin v. Provident Co., 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411.

"The policy having been prepared by the insurers, it should be construed most strongly against them." First Nat. Bank v. Hartford Co., 95 U. S. 673, 24 L. Ed. 563.

Justice Harlan, in Thompson v. Phœnix Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408, says:

"If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured."

In Indiana Co. v. McGinnis, 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192, it is said:

"The incontestable clause is construed by us to be binding upon the appellant, and to mean just what it says, that 'after one year from the date of issue this policy shall be incontestable if the premiums have been duly paid.' "

Attached to the original policy issued in 1890, which is before the court, is a form letter, evidently sent out to all persons acquiring insurance, congratulating the insured, and emphasizing the achievements of the company. In this letter it is said:

"The Equitable was also the first company to make its policies absolutely incontestable after a limited period. By this concession the policy becomes practically a bond of the Equitable Life Assurance Society. The Equitable, in adopting this measure, removed an objection which has sometimes been made against life assurance, to the effect that the claims of policy holders might be contested after death, when they would necessarily be unable to defend their own characters and protect the interests of the beneficiaries under their policies."

This, of course, is no part of the policy. I simply refer to it as illustrating the reason why the courts have been so firm in refusing to recognize any exception to an incontestable clause, unless expressly reserved. As stated in the cases supra, this incontestable clause is no doubt a strong "talking point" in procuring insurance, and a strong reason for taking insurance.

It is not an uncommon thing to find a misrepresentation of age in an application for insurance. In this case, it is only one year. It might be ten, but the rule would be the same. Misrepresentation as to age is either a mistake or a fraud. In the absence of legislation, the insurer

would have an absolute defense to the policy, whether made by mistake or fraud; and yet no one would contend that, with the incontestable clause in the policy in suit, that such defense could be made.

Now the statute took away part of this right which the defendant otherwise would have. Certainly as to innocent misstatement, it deprived the company of the right to use such misstatement as a defense, although it reserved to the insurer the defense of actual fraud; but the statute created a new right which did not previously exist—the right to recover the difference between the contract premium, and the premium which the party should pay in view of his age. This right was in existence when this policy was issued. It is now asserted by the defendant that it is not liable for $10,000—the face of the policy. In the face of an absolute incontestable clause, it claims the right to contest the policy in part. The amount which plaintiff would be entitled to recover in case the statutory right is recognized would not be $10,000, but would be $8,206. 21. If the misstatement had been ten years, instead of one year, the beneficiary would be entitled to but a small amount upon this policy.

In this case it is true that the parties agree that this misstatement was made; but suppose it were contended that the age given was correct, then it might involve an expensive and difficult investigation and trial—investigation and trial which might be rendered much more difficult and expensive because, as expressed in the Robinson Case, supra, the case must be "determined after the death of insured, when he could no longer be heard on the questions involving, not only the validity of his contract, but sometimes his character as well." In the majority of cases, life insurance is for the benefit of a widow and children. The incontestable clause is intended to free them from delay and annoyance and expense in acquiring the amount which had been carefully provided, and the courts have constantly construed these clauses to bar any attempt to invade the plain meaning and intent of the contract executed by the insurer. I am convinced that the partial defense pleaded cannot be sustained, and this view is decisive of the case, regardless of other questions involved.

[2] Now as to who shall recover the amount of this policy. The plaintiffs are the executors under a will which disposes of the proceeds of the policy in suit. The interveners are the beneficiaries in the policy. The policy is an unconditional "promise to pay to Belle J. Arnold and Elizabeth C. Beattie, children, and to the surviving grandchildren of Lois G. Stuart," upon the death of the insured. Under the contract the insured is given no authority to change the beneficiaries.

"Under a policy of life insurance, in the absence of any express stipulation authorizing a change of beneficiary by the assured without the consent of the original beneficiary, the beneficiaries named in the policy have a vested interest in the proceeds from the time the policy is taken, which cannot be defeated by an assignment without their consent." 25 Cyc. 778.

If beneficiaries cannot be substituted by assignment, they cannot by will. I find no authority justifying the recovery of the proceeds of this policy by the executors, plaintiffs herein. The interveners, being the persons specifically named in the policy, are entitled to recover.

Counsel for plaintiff will prepare a judgment entry, and submit the same to opposing counsel, reserving the proper exceptions, and opposing counsel may make the objections thereto, if desired, and the same can be presented for determination.

UNITED STATES v. CARNEY.

(District Court, N. D. Iowa, C. D. December 7, 1915.)

No. 1158.

1. CRIMINAL LAW ⟸13—INDICTMENT AND INFORMATION ⟸109—DESCRIPTION OF OFFENSE.

Statutes creating and defining crimes cannot be extended by implication or intendment, and an indictment under such a statute must allege directly and with certainty every element essential to bring the offense within its terms.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. ⟸13; Indictment and Information, Cent. Dig. §§ 286–288; Dec. Dig. ⟸109.]

2. INDICTMENT AND INFORMATION ⟸111—DESCRIPTION OF OFFENSE—STATUTE CONTAINING EXCEPTIONS.

Where a statute defining an offense contains an exception in the clause creating the offense, which is so incorporated with the language defining it that the offense cannot be accurately and clearly described, if the exception is omitted, the indictment must allege enough to show that the accused is not within the exception; but, if the language creating the offense is so completely separable from the exception that the essential ingredients of the offense may be accurately and clearly defined without any reference to the exception, it need not be negatived therein, but it is a matter of defense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295–298; Dec. Dig. ⟸111.]

3. POISONS ⟸9—ANTI-NARCOTIC LAW—INDICTMENT FOR VIOLATION.

An indictment under Harrison Anti-Narcotic Act Dec. 17, 1914, c. 1, § 8, 38 Stat. 789, charging that defendant not having registered and paid the special tax required by section 1 of the act, had in his possession a quantity of morphine, is insufficient to charge an offense where it is not alleged that he was engaged in a business which required him to register and pay such special tax.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. ⟸9.]

4. INDICTMENT AND INFORMATION ⟸111—NEGATIVING EXCEPTIONS.

Exemptions from liability for offenses created by acts of Congress are matters of defense; but matters excepted from the granting clause of the act are not within the terms of the act, and such matters must be negatived in the indictment or complaint.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295–298; Dec. Dig. ⟸111.]

Criminal prosecution by the United States against Lester Carney. On demurrer to indictment. Demurrer sustained.

F. A. O'Connor, U. S. Atty., of New Hampton, Iowa, and Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa.

Grover M. Neese, of Ft. Dodge, Iowa, for defendant.

REED, District Judge. The indictment (omitting formal parts) charges:

"That on or about the 15th day of September, 1915, at Mason City, Iowa, within the jurisdiction of this court, the defendant did, knowingly and unlawfully, have in his possession a large quantity of morphine, to wit, about 140 tablets, each containing one-fourth of a grain of morphine, which said morphine was a derivative of opium, without having theretofore registered with the collector of internal revenue for the district of Iowa his name and place of business, and paid to said collector the special tax as provided and required by the act of Congress approved Dec. 17, 1914, relating to the production, importation, manufacture, compounding, sale, dispensing, or giving away of opium or coca leaves, their salts, derivatives, or preparations, contrary to the statute in such case made and provided."

The defendant demurs to the indictment upon the ground alone that it charges no offense. The applicable provisions of the act referred to (38 Stat. 785, chapter 1), are:

Section 1: "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 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 "at the time of such registry," and "annually thereafter" on or before July 1st, "shall pay to said collector a special tax of $1 per annum. * * * It shall be unlawful for any person required to register under the terms of this act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section. That the word 'person' as used in this act shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person; and all provisions of existing law relating to special taxes, so far as applicable, including the provisions of section 3240 of the Revised Statutes of the United States [Comp. St. 1913, § 5963], are hereby extended to the special tax herein imposed. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this act into effect."

Section 2: "That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs *except* in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. 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 in such a way as to be readily accessible to inspection by any officer, agent, or employé of the Treasury Department duly authorized for that purpose. * * * Nothing contained in this section shall apply—

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only. * * *

"(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this act. * * *

"(c) To the sale, exportation, shipment, or delivery of any of the aforesaid drugs by any person within the United States or any territory or the District of Columbia or any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such

regulations for importation thereof into such foreign country as are prescribed by said country. * * *

"(d) To the sale, barter, exchange, or giving away of any of the aforesaid drugs to any officer of the United States government or of any state, territorial, district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy," etc.

Section 8: "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 a violation of this section, and also of a violation of the provisions of section one of this act: Provided, that this section shall not apply to any employé of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this act; or to any United States, state, county, municipal, district, territorial, or insular officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouseman holding possession for a person registered and who has paid the taxes under this act; or to common carriers engaged in transporting such drugs: Provided further, that it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this act; and the burden of proof of any such exemption shall be upon the defendant. * * *"

Section 12: "That nothing contained in this act shall be construed to impair, alter, amend, or repeal any of the provisions of the act of Congress approved * * * February ninth, 1909, entitled 'An act to prohibit the importation and use of opium for other than medicinal purposes,' and any amendment thereof."

The demurrer presents the single question: Does the indictment sufficiently charge the defendant with a violation of any of the provisions of this act? It is not alleged that defendant was or had been engaged in any business that required him to register and pay the special tax as required by the act; nor is anything alleged showing his possession of the tablets to be unlawful, save only the legal conclusion that defendant did "knowingly and unlawfully" have in his possession the 140 tablets, each containing one-fourth grain of morphine.

[1] It is axiomatic that statutes creating and defining crimes cannot be extended by implication or intendment; and before one can rightly be punished under a statute creating an offense, the acts done by him must be plainly and unequivocally alleged to be within the offense as created. Todd v. United States, 158 U. S. 278, 282, 15 Sup. Ct. 889, 39 L. Ed. 982; United States v. Cook, 17 Wall. 168, 21 L. Ed. 538; United States v. Reese, 92 U. S. 214, 23 L. Ed. 563; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States v. Mann, 95 U. S. 580, 584, 24 L. Ed. 531; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135; United States v. Hess, 124 U. S. 483, 486, 8 Sup. Ct. 571, 31 L. Ed. 516; Pettibone v. United States, 148 U. S. 197, 204, 13 Sup. Ct. 542, 37 L. Ed. 419.

It is also a cardinal rule of criminal pleading that an indictment for an offense must allege directly and with certainty every essential element or ingredient of the offense and not by way of recital or infer-

ence; that it is not sufficient to allege it in the words of the statute unless those words of themselves set forth clearly, fully, and with certainty every essential ingredient of which the offense consists. In United States v. Cruikshank, above, Mr. Chief Justice Waite, delivering the opinion of the Supreme Court, said:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation' against him. Const. Amend. 6. In United States v. Mills, 7 Pet. 142 [8 L. Ed. 636], this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged'; and in United States v. Cook, 17 Wall. 174 [21 L. Ed. 538] that * * * it is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.'"

In United States v. Reese, 92 U. S. 214, 23 L. Ed. 563, the Chief Justice also said:

"If the Legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

And Mr. Justice Clifford in his concurring opinion said:

"Offenses created by statute, as well as those at common law, with rare exceptions, consist of more than one ingredient, and, in some cases, of many; and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad on demurrer, or it may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on a writ of error."

[2] Where a statute defining an offense contains an *exception,* in the clause creating the offense, which is so incorporated with the language defining it that the offense cannot be accurately and clearly described if the exception is omitted, then the rules of good pleading require that the indictment must allege enough *to show that the accused is not within the exception;* but if the language creating the offense is so completely separable from the exception that the essential ingredients of the offense may be accurately and clearly defined without any reference to the exception, it need not be negatived therein, for it is then matter of defense to be shown by the accused. United States v. Cook, 17 Wall. 168, 173, 176, 177, 21 L. Ed. 538, and other cases above cited.

The constitutional validity of the act is not challenged, and, of course, will not be considered.

[3] With these principles in mind, the statute and indictment in question may be considered. Section 1 provides that on and after March 1, 1915, every person who produces, imports, manufactures, deals in, dispenses, sells, distributes, or gives away any of the drugs mentioned shall register with the proper revenue collector his name and place or places where such business is to be carried on, and pay

to the collector the special tax required. Plainly it is only the person or persons who engage in dealing in or in some manner handling the drugs as a part of his or their business that are to register and pay the required tax; and persons or associations not so engaged are not within its terms. The act is highly penal in its nature, and must be so construed as to include only those who are clearly within its terms. The provisions in section 1, that all provisions of existing law relating to special taxes, so far as applicable, are extended to the special tax herein imposed, indicates that the construction given by the Supreme Court to the "special tax law," which is section 3232 et seq., of the Revised Statutes of the United States (Comp. St. 1913, § 5955 et seq.), is applicable to this act.

The case of Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162, arose under section 3242 of the Revised Statutes of the United States, as amended by Act Feb. 8, 1875, c. 36, 18 Stat. 307 (Comp. St. 1913, §§ 5965, 5966). The indictment in that case charged the defendant, in the words of section 3242 as amended, with having "carried on the business of a retail liquor dealer without having paid the special tax therefor as required by law." The sufficiency of this indictment was not challenged by demurrer or otherwise before trial, but after being found guilty the defendant moved in arrest of judgment upon the ground, in effect, that the indictment charged no offense. In denying such motion the Supreme Court said:

"We have no disposition to qualify what has already been frequently decided by this court, that where the crime is a statutory one it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the cases of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged. * * * But we are of opinion that the statute in this case does define the offense with the requisite precision, and that the pleader has chosen the safer course in charging it in the language of this section. The offense does not consist in selling or offering for sale to a particular person distilled spirits, etc., in less quantities than five gallons at one time, but in carrying this on as a business; in other words, in the defendant holding himself out to the public as selling or offering for sale, etc. * * * It is quite evident that an indictment averring in the language of section 18 [Comp. St. 1913, § 5973], which defines a retail liquor dealer, that the defendant sold or offered for sale the liquors named, without averring that he made this a business, and that he had not paid the special tax required by law, would be insufficient."

And finally the court said:

"We do not wish to be understood as approving the practice that was pursued in this case, or even as holding that this indictment might not have been open to special demurrer for insufficiency as to the allegations of time and place, but upon motion in arrest of judgment we think it is sufficient."

It seems quite clear that the act in question is to be construed as one imposing a tax upon those who engage in dealing in and handling the drugs mentioned as a part of their business, and that a single sale, or having in possession a small quantity of the drug, by one not engaged in the business of dealing in them, is not within the terms of the act.

But it is urged in behalf of the government, that possession alone of the drug *by any one* under section 8 of the act is unlawful, unless such person has registered and paid the tax as required by the act, and that an indictment charging any one of having possession of the drug is sufficient. Section 8 reads in this way:

"That it shall be unlawful for any person *not registered under the provisions of this act*, and who has not paid the special tax, * * * to have in his possession or under his control any of the aforesaid drugs, and such possession or control shall be presumptive evidence of a violation of this *section*, and also * * * of section one of this act."

The possession forbidden by this section is of a person "not registered under the provisions of this act." Plainly the person who has not so registered and paid the required tax refers only to one who is required by section 1 of the act to register and pay such tax. No other possession is referred to by *this section* of which there can be a violation, other than the possession of one who is required by section 1 to register and pay the tax. The section will reasonably bear no other interpretation; and as the defendant is not charged with being a person required by the act to register, or with having engaged in any business that requires him to do so, the indictment fails to charge an offense against him under this act. It was so held by Judge McCall in United States v. Friedman (D. C.) 224 Fed. 276, and United States v. Wilson (D. C.) 225 Fed. 82, by Judge Bourquin in United States v. Woods (D. C.) 224 Fed. 278, and by Judge Thomson in United States v. Jin Fuey Moy (D. C.) 225 Fed. 1003, upon indictments quite similar to the one in question.

A contrary conclusion, it is true, was reached in United States v. Brown (D. C.) 224 Fed. 135, by Judge Neterer in the Western district of Washington; but I am not satisfied that the conclusion reached by him is correct. It is by him assumed that the act in question is intended to prohibit the importation of opium for any purpose whatever, and that the drug is therefore an "outlaw" in this country, and for that reason Congress may rightly prohibit its importation, and that this was intended by the act in question. It seems to me that this conclusion is unwarranted; for by the act of Congress approved February 9, 1909 (35 Stat. 614, c. 100 [Comp. St. 1913, §§ 8800, 8801]), the importation of opium for other than the purpose of smoking is permitted under such rules and regulations as the Secretary of the Treasury may prescribe; and section 12 of the act in question especially provides that nothing contained therein shall be construed to impair, alter, or repeal any of the provisions of the act of Congress approved February 9, 1909, or any amendment thereof. Opium, therefore, and its derivatives, when imported under the provisions of that act, are legitimate articles of commerce. It seems entirely clear that a purchaser of opium, or some compound or derivative thereof, for medicinal use, from one authorized to sell or to dispense it, and who has it in his possession for such purpose, should not be required to register or pay the special tax exacted only because of such possession. The act in question does not in plain terms so provide, and it

is not within the rightful power of the courts to add such a provision thereto, either directly or impliedly, and an indictment that fails to charge facts showing the possession of one to be unlawful does not charge an offense within the terms of this act.

[4] The last proviso in section 8 above, "that it shall not be necessary to negative any of the aforesaid *exemptions* in any complaint or indictment under this act," is but declaratory of the existing rule of pleading in the federal courts in criminal cases. Exemptions from liability for offenses created by acts of Congress are matters of defense; but matters *excepted* from the granting clause of the act are not within the terms of the act, and such matters must be negatived in the indictment or complaint.

I therefore reach the conclusion that the demurrer to this indictment should be sustained, the defendant discharged, and his bail exonerated. It is accordingly so ordered.

In re FITZHUGH HALL AMUSEMENT CO.

(District Court, W. D. New York. May 11, 1915.)

No. 5302.

BANKRUPTCY ⟸140, 205—PROPERTY PASSING TO TRUSTEE—RIGHTS AS LIEN CREDITOR.

A seller of property by a conditional sale contract reserving title until full payment, which on default by the purchaser placed its claim in judgment and levied execution on the property, thereby elected to treat the sale as absolute, and on the bankruptcy of the purchaser cannot claim title under the contract; but where the property remained in the possession of the bankrupt at the time of the bankruptcy, and the levy was made within four months, 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), the trustee took the same with all the rights of a creditor holding a lien by legal proceedings, and also by virtue of section 67f (section 9651) may be authorized to enforce the lien of the execution for the benefit of the general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225, 234, 303; Dec. Dig. ⟸140, 205.]

In Bankruptcy. In the matter of the Fitzhugh Hall Amusement Company, bankrupt. On review of order of referee directing sale of property. Affirmed.

Albert H. Stearns, of Rochester, N. Y., for trustee.
Isaac Adler, of Rochester, N. Y., for claimant.

THOMAS, District Judge. This case arises on the petition of the trustee of the bankrupt for authority to sell an organ free from lien claimed by the Rudolph Wurlitzer Company to exist thereon. The referee granted the petition and entered an order to that effect, containing the further provision that the proceeds of the sale should be

set aside pending a determination as to the validity of the lien. The Rudolph Wurlitzer Company has brought this proceeding to review this order, and the referee has made his certificate and return.

The facts of this case, about which there is practically no dispute, are as follows:

The Fitzhugh Hall Amusement Company, which was adjudged a bankrupt in May, 1914, had prior thereto, on May 2, 1913, entered into a contract with one Kelley for the purchase of an organ of the value of $10,000, which contract contained the provision that the title should remain in the vendor until the purchase price and any judgment therefore were fully paid. Thereafter Kelley assigned this contract to the Rudolph Wurlitzer Company. Subsequently, on January 26, 1914, the Rudolph Wurlitzer Company brought an action in the Supreme Court of New York to recover a judgment for the balance of the purchase price of said organ then remaining unpaid, amounting to $9,398.45, with interest. The summons and complaint in the action were duly served, and the judgment was obtained by default on February 18, 1914, for $9,454.70. On the same day the plaintiff in that action, the Rudolph Wurlitzer Company, caused an execution to issue on said judgment and placed said execution in the hands of the sheriff of Monroe county. A levy was thereupon made upon the organ under the execution, together with other property. On the same day, February 18, 1914, and after the sheriff had made the levy, an agreement was entered into between the Rudolph Wurlitzer Company and one Arnold, by the terms of which the latter was to pay $2,000 in cash upon the execution, and further payments were to be made according to its terms. The cash payment was directly to the sheriff, and included the sheriff's fees. The sheriff immediately turned over to the plaintiff this amount, and the sheriff was instructed to hold the levy. The attorney for the petitioner had notice of this levy, and in fact instructed the sheriff to hold the levy, and the levy is still on the organ.

The first meeting of the creditors of the bankrupt following the adjudication was held on May 16, 1914, at which time the Rudolph Wurlitzer Company proved its claim in bankruptcy for $7,537.40, the balance due on the Arnold contract, and participated in the election of the trustee for the full amount. The Rudolph Wurlitzer Company has also at various meetings subsequent thereto participated in the proceedings, appearing as a general creditor, and in every way acted as a general creditor for the purpose of controlling the proceedings in the bankruptcy court.

The Rudolph Wurlitzer Company relies upon the rulings in Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, and York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, to the effect that a trustee in bankruptcy acquires no better title than the bankrupt, and that a vendor's title under a conditional bill of sale is valid against the bankrupt and his trustee. These authorities are not apposite, because of the levy and the amendment of 1910 to the Bankruptcy Act, § 47a (2), by Act June 25, 1910, c. 812, §

8, 36 Stat. 840, read in connection with section 67f of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564).

1. The Rudolph Wurlitzer Company, by its levy on the organ as the property of the vendee of an execution to enforce the judgment in the action brought to recover the purchase price, has precluded itself from denying that the transaction was an absolute sale by itself, and has waived any title thereto by virtue of the original agreement. Morris v. Rexford, 18 N. Y. 552, 557; Fields v. Bland, 81 N. Y. 239. This levy brings the Rudolph Wurlitzer Company within the well-settled principle that a party cannot, either in the course of litigation or in dealings in pais, occupy inconsistent positions. The test of what constitutes an election in such a case is, in general, that any decisive act done by a person with knowledge of his rights and all other facts material to him is binding. When a party has two remedies inconsistent with each other, any decisive act by him done with knowledge of his rights and of the facts determines his election of his remedy. Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52; Connihan v. Thompson, 111 Mass. 270; Rodermund v. Clark, 46 N. Y. 354.

2. The amendment of 1910—section 47a (2)—was enacted as a result of the decisions in Hewit v. Berlin Machine Works and York Mfg. Co., supra, and with a view of meeting the same. The effect of this amendment was to give to the trustee, as to all property coming into the custody of the bankruptcy court, the rights of a creditor holding a lien. Holt v. Henley, Trustee, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767; In re Williamsburg Knitting Mill (D. C.) 190 Fed. 871; Milliken v. Second National Bank of Baltimore, 206 Fed. 14, 124 C. C. A. 148; In re Bazemore (D. C.) 189 Fed. 236; Bank of North America v. Penn. Motor Car Co., 235 Pa. 194, 83 Atl. 622; In re Smith (D. C.) 198 Fed. 876. The numerous authorities, in addition to those cited, stating this position are collected in Remington on Bankruptcy, vol. 2, §§ 1137, 1207, 1270–1273.

The organ was in the possession of the bankrupt at the time of the adjudication and was taken by the trustee. It was therefore within the custody of the bankruptcy court. Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157. And the levy having been made within four months of the adjudication on property which the levying creditor treated as the property of the bankrupt for the purposes of the levy may be preserved for the general benefit of the estate, and whatever the trustee realizes thereon may be distributed among the creditors. The lien is valid, but it loses its preferential character in favor of the attaching creditor by the institution of the bankruptcy proceedings. First National Bank of Baltimore v. Staake, 202 U. S. 141, 149, 26 Sup. Ct. 580, 50 L. Ed. 967. That the purpose of section 67f of the act of 1898 was to subrogate the trustee to all liens acquired by the creditors within four months of the adjudication in bankruptcy is too well settled to admit of question. Fallows v. Continental, etc., Savings Bank, 235 U. S. 300, 35 Sup. Ct. 29, 59 L. Ed. 238; Rock Island Plow Co. v. Reardon, 222 U. S. 354, 32 Sup. Ct.

164, 56 L. Ed. 231; First National Bank of Baltimore v. Staake, supra.

3. The contention that the levy was rendered null and void by reason of the bankrupt's adjudication within four months thereafter, and that therefore the rights of the Rudolph Wurlitzer Company under the contract are restored and reinstated, notwithstanding the election, is not well taken. It may be true, as is now contended, that in some cases the attempt to choose a right which one wrongly or mistakenly supposes to exist is no election; but that is not this case, for the reason that under section 67f the bankruptcy court has the right on due notice, to—

"order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

The equity of this section, particularly as read in connection with the amendment of 1910—section 47a (2)—clearly makes property under attachment or levy subject to the order of the bankruptcy court, and extends to and includes goods, chattels, or property sold under the condition that the legal title shall remain in the vendor until fully paid. Authorities supra. This principle was recognized by the Supreme Court in First National Bank of Baltimore v. Staake, supra, even prior to the amendment of 1910, where, in the opinion of the court, delivered by Mr. Justice Brown (202 U. S. at page 149, 26 Sup. Ct. at page 584 [50 L. Ed. 967]), it is said:

"The extent to which the bankruptcy court shall recognize the rights obtained by creditors upon property attached as property of the bankrupt, * * * is a matter solely within the discretion of Congress."

If this were so under section 67f, prior to the amendment of 1910, it is manifestly the rule under the amendment, the object and purpose of which are fully stated in the authorities to which reference has been made.

The order of the referee should be affirmed. Let an order to that effect be entered.

UNITED STATES v. J. L. HOPKINS & CO.

(District Court, S. D. New York. February 13, 1912.)

1. FOOD ⟸20—PROSECUTION FOR VIOLATION OF FOOD AND DRUGS ACT—PLEADING.

Proceeding by criminal information for violation of the Pure Food Law (Act June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. 1913, § 8717 et seq.]) is merely the application of a long-used proceeding to misdemeanors created by a new statute, which does not change the course of trial, and the only pleas allowable are those in abatement, in bar, or the general issue.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 21; Dec. Dig. ⟸20.]

2. CRIMINAL LAW ⟸288—PLEAS.

It is permissible, but not necessary, to raise the defense of limitation in a criminal case by special plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 660, 661; Dec. Dig. ⟸288.]

3. CRIMINAL LAW ⟸291—PLEAS.

A plea of autrefois acquit or convict should not be tendered simultaneously with the general issue; but all defenses, both dilatory and peremptory, not going to the merits of the controversy, should be first pleaded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 667; Dec. Dig. ⟸291.]

4. CRIMINAL LAW ⟸300—PROSECUTION FOR VIOLATION OF FOOD AND DRUGS ACT—PLEA.

A "plea and answer" filed to an information for violation of the Pure Food Law *held* only a statement of evidence intended to support a plea of not guilty, and not in fact a plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 684–686; Dec. Dig. ⟸300.]

Criminal prosecution by the United States against J. L. Hopkins & Co. On motion to strike out parts of plea and answer of defendant. Sustained in part.

See, also, 199 Fed. 649.

Having been called upon to plead, defendant offers a written document, entitled "Plea and Answer," whereupon the prosecution moves to quash (i. e., strike out) as irrelevant or improper most of said written instrument. An examination of the "Plea and Answer" shows it to consist of four parts: (1) A declaration that defendant is not guilty; (2) that prosecution is barred by the statute of limitations; (3) that defendant was formerly acquitted of the same misdemeanors as are charged in the present information; (4) a statement which may be summarized as follows, viz.:

Long before the passage of the Pure Food Act, gum tragacanth was a well-known article of commerce. It is a vegetable gum, exuding from many varieties of plants, which plants exist for the most part in Asia, but all such vegetable gums having the same properties are known as tragacanth. The United States Pharmacopœia (8th Ed., Sept., 1909) is a publication which (for the purposes of the Pure Food Law) fixes the standard by which the quality of drugs shall be determined. The edition of the Pharmacopœia above referred to declares in its preface that: "The standards of purity and strength [described in the book] are intended to apply to substances used solely for medicinal purposes and when professionally bought, sold, and dispensed as such." Said book contains a complete list of drugs, of which "a

medicine dose" is prescribed, and neither tragacanth nor senna is on that list.

In May, 1909, defendant imported "33 bags gum Indian tragacanth." One of these bags was inspected by the customs authorities and an examiner of the Department of Agriculture, and passed as a "crude drug." Thereafter said gum was ground by defendant, and after such grinding a skilled chemist made an analysis thereof and reported that said ground tragacanth complied with the said Pharmacopœia's requirements. Thereafter defendant received a pretended order from a firm in Norfolk, Va., asking, among other things, for five pounds tragacanth gum and ten pounds senna leaves. This order was really given by an employé of the Department of Agriculture. Defendant sent, inter alia, both the tragacanth gum and senna leaves, filling the order for tragacanth with its second quality, described as "tragacanth gum Mo. 1 U. S. P. powder." That at or just before the time of this sale certain employés of the Department of Agriculture had publicly claimed in writing that gum tragacanth from India was not real tragacanth; but of this fact no public notice had been given, nor was defendant aware of it at the time of shipment.

Defendant had long sold and catalogued several varieties of senna, described as "whole leaf U. S. P.," "half leaf," and "broken." Defendant received an order from a firm of San Francisco, Cal., for one barrel of senna "U. S. P. broken powder," and for two bales "senna Alex. U. S. P. broken." Defendant filled this order partially, by shipping two bales of senna, broken, which had been passed by the customs and agricultural authorities of the United States. Said order so received from California was not a genuine order, but one given at the instigation of the United States Department of Agriculture. Senna in the leaf is not used for medical purposes, but by soaking and filtration is made into extract, so that the broken leaf is as effective as the whole leaf.

The information consists of four counts: (1) Shipping in interstate commerce adulterated gum tragacanth, in that it differs from the standard of strength, quality, and purity laid down in the United States Pharmacopœia; (2) shipping in interstate commerce misbranded gum tragacanth, in that the article was labeled with the false and misleading statement that it was tragacanth of the standard prescribed by said Pharmacopœia, whereas it was not gum tragacanth, but Indian gum, and not of the standard prescribed as aforesaid; (3) shipping in interstate commerce adulterated senna, not of the strength, quality, and purity prescribed by the United States Pharmacopœia, in that it contained stalks, stones, seeds, pebbles, and other substances foreign to senna leaves; (4) shipping in interstate commerce misbranded senna, in that its label represented the article to consist entirely of senna leaves of the standard prescribed by said Pharmacopœia, whereas it in fact consisted of a mixture of said leaves with stalks, seeds, etc.

Robert P. Stephenson, Asst. U. S. Atty.

Hector M. Hitchings, of New York City, for defendant.

HOUGH, District Judge (after stating the facts as above). [1] It is suggested that, so extraordinary are the prosecutions or proceedings brought under the Pure Food Law, some new procedure should be brought out in respect of them, apparently for the purpose of preventing a trial occurring on the criminal side of the court until after the facts have been looked into by the court itself. This is a startling innovation, and so far as I am concerned might be disposed of by expressing my unwillingness to attempt such new procedure, and my belief that juries are far more apt to be extremely tender of defendants and their rights, real or pretended, than any judge could be.

But it is perhaps advisable to indicate, even at some length, the view that no such method of judging facts is permitted by the crim-

inal law. It is the invariable practice in this district to prosecute under the Pure Food Law by criminal information; that is, the government alleges a misdemeanor.

It is not open to doubt that Congress has created several possible misdemeanors by the passage of the act in question. Procedure by criminal information is common-law practice, and, being a matter of practice, it needs no statute to support it. Originally it was a concurrent remedy with indictments for all misdemeanors except misprision of treason. In practice, even before the independence of the United States, leave to file informations was seldom sought by the Attorney General, except at the instance of a high officer of government.

Informations under the Pure Food Law are perfect representatives of this ancient practice, being brought by the District Attorney under leave of court at the instance of the Department of Agriculture. In the United States the function of an information is limited, however, by the constitutional provision that no one shall be held to answer for a "capital or otherwise infamous crime," except on presentment by the grand jury. On this subject, generally, see 2 Hawk. P. C. c. 26, § 3, page 326 et seq.; United States v. Waller, 1 Sawy. 701, Fed. Cas. No. 16,634; Ex parte Wilson, 114 U. S. 425, 5 Sup. Ct. 935, 29 L. Ed. 89; United States v. De Walt, 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485.

An information, therefore, being no novelty, it does not become one by being applied to a new misdemeanor. The course of trial is and must remain that of an indictment. It is therefore necessary to inquire what pleas are possible either to an indictment or information, there being no such thing known as an answer in criminal law in the sense in which that word is used on the civil side. All possible pleas on the criminal side of this court must be either in abatement, in bar, or the general issue.

A motion to quash is not a pleading, and therefore is not included, and jurisdictional pleas, which are sometimes given as a separate class, are really either in abatement or bar according to whether the objection is to a particular court or to courts in general.

[2] Tested by these rules, this defendant has (1) pleaded the general issue, which is of course proper and sufficient; (2) the statute of limitations is raised by special plea, which is permissible, but not necessary (United States v. Brown, 2 Lowell, 267, Fed. Cas. No. 14,665); (3) a plea is tendered of autrefois acquit, concerning which plea the record is in the same condition as found by me in United States v. Robinson (memorandum filed January 18, 1910); and, finally, (4) the evidential matter as above digested is put into a pleading.

[3] It may first be noted that the plea of autrefois acquit or convict should not be tendered simultaneously with the general issue. It is the rule in criminal law, as it was at common law on the civil side, that defenses both dilatory and peremptory, if they did not go to the merits of the controversy, should be pleaded first, in order that judgment (if against defendant) might be respondeat ouster. This

practice arose after the severity which directed final judgment against defendant on overruling a plea in bar (Rex v. Taylor, 3 B. & C. 502) had been modified.

This, however, being a matter of detail only, I have examined the record as if the prosecution had filed a replication to the plea of autrefois acquit, and find by the record that the previous information failed for what the court considered defects apparent on the face thereof. Therefore it was no information, and the defendant was never in jeopardy.

[4] Notwithstanding the informality of the fourth plea, what is sought to be raised is, I think, plain enough, viz.; unless this defendant shipped a "drug," it is not guilty under this information. "Drug" is defined by the sixth section of the act, and the standard of drugs is to be ascertained from the United States Pharmacopœia by the seventh section thereof. What the Pharmacopœia says, therefore, the defendant asserts the court may take judicial cognizance of, and, having done this, it is found that neither leaf senna nor gum tragacanth is a drug in the sense in which the Pharmacopœia uses that word; i. e.:

"Substances used solely for medicinal purposes and when professionally bought, sold, and dispensed as such."

If such a plea as this (plainly in bar, if it is anything) can be tried, it must be tried either by the court or the jury; and, no matter which course of trial is adopted, it is a sure test of a good plea that the trying power can give judgment or verdict either way. If it be regarded as a plea triable by the court only, judgment against the defendant would be respondeat ouster; but such judgment would be based necessarily upon the insufficiency of the facts alleged, admitting them to be true. This reduces the whole matter to an absurdity, for, if the facts alleged (as I understand them) be true, the defendant is not guilty, and the court has no more power to pronounce a judgment of not guilty than it has to enter one of guilty.

I think this analysis shows that the alleged plea amounts to no more than a statement of evidence intended to support the plea of not guilty; therefore it is not a plea at all.

It is ordered that the pleas of not guilty and statute of limitations stand, that the plea of autrefois acquit be overruled after an inspection of the records of this court, and that the remainder and balance of the document filed and entitled "Plea and Answer" be stricken from the files as unauthorized by law.

THE GWYNEDD.

(Circuit Court of Appeals, Third Circuit. December 8, 1915.)

No. 2004.

ADMIRALTY ⇐60—PLEADING—SUFFICIENCY OF LIBEL.

A court of admiralty is always liberal in the construction of pleadings, and where a libel sets out, although obscurely and as a secondary claim, a cause of action in rem within the jurisdiction of the court, and prays for general relief, it should not be dismissed, but its amendment should be permitted.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 482–496; Dec. Dig. ⇐60.]

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

Suit in admiralty by Joseph Sessich against the tugboat Gwynedd. From a decree dismissing the libel, libelant appeals. Reversed.

For opinion below, see 220 Fed. 192.

W. M. Harris, of Philadelphia, Pa., for appellant.

Wm. Clarke Mason, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The libelant, Joseph Sessich, was a deckhand on the tugboat Gwynedd, which was under charter to the Philadelphia & Reading Railway Company. On January 1, 1913, while in the service of the tug, he was injured, and afterwards sued in rem to recover damages. Exceptions to the libel were sustained, and the suit was dismissed; this being the error complained of.

In substance the libel sets forth that, while the tug was employed in towing car floats on the Delaware river in the port of Philadelphia, the libelant and another deckhand were ordered on board one of the floats in order to make it fast to a pier; the libelant remaining on the float to attend to that end of the line. His companion stepped ashore to fasten the other end, but the first cleat he approached was either missing or broken, owing to the negligence of the owner of the pier. In the hurry and confusion that accompanied the effort to find another cleat on shore—the operation being at night, the tug being in motion, the weather being cold and freezing, and the line being coated with ice and hard to manage—the libelant's hand was caught between the rope and a cleat on the tug, and was severely and permanently injured. The negligence charged was failure to keep the pier in proper condition and repair by providing and maintaining suitable cleats, so that the float might be safely and seasonably moored.

Thus far it is evident that the libel sets forth no fault against the tug that would sustain an action in rem. The fault was chargeable against the owner of the pier, and of course a suit against the owner could only be in personam. But, as it happens, the Philadelphia & Reading Railway Company is also the owner of the pier, and we sup-

pose it to be likely that this fact may have had something to do with the adoption of the action in rem. We agree, however, that the common ownership of the tug and the pier should have no influence on the decision, whether the admiralty has jurisdiction of the present action. The remedy is peculiar, with its own well-established characteristics, and the rule has long been settled that a vessel cannot be held to account by a suit in rem, unless the vessel itself or some one identified with her has been at fault. Aurora Shipping Co. v. Boyce (C. C. A. 9th Cir.) 191 Fed. 967, 112 C. C. A. 372, and cases cited. The libel makes no such charge, and accordingly the tug filed exceptions, alleging that the negligence set up was the negligence of the owner of the pier, and that no fault was charged against the tug or its master or any of the crew, "in matters relating or pertaining to the construction, maintenance, repair, or management of the said tug Gwynedd, her tackle, apparel, furniture, boilers, engines, machinery," etc. The District Court agreed that the libel failed to set forth a cause of action in rem within the admiralty jurisdiction, and accordingly dismissed the libel. The Gwynedd (D. C.) 220 Fed. 192.

If this were the only matter of dispute, an appeal would not have been taken. The libelant concedes the soundness of the reason just stated, and the whole controversy arises out of the concluding portion of the libel, to which we have not yet referred. Informally and certainly with a good deal of obscurity, but still we think perceptibly, the libel does set up a claim based on the ruling in The Osceola, 189 U. S. 175, 23 Sup. Ct. 483, 47 L. Ed. 760, where the Supreme Court formulates the rule, inter alia, that a vessel and her owner are liable, in case a seaman falls sick or is injured in the service of the ship, to the extent of his maintenance and cure, and also for his wages at least as long as the voyage is continued—such recovery for maintenance and cure being permitted whether the injury was received by accident or by the negligence of the master or any of the crew. The libel details the extent of the libelant's injury, and also avers that he has been, and will be, obliged to expend money for medicine, for medical attendance, and for maintenance, in order to keep and cure himself, for which "as a seaman on said tug he claims reimbursement." There is also a prayer for general relief. This claim was brought to the attention of the District Court in the first argument on the exceptions, and was also made the single subject of a reargument; but the court continued to be of opinion that the libel "cannot be said to set forth any such cause of action, or to lay such damages. The cause of action is, generally speaking, negligence, and the particular negligence alleged is that of the owner of the pier." This we think is not precisely, although no doubt it is substantially, an accurate description of the libel as it stands; the other claim is there, although not distinct or plain. But, as was said in North Alaska Co. v. Larsen (C. C. A. 9th Cir.) 220 Fed. 96, 135 C. C. A. 661: "Courts of admiralty are always liberal in the construction of pleadings, especially against seamen, whose lives at best are hard, and are often spoken of as wards of the court." We think, therefore, that the libel contained sufficient to serve at least as a basis for amendment; and as it also contained a prayer for

general relief we are constrained to hold that, instead of dismissing the libel, and thus requiring a new action, the District Court should have directed the claim to be amended, so that the right to recovery should be put distinctly and solely upon whatever right the libelant may possess to recover for maintenance and cure. The Kenilworth (C. C. A. 3d Circ.) 144 Fed. 376, 75 C. C. A. 314, 4 L. R. A. (N. S.) 49, 7 Ann. Cas. 202; The Mars (C. C. A. 3d Cir.) 149 Fed. 729, 79 C. C. A. 435; Dougherty v. Thompson Lockhart Co. (D. C.) 211 Fed. 224. He does not claim wages, so that the only ground of recovery would be such right as may exist to the cost of maintenance and cure. We express no opinion as to the extent of his right; we simply place our ruling on the ground that he has obscurely put forward a cause of action in rem within the admiralty jurisdiction, and should be allowed to amend and to make out whatever case may lie within his power under the rule in The Osceola.

The decree, therefore, must be reversed, and the District Court is directed to permit an amendment in accordance with this opinion (if the libelant shall so elect), and thereafter to proceed with the cause.

AMERICAN CAR & FOUNDRY CO. v. MATZOK.

(Circuit Court of Appeals, Third Circuit. December 7, 1915.)

No. 1983.

1. APPEAL AND ERROR ⊂⊃757—BRIEFS—STATEMENT OF QUESTIONS INVOLVED.
Under the express provisions of rule 24 of the Third circuit (224 Fed. xvii, 137 C. C. A. xvii), the brief of plaintiff in error should contain a statement of the questions involved in the briefest and most general terms, without names, dates, amounts, or particulars of any kind whatever. The statement pursuant to such rule in this case commended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. ⊂⊃757.]

2. MASTER AND SERVANT ⊂⊃288, 289—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.
Plaintiff, an electric craneman in defendant's car factory, was injured when a steel wire rope on his crane broke as he was lifting steel car parts. The rope was new, but the proof showed that the ropes became unfit for use, even on very brief service; that their life varied from an hour to a month, with an average of life of five working days; that they had to be inspected constantly, two or three times a day, and might become unsafe within ten minutes of being inspected. There was evidence that plaintiff saw the rope was torn, called the foreman's attention to it, and that the foreman told him the rope was all right, and directed him to go ahead. *Held* that, in view of the fact that the foreman regarded the rope as safe and directed its use, and that the services of experienced inspectors were required to determine the safety of such ropes, and that its incapacity to hold was a latent and not a patent defect, plaintiff did not as a matter of law assume the risk, and whether he was negligent was a question for the jury.

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

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3. APPEAL AND ERROR ⊜1002—REVIEW—QUESTIONS OF FACT.

Where the only persons who saw an accident whereby an employé was injured were the injured employé and his foreman, and an action for injuries substantially narrowed to a question of credibility between them, an appellate court must accept a verdict for the employé as establishing his version of the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⊜1002.]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action by Wasil Matzok against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Fred Ikeler, of Bloomsburg, Pa., G. A. Orth, of St. Louis, Mo., and Charles J. Hardy, of New York City, for plaintiff in error.

Paul J. Sherwood, of Wilkes-Barre, Pa., and R. W. Archbald, of Scranton, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Wasil Matzok, a citizen of Russia, brought suit against the American Car & Foundry Company, a corporate citizen of New Jersey, and recovered a verdict for personal injuries. On entry of judgment thereon, the Car Company sued out this writ.

[1] Pursuant to a rule of this court which provides that the brief shall contain "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" (rule 24, § 2 (c), 224 Fed. xvii, 137 C. C. A. xvii; see also rule 34 of the Supreme Court of Pennsylvania), counsel have tersely summarized the questions involved as follows:

"(a) Whether, under the undisputed evidence, the court should have held, as a matter of law, that the plaintiff assumed the risk of injury.

"(b) Whether, under the undisputed evidence, the court should have held, as a matter of law, that the plaintiff was guilty of contributory negligence.

"(c) Whether, under all the evidence, the court should have directed a verdict for the defendant."

These questions are based on the refusal of requests to charge, and as the several assignments show that in each of such requests there was a prayer for binding instructions to the jury, it will be seen that all of them finally center in the underlying question raised by the defendant's point:

"That under all the law and evidence in the case, the verdict of the jury must be for the defendant."

To settle this underlying question we turn to the facts.

[2, 3] The plaintiff, who was employed as an electric craneman in defendant's car factory, was injured when a steel wire rope on his crane broke as he was lifting steel car parts. The break of the cable caused a rebound, which in turn caused a certain part of the mechan-

ism to escape from a hook from which it was suspended and crush the plaintiff's leg. The negligence charged was that the rope was unsafe and unfit for use. While the wire rope was new, the proofs were that such ropes were liable to become unfit for use even on very brief service; that they had to be inspected constantly, two or three times a day; that the life of such a rope varied from an hour to a month; that the average life was five working days; that its defects were discovered by stripping the hand over it to discover parted strands; and that a new rope, within ten minutes of being inspected, was liable to become unsafe. It will thus be apparent the necessity for careful and frequent inspection was more insistent than with the usual run of appliances.

The plaintiff testified that just before the accident he hoisted the load a little ways and saw that the rope was torn, whereupon he stopped the hoist and called the foreman's attention to it, and "showed him the rope was not any good"; that the foreman told him the rope was all right and directed him to go ahead; that he followed such directions and started to hoist; that when he did so the rope parted and he was injured. The foreman denied such conversation had taken place, and the defendant's contention was that the injury was caused by the plaintiff negligently allowing his load to engage the lattice of a column and in unduly and needlessly straining the rope in endeavoring to hoist his load when so held by the column. As no other persons saw the accident, the case substantially narrowed to a question of credibility between Matzok, the plaintiff, and Durso, the foreman, and we must accept the verdict as establishing Matzok's version.

Such being the case was the court bound, as a matter of law, to hold Matzok, in continuing to use the cable, assumed the risk of its breaking or was guilty of contributory negligence? Clearly not. In view of the fact that the foreman regarded it as safe and directed its continued use, that the services of experienced inspectors were required to determine the safety of such cable, and that its incapacity to hold was a latent and not a patent fact, we think the question of the plaintiff's contributory negligence was therefore peculiarly one for the jury to determine, and not one of law for a court to declare.

The judgment below is therefore affirmed.

In re ANGER BAKING CO., Inc.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 18.

1. PLEDGES ⇐19—LIABILITY SECURED—CONSTRUCTION OF CONTRACT.

A corporation borrowed money on the guaranty of a surety company, and contracted to indemnify the latter against liability on the note and for all costs and expenses incurred in connection therewith. It violated the terms of its agreement by drawing a part of the proceeds from the bank without the assent of the surety company, and being threatened with suit it agreed to replace the same, and to secure such agreement pledged

certain notes as collateral. *Held* that, construing the two agreements as one contract, the collateral secured also the repayment of the cost and expense incurred by the surety company.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 58–63; Dec. Dig. ⟸19.]

2. PLEDGES ⟸9—CONSIDERATION.

The fact that the collateral was due at a future date, together with forbearance of suit, amounted to an agreement to forbear at least until maturity of the collateral notes, and constituted a good consideration for the pledge.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 20; Dec. Dig. ⟸9.]

3. BANKRUPTCY ⟸323—PROOF OF NOTES BY PLEDGEE—AMOUNT PROVABLE.

A pledgee of notes of a bankrupt may prove for their full amount, although the debt secured is less, where necessary to cover its claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 503, 505, 513; Dec. Dig. ⟸323.]

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

In the matter of the Anger Baking Company, Incorporated. On petition by E. B. Walden, trustee, and others, to revise an order allowing claim of the Southern Surety Company. Affirmed.

C. L. Greenhall, of New York City, for appellants.

A. F. Chapin, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. [1] October 4, 1913, Heffron & Co. borrowed $10,000 of M. M. Hart, Incorporated, for which it gave its note payable in 30 days. The lender required as a condition of the loan that the Southern Surety Company should guarantee the payment of the note at maturity which it did on an application of Heffron & Co. containing the following article:

"(5) That the undersigned [Heffron & Co.] will at all times indemnify and keep indemnified the company and save it harmless from and against all claims, demands, liabilities, costs, charges, and expenses of every kind or nature, which shall at any time be made or which it shall at any time sustain or incur, and will pay over, reimburse, and make good to the company, its successors and assigns, all sums and amounts of money necessary to meet every claim, demand, liability, cost, charge, expense, suit, order, decree, judgment, and adjudication against it by reason of the execution of the bond or undertaking herein applied for."

At the same time Heffron & Co. and the Surety Company entered into another written contract by which the former agreed to deposit the $10,000 in a bank to be drawn out only upon checks countersigned by the Surety Company. The money was so deposited in the Marine National Bank. Shortly afterwards Heffron & Co. asked permission of the Surety Company to transfer the deposit to the Buffalo Loan & Trust Company on the same terms. The agent of the Surety Company countersigned the check to enable this change to be made and gave it to Heffron, who deposited the money without requiring the countersignature of the Surety Company and drew out $6,000 of it.

As soon as this came to the knowledge of the Surety Company, it threatened Heffron & Co. with suit unless the money were immediately replaced. Heffron & Co. said they could not raise the cash, but would give the Surety Company some A–1 paper as collateral if it would forbear to sue. Thereupon they gave the note of the Anger Baking Company for $4,056.80 falling due several months after Heffron & Co.'s note to M. M. Hart, Incorporated, together with other collateral which proved worthless. When the Heffron & Co. note became due it was protested for nonpayment, and was thereupon paid by the Surety Company, which within a few days received the amount, less $1.25 from Heffron & Co. It is stipulated that the Surety Company was put to an expense of $1,000 for legal services and other expenses in connection with the withdrawal of the $6,000.

The Anger Company having been adjudicated a bankrupt, the Surety Company filed proof of claim upon the note. The trustee objected to the proof on the ground that the proceeds of the note had been wrongfully diverted by Heffron & Co. and that the Surety Company was not a bona fide holder for value; also on the ground that under no cirumstances could it prove for more than $1,000, the actual amount of its claim. The referee and District Judge sustained the proof, and this is a petition to revise the order.

The first question is whether the collateral was meant to secure only the return of the $6,000, or also the expenses to which the Surety Company was put in connection therewith. The two agreements made between the parties constitute but one contract. If the Surety Company had sued, it would certainly have been not only for the $6,000, but also for the expenses. We think the collateral was given to secure the payment of its whole claim, which included both accounts.

[2] The next objection is that, as the Surety Company did not give up its existing claim against Heffron & Co. for the $6,000, there was no consideration moving from the Surety Company. The agreement to forbear suit for any fixed time would have been concededly a good consideration. Such an agreement could not be inferred from the mere fact that the collateral was payable at a future date, because that would not have prevented the Surety Company from suing immediately (Cary v. White, 52 N. Y. 138, 144); but we think that the taking of collateral due at a future date, together with the Surety Company's agreement to forbear, amounts to an agreement to forbear, at least until the maturity of the collateral note. This constituted a consideration.

[3] Finally it is said that the Surety Company should only have been allowed to prove on the note up to the amount of its claim, viz., $1,000. We think it could properly prove for the whole amount of the note, if necessary to cover its claim, as is the case.

The order is affirmed.

In re MARTIN.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 24.

BANKRUPTCY ⊂=320—UNLIQUIDATED CLAIMS—DAMAGES FOR BREACH OF PROMISE—LIQUIDATION.

A claim against a bankrupt for damages for breach of a contract to marry, upon which the claimant had recovered a judgment in a state court, which had been reversed on technical grounds, *held* an unliquidated claim, within the meaning of Bankr. Act July 1, 1898, c. 541, § 63b, 30 Stat. 563 (Comp. St. 1913, § 9647), which the court properly ordered liquidated by a retrial in the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 479, 480; Dec. Dig. ⊂=320.]

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

On petition to revise an order made by Judge Learned Hand, confirming an order made by Referee John J. Townsend, which directed the claim of Cora Maude Clark to be re-examined and liquidated by the trial and final determination of an action for breach of promise to marry pending in the Supreme Court of New York County, in which the plaintiff is Cora Maude Clark and the defendant is the bankrupt.

Olcott, Gruber, Bonynge & McManus, of New York City (Irving L. Ernst, of New York City, of counsel), for appellant.

Jetmore & Jetmore, of New York City (Aaron P. Jetmore, of New York City, of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. This case comes here upon petition to review an order made by Judge Learned Hand confirming an order of John J. Townsend, referee, which directed that the claim filed by Cora Maude Clark be reliquidated by the trial and final determination of an action pending in the Supreme Court of New York between the bankrupt and the said Cora Maude Clark.

Before the filing of the petition Cora Maude Clark commenced a breach of promise suit against the bankrupt and secured a verdict for $25,000. The bankrupt appealed from the judgment entered on the verdict and filed a petition in bankruptcy pending the appeal. Before the appeal was determined Cora Maude Clark filed a claim, based on said judgment, in the bankruptcy court. Thereafter the Appellate Division of the state court reversed the said judgment on technical grounds and ordered a new trial. The bankrupt thereupon filed a petition with the referee in bankruptcy under clause 3 of section 7, alleging that Cora Maude Clark had no claim against him and denied her right to file a claim. He prayed that the claim be re-examined, disallowed and expunged. The trustee filed a petition asking that the claim be re-examined and the amount thereof, if any, be determined

and liquidated by a retrial in the Supreme Court of New York. The referee after argument recommended that the claim be re-examined and liquidated by a jury trial in the state court.

The question here is whether the claim for damages for the breach of a contract is one that can be sent to the state court for determination. The bankrupt insists that the judgment of the state court having been reversed, there is now no legal claim against him, the law relating only to claims which are admitted or conclusively proved and not to claims which are unliquidated, denied and which may never be established at all. It seems to us that the referee was right in holding that section 63b covers the present controversy and that under this section he was justified in regarding the claim as unliquidated and properly found that it should be liquidated in such manner as the court may direct and then proved against the estate for the amount allowed. An action such as this is generally supposed to be one within the province of a jury and it is thought that the referee did not exceed his powers in ordering that the claim be determined in the Supreme Court of the state where the action was commenced and where it is now pending. The argument that a breach of promise to marry is not a claim until the question whether or not there was a contract of marriage is finally settled, is ingenious but not convincing. It is too refined for everyday application. The contention of the bankrupt in the District Court, was as stated by the referee, that:

"The referee should first sit and hear whether or not a contract of marriage was outstanding between these two parties, which was broken by one of them, and, having determined that issue in my mind, it is discretionary with me to send it where I choose in order to liquidate the damages for a breach."

In other words there must be two trials, one by the referee to determine whether the contract exists and another before a jury to determine the amount of the damages. We cannot agree to this proposition. The claim exists when the claimant alleges that the bankrupt promised to marry her, that he did so may be disputed and the proof may show that the claim is unfounded, but it is a claim, nevertheless, and if established and damages are found by reason of the breach of contract, they may be regarded as liquidated by the bankruptcy court. The District Court made a sensible disposition of the controversy by directing that the claim of Cora Maude Clark be re-examined and liquidated by the trial of the action pending in the state court.

The order is affirmed with costs.

THE WYOMISSING.

THE BERN.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 12.

TOWAGE ⊂=11—STRANDING OF TOW—LIABILITY OF TUG.

That a coal-laden scow forming part of a tow was leaking, thus increasing its draft as it proceeded, which fact was known to the tugs, did not relieve the tugs, in towing over a well-known and constantly used course, from the duty of keeping the scow in sufficient depth of water, and they are liable for the sinking of the scow as the result of striking a rock in the channel, in the absence of proof that the rock was an unknown obstruction.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. ⊂=11.]

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

Suit in admiralty by Thomas J. Howard and others against the steam tugs Wyomissing and Bern; the Philadelphia & Reading Railway Company, claimant. Decree for claimant, and libelants appeal. Reversed.

Herbert Green, of New York City, for appellants.

Armstrong, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. Appeal from decree dismissing libel for negligent towage. October 20, 1913, between 9 and 10 p. m., the tugs Wyomissing and Bern, belonging to the Philadelphia & Reading Railway Company, left Port Reading with a flotilla of coal-laden boats, consisting of six tiers of four boats each. The scow Van Winkle, outside boat on the starboard side in the fifth tier, was carrying 1,372 tons of coal, giving her a draft of 14 feet. The railway company's dockmaster at Port Reading knew that the scow was leaking when he put her in the tow, and indeed had received a message from the main office to do so. About 6 a. m. the next morning, at low water, the scow ran upon a rock or boulder, which made a hole in her square bow some 2 or 3 feet above her bottom. She sank with her bow projecting above the surface and her stern entirely submerged, and there was from 19 to 24 feet of water at different points around her.

The District Judge dismissed the libel, saying among other things:

"At the same time the evidence satisfies the court that at the point where the barge was sunk at mean low water there could not have been less than 14 feet 6 inches of water in depth, even giving to the libelants' testimony all the effect claimed for it. Now the evidence is that the bow of the barge showed signs of forcible impact against and contact with rocks to a distance of 2 to 3 feet above the bottom of the barge; that is, when the barge struck, her bow must have struck an obstruction which reached up 2½ feet higher

than the bottom of the barge.. Thus, if the barge was only drawing a normal draught of 14 feet, the barge must have struck with her bow against an obstruction or shoal of a rocky character which rose up 2½ feet higher; so that, if the minimum low water was 14 feet 6 inches at that point over the higher obstruction struck by the bow, the barge at that time must have been drawing near 17 feet. * * *

"Testing the barge master's testimony by the circumstances of the case, the conclusion follows that he was mistaken if and when he sounded on the morning of the 21st he thought he found only 12 inches of water in the bottom of the barge. The evidence is he had gone to bed exhausted by a hard day's pumping, had slept for several hours, and waked that morning and sounded for the depth of water in the barge. And inasmuch as the soundings noticed by him are wholly irreconcilable with the circumstances of the case, the conclusion is that he was mistaken, and that the only way to account for the barge's striking as she did is by the explanation that she had been leaking all night, that her draft had increased from the normal of 14 feet to something in the neighborhood of 17 feet, and that striking on the bottom at 17 feet or over she was dragged until the bow encountered a slightly higher part of the shoal rising some 2 to 2½ feet up against which the bow struck, in consequence of which blow the planks of the bow were crushed in, and up over which the bow of the barge was dragged, so as to give it the uplifted appearance it had after the barge finally sank. The sinking, therefore, was due, not to the fact that the barge was towed out of the proper channel, or over a place which at its normal draught would not have been wholly and entirely safe for it to be towed at that stage of the tide, but was due to the greater and abnormal draught caused by an unseaworthy condition; that is, a leakage, and for which the towing company respondents would not be responsible."

We think on these facts the libel should not have been dismissed. The proofs show that the scow when fully loaded drew 17 feet, which therefore was not an abnormal draft. There was no representation as to her draft made to the railway company, and it knew that her actual draft was liable to be increased on the trip, because she was leaking. The libelant was entitled to have his scow safely towed at any draft she could stand, whether due to cargo or to a leak. Of course, if she had foundered, as the answer alleges, because of the leak, the tug would not be responsible; but it is clear that she sank as the result of striking on the rock.

When a tug strands a tow on a well-known and constantly frequented course, she is bound to explain the accident. The Ellen McGovern (D. C.) 27 Fed. 868. If the tow strikes a rock in the channel, as the District Judge found in this case, the claimant is bound to show that the rock was an unknown obstruction. The Mary N. Hogan (D. C.) 30 Fed. 927; The Pierrepont (D. C.) 42 Fed. 687. As it has failed to do this, the decree is reversed, and the court below directed to enter the usual interlocutory decree in favor of the libelants.

REPUBLIC IRON & STEEL CO. v. PORTER.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1915.)

No. 2756.

1. MASTER AND SERVANT ⊂⊃286—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.
Where, in an employé's action for injuries, there was substantial evidence tending to show defendant's negligence, defendant's motion to direct a verdict was properly denied.

[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. COURTS ⊂⊃405—CIRCUIT COURT OF APPEALS—ASSIGNMENTS OF ERROR—SUFFICIENCY.
Rule 11 of the Sixth Circuit (150 Fed. xxvii, 79 C. C. A. xxvii) provides that, when the error alleged is to the charge of the court, the assignment of error shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, and that errors not assigned according to that rule will be disregarded, but that the court at its option may notice a plain error not assigned. *Held* that the proviso relates only to errors which are obvious upon inspection and of a controlling character, and where in an employé's action for injuries there was substantial evidence of defendant's negligence in one respect, requiring the submission of the case to the jury and making a recovery at least fairly possible on that ground, an error in the charge as to another ground was not of a controlling character, and its consideration was not necessary to prevent a miscarriage of justice, and hence an assignment that the court erred in its charge to the jury would not be considered.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099, 1101, 1103; Dec. Dig. ⊂⊃405.]

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

Action by Thomas Porter against the Republic Iron & Steel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. M. Roberts, of Cleveland, Ohio, for plaintiff in error.

D. F. Anderson, of Youngstown, Ohio, for defendant in error.

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

PER CURIAM. Defendant in error (plaintiff below), while operating an elevator crane for supplying coal to a battery of boilers in defendant's plant, was injured by the escape of hot steam and water, due to the explosion of a boiler tube. Two questions of negligence were submitted to the jury: First, whether the defendant, in failing to inclose the cage in which plaintiff was working, exercised due care to provide plaintiff a safe place to work; and, second, whether like care was exercised in inspecting the boiler tube. Plaintiff had judgment upon a verdict finding for the plaintiff "on the issue joined."

[1, 2] At the most, but two assignments are open for consideration, viz., No. 6, which is addressed to the overruling of defendant's motion to direct verdict, and No. 7, which complains of the charge to the jury. There was substantial evidence tending to show that de-

fendant was negligent in failing to inclose the cage. The motion to direct verdict was thus properly denied. Assignment No. 7 is merely that "the court erred in its charge to the jury." Rule No. 11 of this court (150 Fed. xxvii, 79 C. C. A. xxvii) requires that, when error in the charge is alleged, the assignment "shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused," and provides that "when this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded." The assignment in question disregards the rule, and can, at best, be considered only by virtue of the proviso which permits the court "at its option" to "notice a plain error not assigned." We have frequently had occasion to enforce this rule. The proviso relates only to "errors which are obvious upon inspection and of a controlling character." P. P. Mast. Co. v. Drill Co. (C. C. A. 6th Cir.), 154 Fed. 45, 51, 83 C. C. A. 157, 163, where it was said that "the underlying principle of this reservation * * * is to prevent the miscarriage of justice from oversight."

In view of the fact that there was substantial evidence of defendant's negligence in failing to inclose the cage, so requiring submission to the jury and making plaintiff's recovery at least fairly possible on that ground, we do not think the error, if any (relating to the charge on the other ground), "of a controlling character," or its consideration necessary to "prevent the miscarriage of justice."

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

W. S. ROCKWELL CO. v. NAUMBURG.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 49.

FRAUD ⊜20—FRAUDULENT REPRESENTATIONS—ACTION FOR DAMAGES.

A representation in an agreement for the sale of a process that it is secret and unpatented is one of fact, and if fraudulently or recklessly made, and the intending purchaser incurs expense in reliance thereon, affords basis for an action for damages.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18; Dec. Dig. ⊜20.]

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

Action at law by the W. S. Rockwell Company against Bernard Naumburg. Judgment for defendant, and plaintiff brings error. Reversed.

John Gerdes, of New York City, for plaintiff in error.

Morris & Plante, of New York City (H. F. Parmelee and Guthrie B. Plante, both of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an action to recover damages of the defendant Naumburg, treasurer of the Transformetal Tool Steel Company, on the ground that he had fraudulently represented to the plaintiff, either knowing the contrary, or recklessly, not knowing anything about it, that a certain process for manufacturing steel was owned by the Metal Company, was secret, and was not patented, in reliance upon which representation the plaintiff entered into a contract with the Metal Company with reference to such process and incurred expenses in exploiting it, whereas in point of fact the process was not owned by the Metal Company and had been patented.

There was testimony that the defendant assured the plaintiff that the process was secret and not patented; that the plaintiff insisted that this representation should be expressly stated in the contract with the Metal Company, which the defendant executed as treasurer; that the plaintiff, relying on this statement, made a contract with the Metal Company and incurred expenses in exploiting the process; that the process in question was called the Massot process; that a United States patent had been issued to Massot for this process, which patent was not owned by the Metal Company; that upon learning this fact the plaintiff immediately abandoned all operations in connection with the process.

The District Judge dismissed the complaint, first, because he held that a statement that the process was secret was a matter of opinion, and not of fact; but the representation complained of was not that the process was secret, but that it had not been patented, which was a matter of fact. In the second place, he was of opinion that the contract between the plaintiff and the Metal Company was unenforceable by either for lack of consideration, and that it followed from this that the plaintiff could have no cause of action against the defendant. Assuming this premise to be true, the conclusion does not follow. No question of consideration is involved. Proof of damage and fraud would make a good cause of action against the defendant. Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. 923. The proof that moneys had been expended by the plaintiff in reliance upon the representation was evidence of damage and the fact that the process was patented was evidence of actual or legal fraud upon the part of the defendant. Pittsburg Co. v. Northern Central Co., 148 Fed. 674, 78 C. C. A. 408; Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651. If he made the representation honestly, but without knowledge, it would be a question for the jury whether he made it recklessly. This would depend upon circumstances. That the representation was not made incidentally or lightly is to be inferred from the fact that the plaintiff insisted that it should be expressly stated in the contract with the Metal Company which the defendant executed. We think the plaintiff made out a prima facie case, which should have gone to the jury.

The judgment is reversed.

DUCKTOWN SULPHUR, COPPER & IRON CO., Limited, v. FORTNER.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1915.)

No. 2658.

1. MASTER AND SERVANT ⊂⊃286—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.
Where plaintiff was injured by the sudden lowering or falling of an elevator or cage in the shaft of a mine, raised and lowered by an engine, and the employer's apparatus and rule, if used and followed, provided an efficient safeguard against such an accident, if plaintiff and a fellow servant or both had not disregarded such rule, but additional apparatus easily installed, or additional rules, would have supplied a further safeguard and prevented such an accident, unless the operator's carelessness had also increased to an improbable point, the case was properly 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.]

2. APPEAL AND ERROR ⊂⊃928—RESERVATION OF GROUNDS OF REVIEW—PRESUMPTIONS IN SUPPORT OF JUDGMENT.
In the absence of any exception to the charge, it must be presumed, on appeal in an employé's action for injuries, that it correctly defined the employer's duty to provide reasonably safe, but not the safest, apparatus and rules of operation, and made clear how far, if at all, plaintiff might be exonerated from contributory negligence and from having assumed the risk.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749–3754; Dec. Dig. ⊂⊃928.]

In Error to the District Court of the United States for the Southern Division of the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by T. S. Fortner against the Ducktown Sulphur, Copper & Iron Company, Limited, for personal injuries caused by the sudden lowering or falling of an elevator or cage raised and lowered in the shaft of a mine by means of an engine. Judgment for plaintiff, and defendant brings error. Affirmed.

W. B. Miller, of Chattanooga, Tenn., for plaintiff in error.

James B. Cox, of Johnson City, Tenn., for defendant in error.

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

DENISON, Circuit Judge. [1, 2] Error to reverse judgment for plaintiff for a personal injury. The only substantial question is whether there was any case for the jury. The company's apparatus and rule, if used and followed, provided an efficient safeguard against such an accident as did happen; but a fellow servant or plaintiff, or both, disregarded this rule. Additional apparatus, easily installed, or additional rules, would have supplied a further safeguard and would have prevented such an accident, unless the operator's carelessness had also increased to an improbable point. Lacking exception thereto, it must be presumed that the charge correctly defined the duty of the com-

pany to provide reasonably safe, but not the safest, apparatus and rules of operation, and made clear how far, if at all, plaintiff might be exonerated from contributory negligence and from having assumed that risk which came from the lack of the safer methods.

We cannot say that there was nothing substantial for the jury, on these issues.

In re COGAN.

(Circuit Court of Appeals, Second Circuit. October 12, 1915.)

CERTIORARI ⊜5—NATURE AND GROUNDS—EXISTENCE OF REMEDY BY APPEAL.

Certiorari will not lie to review the action of a District Court or judge in granting or refusing an injunction, which is reviewable by appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. ⊜5.]

In the matter of the application of William H. Cogan for a writ of certiorari directed to the District Court of the United States for the Southern District of New York. Application denied.

Wm. H. Cogan, pro se.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. When a party considers himself aggrieved by the action of a District Court or of a District Judge in granting or refusing an injunction, he may review such action by appeal. See section 129, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. 1913, § 1121]). Certiorari to review will not lie.

This certainly is not an appeal; indeed, the papers fail to indicate that suit in equity was ever brought. Apparently no process was ever served, and no bill of complaint was ever filed.

Motion denied.

COOK v. AUTOMATIC FIRE PROTECTION CO. et al.

(District Court, S. D. New York. February 9, 1915.)

No. 5–130.

1. PATENTS ⊜211—LICENSE CONTRACTS—CONSTRUCTION.

Contracts relating to the granting of licenses under patents *held* valid and operative, and also construed, and the rights of the parties thereunder determined.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 304–311; Dec. Dig. ⊜211.]

2. ESTOPPEL ⊜3—ESTOPPEL BY PLEADING—DENIAL OF CONTRACT.

Where defendants alleged a contract between the parties as the one by which their rights were to be determined, in which they were sustained by the court, the fact that complainant denied the contract does not deprive him in a court of equity of the right to its benefits, nor relieve defendants from its obligations.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 2–5, 7; Dec. Dig. ⊜3.]

3. EQUITY ⊂⊃87—LIMITATIONS—STATUTE GOVERNING—APPLICATION.

Where, in the execution of a contract in suit between a corporation and others, intended by the parties to be under seal, mere scrolls were used, which were valid as seals in the state where the contract was made and expected to be performed and in the state of suit, the fact that they were ineffective to make the contract a sealed instrument in the state where the company was incorporated does not require a court of equity to apply the statute of limitations governing suits on unsealed instruments.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242–244, 395; Dec. Dig. ⊂⊃87.]

In Equity. Suit by Frank R. Cook against the Automatic Fire Protection Company, the Fire Protection Development Company, James G. Nolen, and Robert L. McElroy. Decree for complainant.

Jones, Addington, Ames & Seibold, of Chicago, Ill., for plaintiff.
Griggs, Baldwin & Baldwin, of New York City, for defendants.

ROSE, District Judge. [1] This controversy centers around the inventions of the defendant James G. Nolen. He is an electrical engineer and inventor. He and the complainant, Frank R. Cook, had been acquainted for many years. In the fall of 1902 Cook was engaged in business in Chicago as a manufacturer of electrical supplies and fittings. Nolen, together with his brother, had jointly invented a method by which a sprinkler system would automatically report whenever it got out of order, and would in like manner turn in an alarm whenever a fire started in a building protected by it. On September 11, 1902, they applied for a patent therefor. This application was subsequently divided, and ultimately resulted in the granting of two letters patent, viz. Nos. 805,874 and 860,560. About this period Nolen had other inventions in various stages of progress. His head was apparently filled with more or less promising ideas. On the 24th of October, 1902, he and Cook entered into an agreement which recited that he had made certain improvements or inventions in connection with what were known as automatic sprinklers and fire alarm systems, for which he was about to make application for letters patent; that Cook was engaged in the manufacture and sale of electrical apparatus, and proposed to furnish the funds necessary to obtain the patents for such inventions and to manufacture them for sale. By the terms of this instrument Nolen granted to Cook an undivided half interest in the inventions then made and any improvements upon them which might subsequently be made and developed by Nolen. It contained a clause which read as follows:

"It being understood that either party is not to sell or assign any of the said inventions or improvements thereon, or grant any licenses, shop rights, or otherwise part with any interest whatsoever in the inventions and patents to be obtained thereon."

Cook agreed to make applications for letters patent on such inventions already made, or to be made, as should be deemed practicable and marketable. He was to pay the cost of so doing, and that cost was to be deducted from the first proceeds derived from the sale of

the apparatus. He was to furnish means to develop, perfect, and make said inventions for sale in the open market. He was to continue to manufacture them so long as there was a demand for them, and was to use his best skill and uttermost endeavor to place them upon the market. The profits from the manufacture and sale of the inventions and appliances were to be equally divided between the parties; the actual cost of manufacturing, together with 10 per cent. as a manufacturer's profit, being first deducted. Cook was to begin their manufacture and sale as soon as practicable. Nolen procured from his brother an assignment of the latter's half interest in the application of September 11, 1902, and then assigned one-half of the whole invention to Cook. He went to work in Cook's factory to develop his various inventions, and between that date and March 11, 1904, made other applications which ultimately resulted in the granting of more than a dozen additional patents for various electrical devices, some of them suitable for use in connection with the sprinkler fire alarm system, and some which in all probability would not be so employed. From time to time Cook advanced money to Nolen. He paid out some $1,600 in Patent Office fees and charges and in compensation to patent solicitors. He supplied labor, materials, and the use of his factory. His expenditures for all these purposes aggregated, according to his present impression and testimony, somewhere between $6,000 and $7,000.

In the spring of 1903 Nolen and one Hewitt jointly invented some improvements in sprinkler systems. On the 28th of April, 1903, Cook, Nolen, and Hewitt and a man named Green entered into an agreement which recited that in addition to the application of September 11, 1902, Nolen had made six others, and that Hewitt and Nolen had jointly made another invention for which application for letters patent were then in course of preparation; that Cook had advanced $780, had spent in and about the development of the devices the sum of $535.12, had guaranteed the payment of certain Patent Office fees, and had by virtue of certain oral and written contracts, dated October 24, 1902, with Nolen, acquired an interest in all of such inventions and the patents issued, or thereafter to be issued, thereon. The agreement then provided that Nolen, Cook, and Hewitt should assign to a trustee, to be mutually agreed upon by all the parties, all their rights in such inventions and in the patents to be obtained therefor. The trustee was to hold the rights for their mutual benefit and to dispose of them in accordance with their instructions. In the event of such disposition the trustee was to receive the consideration therefor and to pay $^{7}/_{24}$ of it to Nolen, a like amount to Hewitt, $^{6}/_{24}$ to Green, and $^{4}/_{24}$ to Cook. By this contract Cook and Nolen mutually released each other from all obligations arising under and by virtue of the contract of October 24, 1902, in so far as it applied to the inventions and letters patent to be obtained therefor. There were certain provisions which enabled the other parties to get rid of Cook by paying $5,000 for his interest. It was provided that in disposing of the inventions the trustee should stipulate that if the assignee should become insolvent, or should otherwise fail to place the inventions on the market, all right

in them was to revert to the parties to the agreement in the proportion that their respective interests in the inventions should bear to the entire interest. It was further provided that, if satisfactory arrangements should not have been completed within one year and a reasonable number of some of the patented devices by that time manufactured and sold, then the patents and all rights thereunder were to revert to, and become the exclusive property of, the parties in the same proportion and to the same extent as they and each of them at the date of the making of the agreement owned and possessed such patents. Thereafter each of the parties was to have the right to manufacture and sell said articles without in any wise being required or compelled to account one to the other, or to any of them.

It was a curiously drawn agreement. It was very difficult of actual performance, or at all events was very unlikely to be performed. Cook and Nolen seem to have come to that conclusion very early, for on the 29th of June, 1903, they entered into an agreement with the defendant McElroy which entirely ignored the existence of that of April 28th. The later contract recited that Cook and Nolen were the owners of certain inventions and improvements in fire alarm and signal systems and apparatus, which were then being perfected and for which applications for letters patent had been made; that McElroy was desirous of operating under the patents to be obtained thereon in connection with the giving of signals or alarms of fire, and wished to acquire the exclusive right to make, use, and install any and all inventions or improvements for that purpose which had been made, or which might be made, by Cook or Nolen, or either of them. Cook and Nolen gave such license to McElroy as trustee. The instrument recited that it was understood that the license should include and relate to the rights in such inventions or improvements as had been or might be made by Cook or Nolen in connection with systems for giving signals or alarms of fire or burglars, automatic sprinklers, and other purposes of like nature. McElroy was to pay Cook and Nolen 3 per cent. of "all gross money received" from "the users of said inventions or improvements" of Cook and Nolen. McElroy agreed that the 3 per cent. should not be less than $2,000 per year. If he failed to pay the minimum license fee, the license was to become null and void, and to revert to Cook and Nolen. The agreement contained a proviso, which it appeared Cook caused to be inserted, to the effect:

"That the license should take effect and have force from and after the 1st day of May, 1904, provided said Robert L. McElroy, trustee, shall within 60 days thereafter elect to accept and act under the license aforesaid; this agreement constituting an option whereby the said Robert L. McElroy, trustee, may within the 60 days elect to accept or refuse the license aforesaid."

It appears that one of Cook's purposes in requiring the insertion of this clause was to avoid any conflict with the agreement of April 28th, which by its terms would expire on the same day in 1904, unless various things were done which Cook felt sure never would be. The agreement of June 29, 1903, was under seal. It was understood by all the parties that McElroy was acting, not as an individual, but for

and on behalf of the defendant the Automatic Fire Protection Company of Maine, and that it was for it that he was trustee.

It seems that at the time this agreement was made neither Hewitt nor Green knew anything of it, nor did McElroy have any knowledge of Cook's and Nolen's contract with them. The day after the agreement of June 29th was executed, Hewitt in some way heard of it. He at once told one Shepherd, who, with McElroy, was interested in the Automatic Fire Protection Company, of the contract of April 28th. Various negotiations among all the parties followed, the upshot of which was that they all agreed that the interests of Hewitt and Green should be confined to inventions relating to the automatic fire extinguishing system, and should not include any of those having to do with signaling. To carry this purpose into effect, on the 11th of August, 1903, a new contract among Cook, Nolen, Hewitt, and Green was entered into. By it the agreement of April 28, 1903, was expressly canceled and declared null and void.

It was provided that in the automatic fire extinguishing system, for which letters patent had been or might be applied for, Hewitt and Nolen were each to have $^{17}/_{48}$ and Green $^{14}/_{48}$. From the construction subsequently put on this provision by the parties, it seems that Nolen was to hold one-half of his $^{17}/_{48}$, or $^{17}/_{96}$, for himself, and the other half for Cook. In the signaling apparatus and devices Cook and Nolen were each to have a one-half interest. Below the signatures of the parties an additional clause was added, and initialed by all of them. It declared that the agreement—

"shall extend to and be binding upon the heirs and assigns of each of the parties hereto. Said Hewitt, Green, and Cook hereby release the said Nolen from any contract or obligation, either written or oral, which said Nolen may have with them, or either of them, as to future inventions."

The contract was executed in quadruplicate. The four copies were delivered to Shepherd, to be held by him in escrow as trustee; Cook's signature being conditioned upon Shepherd's securing an exclusive license and right to McElroy, as trustee, from Nolen, Green, and Hewitt in the several patents then applied for, or which might be applied for, and described in the contract. Such license was to be on the basis of 2 per cent. of gross sales, rentals, or other receipts from the devices. If such licenses were not received, the contract was to be returned to Cook. If the license was given, Cook was to have the option either of accepting $^{17}/_{96}$ of said 2 per cent., or by bearing one-sixth of the expenses, in no event to exceed $2,500, in making the demonstration of the utility of the sprinkler devices, to become entitled to receive 3 per cent. If Cook was not satisfied with the license given to McElroy, those conditions which were unsatisfactory to him, so far as his interests were concerned, were to be left to an arbitration committee of three to be selected in the usual manner, their findings to be final. If the committee's findings resulted in Shepherd being unable to secure a license complying therewith, the four copies of the agreement bearing Cook's signature were to be returned to him. A satisfactory license was to be obtained within a year's time; otherwise, the contract was to be at an end.

Three days later, on the 15th of August, Nolen, Green, and Hewitt granted McElroy an exclusive license, applicable to any inventions or improvements made or to be made by any of them in connection with sprinkler equipments or devices of any nature whatsoever. McElroy was to pay them quarterly 2 per cent. of the gross rentals of their sprinkler apparatus or device; Hewitt and Nolen each to have $^{17}/_{48}$ and Green $^{14}/_{48}$. On the same day Nolen entered into an agreement with McElroy and Shepherd by which he undertook to serve them faithfully and diligently in inventing and perfecting devices, appliances, equipments, attachments, and improvements in fire alarms and signal devices for fire alarms and other purposes, and in systems and methods of signaling, and in such other matters and things as might be suggested or requested by McElroy and Shepherd, and devised and invented by Nolen within the period of three years, for which Nolen was to receive the sum of $150 per month, payable semimonthly. This agreement included all inventions and improvements, except those in automatic sprinkler equipments, devices, and appliances described in the contract of even date with McElroy, trustee.

It has been suggested by counsel for the defense in this case that the agreement of October 24, 1902, did not cover the application of Nolen of September 11, 1902, because it is said that the agreement referred only to applications thereafter to be made. I do not think that such was the intention of the parties at the time they entered into the agreement. The subsequent action of all of them shows that they understood the application of September 11th to be included under the agreement of October 24th. Indeed, that invention was the basic one. Unless all the parties felt that Cook had an interest in it, it is utterly improbable that the others would have dealt with him for the next 18 months as they did.

Cook claims, on the other hand, that the proviso added to the agreement of August 11th, surrendering his interest and that of Green and Hewitt in all subsequent inventions of Nolen, was limited to such inventions as had to do with the sprinkler system, as distinguished from the alarm or signaling system. In view of the relation the parties then occupied to each other, and the substantially contemporaneous action of some of them, this contention cannot be sustained. It appears probable that the purpose of this clause was to get rid of the interest of Hewitt, Green, and Cook in the subsequent inventions of Nolen, no matter to what such subsequent inventions might relate.

It is not shown that the agreement of August 14th between McElroy and Shepherd, on the one part, and Nolen, on the other, was communicated to Cook; yet it is difficult to believe that he did not know or have reason to think that Nolen had entered into their employ. He was thereafter very little about Cook's factory. About that time he ceased to receive any appreciable sums of money from Cook. The latter must have known that he was employed elsewhere.

At this period Cook recognized that McElroy, or rather the company represented by McElroy, the defendant the Automatic Fire Protection Company of Maine, was the exclusive licensee under the automatic fire alarm patents, and so notified persons who requested infor-

mation about the installation of systems embodying such patents. He knew that they were manufacturing under those patents. He did part of the work of such manufacture and sent them bills therefor. The first of these were for materials delivered. They were paid with reasonable promptness. He had other work on hand for them. It was not completed promptly, as they thought, because of his tardiness, as he says, because they did not give him proper directions concerning it. On the 18th of March, 1904, he personally submitted them bills for something over $500 for work thus far done by him and for which he had not been paid. The charge was apparently in larger part for work not yet completed, but still in process of manufacture. The others thought that his charges were excessive, and told him so.

At this interview it appears that some question was raised as to whether McElroy proposed to accept the option given him by the agreement of June 29th. The accounts of what was said on that subject differ. Cook claims that he told the others that if he was not paid his bills he would cancel the option of June 29th. They say he expressed reluctance to go on with the work they had given him, because he did not know whether McElroy would accept the option or not, and that thereupon McElroy verbally accepted it. By some letters written by some of the defendants at that time it would appear that their then recollection of the conversation was the same as that now stated by them. In point of fact, all the parties appear to have gotten very angry. It is likely enough that each of them may, in the course of the interview, have made statements not altogether consistent with what they said at another part of it. Very possibly the recollection of none of them is now absolutely accurate, at least as to the precise connection in which were uttered words they remember.

However this may be, on March 22, 1903, McElroy in writing notified Cook that he elected to accept the option under the contract of June 29th. A week later Cook replied, also in writing, that he canceled that option. On the next day McElroy answered, denying that Cook had any right of cancellation, and notifying the latter that he intended to insist upon the enforcement of the agreement of June 29th. On the 29th of March Cook wrote Shepherd that the agreement of August 15th between McElroy, Hewitt, and Nolen was unsatisfactory to him, in that it in no wise recognized and protected his rights, and that he elected to terminate the escrow of the conditional contracts of August 11th. Shepherd on the next day replied. He told Cook that he was prepared to secure him either $^{17}/_{96}$ of 2 per cent., or of 3 per cent., as Cook chose. He called his attention to the provision for arbitration in the event that the license given by Hewitt, Green, and Nolen was unsatisfactory to him. He told Cook that he was willing to submit to such arbitration. He said that Nolen had authorized McElroy to pay Cook the $^{17}/_{96}$ of the 2 per cent., or of the 3 per cent., so that his rights were fully recognized and protected. He concluded by stating that the contracts were in force and that he would deliver them to the several parties entitled to them.

To this letter Cook made no reply, and on the 25th of July a Mr. Hatch, since dead, who was then counsel for Shepherd and McElroy,

wrote Cook, transmitting to him one of the four copies of the contract of August 11th and one of the original licenses of August 15th from Nolen, Hewitt, and Green to McElroy. He also inclosed the written authorization and direction of Nolen to McElroy to pay Cook $^{17}/_{96}$ of the 2 per cent. royalties, or the same proportion of 3 per cent., if Cook contributed the $2,500 already mentioned. Mr. Hatch stated that such authorization of Nolen met the only objection which Cook had at any time suggested to the license of August 15, 1903. On the 12th of August, 1904, Cook wrote the Automatic Fire Protection Company, acknowledging some request he had had from them for an itemized bill. He asked instructions about completing work which he had in hand for it, or an instruction that it did not want it completed.

On the 20th of September the same counsel who now represents Cook wrote Hatch, telling the latter that they believed he represented all interests adverse to Cook in the matter of the controversies on fire alarm and sprinkler system patents. They said that Cook had retained them to institute litigation with a view to setting aside certain contracts and licenses. They stated that Cook would rather compromise the matter, receiving cash due him for materials furnished and labor performed, aggregating $1,015.42, and an additional sum of $7,500—$2,500 in cash and the balance in one or two years, represented by notes properly secured. Hatch in reply asked for a list of the several patents and applications for patents in which Cook claimed to have an interest, together with copies of the specifications of such applications as had not ripened into patents, with a statement of what claims had been allowed and in what condition the applications in the Patent Office were. Cook's counsel replied, under date of October 1st, that they did not desire at the time to furnish copies of applications. They said that McElroy knew what Cook had to sell, and if he indicated a disposition to accept the proposition they could satisfy both Hatch and McElroy with respect to the patent situation. On October 3, 1904, Hatch replied that McElroy was out of town. There the correspondence between the parties with reference to the matters involved in this litigation appears to have ended. In 1907 Cook sued in Chicago the Automatic Fire Protection Company of Maine for his bill of $1,015. An ultimate settlement of that particular controversy was arrived at, by the terms of which Cook received $700.

McElroy and Shepherd, and probably Cook as well, early appreciated that the inventions could be profitably and successfully exploited in any city only with the co-operation of some organization which had a regularly established telegraph and messenger service therein. Practically that meant that the assistance of the American District Telegraph Company and its subsidiary organizations were requisite to turn the inventions to profitable use. McElroy seems to have been in a position in which it was easy for him to get the ear of those influential in that corporation and to convince them that the inventions in question and others made by him and Shepherd were likely to prove highly useful. As early as the 18th of February, 1904, a contract between him and the American District Telegraph Company for the joint use of these inventions was entered into. The

business seems to have had a fairly rapid and quite extensive development. McElroy represented the defendant the Automatic Fire Protection Company of Maine, as did Shepherd. The Maine Company from time to time organized and sometimes wound up various subsidiary companies under laws of other states, some of which bore its name, and some of which, perhaps, were somewhat differently designated. For some reason, about May, 1909, the Automatic Fire Protection Company sold its business to the Fire Protection Development Company, also a Maine corporation, and for the next four years the payments of the American District Telegraph Company were made directly to the Fire Protection Development Company; then by an agreement of the 13th of June, 1913, the Automatic Fire Protection Company of Maine again entered into the direct receipt of such revenues.

It is not necessary or expedient in this opinion to attempt to unravel the precise relationship between these various companies. It may, I think, be taken as established, however, that all of them who are parties to this cause had, at the time they assumed any obligations or acquired any rights with reference to the patented devices in controversy, full knowledge of the various agreements to which Cook was a party and which have been heretofore recited. It does not appear that Cook, subsequent to October, 1904, did anything whatever to assert his alleged rights until the 3d of March, 1909, when, in the circuit court of Cook county, Ill., he filed a bill in equity against Nolen, Shepherd, McElroy, and the Automatic Fire Protection Company of Maine. In this bill he set up the contract of October 24th between himself and Nolen, said nothing whatever about any of the subsequent contracts to which he was a party, and alleged that Shepherd, McElroy, and the Automatic Fire Protection Company, with full knowledge of his rights in the premises, had been receiving gains and profits to one-half of which he was entitled. By that time the various individual defendants had removed from Chicago and were residing elsewhere, and the Automatic Fire Protection Company of Maine specially appeared and asserted that it had ceased to do business in Illinois and was not subject to suit therein. Perhaps because of these difficulties, plaintiff on the 17th of January, 1910, filed his bill in this court, and on the 25th of March of the same year dismissed his Illinois suit.

The theory of the second proceeding is that of the first. The later bill incorporates in substantially the same words all the material allegations of the earlier. In like manner it ignores the existence of any of the agreements, subsequent to that of October 24th, to which Cook and Nolen were parties. The principal respect in which the New York bill differs from the Illinois is in the persons, natural and artificial, who are made defendants to it. Nolen and McElroy were sued in New York, as they had been in Chicago. Shepherd, who was a defendant in the Western case, was not proceeded against in the Eastern. As an amendment to the bill made on the 25th of June, 1910, explains, he was not made a party because he did not reside in the Southern district of New York. Leave was then obtained to

make him a party defendant, so that he could be sued if at any time he came within that district. The Automatic Fire Protection Company of Maine was not made a party, very probably because Cook thought that its rights and obligations in the premises had been transferred to the Fire Protection Development Company of Maine, which had unquestionably taken over many of them. The last-named corporation was sued. Why the Automatic Fire Protection Company of New York was made a defendant here has not been stated. It was a mere subsidiary to the Automatic Fire Protection Company of Maine. There does not appear to have been any substantial reason why it should have been sued, even if it should be conceded that it might possibly have done something which upon plaintiff's theory of his rights might have made it technically liable to him. He has himself reached this conclusion and assented to the granting of its request that the bill as against it be dismissed.

In the pending case the American District Telegraph Company was made a defendant, doubtless in part for purposes of discovery, and in part in order that any decree which might be passed would safeguard its rights, while protecting for the future those of the plaintiff.

The defendants all answered. From the answers of some of them it appears that they were not all residents of the Southern district of New York; but, as they proceeded to answer fully on the merits, they waived their rights to object that they were not properly suable therein. The defendants McElroy and Nolen in their answers say that Cook forfeited all his rights under the contract of October 24th, because he failed and refused to do what was therein required of him. They say he did not make application for patents on Nolen's inventions and pay the cost of obtaining them; that he did not furnish means to develop such inventions, nor use his best skill and utmost endeavor to place them upon the market, nor did he commence the manufacture of appliances embodying them as soon as was practicable. Both Nolen and McElroy set up that Shepherd was an indispensable party. McElroy further alleged that he had acted under the agreement of June 29, 1903, and that under it he had, with Cook's knowledge and acquiescence, paid Nolen or accounted to him for all sums coming to Cook and Nolen under such agreement, and that consequently Cook had no claim against him. Nolen alleged that the contract of October 24th had been abrogated by subsequent agreements. The allegations of the other defendants need not be recited. They were for the most part either general denials or expressions of ignorance and demands for proof.

It was five years after the institution of his suit before Cook did anything else in the cause, except to file a general replication and obtain leave to amend the bill with reference to Shepherd in the manner above stated. On the 4th of April, 1914, he sought permission to amend his bill by making the Automatic Fire Protection Company of Maine a defendant. He also made the same request as to Shepherd, apparently unnecessarily, in view of what had been done four years before. Judge Hough denied this petition, on the ground that the granting of it might conceivably remove the bar of the statute of lim-

itations, which might possibly otherwise preclude Cook from then instituting a new suit. This cause came on for final hearing on the 19th of November. By the opening of the court on the morning of the 24th, which was the fourth day of actual trial, all parties had come to the conclusion that it would be better for everybody if the cause could be gotten into such shape that all the controversies growing out of the transactions which have been recited could be determined at once and for all, except in so far as the action of this court might be reversed or modified on appeal. It was accordingly stipulated that the bill should be considered amended so as to make the Automatic Fire Protection Company of Maine a defendant, and that that company would enter its appearance and file its answer. All the testimony taken in the cause should be held to have been taken in a proceeding to which it was a party. It reserved the right to rely upon any defense of limitations to the same extent as such defense would have been available to it, had it in fact been sued for the first time on November 24, 1914.

In its answer it set up the defense that the suit had not been brought within six years after the cause of action accrued; that the plaintiff was guilty of such laches as to make it inequitable to give him any relief; that Shepherd was an indispensable party; that Cook had forfeited all his rights under the contract of October 24th by failing to perform the obligations imposed on him thereby; and that by his attempted cancellation and repudiation of the agreement of June 29th he had shut himself off from any right to claim benefits thereunder.

Before inquiring whether the defense of limitations is available, it will be expedient to determine what contracts, if any, between the plaintiff and any of the defendants, are in force.

The contention of some of the defendants that the contract of October 24th has been abrogated by the failure of the plaintiff to perform the obligations imposed by it upon him does not seem to be persuasive. It is true that after June 29, 1903, Cook did little to develop and market the inventions, but before the end of March, 1904, nobody wanted him to, and after that time the defendants would not let him. It is equally certain that after the last-mentioned period Cook did nothing and spent substantially nothing, except in the payment of charges connected with the prosecution of the patents. But it was impossible, under the circumstances, that he should do anything. His failure to make any attempt to do any of the things required of him by the contract of October 24th may be evidence, and is evidence, and strong evidence, that he regarded the relations between himself and the others as governed by the agreements of June 29th and August 11th. But under all the circumstances it does not tend to show a breach by him of the contract of October 24th.

He says that the last-mentioned contract is the only one which is now in existence. In support of this contention he asserts, first, that the agreement of June 29th was a mere offer, from which either party could withdraw until it had been made a complete contract by acceptance; that Cook had withdrawn verbally at the stormy interview in March, 1904, or, if not, he had certainly done so by his letter of March

29, 1904. He claims that McElroy's attempted acceptance a week earlier was ineffective, because by the terms of the contract he had no right to accept at all until May 1, 1904; or, second, that McElroy's failure during all the years which elapsed prior to the filing of the bill of complaint in this cause, and subsequently, to make any of the payments required under the contract of June 29th in itself was such a total and complete breach as to put an end to it altogether.

I cannot think that the agreement of June 29th was a mere offer. McElroy and the Automatic Fire Protection Company proceeded at once to act under it. Cook knew they were doing so. He advised other people in writing that they held rights to the inventions now in question. He himself undertook to furnish them labor and materials required for the development and use of such inventions. After his attempted abrogation of the contract he continued to seek instructions from them as to the manufacture of devices for which they could have had no use whatever, were the parties to be governed solely by the contract of October 24th. Whatever the right conferred upon McElroy was, it was not a naked option given without consideration. Under it McElroy and the Automatic Fire Protection Company acted, spent money, and incurred liabilities. They paid for it, and had the right to it, and of it Cook could not deprive them. It follows that the contract of October 24th was replaced by, or merged in, those of June 29th and August 11th.

[2] The defendants contend that Cook cannot now rely upon either of those contracts, first, because he has repudiated them. That is true, but the defendants assert rights under them. The existence of those contracts is their defense to the claims made by Cook under the contract of October 24th. Under such circumstances a court of equity will adopt one view of those contracts or the other. If at the instance of the defendants it holds, as I do hold, that they were not abrogated, the mere fact that Cook tried to convince the court that they had been would not affect either his rights or the obligations of his adversaries. The duty of a court of equity to do justice between the suitors at its bar is not made any the less obligatory because one or both of them have claimed that to which they were not entitled. Doubtless the relief it may give is limited by the pleadings, as well as by the proofs; but such limitation is of no consequence in this case. Whatever may be said as to the silence of the original bill on the subject of the agreements of June 29th and August 11th at the final hearing in open court at the time, on November 24, 1914, when it was arranged that the Automatic Fire Protection Company of Maine be made a defendant, Cook reserved the right to stand on them if the court should be of opinion that his contention that the contract of October 24th was still in force could not be sustained. It may well happen that one who, by setting up an untenable claim, causes his adversary to change position, may be afterwards estopped from asserting rights that otherwise would have been his. But nothing of that character has happened in this case.

Assuming these contracts to have been originally valid and binding upon the parties, nothing that Cook has done or left undone with

reference to them has in a legal sense injuriously affected the rights of the defendants. The latter have remained in control of the inventions under the exclusive licenses granted by or under those agreements. They have done precisely what the contracts contemplated they should do. Cook had no active obligations thereunder. If the other parties be required now to account to him, they will be no worse off than they would have been, had they paid him from year to year the amounts to which under those contracts he would have been entitled. The assertion in McElroy's answer that he had paid Nolen Cook's part of the percentage reserved to Cook and Nolen is entirely unsupported by the evidence and is clearly without justification in fact. It follows that there has been on his part no such laches as should in a court of equity bar him from asserting any rights he might have under those agreements. Such a tribunal does not take anything from one suitor unless it is necessary so to do to avoid doing injustice to the other.

[3] The six-year period of limitation relied on by the Automatic Fire Protection Company of Maine is clearly inapplicable. Both of these agreements were under seal. Actions upon them may be brought at any time within 20 years. Code Civ. Proc. N. Y. § 381. Section 390 provides that, where a cause of action which does not involve the title to, or possession of, real property within New York accrues against a person who is not then a resident of that state, an action cannot be brought thereon in one of its courts after the expiration of the time limited by the laws of his residence for bringing a like action.

The Automatic Fire Protection Company of Maine and the Fire Protection Development Company are Maine corporations. The period of limitations for suits upon sealed instruments is by the law of Maine the same as it is by that of New York, viz. 20 years. Section 93, c. 83, Revised Statutes of Maine. It is true that the seals upon the instruments in question are mere scrolls, which, while they are valid as seals in Illinois where the papers were executed, and in New York where the suit is pending, are probably ineffective in Maine to make the agreements to which they are attached sealed instruments. McLaughlin v. Randall, 66 Me. 226.

It might be interesting to inquire whether under the circumstances the requisites for a seal are to be determined by the laws of New York, of Illinois, or of Maine; but it is unnecessary. In applying the statute of limitations, equity seeks to follow the law; but it is not bound in doing so to go to the lengths which would be required to hold this suit barred merely because the parties, when they entered into what they supposed were contracts under seal, did not attach their seals in a way required by the laws of a state of which none of them who personally executed the papers were residents, and in which the performance of the contracts was not contemplated, except in the same way in which it might have been hoped for in any of the other 47 states of the Union.

It is possible that, within the meaning of section 390a of the Code of Civil Procedure, this suit is on a cause of action arising outside

the state of New York. In that case the period of limitations would be that prescribed by the law of Illinois, where the cause of action arose; that is to say, 10 years from the time when it accrued. Section 16, c. 83, Rev. St. Ill. Even if that be true, this suit appears to have been brought in time. McElroy accepted the contracts on March 22, 1904. The right to the first year's percentage of profits did not, therefore, arise before March 22, 1905, and perhaps not before May 1, 1905. Either date is less than 10 years prior to November 24, 1914.

It follows that Cook is entitled to an accounting under these contracts, bearing in mind, however, that, as has already been stated, he has no interest in such of Nolen's inventions as were made after August 11, 1903, if such limitation shall prove in point of fact material, as to which no opinion is now intimated.

In advance of the accounting it does not now appear to be necessary to anticipate any determination of the rights of McElroy, the Automatic Fire Protection Company of Maine, and the Fire Protection Development Company among themselves, and it might be inexpedient to attempt so to do. After the accounting has been had, such questions will probably be of easy determination.

A decree in conformity with this opinion may be drafted.

DIAMOND EXPANSION BOLT CO. v. PARKER SUPPLY CO. et al.

(District Court, S. D. New York. December 6, 1915.)

PATENTS ⊂=328—INFRINGEMENT—EXPANSION SHIELD FOR SCREWS.

The Cook patent, No. 685,820, for an expansion shield designed to hold screws or screw bolts in place in difficult material, construed, and *held* not infringed.

In Equity. Suit by the Diamond Expansion Bolt Company against the Parker Supply Company, Hyman Rosenberg, and Albert Blumlein. On final hearing. Decree for defendants.

This is the usual bill in equity for infringement of patent to John H. Cook, No. 685,820, issued on November 5, 1901. The patent is for an expansion shield designed to hold a screw or screw bolt in place in material in which the thread of the screw will not hold of itself, such as marble, slate, tiling, or the like. Claims 1, 2, 3, 5, 10, 11, and 14 are in issue. Expansion shields were not new with the patentee; he had himself in 1897 obtained a patent for a similar invention, No. 575,282, and a device of somewhat the same character goes back to 1883, Cornell, No. 282,501. The patent was in suit in the Western district of Wisconsin between different parties, and a shield similar to that which the defendant now uses was there held by Judge Sanborn not to infringe. The question in this case, therefore, involves the correctness of that decision.

Alan M. Johnson, of New York City, for complainant.

Philip C. Peck and Maurice Block, both of New York City, for defendants.

LEARNED HAND, District Judge. Claim 1 provides that the screw shall engage the interior cavity through only a small portion

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

of its periphery which is to be threaded by the screw. This is explained by the figures themselves. The slots, *c*, *c*, of the patent meet the sides of the square interior section of the shield and result in leaving of the interior cavity only the corners of the shield. Thus there results a narrow rib having a groove within it, the four grooves and four slots together making eight ribs, which are described in the patent. The periphery of the screw as it enters the cavity is therefore touched by only these four ribs, which engage but a very small percentage of that periphery. In the defendant's shield the screw from the very outset touches the whole inner cavity, except where the two slots cut it, which amounts in all to only about one-twentieth of the total interior of the cavity. Now it is quite true that as the shield expands the slots will widen, and the screw will engage the interior of the cavity for a less and less portion of its periphery. If the claim could be confined, therefore, to the inward end of the shield, it might have some application to the defendant's shield; but if it be conceived in this way the claim would cover any slotted expansible bolt that could be devised, for the expanding of the shield inevitably opens the slots and permits the bolt to engage a smaller percentage of the inner cavity. The claim cannot, therefore, be construed in that way. It must mean that the screw engages the interior cavity with only a small portion of its own periphery as soon as it begins to engage the shield at all.

Claim 2 contains as an element "interior projections arranged to form the seat for a bolt." By the phrase "interior projections" is clearly intended projections into the interior cavity. In the defendant's shield the interior cavity is conical, and therefore each section is a circle. It is an abuse of language to speak of those circles as being projections. However many slots are made in the shield, the resultant section will remain circular, and will have no projections within its circumference. The patentee clearly intended projections into interior cavity itself, for he said on page 1, lines 87–99:

"Its threads engage the projections formed on the members or sections, *b*, and on the interior of the square hole *D*, into which the threads of the screw readily bite and render it easy to drive such screw in. The threads of the screw engage with the interior of my shield through only a small portion of the periphery of such screw, since, as is indicated in Fig. 2, the ribs or projections extend over only a small portion of the interior surface of the shield, where they would engage a screw inserted into the shield to form a seat or support for the screw."

The purpose of the patentee seems in part to have been by reducing the area of the shield which the threads of the screw must cut, to diminish the pressure on the outside of the shield. Page 2, lines 7–10. This could be accomplished only in case the threads engage the interior of the shield over only a small portion of their periphery. It is of no consequence whether in fact he was deceived in this expectation or not. The plaintiff's expert does testify that the thread cuts deeper than the projections and into the full body of the cavity, but that obviously depends upon the resistance of the expansion shield, which may arise from the rigidity of the shield itself or from the pressure exerted on its exterior. The idea that the ribs

project into the interior cavity is further manifested in the possible alternatives indicated in the patent (page 2, lines 49–59), where the patentee says that the ribs may be formed in any other manner if they be of relatively small area, and further says that their number, form, or contour might be varied, provided they exercised a comparatively gentle action. This gentle action again reflected the idea mentioned above, that by reducing the proportion of the interior cavity which the threads must cut the external pressure will be reduced.

There is, indeed, one most strained interpretation which can be placed upon this language, and which would answer, which is to regard the mere conical shape of the interior cavity as resulting in projections into its own interior. If one looks into the large end of a cone, all portions away from the eye project into the cavity as it were; only in case the cavity be cylindrical would there be no projections into the far end. To divide such a cavity into two sections by two slots makes each of these sections project into a cavity so considered, This, however, is no more than to say that the cavity is itself conical, which is certainly not the intention of the patent. Indeed, the patent itself seems to contemplate the possibility of a cylindrical inner cavity, for the patentee (page 2, lines 64–72) suggests that the shield may be either cylindrical or tapering, with a corresponding interior cavity, although to secure the desirable effect of a greater expansibility at the rear the radial thickness of the rear walls should be greater than those of the front. However, even though this were the intention of the patent, it could not constitute patentability, for a conical interior cavity had been shown in the art before. McCreery, No. 623,809, is such a disclosure, although the threads of the bolt do not cut into the conical cavity and the expansion of the bolt is intended only as a means of holding the whole shield in place. Cook's former patent, also, has such a cavity. It is true that the conical portion of the cavity appears to have been only toward the end, but there could be no patentability in extending the slots further toward the front and making the cavity taper where the slots begin.

Claims 3 and 5 do not require any consideration, other than that given to claim 2, for they each use the words "interior projections arranged to form the seat for a bolt inserted into said block."

Claims 10, 11, and 14 vary the language somewhat, speaking of "ribs formed upon the slotted portion of said shield and adapted to engage the threads of said bolt or of ribs or projections." The term "ribs" is quite clearly the equivalent for the "interior projections" mentioned in claims 2 and 3, and requires no further consideration than that given to claim 2. The words "adapted to engage the threads of the bolt" I do not understand to mean anything different from the phrase "arranged to form the seat for a bolt." It is true that the plaintiff lays some emphasis upon the language in the specifications on page 2, lines 37–46, in which the longitudinal grooves mentioned in the patent are said to be adapted to guide the screw or bolt inserted into the shield in a more accurate manner. The reason given by the patentee for this result is that, owing to the grooves, the screw is engaged by each rib at two points, which prevents its displacement.

There really is very little in this contention. If the ribs were not grooved, and were all equally distant from the center of the cavity, the screw would be equally well guided in its true axial position as though the rib had a small groove. However, the language has application only to a form in which there are in fact ribs projecting into the cavity, each of which has a groove. It can have no application to a device in which there are no ribs projecting into the interior cavity at all.

The plaintiff urges that the earlier Cook patent does not disclose the whole of the defendant's bolt, but that it was necessary for the defendant to borrow from the patent in suit. Now, it is true that the earlier Cook patent was not sufficient for three reasons: In the first place, the flanges *B*, displaced the whole bolt laterally; in the second place, the outer end of the shield itself had to be expanded; in the third place, the slots of the expansible portion began only a short distance from the end of the shield. The earlier art, nevertheless, showed the correction of each of these elements. The solid outer end of the shield is shown in Cornell, No. 282,501, McGrath, No. 456,588, and McCreery, No. 623,809. It is true that in Cornell the threads of the bolt did not make their own seat in the shield. McGrath, however, showed a shield of soft material into which the screw threaded its own way, and the defendant's shield is no more than McGrath's shield slotted at its interior end and tapered as indicated by the earlier Cook patent. The exterior projections of the earlier Cook patent were supposed to be advantages, but were found not to be so; in order to suggest their abandonment, it was not necessary to resort to the patent in suit.

The plaintiff finally relies upon the commercial success of its own shield. Now the shield as actually disclosed was a failure and was abandoned. The ribbed shield subsequently manufactured has undoubtedly been a success, but its success is either due to the ribbing, which the plaintiff does not use, to omitting the external flanges of the earlier Cook patent, which required no invention, or to closing the front end, which was common in the art. The earlier patent was itself a failure, chiefly because the flanges decentered the bolts; but it is impossible to monopolize the features in it which are so fully disclosed, and when relying upon this patent to omit those elements upon which the patentee procured his present monopoly.

I altogether agree with Judge Sanborn's judgment. The bill will be dismissed, with costs.

FREY & SON, Inc., v. CUDAHY PACKING CO.

(District Court, D. Maryland. December 9, 1915.)

1. COURTS ⟸274—ANTI-TRUST ACTS—SUIT AGAINST CORPORATION FOR VIOLATION—DISTRICT OF SUIT.

Clayton Anti-Trust Act Oct. 15, 1914, c. 323, §§ 4, 12, 38 Stat. 731, 736, in providing that a suit for violation of the anti-trust laws may be brought in any district in which the defendant resides, or is found, or has an agent, and that, if a corporation suit may be brought not only in the district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business, and that in such cases process may be served in the district of which it is an inhabitant, does not authorize a suit against a corporation in any district in which an agent may be found, unless he is there in his representative capacity, and the defendant is more or less regularly, through him, transacting business therein.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. ⟸274.]

2. COURTS ⟸274—ANTI-TRUST ACTS—SUIT AGAINST CORPORATION FOR VIOLATION—DISTRICT OF SUIT—TRANSACTING BUSINESS IN DISTRICT.

Defendant, a foreign packing company, had agents soliciting orders for its products in Maryland, chiefly from jobbing houses, and for the purpose of promptly filling such orders kept a supply of its goods with a storage company, which delivered the same on orders from defendant's officers in other states. *Held*, that defendant was transacting business in Maryland, within the meaning of Clayton Anti-Trust Act Oct. 15, 1914, c. 323, § 12, 38 Stat. 736, that a suit for a violation of the anti-trust laws could be maintained against it in that district, and that it might be brought into court by process served upon it in the state of its incorporation, as provided in said section.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. ⟸274.]

At Law. Action by Frey & Son, Incorporated, against the Cudahy Packing Company. On motion to quash return of service. Denied.

Horace T. Smith, of Baltimore, Md., and Daniel W. Baker, of Washington, D. C., for plaintiff.

Washington Bowie, Jr., of Baltimore, Md., and Gilbert H. Montague, of New York City, for defendant.

ROSE, District Judge. The plaintiff is a Maryland corporation, carrying on business in the city of Baltimore. It claims that the defendant has, by doing a thing forbidden by the anti-trust laws of the United States, injured it in its business. To recover for the damage so brought about this suit was instituted.

[1] The defendant is an Illinois corporation. It appears specially for the sole purpose of moving to quash the marshal's return of service. It says that (1) it is not liable to suit in this district, because it neither resides, is found, transacts business, or has an agent herein; and (2) if liable herein, it cannot be brought into court by service upon the individuals actually served by the marshal.

The first contention alone raises any vital issue. It is true that there are high authorities for the rule that a nonresident corporation can ordinarily be sued only (1) in the district in which it is carrying

on business; (2) by service upon some agent or officer appointed by and representing it; and (3) in which some state law makes it amenable to suit as a condition of doing business therein. United States v. American Bell Telephone Co. (C. C.) 29 Fed. 17.

The third of these requirements is obviously inapplicable here. This is a suit brought in a federal court, to recover for a wrong done in contravention of a federal law, which law specifies the district in which such suit may be prosecuted.

Nor in this case is the second of much greater real importance. Ordinarily, process either of a state court or of a District Court of the United States cannot be served beyond the territorial limits of the state or of the district, as the case may be. A nonresident corporation may be doing business in a district, and therefore theoretically be liable to suit therein; but if it is not represented therein by an agent, upon whom process against it may be legally served, it cannot, against its will, be brought into court. The framers of the Clayton Act, however, have taken care that suits authorized by it shall not be so obstructed. The twelfth section of that statute provides for the bringing of a corporation into the court of any district in which, under that act, it may be sued, by service of process upon it in any district of which it is an inhabitant, or wherein it may be found. If the defendant is properly suable in this district, the objection to the representative character of the so-called agent, upon whom the process herein was served, would not end the suit here. It could have no other effect than to delay the progress of the case until process could be served upon the defendant in the district of which it is an inhabitant.

The first requirement remains of binding force, except in so far as, if at all, it has been modified by the provisions of the Clayton Act. The fourth section of that act provides that such suit as this may be brought in the district in which the defendant resides, or is found, or has an agent, and section 12, that such suit, when against a corporation, may be brought, not only in the judicial district in which it is an inhabitant, but also in any district wherein it may be found or transacts business.

Plaintiff contends that both these sections are applicable to corporate defendants, although section 12 obviously has nothing to do with noncorporate. Assuming, without deciding, that defendant's contention in this respect is sound, there is nothing in the history of this legislation, or of the needs, or supposed needs, which gave rise to it, to suggest that Congress intended to say that a defendant corporation could be sued in any district in which an agent of it happened to be on business other than its own. Clearer language than that used would be required to show that Congress intended to change the rule that an officer, agent, or employé of a corporation cannot carry it into any jurisdiction in which he is not acting for it. But, when he is so acting, the corporation is, through him, doing something there, and, if it is through him regularly doing something, it is in the broadest sense, at least, doing business.

The language used, viz. "has an agent residing," does not suggest that the mere casual presence of an agent would be sufficient. It seems as

if Congress, in using it, had in mind those cases which have held that a corporation is not doing business generally in a district, unless it is there carrying on a fairly continuous series of transactions. Into many of these questions it is not here necessary to go.

Congress doubtless meant to facilitate the redress of wrongs done in violation of the anti-trust acts. It wanted to let a plaintiff sue wherever it was most convenient to him, provided injustice was not thereby done a defendant. The provision in section 12, for serving process in another district from that in which the suit was instituted, itself took out of a plaintiff's way most, if not all, the purely technical obstacles which had formerly obstructed it. Congress, in designating the district in which the suit against a corporation might be brought, did not materially, if at all, change the rule which had been laid down in a long line of well-considered cases. Probably in the nature of things it could not. The intangible thing, a corporate aggregate, can fairly be supposed to be always found in the state which gave it being. It may, without obvious unfairness, be made suable wherever it chooses to carry on some part of its business. But it cannot be said to be anywhere else. Persons connected with it may be; but, if it is not acting through them at the time, they cannot carry it with them. But, so far as corporate defendants are concerned, does not the act go as far as there is any reason any one should want it to go? A corporation may be sued under this statute where it transacts business. It cannot escape the obligation to respond because no agent of it, of the rank and character qualified to be served for it, can be there found. Suit may be there brought and process may issue to a district in which it cannot deny its liability to service.

The act so construed will for practical purposes usually make it unimportant to consider, in connection with liability to suit and to service, any question except whether the defendant is doing or transacting business in a particular district, for, unless it is, it cannot possibly have any agent who, as agent, is therein.

[2] Last May, when this suit was brought, was the defendant doing business in this district? The relevant facts are not in dispute. For some years previous it had a number of customers in this state. Most of these were jobbers, handling wholesale groceries and like goods. They bought defendant's products for the purpose of reselling them to retailers in the ordinary course of business. For some reason or other it preferred to call them "distributing agents." In some instances defendant sold some of its products directly to ultimate consumers. They were usually institutions or owners of large buildings, who bought in fairly considerable quantities. It had drummers, who regularly visited the jobbing trade, in order to secure orders for its wares.

As is the usual business custom, when these orders were received at one or the other of defendant's principal offices outside of Maryland, reserved to itself the right of accepting or rejecting them. It further stimulated a demand for certain of its products by sending an agent to the retail grocers. It was his business to show how the appearance of the corner grocery could be made more attractive by displaying the advertising matter which the defendant was ready to furnish to those

who kept its "Old Dutch Cleanser" for sale. If this agent was able to interest the grocer, he would ask him with what jobber he dealt, and if one who handled defendant's goods was named the agent would get an order from the grocer on such jobber for as much of defendant's goods as the grocer could be induced to buy. Whether the order was or was not filled, of course, rested with the jobber. In these ways, in addition doubtless to the usual advertising through the mails and otherwise, the defendant sought here to create and maintain a demand for its wares.

To facilitate the supply of that demand, when the goods were, as usual, called for in less than carload lots, and for the purpose of rendering easier the work of its retail demonstrator, it had, some years ago, entered into an arrangement with the Fidelity Warehouse Company. The latter operates several large warehouses in this city. As such arrangement worked out in actual practice, the defendant kept always at such warehouses a stock of its goods, the value of which at any one time might be as much as $10,000. These goods were shipped in carload lots to the Warehouse Company, which unloaded them from the car and stored them. Upon orders from the defendant, sent from one of its officers outside the district, the Warehouse Company would deliver cases of these goods to persons to whom the defendant, upon the orders in part secured by its drummers, had sold them, or it would, upon like orders, ship portions of them by rail or water in intra or inter state commerce. The Warehouse Company itself made no sales. The contract between it and the defendant provided for the collection in some cases of money due on goods sold C. O. D.; but in point of fact such transactions were so extremely rare as to be almost unknown. It was authorized to deliver goods up to a certain aggregate quantity to certain named customers of the defendant, upon the request of such customers, and without receiving any specific authority so to do from the defendant. Such customers were, however, seldom or never dealers, but were the large ultimate consumers before mentioned. Moreover, the defendant kept at the warehouses quantities of its advertising matter, which were used by its demonstrator in decorating retail grocery stores.

For its services the Warehouse Company was compensated by certain agreed storage and hauling charges. Under the circumstances, was the defendant doing business in Maryland? Many cases have been referred to by one or the other party. It is believed all have been examined. A great many of them are beside the question here to be passed on. Quite a number turn, not so much upon whether a nonresident corporation or individual is doing business of some kind in a particular state, as upon whether what the state has done, or attempted to do, amounts to a direct burden upon interstate commerce. As, for example, there is no question that, in transporting interstate freight into, out of, or through a state, the carrier transacts business therein; but it is not business upon which a state can impose a direct burden.

Other cases cited have their origin in state statutes, which prohibit a nonresident corporation doing business in the state, suing in the state

courts, unless it has complied with certain requirements as to the appointment of agents, etc. Here the courts are disposed to construe the phrase "doing business" in the light of the policy which dictated such enactments.

As the Supreme Court itself has pointed out, it is not possible, in cases in which the sole issue involved is the liability of a nonresident corporation to be sued, to formulate any general rule of universal application. Each of such cases must depend upon its own facts. International Harvester Co. v. Kentucky, 234 U. S. 579, 583, 34 Sup. Ct. 944, 58 L. Ed. 1479. Whether a nonresident corporation is doing business specially, so as to subject it to suit at the instance of a particular defendant, may depend in part upon the relation of the things it is doing to the cause of action asserted. Mutual Life Insurance Co. v. Spratley, 172 U. S. 602, 618, 19 Sup. Ct. 308, 43 L. Ed. 569.

In the case at bar the gravamen of the plaintiff's declaration is that the defendant, in order to coerce it to become a party to an alleged agreement, which was to be carried out chiefly in Maryland, refused to sell to plaintiff its goods; that is to say, refused, for this alleged illegal purpose, to let plaintiff share in any of the facilities, to furnish which was the purpose of the business activities, which, as before set forth, the defendant carried on in Maryland, or caused others to carry on for it. There is no reason under such circumstances to interpret the phrase "doing or transacting business" as if it was a term of an art or a mystery. The average man, whether intelligent or unintelligent, would suppose that a concern which kept steadily on hand in Maryland perhaps $10,000 of goods to facilitate their prompt delivery to numerous customers in that and neighboring states, so soon as the company at one of its outside offices had accepted offers which it kept men busy in Maryland soliciting, was doing business in the state. Whatever may sometimes be the case, there is no occasion here to assume that the reason of the law is not a man's natural reason.

It follows that, when this suit was instituted, the defendant was doing business in this district, within the meaning of the Clayton Act. The defendant says, nevertheless, that the return should be quashed because served upon persons who were not its agents of a character or rank upon whom such service could lawfully be made. Such an issue may often be delicate and difficult. A corporate defendant who is enough in the state or district there to wrong some one should be held to be enough in the state or district to be there answerable for what it has there wrought, provided such holding can be made without giving sanction to practices which in other cases would work injustice. On the other hand, no corporate defendant should be compulsorily brought into court by service upon one who, although connected with it in some sense, bears no such relation to it as to make it fair to presume that either it or any other reasonable and prudent person in like case would care to run the risk of being served by service upon him.

To subject the nonresident to suit in favor of the resident is often, although not always, a result which may justly be thought desirable.

State legislation and state decisions show how the anxiety to attain that end has led to holding good the service of process upon so-called agents, who have little connection with, responsibility to, or concern for the absent defendant. On the other hand, to insure, so far as is humanly possible so to do, that no one shall be judged without having a real opportunity to be heard, is perhaps the most fundamental of all the rights involved in due process of law.

In suits under the Clayton Act is there any reason even to attempt a solution of such problems, or to make decisions which in some other cases may lead to injustice? Provided the defendant is suable at all in the district, why not see to it that it shall be summoned in a way to which no possible objections can be made, and which cannot create a dangerous precedent. Whenever upon grounds not obviously frivolous the question is raised as to the authority of the agent upon whom process was served, why cannot the court suspend its answer until the plaintiff has had due process served, as the Clayton Act authorizes, in the home district of the defendant, upon some of its officers whose right to accept service for it cannot be gainsaid. When such service has been made, the question as to whether the earlier one was or was not good will have become so purely academic that there will seldom be an occasion to answer it at all.

Such course will be followed in this case, provided plaintiff acts with reasonable diligence in causing process to be served upon the defendant in the district of its residence.

GINN & CO. v. APOLLO PUB. CO.

(District Court, E. D. Pennsylvania. December 9, 1915.)

No. 1069.

COPYRIGHTS ⇐87—SUIT FOR INFRINGEMENT—PROFITS RECOVERABLE.

Report of special master as to profits recoverable for infringement of copyrights reviewed.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. ⇐87.]

In Equity. Suit by Ginn & Co. against the Apollo Publishing Company. On exceptions to report of special master. Modified and confirmed.

See, also, 215 Fed. 772.

W. Kerper Stevens, of Reading, Pa., for plaintiff.

H. F. Kantner, of Reading, Pa., and Alex. Simpson, Jr., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Plaintiff and defendant each complain of the report of the master. Whatever real substantial injury either of these parties would suffer from a decree following the findings of the master flows from the acts either of omission or commission of

the complaining party. If substantial justice has not been done by the report, it is the fault of the parties themselves. Any decree based upon the report would nevertheless be a default decree. Recognizing this, the master has coupled the statement of the conclusions reached with an expression of regret that the case as presented to him compelled these conclusions. There is, however, a different situation now presented, which enables us to do that which the master regretfully found he could not do. This difference springs out of the fact that we are asked to extend a helping hand, and in consequence have it in our power to extend it only on terms. This, of course, the master could not do. He has, however, so fully and clearly returned the facts that the case can be disposed of without a re-reference.

The trial of this case resulted in the usual findings establishing the rights of the plaintiff, the infringement of those rights by the defendant, the extension of the remedy of injunction and the awarding of damages and profits or a penalty, as the case might be. In copyright as in patent cases, the purpose is to find the amount of damages or of profits. The difference in the two classes of cases is a practical one. In patent cases, the profits are found by contrasting the amount of proceeds of sales made with the total cost of production. In copyright cases, under the act of 1912 (Act Aug. 24, 1912, c. 356, § 25(b), 37 Stat. 489 [Comp. St. 1913, § 9546]), the plaintiff may show only the receipts, or debit side of the account, and put upon the defendant the burden of proving the cost of production, or the plaintiff may exact the penalty. A successful plaintiff is thus given something in the nature of certain options. He may take damages and profits or the penalty imposed. If he takes profits, he may avail himself of the method of proving profits given by the act of 1912. This method, however, is not exclusive. Whatever method he adopts, he may apply it by calling upon the defendant to account, or by proving either sales or profits through and by evidence introduced or witnesses called by him. He may require the production of books and papers, and in proper cases offer them as part of his evidence in proof of either sales or profits. He may compel such production either by notice, or through an order to produce, or by a subpœna duces tecum. Certain legal consequences follow the method adopted, which differ if some one other than a party is subpœnaed.

The decree in this case was a consent decree, in the sense that it was prepared and submitted by counsel. It awards damages and profits, the ascertainment of the amount of which to be by the special master. The plaintiff began before the master in the regular way of securing the allowance of an order on the defendant to file an account in accordance with the established practice under the equity rules. After this, however, the proceedings were diverted by the plaintiff to an inquiry into the financial condition of the defendant, its original organization, the issue of its stock and obligations entered into by it, and what had become of its assets. Witnesses were subpœnaed, and required to produce and to testify as to books and papers. Some of the witnesses were officers and some employés of the defendant, and some were persons into whose control its books of account had

passed. Out of eight meetings before the master six were devoted to the extraneous inquiries mentioned, and only two (and one of these only formally) were devoted to aiding the master in the work he had on hand. A feature of these first six meetings was that at none of them was there any appearance on behalf of the defendant. Counsel (other than counsel for plaintiff) who appeared limited their appearance for the "witnesses." It was not until the present counsel for defendant was connected with the case that any counsel appeared for the defendant and any attempt was made to proceed with the work before the master. One meeting then sufficed to complete it.

What had previously been done can be soon recounted. Plaintiff began with asking for a formal order on the defendant for an accounting in accordance with the equity rules. This was limited (as plaintiff had the right to limit it) to an account of sales. The master promptly issued the order. Plaintiff made no formal proof of how or when it was served. A number of witnesses, some of whom were or had been executive officers of defendant, were subpœnaed and testified. The inquiry was then diverted, as already stated, to other matters. In the midst of this, however, an account was stated and produced. This seems to have been in part the joint production of the former manager and former bookkeeper of defendant, and in part was made up from the report of an examination of the books of the defendant which had previously been made. Just what it was does not perhaps clearly appear, but plaintiff went over it and had a statement prepared from it by other accountants. The plaintiff offered the statement of its accountants, and the defendant recalled its manager, who testified to facts upon which was based, at least in part, an account which he had prepared which showed the profits received from sales after the cost was deducted.

From all which took place there is to be gathered these facts: The defendant admits $1,141.34 of profits to have been received in all. The plaintiff disputes the correctness of the witnesses' statement of the cost of production.

We must now recur to the early stages of the proceedings. Plaintiff by the bill of complaint specifically averred the copyright of books known as Frye's Geographies, Smith's Arithmetics, and Cyr Readers, and the infringement by defendant. There was, in addition, a general averment that the specific instances given were typical of infringement of plaintiff's copyrights in many other instances. At the trial there was no controversy over plaintiff's copyrights, but no formal proof was made of any copyrights except those specifically averred. During the proceedings before the master it appeared from the admissions made in the accounting that a number of other copyrighted books of plaintiff were in fact to be added to the list of those proof of the copyright and infringement of which had been offered at the trial. It is also clear that at least some of the "elements of cost" in defendant's accounting of profits are based upon the statement of others than the witness who was called to vouch the account.

The bill of complaint laid at the door of the defendant the charge of three wrongs. One was unfair trade competition; another, in-

fringement of copyright, in that defendant had rebound the copyrighted books of plaintiff; the third, that they had further infringed by reprinting and republishing parts of plaintiff's copyrighted books. The bill was sustained only as to the third complaint. The inquiry before the master disclosed the fact that the business transactions of defendant had been so recorded that it is now impossible to distinguish between the publications of plaintiff which were rebound and those which were reprinted and republished, as well as rebound. Counsel for defendant has therefore accepted the necessity of including them all. It is manifest that any statement of the actual profits received by defendant from that part of its business which has been found to have been an infringement of plaintiff's copyright must be based upon a more or less intelligent guess or upon an arbitrary assumption of no cost, or upon more or less arbitrary legal presumption.

Both parties have filed exceptions to the report of the master. The plaintiff has further made application to have the decree opened, the bill amended, and proofs of the omitted copyrights heard. The case has been long pending and should be disposed of. Neither party is entitled to any further indulgence than is required to reach as nearly a correct calculation of the profits as can now be made. Any amount which would ultimately be awarded would scarce repay the expense of a satisfactory examination, and in all probability would be the amount which we think should now be found.

The conclusion reached is that the amount of the profits be fixed at the sum of $1,141.34 on the basis of the inclusion of the omitted copyrights, and to carry this into effect the leave asked for by plaintiff is granted, and the exceptions of defendant to the report of the master are sustained, to the extent that the finding that plaintiff is entitled to recover from defendant as profits the sum named in the master's report is modified and changed to the sum of $1,141.34, and the defendant's exceptions are (except to this extent), as well as the exceptions of plaintiff, dismissed, and the report of the master, as thus modified, is confirmed.

SUSMAN v. BOARD OF PUBLIC EDUCATION OF CITY OF PITTSBURGH.

(District Court, W. D. Pennsylvania. November 5, 1915.)

No. 9.

1. CONSTITUTIONAL LAW ⊜68—JUDICIAL POWERS—REPUBLICAN FORM OF GOVERNMENT.

An act of a state Legislature cannot be held invalid by the courts on the ground that the state has not a republican form of government as guaranteed by article 4, § 4, of the federal Constitution; that being a matter as to which the decision of Congress is conclusive.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 125–127; Dec. Dig. ⊜68.]

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2. CONSTITUTIONAL LAW ⊂⊃284—DUE PROCESS OF LAW—TAXATION—PENNSYLVANIA SCHOOL CODE.

School Code Pa. Act May 18, 1911 (P. L. 309), in authorizing the levy of taxes by officers of school districts, *held* not unconstitutional as depriving property owners of their property without due process by law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 893–896; Dec. Dig. ⊂⊃284.]

In Equity. Suit by Harry Susman against the Board of Public Education of the City of Pittsburgh. Decree for defendant.

Andrew G. Smith and William H. Dodds, both of Pittsburgh, Pa., and J. Norman Martin, of New Castle, Pa., for plaintiff.

J. Rodgers McCreery, of Pittsburgh, Pa., for defendant.

ORR, District Judge. This suit is before the court upon bill and answer. The bill sets forth that the plaintiff is a citizen of the state of Virginia; that he is the owner of certain real estate in the city of Pittsburgh, which is subject to and liable to taxation for municipal and local purposes, including the maintenance of public schools; that the defendant is an organized board or body of persons appointed by the judges of the court of common pleas of Allegheny county, Pa., and authorized by an act of Assembly to represent the school district of Pittsburgh in its corporate capacity, which said school district was constituted a municipal corporation by an act of the General Assembly of the state of Pennsylvania, approved the 18th day of May, 1911 (P. L. 309); that by said act of Assembly, among the powers conferred upon the defendant, was a power of taxation, and of creating indebtedness by virtue of which the real estate of the plaintiff and others may be charged with the payment of certain sums of money; that the defendant, pretending to exercise the discretion of ascertaining the amount of funds required for the maintenance of schools, has, within the limitations provided by the said act of Assembly, undertaken to levy, assess, and direct the collection of taxes as they see proper, and to borrow money upon the credit of such taxing power, without a vote of the people; that the said tax is not in the nature of a special assessment wherefrom the plaintiff and others would have a right to appeal, or wherein they would have their day in court, but is a general tax, unconditional and absolute in its nature, in default of payment of which property may be seized in execution and the plaintiff and other taxables may be liable to imprisonment; that defendant is without right or authority to levy a school tax for the reason that the said act of Assembly is unconstitutional, in offending against the Constitution of the United States, section 4 of article 4, which guarantees to every state a republican form of government, and in further offending against the fourteenth amendment of the Constitution of the United States, in that said law abridges the privileges and immunities of citizens of the United States, and may have the effect of depriving the plaintiff and other taxpayers of property and liberty, without due process of law.

The bill prays for an injunction to restrain the defendant from levying a school tax and for general relief.

The answer does not deny any of the material averments of the bill, which, however, are admitted by agreement filed. It does contain the averment, however, that in a certain proceeding instituted by one Jacob Minsinger, a taxpayer and resident of the city of Pittsburgh, in the court of common pleas No. 3 of Allegheny county, at No. 222 August term, 1911, and certain proceedings had in the Supreme Court of the state of Pennsylvania, upon appeal of said proceedings, as the same are reported in Minsinger v. Rau, 236 Pa. 327, 84 Atl. 902, Ann. Cas. 1913E, 1324, the same questions were raised as in the present bill and by said Supreme Court decided.

By reference to that case it is found that the Supreme Court had before it the questions as to whether the School Code was in violation of any provision of the Constitution of Pennsylvania, and the special constitutional questions raised in this case. The Supreme Court of Pennsylvania decided all the questions against the contention of the plaintiff in the bill. The decision of that court that the act of Assembly does not violate the terms of the Constitution of Pennsylvania should be accepted by this court as conclusive upon that particular question. It is, of course, not conclusive upon this court upon the questions whether the Code is in contravention of the Constitution of the United States.

[1] As to the alleged violation of article 4, § 4, of the Constitution, little need be said. As to whether the state of Pennsylvania has been guaranteed a republican form of government by the United States is a question which is not difficult of decision. That the state has a republican form of government is a matter of such common knowledge that this court is affected thereby. Moreover, whether a republican form of government has been guaranteed to any particular state is a matter for Congress only to decide. Luther v. Borden, 7 How. 1, 12 L. Ed. 581. Further, there does not seem to be any case which is authority for the proposition that an act of the Legislature of the state, with a republican form of government and so recognized by Congress, can be held invalid under the provisions of article 4, § 4, of the Constitution.

[2] With respect to the contention that the levy of the tax by the defendant, and the consequences thereof, are without due process of law and deprive the plaintiff and other taxpayers of the equal protection of the law, some observations should be made. Section 524 of the act provides:

"The total annual school tax levy, made in any one year by any school district, * * * shall not be less than five nor more than six mills on the dollar of the total assessment of all property assessed and certified for taxation therein."

After quoting that section, the opinion of the Supreme Court of Pennsylvania proceeds to state:

"Practically the Legislature itself has fixed the tax levy at a maximum of six mills, and simply leaves to its agents the privilege of collecting not less than five mills in any one year. This cannot properly be objected to as unrepublican or as an unlawful delegation of legislative power to an unrepresentative body."

Briefly, plaintiff's contention with respect to this branch of the case is that the School Code makes no provision for appeal or contest by the taxpayer, and therefore deprives him of a constitutional right. But section 531 of the Code makes the levy "subject to like provisions and restrictions, as exist and shall exist in the cases of all other taxes assessed in this commonwealth." In view of this provision, the general procedure in the matter of taxation should be considered. It will be noticed that the amount to be paid by the taxable is based upon the assessment of property. Property owners receive notice of the assessment of their property for taxation. Either actual notice is given them, or constructive notice is given by legislative action fixing the time at which the assessment is to be made. The property owner having been notified, he may be heard upon the propriety of the assessment and may appeal therefrom to the courts. Again, proceedings to recover unpaid taxes are not instituted until after public notice by advertisement is given, and until after a claim therefor is filed in the prothonotary's office of the proper county. Upon said claim in said office a writ of scire facias issues, to which, after service thereof by the sheriff, an affidavit of defense may be filed.

There is another remedy which the taxpayer may have in Pennsylvania, and that is by a bill in equity to restrain the collection of taxes illegally assessed against his property, for Pennsylvania has not yet applied to its citizens the strict rule of the United States that taxes must be paid in the first instance, after which, under certain conditions, suits may be instituted to recover the same.

Without further elaboration, it is sufficient to state that this court finds nothing which would justify the plaintiff in believing that any of his constitutional rights have been invaded.

The bill must be dismissed.

UNITED STATES v. OPPENHEIM et al.

(District Court, N. D. New York. November 30, 1915.)

1. CRIMINAL LAW ⟸863—INSTRUCTIONS—FURTHER INSTRUCTIONS AFTER RETIREMENT OF JURY.

A federal court may properly give additional instructions to a jury which has returned into court and reported its inability to determine certain questions of fact, and in doing so may call attention to all or any part of the evidence bearing on such questions and state the contentions of the parties with respect to its bearing and weight.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2065–2067; Dec. Dig. ⟸863.]

2. COURTS ⟸374—FEDERAL COURTS—STATE LAWS OR RULES GOVERNING PROCEDURE.

With respect to the charging of juries a federal court is not affected by state statutes or rules of procedure.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 981, 982; Dec. Dig. ⟸374.]

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3. CRIMINAL LAW ⊂⊃760—INSTRUCTIONS—WEIGHT AND EFFECT OF EVIDENCE.
A court in its charge may illustrate the manner in which a fact may be proved other than by direct evidence by stating a hypothetical case.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1749; Dec. Dig. ⊂⊃760.]

4. WITNESSES ⊂⊃277—EVIDENCE—ADMISSIONS—PRIVILEGE.
A defendant in a criminal case, who testifies in behalf of himself and other defendants, may, when it is proper cross-examination, be asked as to a written statement voluntarily made by him to the district attorney prior to any charge against him relating to the general subject-matter, or if he did not testify to certain facts before a grand jury, other than the one which afterward indicted him, after expressly waiving immunity in writing.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979–983; Dec. Dig. ⊂⊃277.]

5. CRIMINAL LAW ⊂⊃736—EVIDENCE—ADMISSION BY ACCUSED.
When it becomes a question of fact whether or not a confession or admission was voluntary, the same is admissible in evidence, and the jury is to determine the fact, and what credit they will give the statement made.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1219, 1220, 1221, 1701, 1702, 1705, 1716; Dec. Dig. ⊂⊃736.]

6. WITNESSES ⊂⊃305—PRIVILEGE OF ACCUSED IN CRIMINAL CASES—CROSS-EXAMINATION.
Where the defendant in a criminal case takes the stand and testifies, he waives his constitutional privilege of silence, and may be cross-examined with the same latitude as other witnesses.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1053–1057; Dec. Dig. ⊂⊃305.]

Criminal prosecution by the United States against Baron Eugene Francois Oppenheim, Howard G. Rogers, and Richard Murphy. On motion for new trial and in arrest of judgment after conviction, on exceptions to remarks to the jury by the court on the jury coming in for further instructions after having been out for at least 24 hours. Motion denied.

Costello, Burden, Cooney & Walters, of Syracuse, N. Y., for defendants Oppenheim and Rogers.

Charles N. Bulger, of Oswego, N. Y., for defendant Murphy.

Frank J. Cregg, Asst. U. S. Atty., of Syracuse, N. Y., and Wrisley Brown, Sp. Asst. Atty. Gen., of Washington, D. C.

RAY, District Judge. In this case, after a prolonged trial of seven weeks, with long sessions, including one or two Saturdays, and two whole days devoted to summing up by counsel, and after a lengthy charge occupying about five hours, including the consideration of numerous requests, the jury informed the court the second time that it desired further instructions. Thereupon the marshal was directed to bring the jury into court, whereupon the following occurred:

"Well, gentlemen, is there anything the court can do? Any further charge or instructions?

"The Foreman: We have looked the evidence over, and worked hard over it, and seem to be divided, and it does not look as if we could agree.

"The Court: Well, on the questions of law, divided on the questions of law, legal questions?

"The Foreman: On questions of evidence.

"The Court: Anything I could call your attention to, gentlemen, in regard to the evidence? Is it in regard to the weight of the evidence, or what the evidence is?

"The Foreman: We would like to know the time when—the evidence as to when Howard J. Rogers [one of the defendants] first knew that there had been money appropriated from the bank; and also Baron Oppenheim [another defendant]."

The indictment in count 1 charged a conspiracy between Wm. T. Brice, a clerk, and sometimes acting teller, in the First National Bank of Amsterdam, and the defendants on trial, Oppenheim, Rogers, and Murphy, to abstract and also to misapply the funds and credits of said bank for the benefit of all; Brice to do the actual abstracting and misapplication, and the others to aid and abet him in so doing, all sharing in the funds and credits so illegally obtained. It is not disputed that the bank was short some $180,000, or that something like $69,000 of this shortage was obtained from the bank mainly by means of checks drawn on the bank by Murphy, and by Murphy as attorney, and by "Brice-Riley Realty Company, Murphy, Vice President," and by Oppenheim and by Rogers on many occasions, and paid from the funds and credits of said bank without its knowledge, or that of its board of directors, through the artifices and manipulations and concealments and false entries of Brice in the bank. Neither of these persons had any account in the bank, except that Brice had opened a false account for Rogers in "the loose leaf" ledger to aid in the abstraction, etc.

The other counts in the indictment, some 500 or 600 of them, charged that Brice either abstracted or misapplied the funds of the bank, and that Oppenheim, Rogers, and Murphy aided and abetted him in so doing. On some occasions money was taken out by Brice directly and passed over to some one of the other defendants. Brice testified as a witness for the government, and testified that at a time early in 1911 he in substance informed the other defendants that the money must come from the bank and was coming from the bank. It was, of course, necessary to corroborate Brice, and admissions and statements of Murphy and Rogers were used, as were the letters of Rogers, Oppenheim, and Murphy, in addition to the checks themselves. A visit of Oppenheim to Amsterdam to obtain money from Brice, and during which visit he obtained money from Brice, was proved, as was a visit made by Rogers to that place, and what occurred; also many visits by Murphy. Scores of letters written by Rogers and Murphy were in evidence, and one at least written by Oppenheim. The story of the visit by Oppenheim to Brice at Amsterdam as described by Brice differed in some respects from that told by Oppenheim, but both agreed that the visit was to obtain money through Brice; that Oppenheim went to the bank, but that no business was transacted there or discussed there; that they went to the engine house of the fire department of the city and there conversed; that an appointment was made to meet at a hotel, and that later they did

meet there, and that then Brice got the money, he says, from the bank without its knowledge, and took it to the hotel and delivered it to Oppenheim, who gave a receipt. Brice claimed this money came from the bank improperly, and that Oppenheim then knew it. Oppenheim claimed it was a mere loan from Brice, a man of wealth, he supposed.

It is unnecessary to go into or give the details of the transaction. The defendants all claimed that the money, aggregating some $69,000, came as loans from Brice and from his personal funds, and that they had no knowledge of the fact that Brice was improperly and illegally taking the money from the bank. The government contended that the defendants knew it was coming from the bank illegally, and that the defendants aided and abetted, incited, and at times coerced Brice to take the money through fear of disclosure by them and promises of speedy profits and returns from promotion enterprises in which the defendants were concerned and engaged and a share of which was promised Brice. To answer the question propounded by the jury as to what the evidence was as to when Rogers and Oppenheim first knew that money had been or was being taken from the First National Bank of Amsterdam, it was essential to call attention to what proof is necessary to make out knowledge, and also to the evidence bearing on that question of knowledge. The checks were drawn and the money taken, almost entirely, in comparatively small amounts during a period of nearly three years. The court, in view of the letters and documents, could not say to the jury that Rogers first knew at one time or at another time, and the same was true as to Oppenheim. It was for the jury to determine, on all the pertinent evidence, first did they or either of them *know* Brice was improperly taking this money from the bank; second, did they aid and abet him, incite and encourage and procure him to do so, and if they or any one of them did know, when did the defendant having knowledge at any time first become possessed of that knowledge.

The court proceeded, therefore, to indicate the modes of proof by which knowledge may be shown, and then went very briefly over the claims of the government as to what had been shown, and by what evidence as to the time when Rogers and Oppenheim obtained their knowledge, if any, that the money was coming from the bank. The jury was repeatedly told that the matters stated were the contentions of the government, and that it was for the jury to say when the respective defendants first knew the money was being abstracted or misapplied. The jury came in for instructions on two occasions, and had been distinctly told that, inasmuch as Brice was alleged to be a conspirator, one or more of the defendants on trial might be found guilty on the conspiracy count and the others acquitted, and that on the other counts one or all the defendants on trial might be found guilty, or that some one or all might be found guilty on some of the counts and acquitted on the others, depending on when such defendants repectively had knowledge that Brice was taking the money from the bank or misapplying its credits illegally.

In connection with directing the attention of the jury to the claims of the government and the letters referred to the following took place:

"Mr. Costello: I also except to what you said in reference to the letters written by Mr. Rogers and each of them.

"The Court: Yes.

"Mr. Costello: I also ask you to state at this time—

"The Court: No; this is no time for requests.

"Mr. Costello, continuing: In connection with what you have already stated, that the defendants' evidence should be taken into consideration.

"The Court: I have told the jury many times, of course, to take into consideration all the evidence in the case, the evidence given by the defendants, and I tell them right here, in connection with what I have said, that they have heard the explanation given by Rogers, and the explanations, of course, given by Murphy, and the explanations given by Oppenheim. The question is, of course, whether they explain."

Then, after referring to the contentions, the court said:

"It is for you to say, gentlemen. Take the letters as a whole, as I told you before, and the surrounding circumstances and conditions."

Then, after referring to another contention, the court said:

"I have tried to call your attention to that, gentlemen, very pointedly, to what the government contends. It is a question of fact for you as intelligent men."

Then later again:

"Mr. Costello: I would like to ask your honor to charge the jury that the answer to their question of when Rogers or Oppenheim knew is a question of fact for them, to be determined from all the evidence.

"The Court: I have stated that very many times."

Then later the court again said:

"Of course, gentlemen, you understand that the questions of fact are for your decision, and the questions of law for the court. The weight of evidence is for you, subject to the rules of law which I have given you."

Then later:

"These defendants are on trial for something that may involve their liberty, and of course that you are to have in mind in weighing their evidence. Brice is jointly indicted with them. The situation is as I have stated. Has that induced him to give false or colored testimony? Have all that in mind, the probabilities and the improbabilities, the reasonableness and the unreasonableness of the stories told, in view of the light of all the other facts and circumstances in the case—the naturalness or the unnaturalness, in view of the circumstances, the things done, etc. All of that is for the jury to consider in arriving at a decision and determining what the truth is, unbiased, as I have told you, and unprejudiced, without passion, without fear, unaffected by sympathy; that is, in deciding what the facts are. A man without human sympathy is not, I might say—my opinion, I will put it—not a fit member of society, because he would be cruel and heartless, and might be restrained only by his fear, perhaps, or judgment. But we are not—the judge on the bench is not to be swayed by it in stating the law; the jury, in deciding the facts, is not to be swayed by it or consider it. What are the facts? What is the truth? And with the consequences, as I have said before, I think, to these defendants, with that you have nothing to do. That is with the court and the pardoning power. It is for you to say what the truth is as honest, intelligent citizens, called upon to exercise your good judgment in weighing and considering evidence and giving weight to it, that which commends itself to your belief. I think that is all that I need to say to you now, gentlemen. You may retire.

"Mr. Costello: I desire to except to your honor's remarks as made since my former exception.

"The Court: Oh, yes."

The jury in the main charge had been plainly told that the burden of proof was on the government, that guilt must be established on all the evidence beyond a reasonable doubt, and that the defendants were entitled to the benefit of every reasonable doubt, and that the evidence must be inconsistent with the innocence of the defendants, and if just as consistent with innocence as guilt then the defendants should be acquitted; also that defendants and each of them was presumed innocent until proven guilty, and that such presumption accompanied the defendants all through the trial, and at every stage of it, and on all questions necessary for the government to establish, and until overcome by evidence which satisfied the jury of the guilt of the defendants beyond a reasonable doubt; also that all questions of fact were for the jury to decide, and questions for them. This had all been stated a second time in the main charge in response to requests submitted by the defendants.

As to defendant Oppenheim's knowledge that the money was taken from the funds and credits of the bank, the government had shown by the defendant Murphy when on the stand that on one occasion, after he (Murphy) knew that Brice was short in his accounts at the bank, Murphy went into Oppenheim's office and informed him that Brice was short in his accounts at the bank, and that Oppenheim said nothing, showed no surprise, and soon thereafter drew a check or checks on the bank, having no account there, and induced Brice to cause them to be paid, which was done from the funds of the bank without its knowledge. The claim and contention of Oppenheim was that he was borrowing of Brice; that Brice had agreed to loan him money as a favor when he wanted it, and that he honestly believed Brice was a man of wealth and teller or cashier in the bank. The defendant Oppenheim, as a witness on his own behalf, flatly contradicted Murphy as to this interview and conversation. The government contended that from this conversation Oppenheim, in the light of other facts and circumstances, was informed that Brice was taking money from the bank improperly to meet the demands of the defendants, and that at this time, if not before, Oppenheim was informed and must have known that the money he was obtaining from Brice was coming from the funds of the bank, and that, as Oppenheim showed no surprise, it was some evidence that he already knew Brice was taking money from the bank, as Brice had testified. On this subject, when the jury was in for instructions the second time, the court said:

"Now, gentlemen, the defendant Murphy, the government says that he shows every purpose possible to shield and cover the other defendants. That is the way they put it. He shows every disposition not to say anything that would harm them or be against them; but he says that in January, as I have called your attention, that Oppenheim was told directly. So that he then knew and that he did not say a word, evinced no surprise, when told that Brice, who had been helping them all, voluntarily advancing money, Brice, a man of wealth, thought by all of them to be wealthy, that Brice, who had been helping them all, helping Rogers, a member of the firm of Oppenheim & Co., been helping Murphy, not a member, was short at the bank. Murphy knew that, and the claim is they all knew it when Brice was advancing the money to Oppenheim & Co. to the amount of a great many thousand dollars,

as evidenced here by the papers and notes. Now, gentlemen, Murphy says that Oppenheim was silent when he went in there and told Oppenheim that Brice was short—in substance, I won't repeat the language—short in his accounts at the bank; that he was in trouble. Of course, it is assumed that Oppenheim, a financial man, who had been engaged in financial matters all his lifetime, connected with banking houses all his lifetime, the government says that the jury should understand what that meant; that it would indicate to a man of that character trouble between the bank and Brice because he was short in his accounts, and that that would mean trouble because under the statute it is not a mere indebtedness—it is using the money of another unlawfully and improperly. The government claims that when Murphy told Oppenheim that, told Oppenheim, the man that Brice had helped to the amount of thousands of dollars to him personally and to others and to the firm of which he was a member, and then to others, when he told him that, that if Oppenheim had been ignorant of the fact, had not already known it, that he would have evinced some surprise, said something. Now, has Murphy, connected with this case as he is—has Murphy come here and committed perjury against Oppenheim? Has he come here and told a willful lie, and shielded him in all other respects? the government says. That is their contention. It is for you to say. The government says that it was substantially in a way an admission, his mere silence, his showing no surprise, that he did know the facts. Of course, there is evidence here that on at least one or two occasions he was told the same thing. That other evidence came from Brice, and defendants say you should pay no attention to it. I have been speaking of the evidence from other sources in the main."

This was excepted to by Judge Bulger in behalf of the defendant Murphy. The general proposition presented on the argument is that when the jury came in for instructions the second time, after having been out over 24 hours, and presented the questions as to which they desired information, the court had no lawful right to go over any part of the evidence, and state the claims of the respective parties, and quote from the letters of Rogers.

[1] The jury was not sent for by the court, but was brought in for further instructions pursuant to its request. The jury indicated the question on which it desired information. The court could not fix a definite time when either defendant had knowledge, but only call attention to the evidence and claims of the government, so as to enable the jury to fix the time in case they found the defendants had knowledge at any time. The court had the right to recall the jury, and give further instructions, and comment on the evidence; and it was not the duty of the court, nor necessary for it, to recapitulate all the evidence on a given point or points, or the whole case, and the court had the right to go to the extent even of expressing an opinion on the facts (which it did not do), so long as the ultimate decision of the facts was left to the jury. Allis v. United States, 155 U. S. 117, 123, 124, 15 Sup. Ct. 36, 39 L. Ed. 91; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257; Nudd et al. v. Burrows, 91 U. S. 426, 439, 23 L. Ed. 286; Simmons v. United States, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968; Young v. Corrigan (C. C. A. 6th Circuit) 210 Fed. 442, 443, 127 C. C. A. 174; Suslak v. United States (C. C. A. 9th Circuit), 213 Fed. 913, 919, 130 C. C. A. 391; Young v. Corrigan (D. C.) 208 Fed. 431, 436; Allen v. United States, 164 U. S. 492, 494, 17 Sup. Ct. 154, 41 L. Ed. 528; Wiborg v. United States, 163 U. S. 632, 656, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Williams v. Conger, 125 U.

S. 397, 8 Sup. Ct. 933, 31 L. Ed. 778; Lovejoy v. United States, 128 U. S. 171, 173, 9 Sup. Ct. 57, 32 L. Ed. 389; Rucker v. Wheeler, 127 U. S. 93, 8 Sup. Ct. 1142, 32 L. Ed. 102.

In Allis v. United States, supra, it was expressly and distinctly held:

"It is common practice and no error to recall a jury, after they have been in deliberation for a length of time, for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in their solution, and the time at which such recall shall be made must be left to the discretion of the trial court. * * * The rule repeated that in a federal court the presiding judge may express to the jury his opinion as to the weight of evidence. In making such a statement he is under no obligation to recapitulate all the items of the evidence, nor even all bearing on a single question."

In the opinion of the late lamented and able Mr. Justice Brewer (no dissent), the court (155 U. S. at pages 123, 124, 15 Sup. Ct. at page 38, 39 L. Ed. 91) said:

"It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment. The time at which such a recall shall be made, if at all, must be left to the sound discretion of the trial court, and there is nothing in the record to show that the court, in the case at the bar, abused this discretion or failed to wait a reasonable time for the consideration of the case by the jury under the charge as already given. So far as 'arguing the testimony' is concerned, the only part of the charge that can be considered as even tending in that direction was that part referring to the question of intent. We see nothing in this of which any just complaint can be made. The illustration given by the court was apt and fair, and if it bore hardly upon the defendant it was only because the transaction, with which he was charged, was one of like character and indicative of the same intent. The illustration was put in the form of a question, and no affirmation was made as to the intent that must be presumed therefrom. Even if it contained an expression of opinion, such expression is permissible in the federal courts. Simmons v. United States, 142 U. S. 148 [12 Sup. Ct. 171, 35 L. Ed. 968]; Doyle v. Railway Co., 147 U. S. 413 [13 Sup. Ct. 333, 37 L. Ed. 223]. So far as respects the complaint that the court stated part of the testimony on a certain point without stating all, we know of no rule that compels a court to recapitulate all the items of the evidence, nor even all bearing upon a single question. There was no intimation that all the testimony bearing upon any particular point was stated. On the contrary, the plain declaration was that there was other testimony than that mentioned, and the jury was admonished to give that not mentioned as full and careful consideration as that mentioned."

In Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257, the court held:

"At a trial by jury in a court of the United States, the judge may express his opinion upon the facts. The expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed by writ of error; and the powers of the courts of the United States in this respect are not controlled by state statutes forbidding judges to express any opinion upon the facts."

In the opinion by the late lamented and able Mr. Justice Gray the court (118 U. S. at pages 553, 554, 7 Sup. Ct. at page 2, 30 L. Ed. 257) said:

"In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and, the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. Carver v. Jackson, 4 Pet. 1, 80 [7 L. Ed. 761]; Magniac v. Thompson, 7 Pet. 348, 390 [8 L. Ed. 709]; Mitchell v. Harmony, 13 How. 115, 131; Transportation Line v. Hope, 95 U. S. 297, 302 [24 L. Ed. 477]; Taylor on Evidence (8th Ed.) § 25. The powers of the courts of the United States in this respect are not controlled by the statutes of the state forbidding judges to express any opinion upon the facts. Nudd v. Burrows, 91 U. S. 426 [23 L. Ed. 286]; Code of Georgia, § 3248. The exceptions to so much of the judge's charge as bore upon the liability of the defendant cannot therefore be sustained."

In Lovejoy v. United States, supra, the court said:

"It is established by repeated decisions that a court of the United States, in submitting a case to the jury, may at its discretion express its opinion upon the facts, and that such an opinion is not reviewable on error, so long as no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury."

[2] And in these matters the statutes, rules, and practice of the state and state courts of the state in which the case is tried have no application. Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286; Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Vicksburg, etc., v. Putnam, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257; Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; Chateaugay, etc., Iron Co., Petitioner, 128 U. S. 54, 9 Sup. Ct. 150, 32 L. Ed. 508.

[3] The court illustrated the mode in which a fact may be proved to exist, short of actually seeing the thing or acts which causes or caused an existing condition, by referring to the fact that to an intelligent man it may be proved that the sun is shining by having him look through the window and see that it is broad daylight and that there are no artificial lights in the vicinity, where such observer knows the difference between sunlight and artificial light, even if he cannot see the sun. The court said:

"There are different ways of knowing a thing or a fact. It is not necessary, for instance, for a man to see the sun in order to know that the sun is shining, or if the curtain is down, and he cannot see the sun himself, but he can see that it is broad daylight, and that there are no artificial lights around, if he knows the difference between an artificial light and its effect and sunshine, and so on, he might arrive at a correct conclusion that the sun was shining, even if he didn't look out and have the sun there in his face. So, gentlemen, as to knowing a thing, or that a fact exists, as, for instance, this money was coming out of the bank, the government contends that aside from any expressed words, that as to Oppenheim and as to Rogers, if I remember rightly, the evidence shows that they knew and must have known that this money was coming out of the bank in the case of both of them, and especially in that of Rogers, that it was indicated in his letters, shown in his letters. I call your attention, gentlemen, on that question to the contention of the government."

In Allis v. United States, 155 U. S. 117, on page 120, 15 Sup. Ct., on page 37 (39 L. Ed. 91), the court, in charging the jury used this illustration:

"And if he caused these entries to be made, with what intent did he do so? If a customer or friend of yours, who owed you $40,000 on account, should come to you and tell you that he had deposited $50,000 to your credit in the German National Bank of Little Rock, and that he wanted a receipt for the $40,000 that he owed you and wanted a credit for the other $10,000, and you should give him the receipt and the credit, and should subsequently learn that he had never deposited one dollar in that bank for you, with what intent would you conclude he had made these statements? Would you think it was with an honest purpose, or with some intent to injure or defraud you?"

This was held proper, and the court said:

"Even if it contained an expression of opinion, such expression is permissible in the federal courts. Simmons v. United States, 142 U. S. 148 [12 Sup. Ct. 171, 35 L. Ed. 968]; Doyle v. Railway Co., 147 U. S. 413 [13 Sup. Ct. 333, 37 L. Ed. 223]."

In Instructions to Juries, by Blashfield, § 35, page 78, it is said, citing scores of cases:

"It is not a violation of the rule against the assumption of facts in instructions for the court to assume facts merely in order to illustrate the application of a proposition of law pertinent to the case. This is a common practice, and no intelligent juror can be misled by such illustrations."

In this case, after seven weeks of trial, extensive statements by the defendants as witnesses in their own behalf, and the introduction in evidence and reading to the jury of scores of letters, it was impracticable and unnecessary for the court to read or call attention in detail to all the evidence in the case even in the main charge. In Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91, the court held that:

"There is no error where an instruction gives *part* of the testimony on a certain point *without giving all of it*, since there is no rule compelling a court to recapitulate *all* the items of the evidence, *nor even all* bearing upon a *single question*."

Here by consent the jury had been furnished all the letters and all exhibits, and presumably had read them. They had been read to the jury in the presence of the court also during the trial. All the court could do by way of answering the inquiry of the jury was to call attention to the salient points in the evidence which pointed to knowledge on the part of the defendants that the money was coming from the bank, and not from the private funds of Brice, and the time when the defendants gained such knowledge.

As bearing on this it was proper to call attention, not only to the visits of Oppenheim and Rogers to Amsterdam, but to the letters written by Rogers to Brice, containing such expressions as:

"I want to talk to you to-morrow about the checks, so as to see just what can be done and have you send the money for the salaries. Can you be at the Warner at 5 p. m.? We can talk more freely then." And: "So keep mum yourself about it." And: "I know where the Amsterdam money came from, and I want to get it back to you. I don't need to feed it through him." And: "Do for God's sake stand by for one final attack. I will save you as much as possible, but I have to have the safety valve once in a while." And: "Thank the Lord I have got my money fixed for Monday. Had to do it on long distance phone, but I got it. Now you must arrange temporarily to hold that check for $30. It will probably be in to-morrow, whether it comes direct or from some other bank. Please arrange to *intercept* and hold it"

—and which letters mostly, if not all, were written with reference to checks drawn by Rogers on the First National Bank of Amsterdam, where he had no account. The court, in mentioning them, called attention to the contention of the government and to the explanation of Rogers, finally stating to the jury:

"Now, gentlemen, it is all for you to consider;" and, "Now, gentlemen, what is the significance of these letters?" and, "It is for you to say, gentlemen; that is the contention of the government, and take into consideration many of these phrases [in the letters] to which I have called your attention, and say what they mean."

As before stated, the jury was also told to consider the entire contents of the letters, and all the surrounding conditions and attendant circumstances, in determining their true meaning. The court expressed no opinion, unless it may be inferred it had an opinion that these letters, and particularly these expressions, indicated knowledge on the part of Rogers that the money he was obtaining on these checks drawn on the bank and directing the bank to pay them came from the bank, instead of the private funds of Brice, and were evidence on that subject proper for the consideration of the jury in determining when Rogers first knew the money was coming from the bank, if he ever knew. Clearly the letters were competent and pertinent evidence on that subject, and as clearly the court performed its duty in submitting them to the consideration of the jury and in calling attention to the expressions relied on by the government, and in repeatedly submitting it to the jury to find and decide, in view of all the evidence, what the letters and expressions meant, and what fact, if any, in connection with the other evidence, they established. The court did not indicate any opinion whether or not the evidence and letters together *established* such knowledge, but necessarily, by submitting them to the consideration of the jury and calling attention to the contention of the government, in substance said they had a tendency to establish such knowledge. Otherwise, it would have been the duty of the court to withdraw them from the consideration of the jury entirely. The probative weight and force of the letters was left to the jury, as well as the question whether they had any. The conduct of the trial on the part of the government was eminently fair, and the defendants as witnesses were given the widest latitude in explaining their intent and meaning, and in presenting every fact bearing on the questions at issue.

In a trial of this character, evidence competent against one or more of the defendants, and not against the other or others, was offered and admitted. The jury was cautioned, when it was received, that such evidence, admitted against one or two, must not be considered as against the others or the other, as the case may have been, and this was repeated in the charge. Jurors are presumed to observe and obey the instructions of the court.

[4] The defendant Murphy claims that his constitutional rights were invaded by questions calling on him to state whether or not before a prior grand jury (not the one which found the indictment on which defendants were being tried) he gave certain testimony, and

whether or not he made a certain written statement at the request of the United States attorney (not before the grand jury), all pertinent to the charges contained in the indictment on which defendants were being tried.

The contention of the defendant Murphy is, and he so testified, that he was invited to the office of the United States attorney prior to the meeting of the grand jury referred to, and told that he would be used as the main witness on behalf of the United States, that there was nothing on the record against him, and that he was thus requested and encouraged and induced to make the written statement referred to, and as to which he was interrogated on this trial, and to go before the said grand jury (not the one which found the indictment on which he was being tried with Oppenheim and Rogers) and give the testimony to which his attention was called on this trial. He was not contradicted by the United States attorney in these regards, but when called before the grand jury referred to he in writing stated that he was giving his statement voluntarily, and in writing he expressly waived immunity before giving the testimony and after making the written statement which he gave to the United States attorney. On this trial he voluntarily gave evidence in behalf of himself and in behalf of his codefendants. He thus became subject to cross-examination. Statements or admissions made by him were proper subjects of inquiry, unless made under the inducement of fear or promises of favor, or were obtained by the government by misleading inducements. In 2 Chamberlayne on the Modern Law of Evidence, § 1479, pp. 1875, 1876, it is said:

"Confessions, it is said, must be voluntary. The reverse statements, that a confession which is involuntary will be rejected, and that a voluntary confession will be received in evidence, are equally familiar. * * * What is meant, apparently, is this: A confession, like any other statement offered as evidentiary, must, to be admissible, have been made because it was true. It is essential that the speaker should have known the truth of the matter covered by his declaration and honestly endeavored to state it. An incriminating statement made for some other reason than because it was true, in order to gain some advantage or avoid some injury, may not possess these elements of admissibility. Such a statement may therefore properly be *rejected*, often because irrelevant. The general ground for rejecting confessions is said to be that they are involuntary. The rule of procedure is firmly established that involuntary confessions will not be received in evidence. The confession made under a misleading inducement is therefore said to be involuntary."

In Wilson v. United States, 162 U. S. 613, 622, 623, 16 Sup. Ct. 895, 40 L. Ed. 1090, the court said, referring to confessions and admissions:

"In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort."

At page 622 (16 Sup. Ct. at page 899, 40 L. Ed. 1090), the court quoted with approval from Hopt v. Utah, 110 U. S. 574, 584, 4 Sup. Ct. 202, 28 L. Ed. 262, where it was said:

"But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or

promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law."

[5] But when it becomes a question of fact whether or not the confession or admission *was* voluntary the same is admissible in evidence, and the jury is to determine the fact and what credit they will give the statement made. Wilson v. United States, 162 U. S. 613, 624, 16 Sup. Ct. 895, 40 L. Ed. 1090; Commonwealth v. Preece, 140 Mass. 276, 5 N. E. 494; People v. Howes, 81 Mich. 396, 45 N. W. 961; Thomas v. State, 84 Ga. 613, 10 S. E. 1016; Hardy v. United States, 3 App. D. C. 35. In Wilson v. United States, supra, 162 U. S. at page 624, 16 Sup. Ct. at page 900, 40 L. Ed. 1090, the court held:

"When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. Commonwealth v. Preece, 140 Mass. 276 [5 N. E. 494]; People v. Howes, 81 Mich. 396 [45 N. W. 961]; Thomas v. State, 84 Ga. 613 [10 S. E. 1016]; Hardy v. United States, 3 App. D. C. 35."

Murphy is a lawyer of many years' practice and had been a member of the Legislature of the state of New York. Clearly he was not ignorant of his right not to make a statement, or of his right not to give evidence before the grand jury. In no sense was he then being examined as a party accused. True, he implicated himself; but according to his written statement he went voluntarily before the grand jury, and when there he expressly waived immunity. The prior promise of the United States attorney, if it was a promise, to use Murphy as the principal witness for the government, accompanied by a statement there was nothing against him on the record, was not a promise not to prosecute him, and no such promise was made. In view of all the circumstances, it cannot be said as matter of law it was an inducement to make the statements or give the evidence, such as to make it improper to question him as to admissions then made when subsequently on trial on an indictment found subsequently by another grand jury at another term of court and when testifying as a witness on his own behalf and in behalf of the other defendants as to the same general subject-matter. These prior declarations and statements of Murphy were not offered or given in evidence against him as evidence in chief, but only by way of contradiction after he had voluntarily gone upon the stand and given evidence in his own behalf and that of his codefendants. On redirect Mr. Murphy was permitted to state all the facts relating to and all the circumstances under which he gave the testimony and made the written statement to which his attention had been called on cross-examination.

[6] When Murphy took the stand he waived his constitutional privilege of silence and made himself subject to the same rules of cross-examination as any other witness. Fitzpatrick v. United States, 178 U. S. 304, 315, 20 Sup. Ct. 944, 948 (44 L. Ed. 1078) where it is said:

"Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf, and makes his own statement, it is clear that the

prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are."

This case is approved. Sawyer v. United States, 202 U. S. 150, 165, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269.

Section 395 of the Code of Criminal Procedure of the state of New York provides as follows:

"A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor, but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

This rule established by the Code of Criminal Procedure in the state of New York is founded on the common-law rules, but is more definite and stringent. People v. Mondon, 103 N. Y. 211, 219, 8 N. E. 496, 57 Am. Rep. 709. This does not govern here, but it shows the tendency of modern legislation. Here Murphy voluntarily waived immunity, and proceeded to write his statement outside of court and the grand jury room, and to give his evidence before the grand jury. It seems to me clear that he waived his privilege, and that it was proper on this trial and on his cross-examination to inquire of him as to the statements then made after such waiver. Can it be that a person may waive immunity (conceding he has been previously told by the United States attorney that there is nothing against him on the record and that he will be used as the principal witness for the government against others), then give his testimony and make and deliver written statements to the United States attorney which implicate him, and then, when on trial on a subsequently found indictment against himself and others, give evidence in favor of himself and others covering the whole proposition involved in his former statements, and legally claim that his constitutional rights are invaded by asking him if he did not on such former occasion make specific statements at variance with his present testimony?

The witness Brice was in some respects corroborated by Murphy, by Rogers, and by Oppenheim. In other respects he was corroborated by other witnesses, and also by writings and by the letters referred to and letters written by Murphy. I find no substantial or prejudicial error. For a long time Oppenheim, Rogers, and Murphy occupied the same offices and were shown to have acted in concert and for their common benefit. On request they aided each other to obtain money from this bank through Brice.

The evidence was clearly sufficient to sustain the verdict of guilty on each of the counts submitted to the jury, and the motions as to

each defendant are denied. If, as intimated, a writ of error is desired, it will be granted as matter of right, and, if applied for and granted, the bail of Oppenheim, a citizen of France, is fixed at $15,000, and that of the others at $10,000 each.

DE BIASI v. NORMANDY WATER CO. (two cases).

(District Court, D. New Jersey. December 8, 1915.)

1. COURTS ⟸322—JURISDICTION OF FEDERAL COURT—PLEADING—ALLEGATION OF CITIZENSHIP.

An allegation in a complaint that defendant is a corporation duly organized and existing under the laws of a certain state is a sufficient allegation that it is a citizen of such state for the purpose of showing jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876–881, 887; Dec. Dig. ⟸322.]

2. MASTER AND SERVANT ⟸250¾, New, vol. 116 Key-No. Series—MASTER'S LIABILITY FOR DEATH OF SERVANT—CONSTRUCTION OF STATUTES.

The New Jersey Workmen's Compensation Act of April 4, 1911 (P. L. 1911, p. 134), provides two methods of compensation for the injury or death of an employé; that provided by section 1 being by an action for damages for negligence, its provisions being expressly made applicable to actions brought under the Death Act of March 3, 1848 (P. L. p. 151), while section 2 provides for an elective compensation in accordance with a schedule contained therein. Under such section the liability of the employer is fixed, regardless of his fault or negligence, and it is expressly provided that section 1 shall not apply where section 2 becomes operative, and that every contract of hiring shall be presumed to have been made with reference to section 2, and shall be governed thereby, unless otherwise provided in the contract, or a notice to that effect shall have been given by one party to the other. It is further provided that compensation thereunder shall not apply to alien dependents not residents of the United States. *Held* that, on the death of an employé, where nothing had been done to prevent the application of section 2, his administrator could not maintain an action against the employer under the Death Act, nor, where his only dependents were nonresident aliens, could he recover under the Compensation Act; the right being purely statutory.

3. TREATIES ⟸8—CONSTRUCTION—RIGHT OF ACTION FOR WRONGFUL DEATH.

Article 3 of the Treaty between the United States and the kingdom of Italy, proclaimed November 23, 1871 (17 Stat. 845), which provides that the citizens of each country shall receive in the states and territories of the other "the most constant protection and security for their persons and property and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives," does not confer on the nonresident alien relatives of a citizen of Italy a right of action for his death under the laws of a state which give such right of action to native relatives, but expressly deny it to nonresident aliens.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 18; Dec. Dig. ⟸8.]

4. TREATIES ⟸10—AMENDMENT—TIME OF TAKING EFFECT.

An amendment to a treaty is not retroactive, and cannot revive a right of action which was expressly taken away by a state statute prior to its proclamation, although the statute, if enacted afterward, would have been in conflict with the amended treaty.

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

At Law. Two actions by Antonio De Biasi, administrator of the estate of Giovanni Montanaro, deceased, against the Normandy Water Company. On motions to strike out complaints. Motions sustained.

Charles A. Ludlow, of New York City, for plaintiff.
McCarter & English, of Newark, N. J., for defendant.

RELLSTAB, District Judge. The defendant moves to strike out the complaints filed in two suits instituted against it by the administrator of Giovanni Montanaro, deceased. One of these suits is founded on an act of the New Jersey Legislature, entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect, or default," approved March 3, 1848 (P. L. N. J. 1848, p. 151), and the acts amendatory thereof (see 2 Comp. St. N. J. 1910, p. 1907). Hereafter this act will be referred to as the "Death Act," and the suit founded thereon as the one "to recover damages." The other suit is founded on an act of the same Legislature, entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employé in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911 (P. L. N. J. 1911, p. 134), and the acts amendatory thereof. Hereafter this act will be referred to as the "Compensation Act," and the suit founded thereon as the one "to recover compensation."

In substance, the allegations of the complaints, common to both suits, as far as are necessary to be stated on these motions, are that the deceased, previous to his death, was a resident of New Jersey and a citizen of the kingdom of Italy; that the administrator is a resident of New Jersey and a citizen of said kingdom; that the defendant "is a corporation duly organized and existing under the laws of the state of New Jersey"; that the deceased was an employé of the defendant, and that on the 1st of October, 1912, while he "was in the employ of the defendant, in and about the prosecution of its work at Convent, Morris county, New Jersey," he received the injuries which resulted in his death, which injuries were due, not to any fault of his, but solely to the negligence of the defendant; and that the deceased left him surviving a widow and four minor children.

In the suit to recover damages, the Death Act is set out at length, and it is alleged that the widow and minor children were dependent upon deceased for their support. The damages are laid at $5,000. In the suit to recover compensation, there are the further allegations that the death was not due to any willful act or intoxication on the deceased's part, and that the sum of $1,567.50 is due plaintiff pursuant to the provisions of said Compensation Act. In that suit, the declaration also sets up article 1 of the treaty between the United States of America and his majesty the king of Italy, concluded on February 25, 1913, amending article 3 of the treaty of February 26, 1871. This treaty article, thus amended, reads:

"The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant security and protection

for their persons and property and for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs, and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

The plaintiff concedes that the widow and children of deceased are alien dependents, not residents of the United States, that he has but one cause of action, and that both these suits cannot be maintained.

[1] A number of grounds are assigned why the complaints should be struck out. Those common to both complaints are: Their failure to show "that the matter in controversy arises between citizens of different states, * * * [or] between citizens of a state and foreign states, * * * [and] of what state the defendant is a citizen." The complaints, while alleging that the plaintiff is a citizen of a foreign state, fail to allege in terms that the defendant is a citizen of a state. To declare that the defendant is a citizen of New Jersey, without showing where it was incorporated, would be insufficient. A corporation can be a citizen of only the state which created it, and the allegations in the complaints that the defendant "is a corporation duly organized and existing under the laws of the state of New Jersey," in legal intendment, aver citizenship and are sufficient to confer jurisdiction on a federal court. Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; Knight v. Lutcher & Moore Lumber Co., 136 Fed. 404, 406, 69 C. C. A. 248; United States v. New York & O., S. S. Co., 216 Fed. 61, 132 C. C. A. 305; Chicago, R. I. & P. Ry. Co. v. Stephens, 218 Fed. 535, 134 C. C. A. 263, and cases cited.

[2] Now let us turn to those grounds of dismissal addressed to the complaints separately.

First, as to the suit to recover damages, founded upon the Death Act:

This act does not in terms exclude any widow or next of kin from its benefits, and in Cetofonte v. Camden Coke Co., 78 N. J. Law, 662, 75 Atl. 913, 27 L. R. A. (N. S.) 1058, the highest court of the state held that under such statute an administrator appointed in this state could maintain an action for the damages therein authorized, despite the fact that the decedent's widow (his sole beneficiary) was at the time of his death and at the beginning of the suit a nonresident alien. The defendant contends, however, that since the passage of the Compensation Act the personal representative of a deceased employé has no remedy in damages recoverable from an employer on the ground that the death of such employé was due to injuries received by him while at work for his employer, save that provided for in such Compensation Act, and that in the circumstances controlling the plaintiff's alleged cause of action he is prevented from bringing the present suit. This act went into effect July 4, 1911, and so far as pertinent to the present inquiry, provides:

Section 1 (entitled "Compensation by Action at Law"):

Par. "1. When personal injury is caused to an employé by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employé was himself not willfully negligent at the time of receiving such injury, and the question of whether the employé was willfully negligent shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence."

Par. "2. The right to compensation as provided by section 1 of this act shall not be defeated upon the ground that the injury was caused in any degree by the negligence of a fellow employé, or that the injured employé assumed the risks inherent in or incidental to or arising out of his employment or arising from the failure of the employer to provide and maintain safe premises and suitable appliances, which said grounds of defense are hereby abolished."

Par. "4. The provisions of paragraphs 1, 2 and 3 shall apply to any claim for the death of an employé arising under an act entitled 'An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default,' approved March third, eighteen hundred and forty-eight, and the amendments thereof and supplements thereto."

Par. "5. In all actions at law brought pursuant to section 1 of this act, the burden of proof to establish willful negligence in the injured employé shall be upon the defendant."

Section 2 (entitled "Elective Compensation"):

Par. "7. When employer and employé shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section 2 of this act, compensation for personal injuries to or for the death of such employé by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph 11, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of the proof of such fact shall be upon the employer."

Par. "8. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section 2 of this act, and an acceptance of all the provisions of section 2 of this act, and shall bind the employé himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency."

Par. "9. Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section 2 of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section 2 of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section 2 of this act and have agreed to be bound thereby. In the employment of minors, section 2 shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor."

Par. "10. The contract for the operation of the provisions of section 2 of this act may be terminated by either party upon sixty days' notice in writing prior to any accident."

Par. "12 (as amended April 17, 1914; N. J. P. L. p. 499). In case of death compensation shall be computed, but not distributed, on the following basis: * * *

"For five dependents, fifty-five per centum of wages. * * *

"The term 'dependents' shall apply to and include any or all of the following who are dependent upon the deceased at the time of accident or death, namely: * * * Wife, * * * children: * * * Provided, however,

that dependency shall be presumed as to a widow who was living with her husband at the time of his decease, and children under the age of eighteen years. * * *

"The compensation in case of death shall be subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week: Provided, that if at the time of the injury the employé receive wages of less than five dollars per week, then the compensation shall be the full amount of such wages per week. This compensation shall be paid during three hundred weeks.

"Compensation under this schedule shall not apply to alien dependents not residents of the United States."

Section 3 (entitled "General Provisions"):

Par. 24 (last clause). "Section 1 of this act shall not apply in cases where section 2 becomes operative in accordance with the provisions thereof, but shall apply in all other cases, and in such cases shall be in extension of the common law."

Par. "26. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

By the supplement of May 2, 1911 (P. L. N. J. p. 763), every contract of hiring in operation at the time the original act went into effect is declared to "be presumed to continue subject to the provisions of section 2 of the act to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract" that such provisions are not intended to apply. With reference to this statute, this court, in Berton v. Tietjen & Lang Dry Dock Co., 219 Fed. 763, said:

"The effect of this statute is the incorporation into the relation of employer and employé of a new right in the latter and a new obligation upon the former, and in furtherance thereof it provides compensation to workmen who have sustained injuries in their employment. The scheme of this Workmen's Compensation Act is twofold—compensation through action at law, or by legislative schedule. While the act permits an election by either party (Nitram Co. v. Court of Common Pleas, 84 N. J. Law, 243, 245, 86 Atl. 435), the latter scheme is declared in force unless the parties have taken the prescribed steps to put the other into operation (Sexton v. Newark District Telegraph Co., 84 N. J. Law, 85, 86 Atl. 451). In the case of the former, the employer's liability arises only in case he has been negligent—actually or legally imputed—and the employé had not been willfully negligent at the time of such injury. In the case of the latter, the employer's liability is fixed, without his being in fault, where the employé is injured by 'accident arising out of and in the course of his employment * * * in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury.' P. L. N. J. 1911, p. 134, 136, § 2, par. 7; Bateman Mfg. Co. v. Smith, 85 N. J. Law, 409, 411, 89 Atl. 979.

"In the case at bar the plaintiff seeks the compensation fixed by the legislative schedule, and his right to such compensation, as already observed, does not depend upon the defendant's being at fault. The nature of the obligation thus imposed upon the employer is purely economic and sociological. It bears no relation whatever to the modern common-law theory underlying the redress of private wrongs. The award to the injured employé is based on his being injured while in the course of his employment, and in consequence of an accident arising out of such employment, and not on the fault of his employer (American Radiator Co. v. Rogge, 86 N. J. Law, 436, 92 Atl. 85, 87, 94 Atl. 85, and the amount thereof is ascertained on the basis of his wages, regardless of whether such award be commensurate with the injury suffered. A suit to recover such compensation cannot be said to be one founded or sounding in tort. The legislative act referred to expressly declares that every contract of hiring, made subsequently to the time the original act went into effect, shall

be presumed to have been made with reference to such obligation; and by an amendment to such act, passed the same year (P. L. N. J. 1911, p. 763), all contracts of hiring made prior to such time are presumed to continue subject to such obligation unless either party, prior to the accident, shall have taken the prescribed steps to make such presumption inapplicable.

"Neither the pleadings, nor the testimony taken on the issues raised thereby, alleges or shows that any such steps were taken in the present case, and the result is that this obligation thus legislatively thrust upon the employer is a part of the contract of hiring. Gregutis v. Waclark Wire Works, 86 N. J. Law, 610, 92 Atl. 354. Such an obligation was unknown to either the common or maritime law, as they existed at the adoption of our federal Constitution or the passage of the first Judiciary Act; and, while critically considered, it might be more appropriately placed in a class by itself than be classified as contractual, yet this legislative classification must govern. American Radiator Co. v. Rogge, supra."

Both complaints in the instant cases allege that the relation of employer and employé existed between the defendant and the deceased, and that the decedent's death was due to injuries received in the course of such employment. In such circumstances, the scheme of compensation embodied in section 2 of the Compensation Act became operative and bound both decedent and defendant, unless either party had taken the steps prescribed by such act to make such scheme inapplicable. There is no allegation that such steps were taken, and it is conceded that none in fact was taken. It follows, therefore, that the employé could not have recovered damages in a common-law action for any injuries he might have sustained in the course of such employment, if he had survived such injuries, and that the only moneys recoverable for such injuries would have been the compensation prescribed in the schedule of payments in section 2 of the act. These limitations upon the employé's right to recover control the right of recovery by his personal representative in case he died in consequence of such injuries. The right to recover damages for injuries caused by the death of a human being is purely statutory. Myers v. Holborn (E. & A. N. J.) 58 N. J. Law, 193, 33 Atl. 389, 30 L. R. A. 345, 55 Am. St. Rep. 606; Dennick v. R. R. Co., 103 U. S. 11, 21, 26 L. Ed. 439; The Harrisburg, 119 U. S. 199, 204, 7 Sup. Ct. 140, 30 L. Ed. 358; Van Doren v. P. R. R., 93 Fed. 260, 264, 35 C. C. A. 282. The statute of New Jersey relied upon by the plaintiff in this case expressly limits such right of action to such wrongful acts or defaults "as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof." Section 1. As the employé, if living, could not have maintained an action at law to recover damages for injuries thus sustained, but would have had to content himself with the compensation provided in such Compensation Act, his personal representative cannot; he having died in consequence of such injuries. The personal representative, therefore, must find his right, if any, to secure compensation for such alleged wrongful death, in said Compensation Act. This act, however, as noted, expressly excludes alien dependents nonresident of the United States from recovering any compensation in such cases. In Gregutis v. Waclark Wire Works, 86 N. J. Law, 610, 92 Atl. 354, the court of last resort in New Jersey held (headnotes):

"2. Where a complaint sets up a contract of hiring between employer and employé made subsequent to the taking effect of the Workmen's Compensation Act (P. L. 1911, p. 134), and does not aver that the contract contained any express statement in writing that section 2 of the act was not intended to apply, nor that any written notice to that effect was given, it will be presumed that the parties accepted and were bound by the provisions of that section.

"3. Where a deceased employé by his agreement, either express or implied, had accepted and become bound by the provisions of section 2 of the Workmen's Compensation Act (P. L. 1911, p. 134), his personal representatives cannot maintain an action under the Death Act (P. L. 1848, p. 151; Comp. Stat. p. 1907) for damages for death, even though the only dependents decedent left surviving him were aliens not residents of the United States."

This case is directly in point and the New Jersey court's construction of these two statutes is binding on this court (Maiorano v. B. & O. R. R. Co., 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 792; Boston Chamber of Commerce v. Boston, 217 U. S. 189, 30 Sup. Ct. 459, 54 L. Ed. 725) unless, as contended by the plaintiff, the treaties between the kingdom of Italy and the United States secure greater rights to alien subjects of such kingdom.

[3] Article 3, the pertinent part of the treaty negotiated between the United States and the kingdom of Italy on February 26, 1871, proclaimed November 23, 1871 (17 Stat. 845), having reference to the rights of the citizens of Italy with respect to civil responsibility to them for injuries or death caused by fault, etc., and which was in force at the time of the passage of the Compensation Act and at the time the decedent sustained the injuries which resulted in his death, provides:

"The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives." Treaties and Conventions of the United States (1776–1889) p. 581.

This treaty article was under consideration in Maiorano v. B. & O. R. R. Co., supra, and it was there held:

"By a fair construction, articles 2, 3, and 23 of the treaty with Italy of 1871 (17 Stat. 845) do not confer upon the nonresident alien relatives of a citizen of Italy a right of action for damages for his death in one of the states of this Union, although such an action is afforded by a statute of that state to native resident relatives, and although the existence of such an action might indirectly promote his safety, and so held as to the statute of Pennsylvania, it having been so construed by the highest court of that state."

Consequently, the personal representative's right to recover damages for the alleged wrongful death of such decedent depends exclusively upon the legislation of the state in which such injuries were sustained, and which, as noted, excludes such recovery in behalf of alien dependents nonresident in the United States.

[4] The amendment to this treaty article, which was negotiated and proclaimed in 1913, heretofore set out, not being in existence at the time when the alleged causes of action accrued, has no bearing upon the instant case, as its provisions are not retroactive. Haver v. Yaker, 76 U. S. (9 Wall.) 32, 19 L. Ed. 571; Dooley v. United States, 182 U. S. 222, 230, 21 Sup. Ct. 762, 45 L. Ed. 1074. But the plaintiff's

alleged cause of action in this suit would not be cognizable in a federal court, though such treaty as amended in 1913 could be given a retroactive effect. Such effect, while it would invalidate such exclusion clause, could not revive the right of action under the Death Act, which, as noted, was taken away from an employé or his personal representative by such Compensation Act in all cases where section 2 of said act applied. In such cases, the only recovery left to the personal representative after the death of the employé, as well as to the employé, if living, is that provided in the schedules embodied in such Compensation Act.

Admittedly, the amount recoverable by the plaintiff in this case under section 2 of the Compensation Act is less than $3,000. Assuming, therefore, that by virtue of said amended treaty between the United States and the kingdom of Italy, the plaintiff had a right of action under the New Jersey Compensation Act, his showing that the amount in controversy, based on that statute, is less than $3,000 is fatal to the jurisdiction of the federal court. This treaty in terms declares that with regard to such "civil responsibility for injuries or for death caused by negligence or fault" the citizens of the parties to such treaty "shall enjoy * * * the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter." A citizen of the United States could not maintain an action in the federal court based on such statute unless the amount involved, exclusive of interest and costs, exceeded the sum or value of $3,000, and the same condition exists when the controversy "arises under the Constitution or laws of the United States or treaties made or which shall be made under their authority." Judicial Code, § 24, par. 1, Comp. St. 1913, § 991 (1). Therefore, however this exclusion clause of the Compensation Act may be treated —i. e., operative because it includes the plaintiff, or inoperative because overridden by the treaty of 1913—the right of recovery in this action on the Death Act is not cognizable in this court.

Second, as to the suit founded upon the Compensation Act:

As the right to maintain such an action has been considered in connection with the one founded on the Death Act, it is unnecessary to do more than to say that, as this suit is for an amount less than the minimum required to give federal jurisdiction over such controversy, it too fails on jurisdictional grounds.

The motions to strike out both complaints are granted.

FILER v. STEELE, Sheriff, et al.

(District Court, W. D. Pennsylvania. October 23, 1915.)

No. 2.

1. HABEAS CORPUS ⟸45—UNITED STATES COURTS—DETENTION IN VIOLATION OF FEDERAL CONSTITUTION.

Under Rev. St. § 753 (Comp. St. 1913, § 1281), providing that the writ of habeas corpus shall not extend to a prisoner in jail, except in certain cases including the case of a prisoner in custody in violation of the federal Constitution, one in custody by reason of a conviction upon a criminal charge before a state court having jurisdiction over the subject-matter of the offense, the place where it was committed and the person of the prisoner cannot have relief on habeas corpus from a federal court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. ⟸45; Courts, Cent. Dig. §§ 804, 805.]

2. HABEAS CORPUS ⟸30—UNITED STATES COURTS—DETENTION IN VIOLATION OF FEDERAL CONSTITUTION.

The writ of habeas corpus cannot be employed as a substitute for a writ of error, and mere errors of law, however serious, committed by a court in the exercise of its jurisdiction, cannot be reviewed by habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. ⟸30.]

3. CONSTITUTIONAL LAW ⟸257—"DUE PROCESS OF LAW"—CRIMINAL PROSECUTION.

A criminal prosecution in a state court, based on a law not repugnant to the federal Constitution and conducted according to the settled course of proceedings under the law of the state, constitutes "due process of law" in the constitutional sense, so long as it includes notice and a hearing and an opportunity to be heard before a court of competent jurisdiction according to established modes of procedure.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 746, 747, 749; Dec. Dig. ⟸257.]

4. HABEAS CORPUS ⟸45—UNITED STATES COURTS—DETENTION IN VIOLATION OF FEDERAL CONSTITUTION.

Habeas corpus will lie in a federal court on behalf of one convicted in a state court only where the judgment is absolutely void, either because the court had no jurisdiction in the beginning or lost such jurisdiction in the course of the proceedings.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. ⟸45; Courts, Cent. Dig. §§ 804, 805.]

5. HABEAS CORPUS ⟸45—UNITED STATES COURTS—DETENTION IN VIOLATION OF FEDERAL CONSTITUTION.

In determining on habeas corpus whether one convicted in a state court has been deprived of liberty in violation of the federal Constitution, the proceedings in the state appellate tribunal as well as in the trial court are to be regarded as part of the process of law.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. ⟸45; Courts, Cent. Dig. §§ 804, 805.]

6. HABEAS CORPUS ⟸45—UNITED STATES COURTS—DETENTION IN VIOLATION OF FEDERAL CONSTITUTION.

The question whether a state is depriving a prisoner of liberty without due process of law, under a law not violative of the federal Constitution, cannot be determined ordinarily with fairness to the state until the conclusion of the course of justice in the state courts, as the prohibition of

the Fourteenth Amendment is addressed to the state itself, and if a violation be threatened by one agency of the state, but prevented by another agency of higher authority, there is no violation by the state.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. ⇐45; Courts, Cent. Dig. §§ 804, 805.]

7. HABEAS CORPUS ⇐45—UNITED STATES COURTS—DETENTION IN VIOLATION OF FEDERAL CONSTITUTION.

On habeas corpus, a prisoner in custody pursuant to the final judgment of a state court may have a judicial inquiry in the federal courts into the very truth and substance of the causes of his detention, and the court, if necessary, may look beyond the record of the conviction sufficiently to test the jurisdiction of the state court, but should take into consideration the entire course of the proceedings in the state court and not merely a single step in such proceedings.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. ⇐45; Courts, Cent. Dig. §§ 804, 805.]

8. HABEAS CORPUS ⇐45—UNITED STATES COURTS—DETENTION IN VIOLATION OF FEDERAL CONSTITUTION.

A person convicted in a state court, and petitioning a federal court for a writ of habeas corpus, contended that the state court lost jurisdiction because, in his absence and without the permission or presence of the court, the jury viewed certain premises about which he testified. It appeared that he not only exhausted his legal remedies in the trial court, but in the state Supreme Court, where he was heard on the question respecting such view, and that, the judgment of that court being adverse to him, he made three separate applications to judges of the United States Supreme Court for a writ of error, which were denied. *Held*, that it must be presumed that, if his application for a writ of error had presented a cause of deprivation of liberty without due process of law, the writ would have been awarded, and the petition for habeas corpus would therefore be denied.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. ⇐45; Courts, Cent. Dig. §§ 804, 805.]

Application by H. E. Filer for a writ of habeas corpus directed to Ben Steele, Sheriff, and another. Petition denied.

Ralph D. Hurst, of Greensburg, Pa., and Thos. H. Greevy, of Altoona, Pa., for petitioner.

THOMSON, District Judge. The relator, H. E. Filer, makes application to this court for a writ of habeas corpus, averring his unlawful confinement in the jail of Westmoreland county, Pa., in violation of the rights guaranteed to him as a citizen of the United States under the Fourteenth Amendment of the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property without due process of law. That this court has jurisdiction to issue the writ prayed for there is no question. But the duty of the court to grant or refuse it must depend upon the facts of the case.

Under section 755 of the Revised Statutes (Comp. St. 1913, § 1283), it is made the duty of the court or judge to whom application is made for a writ of habeas corpus to issue the writ, "unless it appears from the petition itself that the party is not entitled thereto." We therefore turn to the petition to ascertain relator's right to the writ prayed for.

The petition sets forth that on November 12, 1914, he was indicted by the grand jury of Westmoreland county on the charge of murder, and avers that, on the respective dates therein set forth, he was arraigned and tried, found guilty by the jury, sentenced to death, and remanded to prison, where he is still confined. He avers: That at the time of said verdict, judgment, and sentence the said court in which he was tried had lost jurisdiction over him and over the trial of the indictment, and that all proceedings therein, and his commitment to jail, were without due process of law and in all respects null and void, and in violation of his constitutional rights, for the reason that on November 9, 1914, after the testimony in the case was closed and the case argued to the jury, and before the charge of the court, without the permission or presence of the court, without notice to or the presence of petitioner or his counsel, the jury obtained and received evidence prejudicial to him by viewing, inspecting, and examining certain premises about which the defendant had testified, the facts relating thereto being more particularly set forth in five certain affidavits attached to the petition, four of them by members of the jury who tried him, and one by the officer in charge of the jury. That thereafter, on December 16, 1914, he was sentenced to death by the state court and remanded to prison, said court being at that time without jurisdiction over him or the cause in which said verdict was rendered. A motion for a new trial and in arrest of judgment was filed, 10 days being allowed to file affidavits and additional reasons in support thereof, and that such affidavits were duly filed, the motion granted, and an opinion filed by the court refusing a new trial. That on January 9, 1915, a certiorari in appeal to the Supreme Court was filed, the appeal argued before that court, and on April 19, 1915 (Commonwealth v. Filer, 249 Pa. 171, 94 Atl. 822), the judgment was affirmed and the record remitted for the purpose of execution. That on May 24, 1915, application was made to Mr. Justice Pitney, Justice of the Supreme Court of the United States assigned to the Third Circuit, for a writ of error to review the said judgment, which application was denied on May 24, 1915. That on the same day a similar application was made to Mr. Justice Hughes of the Supreme Court, which was also denied, and that on October 12, 1915, a similar application was made to Mr. Justice McKenna of the Supreme Court, which was in like manner refused. That the Governor of Pennsylvania fixed the date for his execution in the week beginning October 11, 1915, which was afterwards by said Governor stayed to the week beginning November 8, 1915. That petitioner has thus exhausted all his remedies in the state of Pennsylvania and by applications for a writ of error to the Supreme Court of the United States, and, having therefore no adequate and efficient means for obtaining his rights under the federal Constitution, asks to be discharged from custody because of the nullity of the verdict, judgment, and commitment, due to the facts above referred to.

Petitioner specially avers that the court of oyer and terminer of Westmoreland county, in which he was tried and convicted, lost jurisdiction over him because, first, the unauthorized view of certain

premises by the jury amounted to the taking of testimony in his absence, which tended to deprive him of his life and liberty without due process of law; second, that he had the right to be present at every stage of his trial, this right being a fundamental right essential to due process of law; third, his involuntary absence at the time of the unauthorized view by the jury of certain premises deprived him of the privilege to be heard, which constitutes an essential prerequisite to due process of law; fourth, that the trial did not proceed in accordance with the orderly process of law essential to a free and impartial trial.

A certified copy of the opinion of the Supreme Court was handed to the court on request at the time of the presentation of the petition.

The Supreme Court of the United States, in the very recent case of Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969, discusses very fully and with great clearness the question of deprivation of liberty without due process of law, the meaning of the constitutional provision, and the proper mode of procedure, where the citizen claims his constitutional rights have been denied. From this opinion by Justice Pitney, which is in general harmony with many former adjudications of that court, the legal principles applicable to the case at bar may be thus summarized:

[1-7] First. Under the terms of section 753 of the Revised Statutes, in order to entitle the applicant to the relief sought under writ of habeas corpus, it must appear that he is held in custody in violation of the Constitution of the United States. Second. That he cannot have relief on habeas corpus if he is held in custody by reason of conviction upon a criminal charge before a court having jurisdiction over the subject-matter of the offense, the place where it was committed and the person of the prisoner. Third. Mere errors of law, however serious, committed by the court in the exercise of its jurisdiction, cannot be reviewed by habeas corpus. The writ cannot be employed as a substitute for a writ of error. Fourth. A criminal prosecution in the courts of a state, based on a law not repugnant to the federal Constitution and conducted according to the settled course of proceedings under the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process of law" in the constitutional sense. Fifth. The federal courts cannot review irregularity or erroneous rulings upon the trial, however serious, and habeas corpus will lie only where the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court, either because such jurisdiction was absent at the beginning, or was lost in the course of the proceedings. Sixth. In determining the question whether the jurisdiction of the court was lost, the inquiry must not be confined to the proceedings and judgment of the trial court. The proceedings in the appellate tribunal are to be regarded as part of the process of law, and are to be considered in determining any question of deprivation of life or liberty under the federal Constitution. Seventh. Questions arising under the due process clause of the Fourteenth Amendment, instead of involving merely the ju-

risdiction of some court, in a broad sense involve the power and authority of the state itself. The prohibition is addressed to the state itself, and if a violation be threatened by one agency of the state, but prevented by another agency of higher authority, there is no violation by the state; and as the state determines what courts shall be established for the trial of offenses against her laws, it follows that the question whether a state is depriving a prisoner of his liberty without due process of law, under a law not violative of the federal Constitution, cannot be determined ordinarily, with fairness to the state, until the conclusion of the course of justice in its courts. Eighth. Under the liberal procedure on habeas corpus, a prisoner in custody purusant to the final judgment of a state court may have a judicial inquiry in the federal courts into the very truth and substance of the causes of his detention, and, if necessary, to look beyond the record of his conviction sufficiently to test the jurisdiction of the state court to proceed to judgment against him. But the court should take into consideration the entire course of the proceedings in the state courts, and not merely a single step in the proceedings, and that consideration must be given, not only to the averments of the petition, but to the proceedings which the petition attacks.

[8] Applying these legal principles to the facts before us, as disclosed by the petition, leads us to a conclusion adverse to the relator. He was tried in a court of competent jurisdiction, and exhausted his legal remedies, not only in the trial court, but in the appellate court, where he was heard on the very question which forms the basis of this application. The judgment of the Supreme Court being adverse, he made three separate applications to the judges of the Supreme Court for a writ of error, which applications were denied. It must be presumed that, had his application for a writ of error presented a case of deprivation of liberty without due process of law, such writ would have been awarded him.

The petition for a writ of habeas corpus must therefore be denied.

STATE LINE & S. R. CO. v. DAVIS.

(District Court, M. D. Pennsylvania. December, 1915.)

No. 426.

1. PLEADING ⇐8—CONCLUSIONS—CORPORATE EXCISE TAX—ACTIONS TO RECOVER TAX.

In an action to recover a corporate excise tax paid under protest, on the ground that the corporation was not engaged in business, allegations in the affidavit of defense that plaintiff had not in fact gone out of business, in connection with its property, nor disqualified itself from any activities under its charter in respect thereto, and was still actually engaged in the doing of business within the meaning of the statute, and in the capacity necessary to make it subject thereto, were too general to avail the pleader, and were expressive of conclusions which must be ascertained from specific facts alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12–28½, 68; Dec. Dig. ⇐8.]

2. INTERNAL REVENUE ⟸9—CORPORATE EXCISE TAX—CORPORATION'S LIABILITY—"DOING BUSINESS."

A railway company leased its mines, railroads, and other property, but thereafter maintained an office for the transaction of business, maintained its corporate existence and organization by the annual election of officers, and received an income in the shape of rental and distributed dividends to its stockholders. It held itself in readiness to resume the operation of its properties if the leases should be violated by the lessees, and in such leases it reserved the right to develop the forests on its land, to remove timber, and to mine everything underlying its properties except coal. It paid interest on a mortgage indebtedness assumed by it, and was preparing to liquidate and settle such indebtedness. It guaranteed to defend the lessees at its own expense in the enjoyment of the property. It made annual returns of its income, and kept and maintained stockbooks for the transfer of its capital stock and the transaction of other business. *Held*, that these acts did not constitute a "doing of business," so as to subject the corporation to the corporate excise tax, as it is not the power to act, but actual activities in certain directions, which constitute a "doing of business," and the corporation was not doing business as a common carrier, which was the prime object of its incorporation.

[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.]

3. INTERNAL REVENUE ⟸28—SUITS TO RECOVER TAXES PAID UNDER PROTEST—LIMITATIONS.

Rev. St. § 3226 (Comp. St. 1913, § 5949), provides that no suit shall be maintained for the recovery of any internal tax erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue. Section 3227 (section 5950) provides that no such suit or proceeding shall be maintained unless brought within two years after the cause of action accrued. Section 3228 (section 5951) provides that all claims for the refunding of any such tax must be presented to the Commissioner of Internal Revenue within two years after the cause of action accrues. *Held* that, where a claim for refund of a corporate excise tax paid under protest was before the Commissioner within the time required, and rejected by him within two years before suit was brought, the action was not barred by limitations.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76–81; Dec. Dig. ⟸28.]

4. INTERNAL REVENUE ⟸28—CORPORATE EXCISE TAX—RECOVERY BACK—INTEREST.

In a suit against a collector of internal revenue to recover moneys illegally exacted as taxes and paid under protest, interest is recoverable without any statute to that effect.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76–81; Dec. Dig. ⟸28.]

At Law. Action by the State Line & Sullivan Railroad Company against Griffith T. Davis. On exceptions to affidavit of defense and rule for judgment. Exceptions sustained, and rule made absolute.

Rush J. Thomson, of Dushore, Pa., for plaintiff.

R. L. Burnett, of Scranton, Pa., for defendant.

WITMER, District Judge. This suit was brought to obtain the repayment of a special excise tax collected by the defendant from the

plaintiff. The tax was assessed under the so-called Corporation Tax Act of 1909 (Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [Comp. St. 1913, §§ 6300–6307]), and was paid under protest. The case is under consideration on exceptions to the affidavit of defense and for judgment notwithstanding. The plaintiff's statement of claim sets forth that the plaintiff, the State Line & Sullivan Railroad Company, is a corporation duly formed and existing under the laws of the commonwealth of Pennsylvania, and that a portion of said taxes, to wit, $696.90, was assessed against it by the United States Commissioner of Internal Revenue prior to June 30, 1910, as a special excise tax for the year ending December 31, 1909, and the remaining sum of $693.04 having been likewise assessed prior to June 30, 1911, as such tax for the year ending December 31, 1910; that after transmitting the several assessments to the defendant collector, said defendant during the years 1910 and 1911 respectively made formal demand upon the plaintiff for the payment of such taxes assessed under the penalties provided in section 38 of the above act; that on or about June 30, 1910, the plaintiff acting under compulsion to avoid the penalties provided, paid the defendant the tax assessed for the year 1909, filing with him at the same time the usual written protest, and that on or about June 30, 1911, the plaintiff under like circumstances and conditions paid the tax assessed for the year 1910; that on or about July 21, 1911, the plaintiff filed with the defendant a claim for refund of the special excise collected for 1909, and likewise on or about August 21, 1911, he filed a similar claim for refund of the special excise collected for 1910; that after some correspondence between the parties, on consideration of the claims filed, the Commissioner of Internal Revenue rejected the same, whereof he gave notice to the defendant collector, by letter dated August 29, 1911, who in turn notified the plaintiff two days later of the decision reached. The statement further avers that:

"The said taxes were unjustly and illegally assessed against it by the Commissioner of Internal Revenue, and were illegally and wrongfully collected for the plaintiff by the defendant, as collector as aforesaid, for the following reasons, to wit: That prior to the beginning of the year 1909 the plaintiff leased its mines, railroads, and other property, and since that time to the time of filing this complaint has not had them, or any of them, in its possession or control, and has been engaged solely in collecting and distributing rentals derived from the leases made by it as aforesaid, and has not been engaged in business."

[1] In the affidavit of defense it is insisted that the taxes were lawfully collected, although admitting that the plaintiff had leased its mines, railroad, and other property, however expressing the conclusion that:

"Plaintiff has in fact never gone out of business in connection with its said property, nor disqualified itself from any activities under its charter in respect thereto, and is still actually engaged in the doing of business within the meaning of the statute and in the capacity necessary to make it subject to the act of 1909."

These allegations are too general to avail the pleader, and are expressive of conclusions which must be ascertained by the court from specific facts alleged.

[2] The affidavit sets forth:

"That the plaintiff keeps and maintains an office for the transaction of its business at Dushore, in the county of Sullivan, and state of Pennsylvania, and did keep and maintain such office during the years 1909 and 1910, and that the president of said plaintiff corporation is a resident of Dushore, and maintains his office as president of said road at that place. That the said plaintiff has continuously since the year 1909, and prior thereto, maintained its corporate existence and organization by the annual election of a president and board of managers, and the said board of managers has annually since the said date elected officers of the said corporation. That, further, the said corporation has maintained since the year 1910, and prior thereto, an active corporate existence, has continued to exercise during that time certain of the functions for which it was chartered, has received and still receives an income in the shape of rental, and distributes dividends to its stockholders. That the said plaintiff holds itself in readiness, whenever the terms of the leases referred to in the plaintiff's statement of claim shall be violated by the lessees, to resume the act of operation of its properties. That in the leases referred to in said statement of claim it has reserved the right to develop the forests upon its lands, and to remove timber therefrom. It has also reserved the right to mine everything underlying its properties except coal. That it has, since executing the said leases, assumed certain mortgage indebtedness, the interest on which it pays, and which it is preparing to liquidate and settle, and that it guarantees perpetually to defend, at its own expense, the lessees in the enjoyment of its property. That the said plaintiff, through its officers, made returns of its annual net income for the years ending December 31, 1909, and December 31, 1910, as more particularly referred to and stated in the statement of claim filed by it in this case. That it had, during the years aforesaid and prior thereto, kept and maintained at its offices stockbooks for the transfer of its capital stock, and the transaction of all business properly relating to and connected therewith."

Nearly all the alleged activities of the plaintiff corporation were present in the controlling case of McCoach v. Minehill R. R. Co., 228 U. S. 298, 33 Sup. Ct. 419, 57 L. Ed. 842, where it was held that any and all of them were insufficient to constitute a "doing of business" within the meaning of the Corporation Tax Act. That the plaintiff made covenants to defend the lessees in the enjoyment of their property, or that it retained control over timber on the property leased and reserved the right to mine everything but coal, does not alter the case. It is not the power to act, but the actual activities in certain directions, which may constitute a "doing of business." U. S. v. Emery, Bird, Thayer Realty Co., 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825; Abrast Realty Co. v. Maxwell Co. (D. C.) 206 Fed. 333; Cambria Steel Co. v. McCoach (D. C.) 225 Fed. 278; Miller v. Snake River Valley R. R. Co., 223 Fed. 946, — C. C. A. —. Accordingly it was held in Traction Co. v. Collector of Internal Revenue, 223 Fed. 984, — C. C. A. —, that where the lessor covenanted to protect the lessee in the full enjoyment of his property that this did not constitute a doing of business, even though the lessor allowed the use of its name in a suit to prevent interference with the lessee's enjoyment of the property.

Nor can the plaintiff be said to be doing business because of the allegations that the company, since executing the leases of its property, has assumed mortgage indebtedness, that it pays interest on it, and is preparing to pay its principal. It is admitted that such mortgage indebtedness was in fact assumed prior to the time for which the taxes were assessed. The mere paying of interest on indebtedness of any

kind and the preparation to pay the principal are not a doing of business within the meaning of the act. Abrast Realty Co. v. Maxwell (D. C.) 206 Fed. 333; Anderson v. Morris & Essex R. R. Co., 216 Fed. 83, 132 C. C. A. 327; N. Y. Central & Hudson River R. R. Co. v. Gill, 219 Fed. 184, 134 C. C. A. 558; Traction Co. v. Collector of Internal Revenue, 223 Fed. 984, — C. C. A. —; Philadelphia Traction Co. v. McCoach (D. C.) 224 Fed. 800. The tax provided for by the act is not imposed on the franchises of the corporation, nor on its property, only on the "doing of business" in a corporate capacity as authorized. Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428; McCoach v. Minehill Railway Co., supra. It may be safely asserted that the plaintiff was not doing business as a railroad company during the years 1909 and 1910 over the lines and upon its property covered by its lease. The business of serving the public as a common carrier, which was the prime object of its incorporation, was turned over to its lessees. For this purpose the plaintiff must be regarded as out of business, and the taxes therefore were unlawfully imposed.

[3] The affidavit also questions the regularity of the appeal to the Internal Revenue Commissioner, and sets up the statute of limitations. It is not stated wherein such appeal is informal, and it matters little, if any. The plaintiff's statement contains the information, and to this there is no denial, that the claims for refund were before the Commissioner within the time required, and rejected by him, whereupon a cause of action accrued, and this within two years from the bringing of this suit, the period provided by the act of June 6, 1872. There it is enacted that:

"All suits * * * for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, * * * should be brought within two years next after the cause of action accrued and not thereafter; and all claims for the refunding of any internal tax or penalty should be presented to the Commissioner * * * within two years next after the cause of action accrued and not thereafter." 17 Stat. 257, c. 315, § 44 (Comp. St. 1913, § 5950).

See Wright v. Blakeslee, 101 U. S. 174, 25 L. Ed. 1048.

No suit can be maintained under the law until an appeal has been taken to the Commissioner. If on the appeal the claim is rejected, an action may be maintained against the collector (Rev. Stat. §§ 3226, 3227, 3228), and through him, on establishing the error or illegality, a recovery can be had. When the Commissioner rendered his decision, rejecting plaintiff's claim, the right of action was complete. It was then that plaintiff had a right to bring this suit, which was not barred when actually entered.

[4] The remaining question presented on the claim of plaintiff for allowance of interest must also be answered in the affirmative. In a recent opinion handed down by Justice Van Deventer (National Volunteer Home v. Parrish, 229 U. S. 496, 33 Sup. Ct. 944, 57 L. Ed. 1296) the doctrine laid down in Erskine v. Van Arsdale, 14 Wall. 75, 21 L. Ed. 63, and Redfield v. Bartels, 139 U. S. 694, 11 Sup. Ct. 683, 35 L. Ed. 310, was reiterated, that:

"In suits against collectors to recover moneys illegally exacted as taxes and paid under protest the settled rule is that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector but directly from the treasury."

The exceptions are sustained, and the rule for judgment is made absolute. The clerk is instructed to enter judgment for the amount collected, $696.90 and $693.04, with interest from June 30, 1910, and June 30, 1911, on the respective payments.

UNITED STATES v. JOHNSON.

(District Court, W. D. Tennessee. December 11, 1915.)

No. 332.

1. POISONS ⇐4—PARTIES TO OFFENSES—"PRINCIPAL."

Penal Code (Act March 4, 1909, c. 321) § 332, 35 Stat. 1152 (Comp. St. 1913, § 10506), provides that whoever directly commits any act constituting an offense, or aids, abets, commands, induces, or procures its commission, is a principal. Harrison Narcotic Law Dec. 17, 1914, c. 1, § 4, 38 Stat. 788, makes it unlawful for any person who has not registered and paid the special tax as required by that act to send any of the drugs to which that act relates from one state to another, but provides that this shall not apply to common carriers and certain other persons. *Held* that, where M., who had not registered and paid the special tax and was not one of the persons exempted under the proviso, shipped opium prepared for smoking from New Orleans to Memphis on defendant's order, defendant was guilty as a principal.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 2; Dec. Dig. ⇐4.]

2. CUSTOMS DUTIES ⇐134—IMPORTATION OF OPIUM—CRIMINAL PROSECUTIONS—BURDEN OF PROOF.

Act Cong. Jan. 17, 1914, c. 9, § 2, 38 Stat. 276, makes it an offense to receive, conceal, or buy opium, knowing it to have been imported contrary to law, and provides that on trial for a violation thereof whenever defendant is shown to have had possession of such opium, such possession shall be deemed sufficient evidence to authorize a conviction, unless the defendant shall explain such possession to the satisfaction of the jury. Section 3 provides that on and after July 1, 1913, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after April 1, 1909, and the burden of proof shall be on accused to rebut such presumption. On a trial for unlawfully receiving, concealing, and buying opium, knowing it to have been unlawfully imported, defendant testified that he was addicted to opium smoking, and requested and induced a friend in New Orleans to procure a quantity of smoking opium and ship it to him. *Held*, that the mere possession of opium after July 1, 1913, constitutes an offense, unless the party indicted rebuts the presumption of importation as required by the statute, regardless of the purposes for which he may have had it in his possession, and, while the purpose of defendant's possession seemed to be sufficiently explained, this did not rebut the presumption of importation contrary to law.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 336-339; Dec. Dig. ⇐134.]

Johnnie Johnson was convicted of offenses, and he moves for a new trial. Motion overruled.

W. D. Kyser, Asst. U. S. Atty., of Memphis, Tenn., for the United States.

Abe Cohn, of Memphis, Tenn., for defendant.

McCALL, District Judge. The defendant was tried and convicted at the present term of court, under an indictment of two counts. In the first count, he is charged with aiding, abetting, inducing, and procuring the commission of an act constituting an offense against the United States, as defined by an act of Congress of December 17, 1914, known as the Harrison Narcotic Law, by inducing one P. H. Martin to ship cooked opium for smoking purposes, from New Orleans, La., to Memphis, Tenn.; the said P. H. Martin not being duly registered and not having paid the special tax, as required under section 1 of the Harrison Narcotic Law. Count 2 charges the defendant with unlawfully receiving, concealing, and buying opium cooked up for smoking purposes, knowing the same to have been imported contrary to law.

[1] The evidence was conclusive that P. H. Martin shipped cooked opium, prepared for smoking, from New Orleans, La., to the defendant, Johnnie Johnson, Memphis, Tenn., on the order and request of Johnson, who sent the price thereof to Martin before shipment. Johnson is indicted in the first count as an aider and abettor in the commission of the offense; it being charged and proven that Martin had not paid the special tax, and was not duly registered as required by section 1 of the Harrison Narcotic Law. It is sought to hold Johnson as a principal. Section 332 of the Penal Code provides that:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

The fourth section of the Harrison Narcotic Law provides that:

"That it shall be unlawful for any person who shall not have registered and paid the special tax as required by section 1 of this act to send, ship, carry, or deliver any of the aforesaid drugs from any state or territory or the District of Columbia, or any insular possession of the United States, to any * * * other state or territory or the District of Columbia or any insular possession of the United States: Provided, that nothing contained in this section shall apply to common carriers engaged in transporting the aforesaid drugs, or to any employé acting within the scope of his employment, or any person who shall have registered and paid the special tax as required by section 1 of this act, or to any person who shall deliver any such drug which has been prescribed or dispensed by a physician, dentist, or veterinarian required to register under the terms of this act, who has been employed to prescribe for the particular patient receiving such drug, or to any United States, state, county, municipal, district, territorial, or insular officer or official acting within the scope of his official duties."

The government insists, it having alleged and proved that Martin had not registered and paid the special tax as required by section 1 of the act, and that he is not one of the persons exempted under the proviso of said fourth section of said act, and that he was guilty of the offense of sending, shipping, carrying, or delivering a parcel of said drugs mentioned in said act, to wit, opium prepared for smoking, from New Orleans, in the state of Louisiana, to the defendant in Memphis, in the state of Tennessee, and it also having proven that

the defendant Johnson ordered, requested, and induced Martin to ship him the opium, that under section 332 of the Penal Code he is guilty as a principal. This insistence by the government seems to me to be sound.

[2] The second count, as has been seen, charges the defendant with having unlawfully received, concealed, and bought opium, cooked up for smoking purposes, knowing the same to have been imported contrary to law, in violation of section 2 of an act of Congress of January 17, 1914, which is as follows:

"That if a person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited," etc. "Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession, to the satisfaction of the jury."

It was shown indisputably that the defendant had in his possession opium prepared for smoking purposes. Section 3 of the act of Congress, supra, provides:

"That on and after July 1, 1913, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the 1st day of April, 1909, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

There is absolutely no evidence tending to rebut this presumption of law; the undisputed evidence being that the defendant procured Martin to obtain in New Orleans, for him, opium prepared for smoking purposes, and it was found in defendant's possession. So it would seem to follow that the defendant would be guilty under this count in the indictment, except for the last clause in section 2, which provides in substance that the possession of the opium shall be sufficient evidence to authorize conviction, *"unless the defendant shall explain the possession to the satisfaction of the jury."*

His explanation was that he was an addict to opium smoking and that he had requested and induced his friend Martin, in New Orleans, to procure a quantity of smoking opium for and ship it to him. The purpose for which he had it in his possession seems to be sufficiently explained, but does that avail him, in the face of the provisions of the third section of said act, which provides in substance that all smoking opium found in the United States after July 1, 1913, shall be presumed to have been imported after the 1st day of April, 1909, and placing upon the defendant the burden of rebutting that presumption?

As I read these two sections, it seems to me that under an indictment charging a person with receiving, concealing, or buying opium prepared for smoking, and found in his possession after July 1, 1913, knowing the same to have been imported contrary to law, as is charged in this case, then the mere possession of such opium after the last-

named date would constitute an offense, unless the party indicted rebuts the presumption of importation, as required by the act, regardless of the purposes for which he may have had it in his possession. There was no evidence tending to rebut the presumption of importation.

It results from what has been said that the motion for a new trial will be overruled.

POSTAL TELEGRAPH CO. v. CITY OF PORTLAND.

(District Court, D. Oregon. December 6, 1915.)

No. 6894.

1. LICENSES ⊜5—TELEGRAPH COMPANIES—EFFECT OF POST ROADS ACT.
Post Roads Act July 24, 1866, c. 230, 14 Stat. 221 (Comp. St. 1913, §§ 10072–10077), granting the right to telegraph companies to use the military and post roads of the United States for their poles and wires, is permissive in character only, and does not create corporate rights or privileges to carry on the business of telegraphy which are derived from the laws of the state under which the company is incorporated, and the state is not by reason of such act prevented from taxing the real or personal property of the company within its borders, nor from imposing a license tax upon the right to do a local business within the state.
[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 4, 19; Dec. Dig. ⊜5.]

2. COMMERCE ⊜69—ORDINANCE IMPOSING LICENSE TAX—VALIDITY.
A city ordinance, imposing a license tax on telegraph companies for the privilege of doing business in the city, expressly limited to local business within the state, is not invalid, as imposing a burden on interstate commerce, as applied to a company which also does an interstate business.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113–119; Dec. Dig. ⊜69.]

3. CONSTITUTIONAL LAW ⊜68—REASONABLENESS OF TAX—POWER OF COURTS TO DETERMINE.
The question of the reasonableness of a tax of any kind is largely legislative in character, and unless a court may say that it is arbitrary, or imposed for oppression, or through some ulterior motive, it must be held valid.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 125–127; Dec. Dig. ⊜68.]

In Equity. Suit by the Postal Telegraph Company against the City of Portland. On motion to dismiss bill. Motion granted.

Wm. D. Fenton, Ben C. Dey, Alfred A. Hampson, and Kenneth L. Fenton, all of Portland, Or., for complainant.

W. P. La Roche, City Atty., and Stanley Myers, both of Portland, Or., for defendant.

WOLVERTON, District Judge. This is a suit to enjoin the enforcement of a license tax exacted by the city from the complainant. The complainant is a telegraph company, engaged in sending and receiving messages to and from different parts of the United States

and to and from different countries of the world, as well as doing an intrastate business. The company is a domestic corporation; that is to say, it was organized under the laws of the state, having its principal place of business in the city of Portland. It has also accepted the provisions of the Post Roads Act of Congress, approved July 24, 1866, and is entitled to the benefits and privileges of the act.

Ordinance No. 29788 of the city of Portland requires the payment of a license fee of $75 per quarter for the privilege of doing business within the city of Portland. This ordinance was amended by Ordinance No. 30,337, by adding a new section, being section 19, which reads:

"That part of this ordinance providing for the licensing of persons engaged in the telegraph business shall be construed to apply to each and every person, firm, corporation, or joint-stock company commonly known as a telegraph company or agency engaged in the business of sending telegrams for hire from the city of Portland to a point within the state of Oregon, or receiving telegrams in the city of Portland from a point within the state of Oregon, and not including any business done to or from points outside of the state of Oregon, and not including any business done for the government of the United States, its officers or agents."

A motion to dismiss has been interposed, and this brings to a test the sufficiency of the complaint. But one question was presented at the argument, namely, whether this ordinance imposes a burden upon the complainant's interstate commerce business, and, if so, whether, for that reason, the ordinance is void. The license is, in itself, a privilege or occupation tax, a tax imposed upon the right to do business in the city of Portland, and is for the purpose of revenue. Such a tax is a valid exercise of the power of the city to license or tax. City of Portland v. Portland Gas & Coke Co. (Or.) 150 Pac. 273.

[1] The privilege granted by Congress under the Post Roads Act to use the military and post roads of the United States for the poles and wires of the company is permissive in character only, and is not to be regarded as creating corporate rights or privileges to carry on the business of telegraphy. Those rights and privileges are derived from the laws of the state under which the company is incorporated, and the state is not, by reason of the Post Roads Act, prevented from taxing the real or personal property belonging to the company within its borders, nor from imposing a license tax upon the right to do a local business within the state. Williams v. Talladega, 226 U. S. 404, 416, 33 Sup. Ct. 116, 57 L. Ed. 275. See, also, Western Union Telegraph Co. v. Gottlieb, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116.

[2] Nor is such a franchise or occupation tax as here exacted per se void as imposing a burden upon interstate commerce. The ordinance is hedged about by the restriction that it shall apply only to messages transmitted to and from Portland from and to points within the state of Oregon, and not to any business done for the government. Such a case, in its exact lines, almost, was presented by Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871, and the Supreme Court upheld the ordinance.

[3] But counsel for plaintiff claim that, through careful calculation, the revenues derived solely from its intrastate business are found

to be less than the ratable expenses attributable to carrying the local business. The deficiency, it is urged, must be made up out of the revenues derived from interstate business, if the plaintiff continues to do business within the state. Hence it is said that the company's interstate business is burdened with the deficiency. This proposition was touched upon in the Talladega Case, supra, and it was there said that:

"The reasonableness of the ordinance, unless some federal right set up and claimed is violated, is a matter for the state to determine."

The question of the reasonableness of a tax of any kind is largely legislative in character, and I am of the opinion that, unless it is so wholly disproportionate to the object and purposes for which it is levied as that a court of justice may say that it is arbitrary, or imposed for oppression or through some ulterior motive, the tax must be held to be valid. The plaintiff in transacting an interstate business is not bound to transact a local business, and, if it chooses to engage in a local business, there exists no good reason why it should not be taxed the same as a concern doing a wholly local business.

Now, applying the principle suggested, the court could not say that this tax of $75 per quarter would be exorbitant and oppressive if exacted from a concern engaged in purely local business. For a like or analogous reason, this court cannot say that the tax in question is void as a burden on interstate commerce. The fact that it is convenient for the telegraph company to engage in the local business, or the fact, if it be a fact, that the local business operates in aid of its general, or interstate, or international business, does not alter the legal question, because in local concerns the state or municipality may exercise the power of taxation, and this power is not trenched upon by a delegation of authority and control over interstate commerce to the general government.

The motion to dismiss will be sustained.

BOSTON & M. R. R. v. BAXTER.

(Circuit Court of Appeals, First Circuit. December 10, 1915.)

No. 1138.

1. MASTER AND SERVANT ⟸278—ACTIONS FOR DEATH—SUFFICIENCY OF EVIDENCE.

Where, in an action for the death of a railroad fireman, there was evidence to show that he was killed by coming in contact with a bridge only 15½ feet above the track, that the top of the tender was 11½ feet above the track, and the coal therein was piled somewhat higher, and it was not contended that he would have been outside the line of his duties, had he gone upon the coal in the tender, the jury might have found the railroad company negligent in permitting the tender so loaded to be run beneath so low a bridge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. ⟸278.]

2. MASTER AND SERVANT ⟸270—RAILROAD TRACKS—BRIDGES—STATUTORY PROVISIONS.

In an action for the death of a railroad fireman, caused by contact with a low bridge over the railroad track, St. Mass. 1874, c. 372, § 87, providing that no bridge should thereafter be constructed over any railroad at a height less than 18 feet above the track, except by the consent in writing of the Board of Railroad Commissioners, was offered in evidence, and it was shown that the board had taken no action regarding the bridge. The evidence showed that the bridge was in existence in 1850, and the only evidence tending to show a subsequent rebuilding or reconstruction was the testimony of a civil engineer that the planking of such a bridge had to be renewed every 10 or 12 years, that the stringers would wear two or three times as long, and that in most cases the superstructure would have to be renewed in a period of 40 years. *Held*, that the mere renewal of the planking, the stringers, or the superstructure was not such a reconstruction of the bridge as would violate the statute, and, conceding that the evidence would have been admissible in connection with further evidence tending to show reconstruction, the evidence should have been stricken out, or the jury told to disregard it.

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

3. MASTER AND SERVANT ⟸278, 293—ACTIONS FOR DEATH—QUESTIONS FOR JURY—NEGLIGENCE OF DEFENDANT.

In an action for the death of a railway fireman, caused by coming in contact with a low bridge, it appeared that no one saw him after leaving the cab of the locomotive, and it was contended that he went upon the coal in the tender and was struck by the bridge. There was evidence that a fire hook was found in the coal pile, that the person coaling the engine usually placed this in some out of the way place, and it was plaintiff's theory that deceased went on the coal for the purpose of getting this hook, and that if he had been given sufficient time to prepare the engine before leaving the terminal this would not have been necessary. There was evidence that one hour had been agreed upon between defendant and its employés as the time for getting an engine from the roundhouse to its connection with its train, that the engine originally assigned to take out the train in question could not be made ready in time, because a pipe sent out to be brazed did not arrive as expected, and another engine was substituted, so that only 20 minutes was available to make it ready. The engineer testified that he thought the fire would have to be refreshed "most any place along there," referring to the time the fireman left the cab. *Held* that, if this evidence was admissible

to show what deceased probably did after he left the cab and how the injury was sustained, it was not in itself evidence of negligence which could be regarded as the sole or a contributing cause of the injury, and the court erred in charging that if deceased was not given time to prepare his engine, and was obliged to go on the tender after the train started, the jury might find the want of sufficient time to prepare the engine evidence of negligence on defendant's part, since the nonarrival of the pipe and the consequent impossibility of using the originally assigned engine did not of themselves warrant a conclusion of negligence, and, even if they did, it was not a natural and probable consequence of such negligence reasonably to be anticipated that the hook would be misplaced, and be wanted, and found missing just before reaching the bridge, and that this would lead the fireman to go upon the coal at a time when he would incur the danger of being struck by the bridge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977, 1148–1156, 1158–1160; Dec. Dig. ⊂⊃278, 293.]

In Error to the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Action by Mary M. Baxter, administratrix, against the Boston & Maine Railroad. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Archibald R. Tisdale, of Boston, Mass., for plaintiff in error.

Charles C. Barton, Jr., of Boston, Mass. (Barton & Harding, of Boston, Mass., on brief), 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 Massachusetts District Court against the plaintiff in error (hereinafter called defendant) for the death of her intestate, Leslie M. Baxter, instantly killed on August 15, 1913, soon after 4 p. m., while in the defendant's employ as fireman on one of its engines, then hauling an express passenger train bound west from Boston, in interstate commerce. Her suit was brought under the federal Employers' Liability Act. Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657–8665). The plaintiff's right to maintain the suit under that act, if the defendant's negligence caused Baxter's death, was not questioned.

The declaration, in two counts, alleged, in substance: (1) That Baxter was killed by striking the defendant's bridge at Prospect street, Somerville, owing to negligence on its part in its engines, appliances, roadbed, works, and other equipment; (2) that his death was due to negligence on the defendant's part in erecting, constructing, and maintaining said bridge at an insufficient height above the track, and also in other respects further referred to below.

[1] No witness on either side saw the accident happen. Baxter was in the cab of the locomotive with the engineer when the train left Boston at 4:01 p. m. The engineer, who had seen him get down from his seat in the cab before the train had reached the Prospect Street bridge, missed him soon after passing it and stopped the train at Cambridge, a short distance further west. Baxter was then found dead in the back compartment of the tender, behind the pile of coal carried

in its forward compartment. The exceptions state that "a subsequent examination revealed signs establishing the fact that his head had come in contact with the bridge." His cap was later found 25 to 30 feet west of the bridge, in the ditch north of the track. There was no witness who saw him alive after he left his seat as above.

The bridge, at its lowest point, was 15½ feet above the track whereon the train was moving; the top of the tender 11½ feet above the track; and the coal carried therein was piled higher than the top of the tender. So much was undisputed. There were differing estimates as to how far above the top of the tender the coal was piled. The ordinary height at the center was testified to be 13 feet above the track—i. e., 18 inches above the top of the tender—though there was evidence from which the height might have been found to have been 3 feet above the top of the tender, but in no event higher than the top of the cab on the engine, which was 15 feet above the track. No other way appearing in which Baxter could have brought his head where it would strike the bridge after he left the cab and before he was found dead on the tender, the jury might have found that he went from the cab upon the coal in the tender and was somewhere on the coal when struck by the bridge. It was not contended that he would have been outside the line of his duties, had he thus gone from the cab upon the coal.

Since it thus appeared that, without regard to any coal above it, the top of the tender could have passed only 4 feet below the bridge, and that the actual clearance available for a man on the coal was necessarily as much less than 4 feet as the coal may have brought him above the top of the tender, the jury might, on the evidence, have found this clearance too small to afford a margin of safety reasonably sufficient under all the circumstances, and might, therefore, have found the defendant negligent, as regarded the safety of an employé whose duties might bring him on the coal, in permitting the tender, so loaded, to be run beneath so low a bridge. There was evidence that, since the bridge was built, the size of engines in use had materially increased, and that this engine and tender were of the largest type then in use in passenger service on that division of the defendant's road.

The accident happened in broad daylight, on a clear day. There were the usual telltales on both sides of the bridge. No question was raised as to their sufficiency. The answer alleged negligence on Baxter's part contributing to his injury and death; but such negligence, under the act, would have been at most matter for the jury to consider in assessing damages, and none of the assignments of error raise any question relating to this defense. The evidence before them would have permitted them to find that he reached a position on the coal which brought his head where it would strike the bridge, after the telltale intended to give warning that the bridge was near had been passed, but before the bridge itself was reached.

[2] Assignments of error 1–4, inclusive, complain of the admission of certain evidence introduced by the plaintiff against the defendant's objection.

(1) A Massachusetts statute (chapter 372, § 87, of the Acts of 1874), offered "as a matter of evidence that that statute had not been complied with," was thus admitted. It provides:

"That no bridge for any purpose shall hereafter be constructed over any railroad at a height less than eighteen feet above the track * * * except by the consent in writing of the Board of Railroad Commissioners."

It was further shown that the board referred to had "taken no action on the bridge." There is no contention that the class of persons in whose favor this statute imposes a duty is a limited class, not including the person for whose injuries recovery is sought, as in N. Y. Central, etc., Co. v. Price, 159 Fed. 339, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103. Had the plaintiff also shown that the defendant constructed this bridge after the statute took effect, a breach of statutory duty on its part would have been shown which might have been evidence of its negligence toward Baxter. Union Pacific, etc., Co. v. McDonald, 152 U. S. 262, 283, 14 Sup. Ct. 619, 38 L. Ed. 434. But the plaintiff's evidence did not go so far. It showed that the bridge was in existence in 1850; and the only evidence having any tendency to show subsequent rebuilding or reconstruction was that of a civil engineer in the defendant's employ, who testified that the planking of such a bridge has to be renewed as often as every 10 or 12 years, that the stringers wear two or three times as long, and that in most cases the superstructure would have to be renewed in a period of 40 years. This evidence also was admitted against objection. Conceding that it might have been admissible in connection with further evidence tending to show reconstruction, as the case went to the jury, we do not think that any finding that the defendant had in fact reconstructed the bridge since 1874, and had thus violated the statute, would have been justified by the evidence before them. Mere renewal of the planking, or of the stringers, or of the superstructure, would not have been such reconstruction. All the above evidence should have been stricken out, or the jury told to disregard it. The court instructed them, at the defendant's request, that:

"There is no evidence of the violation by the defendant of any statute, the violation of which precludes the defendant from the right to have the jury consider the question whether or not the plaintiff's intestate was guilty of contributory negligence."

But it left them to consider both the above statute and the above evidence as to the usual duration of superstructures in such bridges, upon the general question of the defendant's negligence as regarded Baxter; and this notwithstanding that both had gone in subject to objection. We cannot say that the defendant was not thereby prejudiced, and must therefore sustain the first two assignments of error.

[3] (2) Among the respects wherein the second count alleged the defendant to have been negligent were an alleged failure to allow Baxter time enough to prepare the engine before the train left Boston, and alleged improper coaling of the tender. Because of these alleged failures to use due care, Baxter, according to the second count, was prevented from getting the engine, tender and equipment ready before the train left, and, because he had been so prevented, found it necessary

to go upon the coal in the tender in order to get from there a fire hook which would have been put within reach from the cab before starting, had he been allowed time for preparation as above, thus exposing himself to the risk of being struck by the bridge.

It appeared without contradiction, from evidence objected to, but the admission whereof is not assigned as error, that the fire hook was found, after the accident, in the center of the coal pile on the tender. It was a two-pronged hook, about nine feet long, used for raking and leveling the fire, and there was evidence that in coaling the engine, if the hook was found "where the coal goes," it was usually placed by the man engaged in coaling "in some out of the way place."

Evidence was admitted against the defendant's objection tending to show that one hour had been agreed on, between the defendant and its employés, as the time for getting an engine from the Fitchburg roundhouse to its connection with its train in the North station, the engineers and firemen being required to register on duty one hour before their trains were due to leave; that the engine originally assigned to take out Baxter's train having been found incapable of being made ready in time within the hour and after being partly got ready, because one of its pipes which had been sent out to be brazed did not arrive as expected, another engine was then substituted, being the engine which did take the train out; that, instead of one hour, 20 minutes only was thus left available for doing everything necessary to make the substituted engine ready and bring it from the roundhouse to the train.

The engineer who ran this engine was allowed to testify, against the defendant's objection, that, from his experience as engineer and fireman, he though "the fire would have to be refreshed most any place along there," after the time occupied in running from the North station to the place at which Baxter left his seat in the cab.

The above evidence, admitted against objection, is that to which the third and fourth assignments of error refer. If it was admissible, in that it helped to show what Baxter probably did after he left the cab, where he probably was when the tender went under the bridge, and therefore how the injury which killed him was in fact sustained, it was not, in itself, evidence of such negligence on the defendant's part as could properly be regarded either as the sole or as a contributing cause of Baxter's injury. The nonarrival of the pipe expected, and the consequent impossibility of getting the originally assigned engine ready in time, did not, of themselves, warrant the conclusion that negligence on the defendant's part caused the substitution of a different engine and the resulting necessity for getting that engine ready in 20 minutes, and there was no other proof to that effect. And even if these results could properly have been found due to any negligence of the defendant, it could not be called a natural and probable consequence of such negligence, reasonably to be anticipated, that the hook would be misplaced, that it would be wanted just before reaching this bridge, that it would there be found missing, and that the want of it would lead Baxter to go upon the coal at a time when, by so doing, he would incur the danger of being struck by the bridge. The evidence

here in question does not appear to have been admitted for any limited purpose, but generally, and the only instruction given the jury regarding it—an instruction duly excepted to by the defendant—was, as set forth in the eleventh assignment of error, that:

"If [the jury] should find that the plaintiff's intestate was not given time by the defendant's agents to prepare his engine, and therefore was obliged to go on the tender after the train had started, then the jury may find the want of sufficient time to prepare his engine evidence of negligence on the part of the defendant."

The negligence here referred to could only have been negligence causing Baxter's death. We think the evidence referred to was wrongly admitted for the purpose stated in the instruction, and that the above instruction was, in itself, erroneous in that it permitted the jury to find as a cause of Baxter's death something which could in no proper sense be said to have caused it, viz., the allowance of 20 minutes only, instead of an hour, for getting everything ready before the engine and the tender left Boston, and also to find that there had been a negligent failure by the defendant to allow sufficient time, of which there was no proof.

The above conclusions are enough to prevent us from sustaining the judgment below, although we find nothing in the remaining assignments of error which can avail the defendant. No verdict, in our opinion, could properly have been directed in its favor, even if all the evidence wrongly submitted to the jury, as above, had been withheld from their consideration; nor would any ruling have been justified that, upon the evidence, Baxter had assumed the risk of the injury from which he died.

The judgment of the District Court is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion; and the plaintiff in error recovers its costs of appeal.

PUTNAM, Circuit Judge (concurring). Without coming to any particular conclusion with reference to the grounds taken by the opinion of the court in this case, I concur in the result reached by it that there ought to be a new trial.

It was settled, so far as we are concerned, in Central Vermont Railway Company v. Bethune, decided on September 23, 1913, and reported in 206 Fed. 868, 124 C. C. A. 528, that the Employers' Liability Statutes of the United States do not supersede the common-law doctrine of assumption of risk in cases where the common-law doctrine formerly applied, and no violation of any statute on the part of the defendant is proven. This proposition is in harmony with later decisions of the Supreme Court in various cases, the last of which is Seaboard Air Line Railway Company v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

The bridge with which the head of the intestate came in contact, causing his death, was not maintained in violation of any statute; but, if maintained through any fault of the Boston & Maine Railroad, it was through fault which was in violation only of the rules of the common law. Therefore, so far as I can perceive, the intestate might have

assumed the risk of the events which caused his death in accordance with all the rules of the common law.

One of the events in the line of circumstances which preceded his death was the confusion arising out of the unexpected replacing of the locomotive which was intended for the train on which the intestate was killed, by the locomotive which was in fact used thereon. This is now discussed as though it were a question simply of the direct materiality of those circumstances. I think that in that point of view the evidence in reference to the replacing of the locomotive may have been too remote, and should not have been admitted from that point; but it is very evident that that particular group of facts might have been looked at from another aspect—in substance, that, on account of the haste in replacing the locomotive, the locomotive in connection with which the intestate was killed left the station in some degree of confusion. This is quite apparent from the discussion of this line of events by the court in its charge to the jury. From that part of the charge it is quite apparent that the court might have considered, and probably did consider, that the jury might have found that the intestate justly became temporarily unconscious of the conditions with reference to the bridge, on account of his being suddenly called on to remedy the confusion to which I have referred, particularly in looking after the hook for raking the coal, which had been thrown out of its proper place in the confusion, and thus located on the top of the coal on the tender, when otherwise, and ordinarily, it might have remained easily accessible. The record does not make it clear whether or not the case was presented to the jury in this aspect, although it apparently should have been.

The plaintiff in error was entitled to have the case submitted clearly to the jury on the question as to the acceptance of risk, with whatever qualification properly grows out of these suggestions. Therefore I agree that there should be a new trial.

PHILADELPHIA, B. & W. R. CO. v. McCONNELL.

(Circuit Court of Appeals, Third Circuit. December 9, 1915.)

No. 1956.

COMMERCE ⊂=27—EMPLOYERS' LIABILITY ACT—EMPLOYÉ "EMPLOYED IN INTERSTATE COMMERCE."

Plaintiff was assistant foreman of the gang on a work train on defendant's railroad, and was injured while the train was engaged in removing old rails, which had ben replaced, from between the tracks where they had been left. The movement of the train on that day was wholly within one state, but the tracks extended into other states and were constantly used by defendant in both interstate and intrastate commerce. *Held*, that the work being done was necessary in keeping the tracks and roadbed in suitable condition for interstate commerce, and that plaintiff was at the time "employed" in such commerce within the meaning of Employers' Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (Comp. St. 1913, § 8657), and could maintain an action thereunder.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. ⊂=27.

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

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action at law by William R. McConnell against the Philadelphia, Baltimore & Washington Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John Hampton Barnes, of Philadelphia, Pa., for plaintiff in error.

Owen J. Roberts, of Philadelphia, Pa., and James D. Carpenter, Jr., of Jersey City, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The question is whether the work the plaintiff was doing at the time of his injury was so related to interstate commerce as to bring him within the provisions of the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Statutes at Large, 65.

The plaintiff was assistant foreman of a gang on one of the defendant's work trains. The main business of the work train and its gang was to deliver supplies for repair and maintenance of the four track roadway or main line of the defendant company from a point in Pennsylvania to a point in Delaware, and by removing and carrying away used and discarded materials, to keep clear and clean its tracks and roadbed. A few days before the injuries to the plaintiff, the work train in question had taken new rails to a place where a track was to be repaired. The old rails were removed and the new ones installed. On the day the plaintiff was injured, the same train and gang were engaged in removing the old rails from where they had been left between the tracks. Travel over the roadbed of the defendant company at this point is very heavy, and interstate and intrastate trains pass over all the tracks every few minutes. While the plaintiff was on a car in the performance of his duties, members of the gang, under the supervision of the foreman, threw a rail upon the car in such a manner that one end projected beyond the side of the car and was struck by a passing train and thrust against the plaintiff, causing him the injuries of which he complains.

The errors assigned are two:

1. The refusal of the court to direct the jury that, under all the evidence, the verdict must be for the defendant.

2. The refusal of the court to direct the jury to render a verdict for the defendant, upon the ground that the plaintiff was not entitled to recover under the Federal Employers' Liability Act.

With respect to the first error assigned, we may briefly say, that, as there was a conflict of testimony as to what had occurred, the question of negligence was for the jury. Whether under the second assignment, the case was for the jury, or whether error was committed in refusing to withdraw it from the jury, depends upon whether the plaintiff, at the time of his injury, was employed in interstate commerce.

In order to determine this question, we must ascertain the nature of the work in which the plaintiff was employed with respect to the commerce to which it related, and as his injury was the result of negligence of a fellow servant, which is a risk from the assumption of which he is relieved only by the Federal Employers' Liability Act when it applies, we must inquire whether the work the plaintiff was doing at the time of his injury was within the contemplation of that act.

The right to recover arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce. Pedersen v. D. L. & W. R. R. Co., 229 U. S. 146, 150, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. There is no question that the defendant was engaged in interstate commerce. Therefore, we are concerned only with the nature of the work in which, at the time, the plaintiff was employed. That work was in connection with an instrumentality of commerce then and theretofore constantly, though not wholly, used in interstate commerce, and therefore to be distinguished from the facts and not to be controlled by the law of the case of Bravis v. C. M. S. P. Ry. Co., 217 Fed. 234, 236, 133 C. C. A. 228. The work of the train on which the plaintiff was employed had nothing to do with the immediate or direct movement of interstate commerce. Being a repair train, its direct relation was to instrumentalities of commerce rather than to the movement of commerce. With respect to its movement on the day of the accident, its journey was defined and was wholly within the State of Pennsylvania. It was not a drifting train as in Pennsylvania R. R. Co. v. Knox, 218 Fed. 748, 134 C. C. A. 426. The work of the plaintiff at the time of his injury was similar to that of Pedersen at the time of his injury (Pedersen v. D. L. & W. R. R. Co., supra) in that it related to the roadway of the railroad company over which moved indiscriminately interstate and intrastate traffic, and was distinguished from the work in which Pedersen was employed only in the respect that Pedersen was carrying materials to a point upon the roadway or bridge for the purpose of repairing it, while McConnell, the plaintiff, was carrying materials from the roadway after it had been repaired. How far does the Pedersen Case control this case?

In considering the nature of the work in which Pedersen was employed at the time of his injury, the court in the Pedersen Case, said:

"Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, *track, roadbed,* works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of

opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

If, as held in the Pedersen Case, carrying materials to the place where repair work is to be done is so closely related to interstate commerce as to be a part of it, then carrying materials from the place after repair work has been done is just as closely related to, and, for the same reason, must be a part of it. The questions asked and answered by the court in the opinion in the Pedersen Case, we believe apply with equal force and precision to the facts of this case. Here the work was not being done independently of the interstate commerce in which the defendant was engaged, nor was the performance of the work a matter of indifference so far as that commerce was concerned. The removal of old rails from between the tracks on the roadbed of a railroad over which moves heavy traffic, both interstate and intrastate, constitutes keeping the tracks and roadbed in suitable condition for interstate commerce, and is as necessary for the proper maintenance of the tracks and roadbed as renewing the tracks. The work of which the plaintiff's was a part, was the repair of the roadbed by replacing old rails with new ones. This included removing old rails and installing new ones. The work of removing old rails was not complete when they were lifted from their place upon the ties and tossed upon the roadbed, but was complete only when they were carried away from the place where they lay between the tracks. The removal of old rails was as much a part of the repair work as the bringing of new rails to the place to be repaired. If this be true, this case is within the Pedersen Case, and believing it to be true, we feel that this case is ruled by the principle declared by the Supreme Court in that case.

The judgment below is affirmed.

BOYLE v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. December 8, 1915.)

No. 1977.

COMMERCE ⊂=27—EMPLOYERS' LIABILITY ACT—SERVANT "EMPLOYED IN INTERSTATE COMMERCE."

A passenger train moving between interior points within the same state and not at the time carrying passengers or baggage in interstate commerce was not engaged in such commerce, and an employé injured while inspecting the cars in such train was not at the time of injury "employed in interstate commerce," within the meaning of Employers' Liability Act, April 22, 1908, c. 149, § 1, 35 Stat. 65 (Comp. St. 1913, § 8657), although the train connected with interstate trains, advertised such fact, and frequently carried passengers destined for points in other states.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⊂=27.

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

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by Catherine Boyle, administratrix of the estate of Thomas Boyle, deceased, against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 221 Fed. 453.

Charles Petchon and Bertram D. Rearick, both of Philadelphia, Pa., for plaintiff in error.

John Hampton Barnes, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The question is whether the deceased was employed in interstate commerce at the time he was injured.

The defendant railroad company operated companion trains moving in opposite directions between Philadelphia and Pottsville in the State of Pennsylvania. They were scheduled to pass at Phœnixville, the northbound train being due to arrive two minutes before the southbound train. Thomas Boyle, the plaintiff's intestate, was a car inspector in the employ of the defendant at Phœnixville. It was his duty to inspect both trains. On the day in question, he had completed the inspection of the northbound train, which was the first to arrive. While waiting to inspect the southbound train, which he saw approaching, Boyle stood in the space between the tracks on which the two trains moved, leaning against the engine of the train he had just inspected. While in this position, he was struck by the engine of the southbound train, and received injuries from which he died.

The two trains moved between points within the State of Pennsylvania. Both were advertised on the defendant's time table to connect at West Philadelphia with trains to and from New York. Neither, at the time of the injury to Boyle, was shown to have been transporting passengers, baggage or express matter in interstate commerce. The court submitted the issue of negligence to the jury upon instructions with respect to the defendant's liability under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. 65). These instructions were, in part, as follows:

"I charge you, as a matter of law, that it is not sufficient that this defendant is at times engaged in interstate commerce. That will not do. It is not sufficient that it is prepared to do interstate commerce and holds itself out as ready to do it. The thing that you must find, under the evidence in this case, is that at the time this man was killed, this company was at that time and the train about which he was employed was engaged in interstate commerce. That means, getting it down to a nut-shell, *whether there was anyone on that train, any baggage upon that train, that at that time were being carried from one state to another.* If there was any of that kind of business being done at that time, that is interstate commerce. If it was not being done at that time, then the defendant was not engaged in interstate commerce and that is the end of the case. * * * *Let me say again, the fact that it at times does it or ordinarily does it, the fact that it stands ready to do it, and advertises by its schedules or otherwise, that it is ready to do it, is not enough. You must take it upon your consciences to say that it has been proven by the evidence in this case to your satisfaction that it was so engaged at the time.*"

The jury rendered a verdict for the defendant.

The only error assigned is in the portion of the charge above quoted, in which the trial judge suggested a test or established a standard by which the jury was required to determine whether the deceased was employed in interstate commerce at the time he sustained his injuries. The error consists, as it is contended, in restricting the test to the character of commerce in which the train was engaged at the precise time the injuries were inflicted, indicated by the presence or absence of passengers and baggage being carried to another State, and in not extending the test to other considerations which are conceived to be equally pertinent. One is that the prompt and safe movement of an intrastate train is so necessary to the safety and unimpeded movement of interstate trains moving over the same track, that inspection of the intrastate train becomes a part of interstate commerce. The other is that the advertised fact that an intrastate train connects at West Philadelphia with trains to and from New York, makes that train a link in an interstate system and therefore a part of interstate commerce, and that inspection of such a train is employment in such commerce.

In support of the first exception to the charge, the plaintiff in error cites and relies upon the line of cases, holding generally that the work of repairing or maintaining instrumentalities used indiscriminately in intrastate and interstate commerce is employment in interstate commerce.

The contention of the plaintiff in error is based upon the admittedly correct proposition that a car which has been and may again be used indiscriminately in intrastate and interstate commerce, is an instrument of interstate commerce. Northern Pacific Ry. Co. v. Maerkl, 198 Fed. 1, 4, 117 C. C. A. 237; Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280. Employment upon such an instrument of commerce may be of two kinds; first, repairing or preparing it for use in commerce of both kinds; second, using it in commerce of one kind or the other. With respect to employment upon such an instrument of interstate commerce, the plaintiff cites and relies upon several cases, of which the first is Northern Pacific Ry. Co. v. Maerkl, supra, cited by the Supreme Court in Pedersen v. D. L. & W. R. R. Co., infra. In this case, the court held that a workman employed in the repair shops of a railroad company in repairing a car having been used and intended again to be used in commerce of both kinds, is employed in interstate commerce, and if injured when so employed, he is within the protection of the Federal Employers' Liability Act. It is to be noted that the work that Maerkl was doing was not using an instrument of commerce in interstate commerce, but was preparing that instrument for use in commerce either of one kind or the other, and therefore for use in interstate commerce.

In North Carolina Ry. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, the employment of the injured employé was very similar to that of Maerkl. In this case, the deceased was a fireman on a train about to move between interior

points in the State of North Carolina. The train included two cars which had come from the State of Virginia. After preparing his engine to move the train and continue the transportation of the two cars in interstate commerce, though between intrastate points, the fireman was killed. The court held that "his acts in inspecting, oiling, firing and preparing his engine for the trip" were acts performed as a part of interstate commerce. The deceased was employed in preparing an instrument for use in interstate commerce, and the fact that two of the cars of the train were carrying interstate freight, though vigorously controverted, was the fact upon which the interstate character of the employment of the deceased was established. There is a distinction between employment in preparing an instrument of commerce for use, and employment in using such an instrument in commerce. Preparation of an instrument for use in commerce of both kinds necessarily means preparation for use in commerce of either kind, and as one kind is interstate commerce, it follows logically that such preparation is for use in interstate commerce, but employment connected with the actual use of such an instrument is a part of intrastate or interstate commerce according as the instrument is in use in commerce of one kind or the other. The preparation for use, and the use of instruments in commerce of both kinds, are sometimes not easily distinguishable, when, for instance, the instrumentality is such as a railroad bridge or a railroad track. Upon cases dealing with such instrumentalities, the plaintiff in error principally relies to sustain his contention that preparation of an instrument of commerce having a double use, is interstate commerce, without regard to the kind of commerce in which the instrument is actually employed at the time of an injury. Of course, the leading case upon this subject is Pedersen v. D. L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. At the time Pedersen was injured, he was engaged in repairing a bridge which formed a part of the main line of the defendant's railroad. The court held that the bridge, though used indiscriminately in the two kinds of commerce, was an instrument of interstate commerce, and that in repairing the bridge, Pedersen was employed in such commerce. The decision was based upon the finding that the bridge was an instrument of interstate commerce, without regard to the double use to which it was put, and therefore employment in its repair was so closely connected with interstate commerce as to be a part of it. Following the principle announced in Pedersen v. D. L. & W. R. R. Co., supra, this court has recently held in P., B. & W. R. R. Co. v. McConnell, 228 Fed. 263, — C. C. A. —, that a track used indiscriminately by trains moving in intrastate and interstate commerce, is an instrument of interstate commerce, and employment in repairing the same is employment in interstate commerce. It thus appears that in the Maerkl, Zachary, Pedersen and McConnell cases, the employment related to the preparation of instrumentalities of commerce for use and not to the use of such instrumentalities.

Throughout this line of cases, of which the few discussed are fair examples, there is the underlying idea that work upon instruments of

interstate commerce and preparation for their use in interstate commerce, are so intimately and directly related to interstate commerce as to make such work or employment a part of it. There are other cases, however, which have to do, not with employment in preparing instrumentalities of commerce for use, but with employment connected with the actual use of such instrumentalities in commerce of one kind or the other. In such cases, the law does not hold employment upon an instrumentality to one kind of commerce, notwithstanding its double use, but distinguishes between its use in intrastate and interstate commerce, as of necessity it must, and the courts recognize and attempt to enforce the distinction. In certain cases, the distinction is determined by the character of commerce in which the instrument is in use. For instance, in the Maerkl case, a carpenter was held to be employed in interstate commerce because he was repairing a car in current use in both kinds of commerce; the fact that such a car was being used in interstate commerce determined the interstate character of the fireman's employment in the Zachary case; while the fact that such a car was being moved in intrastate commerce determined the intrastate character of the fireman's employment in the Behrens case, infra.

In the case of Illinois Central R. R. Co. v. Behrens, 232 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, the plaintiff's intestate was a fireman of a switch engine operated exclusively within the City of New Orleans and used at different times in moving indiscriminately both classes of commerce. At the time of the collision which caused the injury, "the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state." The question of law was whether upon these facts the intestate was employed in interstate commerce within the meaning of the act. The court considered the status of the railroad as a highway for both intrastate and interstate commerce, the interdependence of the two classes of traffic in point of movement and safety, and the practical difficulty in separating or dividing the general work of the switching crew. Applying to these considerations the words of the statute, "suffering injury while he is employed by such carrier in such commerce," and giving to the words their natural meaning, the court held:

"That Congress intended to confine its action to injuries occurring *when the particular service* in which the the employé is engaged is a part of interstate commerce."

Quoting from the opinion and applying the test announced in Pedersen v. D. L. & W. R. R. Co., supra, the court continued:

" 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employé is employed by the carrier in such commerce. * * * The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?' * * *

"Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city

to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

What was the character of the train at the time Boyle was to inspect it? Upon the uncontroverted evidence, it was a train moving between interior points in the state, carrying neither interstate passengers nor baggage. It was then rendering no service in interstate commerce. Whether it was then ready to render such a service or thereafter actually rendered it by receiving passengers to be transported to another state, is beyond the question of the character of the commerce in which it was engaged at the time of Boyle's employment and injury.

What was the nature of Boyle's employment at the time of his injury? Unlike Maerkl, Boyle was not repairing or at work upon a car thereafter to be used in both kinds of commerce. He was employed upon cars then in actual use and in use either in one kind of commerce or the other, not in both kinds. The use of the cars at the instant of Boyle's injuries related only to the train of which they were a part, and of the journey of the train. That use was at that time either intrastate or interstate. It could not have been both, for without interstate passengers and baggage it would have been an intrastate use, and with both intrastate and interstate passengers and baggage it would have been interstate. Therefore, the kind of commerce in which the cars were being used at the time Boyle was at work upon them, determines whether Boyle's employment was intrastate or interstate in character.

Boyle's employment was similar to that of Behrens at the time of his injury, with similar disregard to the possible interstate character of the commerce in which the train, as an instrumentality, might subsequently be used. Therefore, the test of the kind of commerce in which the train was being used and in which Boyle was employed, as contained in the charge of the learned trial judge, was not restricted in its scope, when considered with respect to the facts of this case and the restricted question arising from them. There was no occasion for him to include in his instructions and illustrations all instances in which the Act might apply, but it was sufficient for him to conform his instructions to the limited facts of this particular case. This he did correctly and sufficiently, unless indeed it be law, as urged by the plaintiff in error, that inspection of the intrastate train is so related to interstate commerce as to make it a part of it, and that the train moving between interior points lost its intrastate character by reason of the advertised fact that it made interstate connections.

In many cases it is difficult to find the line distinguishing intrastate and interstate commerce; nevertheless the line exists. It is the function of the courts to maintain the line of distinction and to promulgate rules by which it may be found. We are urged in this case, however, to advance a principle which would not aid in discovering the line of

distinction between the two kinds of commerce, but, we conceive, would obliterate it. We are urged to this position upon authority of the decisions under the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1913, §§ 8605–8612]) with which it has been said the Employers' Liability Act is in pari materia.

Under the Safety Appliance Act, all cars of an interstate railroad, in whatever kind of commerce used, are required to be equipped with safety appliances, upon the theory that such universal equipment is necessary to the safety of interstate traffic. It has therefore been held in Southern Ry. Co. v. United States, 222 U. S. 20, 26, 27, 32 Sup. Ct. 2, 56 L. Ed. 72, that a car used for intrastate traffic only, when hauled over tracks used for interstate traffic, is within the Safety Appliance Act. In the Second Employers' Liability Act Cases, 223 U. S. 1, 51, 52, 32 Sup. Ct. 169, 176 (56 L. Ed. 327, 38 L. R. A. [N. S.] 44), it was held that:

"It is not a valid objection that the act embraces instances where the causal negligence is that of an employé engaged in intrastate commerce; for such negligence, when operating injuriously upon an employé engaged in interstate commerce, has the same effect upon that commerce as if the negligent employé were also engaged therein."

Relying upon this expression and the Safety Appliance Act decision, last cited, the plaintiff in error urges the contention that the effect of inspection of an intrastate train is so immediately and necessarily related to the safe movement of interstate commerce as to be a part of it. We are of opinion that the decision cited under the Safety Appliance Act may be considered as a logical interpretation of the means intended by Congress to effect and obtain the safety to interstate commerce contemplated by the Safety Appliance Act. The decision in the Second Employers' Liability Cases, supra, to the extent in which it was cited, dealt only with the liability of employers for injuries to their employés, and related only to the matter of injuries sustained by an employé in interstate commerce, occasioned by an employé in intrastate commerce. Neither case is authority for the contention so broadly made, that acts which are primarily intrastate, become interstate in their nature when they affect the safety or movement of interstate commerce. While the movement of an intrastate train, like the use of any intrastate instrument, may in some measure affect the safe movement of interstate commerce, we believe that in the present case, the inspection of such an intrastate train is so remotely related to interstate commerce that under the tests prescribed by the Supreme Court it cannot be considered a part of it.

It is further contended by the plaintiff in error that the two trains involved in this case were engaged in interstate commerce by reason merely of the fact that they were advertised to make connections at West Philadelphia with trains to and from New York, and "were, therefore, trains employed by the defendant, when occasion required, for the transportation of interstate passengers."

At the West Philadelphia station of the defendant railroad company, connections may hourly be made with a vast number of trains moving between points wholly within the State of Pennsylvania and be-

tween points in Pennsylvania and other States. The opportunity to make connections, whether generally known or advertised, does not effect a change in the character of a train or of the commerce in which it is engaged. It is advertised that connections may be made at this station; if no connections be made, no change is effected; while on the other hand, if connections be made, the character of the commerce may be changed according only as passengers availing themselves of the convenience may be traveling upon through tickets embracing one contract of transportation from a point in Pennsylvania to a point in another state, or upon separate tickets involving two contracts of transportation, one ending at West Philadelphia for a part of the journey, and the other beginning at West Philadelphia for the balance of the journey. Gulf, Colorado & Santa Fé Ry. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540. Therefore, whether the trains involved in this suit were engaged in transporting passengers in interstate commerce, depends not upon the advertisement or upon the fact that connections may be made at West Philadelphia, "when occasion required," that is, when passengers desire, but upon the actual character of the transportation in which such trains are engaged at a given time. We are therefore back to the first question, which relates to the character of the commerce in which the train was engaged and the intestate was employed at the time of his injury, controlled by the evidence that the train moved between interior points in one state, and that it was transporting no passengers or baggage into another state. From this test or standard, presented by the trial judge, it must be decided that it was not engaged in interstate commerce, and those participating in its movements were not employed in that commerce. We find no error in the charge of the court, considered with reference to the facts to which it was directed.

The judgment below is affirmed.

PEASE et al. v. RATHBUN-JONES ENGINEERING CO. PEASE v. SAME. PEASE v. HERRING, U. S. Marshal, et al.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1915. Rehearing Denied January 4, 1916.)

Nos. 2781, 2804, 2834.

1. APPEAL AND ERROR ⇐883—APPEAL BOND—LIABILITY OF SURETIES—SUMMARY DETERMINATION.

On appeal from a decree adjudging that plaintiff recover a specified amount from defendant, and establishing a lien on certain property, the decree was affirmed. A decree was subsequently entered, making the mandate of the appellate court the judgment of the District Court and ordering the clerk to issue an order for the sale of the property described in the judgment, and, if it was insufficient to satisfy such judgment, to issue an execution against the defendant and the sureties on its appeal bond. The sureties moved to set aside such decree, so far as it directed the issuance of execution on grounds involving the question as to their

liability. *Held*, that they could not complain that the court passed on the question of their liability, as, though a surety on a supersedeas bond may have a right to have his liability thereunder adjudicated in an action at law on the bond, he can waive this right by voluntarily submitting the question of liability to the court rendering the decree on the appeal from which the bond was given, and one invoking the decision of a court as to the merits of a claim made against him cannot retain the right of electing to abide by the decision if acceptable to him, and of not being bound by it if adverse to his contention.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. ⟸883.]

2. APPEAL AND ERROR ⟸1234—APPEAL BOND—LIABILITY OF SURETIES.

Rev. St. § 1000 (Comp. St. 1913, § 1660), provides that every justice or judge signing a citation on any writ of error shall take good and sufficient security that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and, if he fails to make his plea good, answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas. Rule 13 of the Fifth Circuit (150 Fed. xxviii, 79 C. C. A. xxviii) require supersedeas bonds to be taken with good and sufficient security that plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fails to make his plea good, and provides that 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 damages and costs, but that where the property in controversy necessarily follows the suit and in suits on mortgages, or where the property is in the custody of the marshal, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity will only be required in an amount sufficient to secure the sum recovered for the use and detention of the property, the costs of the suit, and damages for delay. *Held*, that where, on appeal from a decree adjudging that plaintiff recover of defendant a certain amount, and also establishing a lien on machinery, and ordering its sale unless the money judgment was paid, a bond superseding the decree was given, conditioned as required by section 1000, the sureties were liable for the amount of the decree, so far as it directed the payment of money, as well as for damages for the delay arising from the appeal, as rule 13 only furnishes a guide for determining the amount of bonds, and does not deprive a supersedeas bond of the effect given it by the statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4761–4777; Dec. Dig. ⟸1234.]

3. APPEAL AND ERROR ⟸1033—APPEAL BOND—LIABILITY OF SURETIES.

Where the sureties on a supersedeas bond on an appeal from a decree establishing a lien on property and awarding a money judgment were liable for the amount of the money judgment, they could not complain that before their liability was sought to be enforced this amount was reduced by the application thereon of the amount realized on a sale of the property against which the lien was decreed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052–4062; Dec. Dig. ⟸1033.]

4. COURTS ⟸355—FEDERAL COURT—JUDGMENT—ENFORCEMENT—JURISDICTION OF COURT.

Where the trial court rendered a decree adjudging that plaintiff recover a specified sum of money, and establishing a lien on certain machinery, and ordering the sale thereof unless the money judgment was paid, its jurisdiction was not thereby exhausted, but continued until the decree

was satisfied, except in so far as its right to exercise its power to enforce the decree was suspended during the pendency of the appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 935, 936; Dec. Dig. ⟸355.]

5. COURTS ⟸355—JUDGMENTS ENFORCEABLE BY EXECUTION—DECREES IN EQUITY.

Under equity rule 8 (198 Fed. xxi, 115 C. C. A. xxi), providing that final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, where a decree adjudged that plaintiff recover a sum of money, established a lien on certain machinery, and ordered that such machinery be sold unless the amount decreed against defendant was paid within 60 days, the part of the decree remaining unsatisfied after the sale of such property was solely for the payment of money, and the appropriate process for its execution was a writ of execution, especially where the mandate of the Circuit Court of Appeals on an affirmance of the judgment of the District Court ordered that such execution and further proceedings be had as according to right and justice and the laws of the United States ought to be had.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 935, 936; Dec. Dig. ⟸355.]

6. APPEAL AND ERROR ⟸781—DISMISSAL OF APPEAL—EFFECT OF PAYMENT.

Where, pending an appeal from a decree denying an application for an injunction restraining the enforcement of an execution, the execution was satisfied, there was nothing for decision, and the appeal would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63–80, 3122; Dec. Dig. ⟸781.]

Appeals from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Suit by the Rathbun-Jones Engineering Company against the People's Light Company. From a decree against Clark Pease and another, sureties on an appeal bond of the defendant, such sureties appeal; and from decrees overruling a motion to set aside the first-mentioned decree, and overruling an application for an injunction against J. A. Herring, United States Marshal, and others, Clark Pease appeals. Appeal from decree overruling application for injunction dismissed, and the other decrees affirmed.

In Nos. 2781 and 2804:

Frank H. Booth, of San Antonio, Tex., for appellants.

James D. Walthall, of San Antonio, Tex., for appellees.

In No. 2834:

Frank H. Booth, of San Antonio, Tex., for appellant.

James D. Walthall, of San Antonio, Tex., for appellees.

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

WALKER, Circuit Judge. By a decree rendered on January 9, 1914, in the case of Rathbun-Jones Engineering Company v. People's Light Company, it was adjudged that "plaintiff do have and recover of and from the defendant * * * the sum of six thousand, eight hundred and four dollars and ninety cents ($6,804.90)," and also interest and costs. The decree further provided for the establishment

of a lien on certain described machinery, as claimed in the petition, and that if the amount decreed against the defendant was not paid within 60 days from the date of the decree the clerk issue process directing the marshal to sell the property subjected to the lien. An appeal was taken from this decree, and a bond in the sum of $7,500, dated March 7, 1914, and with the condition that "if the said People's Light Company shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its plea good," was made and approved; Clark Pease and Gust. Heye, Jr., signing as sureties. The result of that appeal was an affirmance by this court of the decree appealed from. People's Light Co. v. Rathbun-Jones Engineering Co., 218 Fed. 167, 133 C. C. A. 523. On February 24, 1915, after the filing of the mandate from this court, the District Court entered a decree which ordered that the mandate be made the judgment of the court, and further ordered "that the clerk of this court issue an order of sale as in the decree of this court provided, directed to the marshal of this district, commanding him to sell the property described in the judgment rendered herein to satisfy said judgment, interest, and costs, and it is further ordered that in the event said property does not sell for sufficient amount to satisfy said judgment, interest, and costs, the clerk of this court issue execution against the defendant and against the sureties on the appeal bond herein, Clark Pease and Gust. Heye, Jr., for any deficiency that may remain." Thereafter, on May 6, 1915, after the marshal's sale of the property decreed subject to the lien declared, and the application of the sum realized on that sale—$1,500—to the satisfaction to that extent of the decree, Clark Pease and the administratrix of the estate of Gust. Heye, Jr., deceased, filed a motion in the cause, which, after stating the proceedings therein, prayed that the above-mentioned order of February 24, 1915, in so far as it directs the issuance of execution against the People's Light Company and against Clark Pease and Gust. Heye, Jr., be set aside and held for naught. The motion stated many grounds for the granting of the relief sought. One of the grounds was:

"That said order was entered by the court without pleading, without notice, and without hearing, against, to, or of these petitioners, or either of them. And said order is in violation of the Constitution of the United States, in that it deprives your petitioners of their property without due process of law."

Among other grounds stated in the motion were the following:

"That said bond did not secure, and was not intended to secure, the payment of the amount of said judgment, or any deficiency that might remain after the application of the proceeds of the sale of said property, but operated only as indemnity against damages and costs by reason of said appeal; and, in this connection, petitioners show that all the costs on said appeal and adjudged against them by the Circuit Court of Appeals have been paid, and attach the receipt of the clerk of this court hereto to show the fact."

"That in its bill filed in this cause the complainant sought a judgment, as at law, for any deficiency that might remain due on said judgment after the application of the proceeds of the sale of said mortgaged property, and such judgment was not awarded it; and therefore its right to a deficiency judgment and execution therefor has been adjudicated against it, and such right, if it ever existed, is res adjudicata, which these petitioners now here

plead in bar of any right of the plaintiff to have execution for such deficiency."

"That the sale of said property, and the acceptance of the proceeds thereof, operated as a complete satisfaction of the decree aforesaid, and no cause of action now exists, if any ever existed, against your petitioners or either of them."

The case is here on separate appeals sued out from, respectively, the decree of February 24, 1915, from the decree overruling the above-mentioned motion, and from a decree overruling an application of Clark Pease for an injunction restraining the enforcement of the execution against him. No stay of the execution having been ordered before the hearing in this court on the last-mentioned appeal, Clark Pease, under protest, paid the amount called for by the execution against him.

[1] It may be assumed that a surety on the supersedeas bond had the right to have the question of his liability thereunder adjudicated in an action at law on the bond in which he could have claimed a trial by jury. If he had this right, it was one he could waive by voluntarily submitting the question as to his liability to the court which rendered the decree on the appeal from which the bond was given. That court could, at the request or with the consent of the surety, determine the liability on a bond which was part of the proceedings in a case which was or had been pending before it. Several of the grounds stated in the motion made by the sureties distinctly invoke a ruling by the court on the question of the liability incurred by the sureties under the facts of the case. The court was invited to pass on the merits of the question, including matters which were set up as barring the asserted right of the plaintiff in the case to have a recovery against the sureties. One against whom a liability is asserted in one court waives a special privilege he may have to require that another court be resorted to for the adjudication of the question of such liability by appearing in the court in which the liability has been asserted and invoking a decision of that court on the merits of the controversy; and such waiver results from such conduct, though the submission of the controversy to that court for its decision is accompanied by the suggestion that that court had not acquired jurisdiction of the person so appearing in it. One so making a general appearance in a court, and invoking its decision as to the merits of a claim made against him, cannot so limit or qualify the effect of his appearance as to retain the right of electing to abide by the decision if it is acceptable to him, or of not being bound by it if it is adverse to his contention. St. Louis & San Francisco Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; 24 Cyc. 156, 158. It follows that the surety cannot sustain a complaint against a ruling as to his liability which was made at his instance, if what he was required to pay as a result of the ruling was no more than the bond made him liable for.

[2, 3] For an appeal to operate as a supersedeas, and to stay execution, there must be taken "good and sufficient security that * * * the appellant shall prosecute * * * his appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs."

Rev. Stat. U. S. § 1000 (Comp. St. 1913, § 1660); rule 13 of this court (150 Fed. xxviii, 79 C. C. A. xxviii). The bond in question was conditioned as required by the quoted provision of the statute. The decree which was so superseded was one for the payment of money. The breach of the condition of such a bond given in such a case entitles the obligee to recover, not only compensation for the delay arising from the appeal, but also the amount of the decree appealed from, so far as the latter directs the payment of money by the appellant to the appellee. American Surety Co. of New York v. North Packing & Provision Co., 178 Fed. 810, 102 C. C. A. 258; Wood v. Brown, 104 Fed. 203, 43 C. C. A. 474. The ruling made in the case of Kountze v. Omaha Hotel Co., 107 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609, is not applicable here. The bond under consideration in that case was given on an appeal from an ordinary foreclosure decree. It was distinctly pointed out in the opinion rendered in that case (107 U. S. 393, 2 Sup. Ct. 911, 27 L. Ed. 609) that the decree appealed from was not a personal one for the debt which the mortgage secured, and that the personal liability of the debtor could have been enforced while the appeal from the foreclosure decree was pending. Not so here, where the effect of the bond under consideration was to supersede the decree as a whole, not merely the part of it which decreed a sale of the property found to be subject to a lien, but the part of it which ordered the payment of money by the appellant to the appellee.

Nothing contained in rule 13 of this court can be given such effect as to prevent the bond standing as security for the superseded decree for the payment of money, at least in so far as that decree is not otherwise secured. The provision of that rule that "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 cost and interest on appeal," by no means has the effect of preventing a bond which superseded such a decree as the one under consideration, which was for the payment of money and also for a lien on property ordered to be sold and the proceeds applied on the decree, standing as security for the decree for money so far as it remained unsatisfied after the application of the proceeds of the property ordered to be sold. That rule undertakes to furnish a guide for determining the amount of supersedeas bonds in specified cases, and shows that the amount is to be more or less according as the appellee or defendant in error may be liable to be subjected to more or less damage by the superseding or suspension of the execution of the decree or judgment in his favor; but certainly it does not undertake to deprive a supersedeas bond in any case of the effect given to it by the statute of subjecting the principal and sureties to liability "for all damages and costs" which the appellee or the defendant in error may sustain if the appellant or plaintiff in error "fail to make his plea good." The liability on a bond which operated to suspend such a decree as the one under consideration would not extend to "all damages," if it did not cover so much of the decree for the payment of money as was left unsatisfied after the application to the decree of the

amount realized on the sale of property subjected to a lien and ordered to be sold. There is nothing for the surety to complain of in the fact that, before his liability was sought to be enforced, the amount of the decree which had been superseded was reduced by the application to it of the amount realized on the sale of the property decreed to be sold.

[4, 5] The jurisdiction of the court was not exhausted by the rendition of the decree in question, but continued until the decree was satisfied, except in so far as its right to exercise its power to enforce the decree was suspended during the pendency of the appeal. Wayman v. Southard, 10 Wheat. 1, 23, 6 L. Ed. 253; Riggs v. Johnson County, 6 Wall. 166, 187, 18 L. Ed. 768; Central National Bank v. Stevens, 169 U. S. 432, 464, 18 Sup. Ct. 403, 42 L. Ed. 807. The part of the decree which remained unsatisfied after the execution of the part of it which decreed the sale of property and the application of the proceeds of the sale was "solely for the payment of money." The appropriate final process for the execution of the decree, so far as it remained unexecuted when the order complained of was made, was such a writ of execution against the defendant as the motion sought to forbid the enforcement of. Equity rule 8 (198 Fed. xxi, 115 C. C. A. xxi). A part of the command of the mandate issued from this court to the trial court upon the affirmance of the latter's decree was:

"You, therefore, are hereby commanded that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said writ of error [appeal?] notwithstanding."

Plainly it was competent for the court to issue against the defendant in the cause such an execution as was issued. And the surety's submission to the court of the question as to his liability on the supersedeas bond conferred on the court the right to decide the question and to provide for the enforcement of its decision by proper process. As at the time that decision was rendered the unexecuted part of the decree which had been superseded was "solely for the payment of money," and as it was for that amount only that execution against the surety was allowed to be enforced, the decree having already been satisfied in part by the application of the proceeds of the sale of the property subjected to a lien and ordered to be sold, the result of what the court did was to allow the execution of appropriate process against the surety to be proceeded with, to the end of coercing the payment by him of no more than the amount which the supersedeas bond obligated him to pay. A surety on the bond cannot sustain a complaint against action of the court having this effect only. It follows that the decrees presented for review by the two appeals first above mentioned as now pending are affirmed.

[6] The satisfaction of the execution, the injunction of the enforcement of which was the sole relief sought in the case in which was rendered the other decree which was appealed from, leaves nothing for decision on that appeal; and that appeal is dismissed.

COLE MOTOR CAR CO. v. HURST et al.

(Circuit Court of Appeals, Fifth Circuit. December 14, 1915. Rehearing Denied January 17, 1916.)

No. 2715.

1. APPEAL AND ERROR ⟸171—REVIEW—CHANGE OF THEORY.
Where, in an action on contracts claimed to violate the state anti-trust laws, plaintiff sued on the contracts as contracts of consignment, but by the court's ruling that they were contracts of sale was compelled to proceed as if they were contracts of sale, this enforced change of attitude did not preclude an appellate court from regarding the contracts in their true light as contracts of consignment.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1063; Dec. Dig. ⟸171.]

2. CONTRACTS ⟸153—VALIDITY—ADOPTING CONSTRUCTION UPHOLDING CONTRACT.
If contracts between a manufacturer of motor cars and a dealer, claimed to violate the anti-trust laws of the state, were open to two reasonable interpretations, one defeating the manufacturer's claim for a balance due and the other enforcing it, the court would be at liberty to adopt the latter interpretation.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. ⟸153.]

3. COMMERCE ⟸8—INTERSTATE COMMERCE—APPLICATION OF STATE LAWS.
Contracts between a manufacturer of motor cars and a dealer, designated as a distributor, provided that cars would be invoiced to the distributor at the regular catalogue price, subject to certain discounts constituting his profits; that he should have the exclusive right to sell the manufacturer's cars in certain designated territory within the state of Texas, and not elsewhere; that remittances for all cars shipped to him would be made the same day cars were sold; that, when cars were shipped direct to his agents, sight drafts would be drawn and a check mailed by the manufacturer on Monday of each week, covering commissions due on shipments for which payments had been received during the previous week; that the distributor would keep the cars insured in the manufacturer's name until sold and paid for; that if the contract was canceled the manufacturer would take over any new cars then on the distributor's show floor at the invoice price with carload freight added; and that if the distributor canceled the contract he would take and pay for all cars on hand or in transit. The contract was made in Indiana, and the cars were to be shipped from Indiana f. o. b. to the distributor in Texas. *Held*, that the transaction was a consignment, and not a sale, and the contract was an interstate one, the validity of which was governed by the federal anti-trust laws (Act July 2, 1890, c. 647, 26 Stat. 209), and not by the anti-trust laws of Texas (Vernon's Sayles' Ann. Civ. St. 1914, § 7796 et seq.).
[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⟸8.]

4. MONOPOLIES ⟸17—CONTRACTS—VALIDITY—RESTRAINT OF TRADE.
The contract was valid under the anti-trust laws, both of the United States and of Texas, as it in no way restrained competition or trade.
[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⟸17.]

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by the Cole Motor Car Company against Charles F. Hurst and another. Judgment for defendants, and plaintiff brings error. Reversed, and new trial granted.

Etheridge, McCormick & Bromberg, of Dallas, Tex., for plaintiff in error.

Crane & Crane and Jed C. Adams, all of Dallas, Tex. (Clendenen & Simmons, of Ft. Worth, Tex., on the brief), for defendants in error.

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

SPEER, District Judge. The Cole Motor Car Company is a corporation and citizen of Indiana. Charles F. Hurst is a citizen of Texas, and of the district in which the instant action is brought. The Cole Company and Hurst made an agreement by which Hurst was to receive, and become the distributor of the Cole Company's automobiles, for certain counties in Texas. Benjamin J. Tillar became guarantor, to the extent of $10,000, that Hurst would comply with his contract. The Cole Company shipped and delivered to Hurst, under the contract, machines in considerable number. Hurst disposed of the same, but omitted to pay to the Cole Company a balance due thereon of $11,491.27. The action was brought to recover this amount, and Tillar was joined as guarantor and defendant. Having received the automobiles of the plaintiff company, and having failed to pay therefor in large part, Hurst now interposed the defense that his contract was violative of the anti-trust law of the state of Texas, and was therefore void. The pretense was that the contract restricted the territory in which Hurst should sell the automobiles, and also restricted the right of the plaintiff company to sell to others in the same territory. Tillar defended upon the ground that certain misrepresentations were made to secure his execution of the guaranty contract, and, further, that he had been discharged from his liability as guarantor by the failure of the plaintiff company to notify him of defaults on the part of Hurst.

Upon the conclusion of the hearing, counsel for the defendants requested the direction of a verdict in their favor. The court gave that direction in the language following:

"Gentlemen of the Jury: The court construes the contracts between the plaintiff and the defendant Hurst to be contracts of sale, and under the law is of the opinion they are void, because in conflict with the anti-trust laws of this state, for which reason alone I charge you to return your verdict for the defendants."

To this exception is taken. Undoubtedly Hurst should not be relieved of his obligation to pay for the cars he had received under his contract, unless, under all circumstances, a contract between himself and the consignor was violative of the public policy of the state. We have attentively scrutinized the record, to discover such violation. There were several contracts, but they were practically the same as to terms and conditions. Hurst was to be paid a commission on each sale. He was to remit to the plaintiff company for each car as it was

sold by him. The cars were to be invoiced to him at a price to the purchaser fixed in advance by the company. This was subject to a discount varying from 25 to 27½ per cent. from the list price. The contract is somewhat voluminous, but the material clause is the following:

"The distributor shall have the exclusive right to sell Cole motor cars in the following territory, and not elsewhere, until the expiration of this contract. That part of the state of Texas north of and including the following counties: Panola, Rusk, Cherokee, Anderson, Freestone, Limestone, Falls, Bell, Burnet, Llano, Mason, Menard, Schliecher, Crockett, Crane, Winkler."

Hurst, as we have seen, is designated as distributor. It appears from the record that, previously to the execution of the contracts in question, Hurst, as a member of a firm, had acted as the agent of the Cole Company in putting their machines on the market. When the firm's agency ended, Hurst, as an individual, was continued as agent until the first contract decreed on was made. The crucial question here is: Did the first and subsequent contracts, with certain typewritten addenda, continue or constitute Hurst as agent or consignee, or did they evidence a sale of the motor cars to him? See Welch v. Phelps & Bigelow Windmill Co., 89 Tex. 653–656, 36 S. W. 71.

[1, 2] That the plaintiff regarded the contracts as of consignment is made plain by the fact that the original action was brought as upon contracts of consignment. When, however, the court, over the plaintiff's objection and exception, held them to be contracts of sale, the plaintiff was driven to proceed as if they were sale contracts. Having saved its exception, this was its only resource, and we are not precluded by this enforced change of attitude from regarding the contracts in their true light. Indeed, if there were two reasonable interpretations of the contract, one defeating the plaintiff's meritorious claim, and the other enforcing it, the court would be at liberty to adopt the latter.

[3, 4] From the record it appears that Tillar, the guarantor, was notified by Kuqua, the agent of the plaintiff company on the ground, that the Cole Company was about to make a contract with Hurst to ship goods on consignment, to be paid for in money as sold; that Hurst was to pay the freight on these goods, and was to insure them in the name of the Cole Motor Car Company; and that Hurst's revenue from the transaction would be the difference between the price the goods were billed to him and what he got for them. This testimony is not in dispute. Again, the first addendum to the first contract provides:

"Remittances for all cars shipped to the distributor under this agreement will be made in funds at par in Indianapolis the same day cars are sold. When cars are shipped direct to the distributor's agents, S/D [by which we presume sight draft is meant], will be drawn direct, and check mailed by the manufacturer on Monday of each week, covering commissions due on shipments for which payments have been received during the previous week."

Had it been a sale contract, Hurst would, of course, have deducted the commissions himself.

Again, it is provided:

"The distributor will keep all Cole motor cars insured in the name of the manufacturer until they are sold and paid for."

This presupposes the insurable interest, and therefore the title, in the Cole Company. It was clearly a commission contract. Kuqua, uncontradicted, testifies:

"We did not consider Mr. Hurst owed us until the cars were moved out of his possession, and the account was kept that way from the beginning."

Again, there was a provision for the cancellation of the arrangement, and in that event the manufacturer was to take over any new cars that should be on the distributor's show floor, at the invoice price, with carload freight added. No condition whatever was attached to the manufacturer's reserved right to take back the machines whenever it chose to do so. It retained unqualified rights of dominion and control, which were inconsistent with the theory that the transactions were sales.

On the other hand, Hurst agrees that if he cancels the contract he will take and pay for all cars on hand or in transit. Such provisions are not unusual in factorage contracts. See Milburn Mfg. Co. v. Peak, 89 Tex. 211, 34 S. W. 102.

As to the amount of Hurst's interest, it appears that the goods were to be invoiced to him at the regular catalogue price, subject to a discount of 25 per cent. on some, and 27½ per cent. on some other models. This discount, of course, constituted his profits, unless, indeed, he sold the cars for less than the catalogue price, in which event his commission was to be the difference between the price at which the cars were sold and the discount, after the list price had been taken off, which was the invoice price. The other paragraphs of the contract provided for the number and type of cars to be shipped Hurst, the manner of advertising, and various other comparatively trivial details.

Now the contract was made in Indiana. The cars were to be shipped from Indiana f. o. b. to Hurst in the state of Texas. Obviously this was an interstate shipment on an interstate contract. Obviously, also, since the transaction was interstate, its validity must be determined by the anti-trust laws of the United States, rather than the anti-trust laws of the state of Texas; but under neither system have we been able to discover in the contract any violation of the state or national law, either in letter or principle. There is such a wealth of paramount authority upon this vital topic that it seems superfluous to offer citations. Generally it may be said that these laws were intended to prevent unlawful combinations in restraint of trade, to prevent the arbitrary fixation of the prices of certain commodities, in order to prevent or lessen competition in the manufacture, transportation, sale, or purchase of any commodity. Now, how can it be said that the contract before the court is obnoxious to the general purposes of the law? On the contrary, its effect is to foster the trade of the plaintiff company, and enhance its business to make se-

cure its returns. This sort of an arrangement is not obnoxious to the law. Phillips v. Cement Co., 125 Fed. 593, 61 C. C. A. 19.

It will be seen that it was not a contract which conveyed title to Hurst, and brought his control of the machines under the operation of the Texas law. Surely the Cole Company had the right to determine that its agents should sell its cars at its own price. True, he was given the privilege of selling in certain counties, and no others, and he was restricted from selling the cars of other motor car companies in the same counties; but this method is an ordinary instrumentality by which manufacturers and others display and dispose of their goods and commodities, and make sure of payment, if they can. It is not restrictive of trade in any sense. Insurance companies, and many other occupations and trades, parcel out their territory to different agents, and make similar arrangements. That it could not defeat competition is obvious to the court. There are a multitude of other companies from whom purchasers can readily obtain motor cars, varying in little, if anything, from the perfectibility of the car made by the plaintiff company. It is common knowledge that most, if not all, of such motor companies avail themselves of similar arrangements. The public, indeed, finds it no small task to avoid the competition and solicitations of the agents or consignees of such companies. Periodicals of every description portray, advertise, and enlarge upon the variety and superiority of their excellencies. There surely, then, has been no restraint of this trade. Was it not, then, easily possible that in the flourishing counties of the Lone Star state enumerated in the contract, notwithstanding the same, any one might have purchased a Ford, a Cadillac, a Pierce-Arrow, a Packard, a Chalmers, a Hudson, or any other of the multitudinous machines which are being constantly manufactured and offered for sale at widely varying prices? Where, then, is the restraint of trade in this transaction? It exists in the refusal of the defendant to pay the balance he owes for the automobiles he received, which, since capital is timorous, may have, for the future, some restraining effect upon similar arrangements.

We conclude, therefore, that this was a contract of consignment, and not of sale, and that it is in no sense obnoxious to the statute of the state of Texas, that the conclusion of the learned judge of the District Court to that effect was erroneous, and that it should be reversed, and a new trial granted; and it is so ordered.

THE NESHAMINY (two cases).

(Circuit Court of Appeals, Third Circuit. December 10, 1915.)

Nos. 1971, 1972.

1. SALVAGE ⊂⊃3—VESSELS SUBJECTS OF SALVAGE SERVICE—VESSEL IN FLOATING DRY DOCK.

A floating dry dock is not a subject of salvage service, but a vessel undergoing repairs in such dock may be the subject of such service.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 5, 6; Dec. Dig. ⊂⊃3.]

2. SALVAGE ⊂⊃7—NATURE OF SERVICE—"SALVAGE SERVICE."

A "salvage service" is a service voluntarily rendered to a vessel in need of assistance and is designed to relieve her from distress or danger either present or to be reasonably apprehended, and assistance to a vessel in a situation of actual apprehension, though not of actual danger, is a salvage service; the degree of danger being immaterial in considering the nature of the service.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 13, 16, 26; Dec. Dig. ⊂⊃7.

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

3. SALVAGE ⊂⊃26—SUIT FOR COMPENSATION—ELEMENTS IN DETERMINATION OF AMOUNT.

The elements to be considered in a case of salvage are the danger to the ship, actual or apprehended, the degree of danger from which the property was rescued, the labor expended, and the promptitude, energy, and skill displayed by the salvors, the value of the property they employed in the service, and the risks and damage to which it was exposed.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 57–64, 68, 84; Dec. Dig. ⊂⊃26.]

4. SALVAGE ⊂⊃10—SERVICE ENTITLED TO COMPENSATION—VESSEL IN DRY DOCK.

While a barge was in a floating dry dock undergoing repairs, an engine house 10 feet from its side on the dock took fire. The dock was beyond the reach of the local fire department, and libelants' tugs after two hours' work extinguished the fire, one playing on it from the deck of the barge and the other from the other side. The barge did not take fire, though its side was blistered. It was in actual danger and would have burned if the dock had burned. The master, who was on board, did not ask the assistance of the tugs, but accepted and relied on it, as the only other means of saving his vessel was by sinking the dock, which he did not attempt. *Held*, that while the direct service of the tugs was to the dock, which was the only effective service that could be rendered, the direct result of such service was protection to the barge, which was a salvage service, entitled to compensation as such.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 18–20; Dec. Dig. ⊂⊃10.]

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

Suits in admiralty by Charles L. Walker, managing owner of the tug Lizzie Crawford, and by John P. Murray, master of the tug Delaware, against the barge Neshaminy; Philadelphia & Reading Railway Com-

pany, claimant. Decrees for libelants, and claimant appeals. Affirmed.

For opinion below, see 220 Fed. 182.

Wm. Clarke Mason, of Philadelphia, Pa., for appellant.

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

Henry R. Edmunds, of Philadelphia, Pa., for appellee Murray.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The question, as presented, is whether an indirect advantage to a vessel, arising out of services in the nature of salvage services rendered to other property, is a proper basis for a salvage award.

The facts found by the District Court appear in its opinion. 220 Fed. 182. Only a brief summary will here be made.

The Barge "Neshaminy" was in a floating dry dock undergoing repairs. She was resting upon blocks and was elevated to the level of the decks of the dock. Upon one deck of the dock and in a position amidships the barge was an engine house, one side of which was flush with the inner wall of the dock. The other side projected over the outer wall about five feet. The barge was but ten feet from the engine house. Early one morning, a fire broke out in the engine house. Responding to an alarm, the Tug Delaware hastened to the scene, ran her bow under the overhang of the engine house and played a stream of water upon the fire, which burned fiercely for two hours or more. While the fire was still beyond control, the Tug Crawford arrived, ran a hose upon the deck of the barge, and from that position played upon the fire of the engine house until it was extinguished. The fire, however, had crept into the interior of the dock and extended down between its inner and outer walls. For an hour or more, the "Crawford" was engaged in extinguishing this fire.

The dry dock was beyond the reach of the local fire department. The crew of the barge was aboard. Its means for fighting fire were entirely inadequate, and the safety of the barge lay either in sinking the dock and causing the barge to float away or remaining in the dock and depending upon the services of the tugs. The barge was not afire, although close enough to the fire for its side to be blistered. Slush upon its decks protected it from sparks. The master of the barge did not ask for assistance, and none was rendered by the tugs in the sense of playing their streams upon it.

From the nature, extent and duration of the fire, and its proximity to the barge, the court found that danger to the barge was not merely to be apprehended, but was actually present. It also found that in rendering assistance, the Tug Delaware was in a position of some danger, while the Tug Crawford was in a position of safety.

Upon these findings of fact, the District Court awarded salvage to each tug, proportioned to the services rendered and the risks encountered.

The facts found by the trial court, after observing and hearing the witnesses, should not be disturbed unless the testimony clearly discloses a serious mistake and compels the appellate court to different findings and conclusions. The testimony amply justifies the findings. Therefore, the only matter for review is the question of law, whether the services indirectly rendered the imperiled barge, under the circumstances, raise a claim for salvage.

[1] Preliminary to a discussion of this question, it may be conceded that a floating dry dock is not a subject of salvage service, Cope v. Dry Dock Co., 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501, and that a vessel while undergoing repairs in a dry dock, may be the subject of such service. The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73; The Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907.

It is admitted that if services had been rendered directly to the barge, or to the dock upon the request of the master of the barge, salvage should have been awarded. The Jefferson, supra; The Blackwell, 10 Wall. 1, 19 L. Ed. 870; The Rosalie, 1 Spinks, 188; The City of Newcastle, 7 Asp. Mar. Cas. (N. S.) 546; The Clarita and The Clara, 23 Wall. 1, 23 L. Ed. 146. But the appellant distinguishes the cases under review from the cases cited, (in which services were rendered directly to imperiled craft) and urges that the services performed by the tugs were rendered directly to the dock, and that the advantage which the barge indirectly derived from them was not a service rendered the barge or a benefit for which it should respond in salvage. The appellant cites The San Cristobal (D. C.) 215 Fed. 615, in which are cited The Acre (D. C.) 195 Fed. 1022, and The City of Atlanta (D. C.) 56 Fed. 252, as authority for the proposition that an indirect advantage to one vessel arising from a salvage service rendered to another cannot be a basis of a salvage award.

We make no criticism of this statement of the law as applied to the cases in which it appears, for those cases were decided, as this one must be, upon the fact of service rendered the vessel endangered, and not upon the claim of an indirect benefit incidentally derived from a service rendered another.

The facts of The City of Atlanta, supra, were these: The City of Columbia, a sister ship, was moored to a dock and to her side was moored the City of Atlanta. Fire broke out on the latter. Without requests or acts by the officers of the City of Columbia, from which it appeared or might be inferred that she was seeking or accepting assistance, tugs rushed to the City of Atlanta, pulled her out into the stream and extinguished the fire. The tugs libeled both ships. The court held that no service was rendered to the City of Columbia, though indirectly she may have derived a benefit from the service rendered the City of Atlanta; that the removal of the City of Atlanta to midstream, where she could be reached and the fire fought on both sides, was a prudent and necessary thing done exclusively for the protection of the ship afire and as a means by which the fire could more readily be reached and extinguished, and that the unsolicited and indirect benefit to the City of Columbia, concerning

whose danger there was conflict in the testimony, was merely incidental and did not constitute salvage service. The facts apparently justify this finding. The point of the finding is that no service was rendered the City of Columbia.

In The Acre, supra, the court found that an indirect service may be the basis of a salvage award. Upon facts in some respect similar to though distinguishable from those in The City of Atlanta, the court said:

"The salvage of the Javary necessitated moving the Acre. The fire proved to have been dangerous to the Acre only by communication from the Javary. The Acre was, however, in a dangerous situation because of the possibility of that communication and the aid given her was a salvage service. This was rendered by the Ox, the Gertrude, the men on the Lucas and the Acre, and the men on the dock. * * * These salvage services were all connected with the services rendered to the Javary, and in that respect the case is like The City of Atlanta (D. C.) 56 Fed. 252, in which the court held that 'an indirect advantage derived from the rendering of a salvage service to another vessel' cannot be made the basis of an award. But where a boat is in the direct zone of danger, and the indirect services are a part (as in this case) of an attempt to save that boat (the salvors thinking that it could be saved), instead of trying first to save a boat which, in their opinion, could not be reached, or was already hopelessly on fire, there should be some award."

Here the court found a service rendered, though indirect in its nature, and awarded salvage.

In the case of The San Cristobal, supra, the ship was in a dry dock undergoing repairs. The dry dock was moored to a pier, at the extremity of which upon the shore was a lumber mill. The mill was afire, and the libelant tugs rendered services by confining the fire to the mill, but rendered no direct service to the dry dock or the ship. Neither was damaged, nor does it appear that either was in danger. The court found that "no direct service was rendered" the ship, and refused an award of salvage, and in so finding, cited and quoted from The Acre and The City of Atlanta, supra. A careful reading of these cases discloses that they were not decided upon questions of direct or indirect benefits derived from services rendered other vessels. They were decided upon findings that salvage services, as distinguished from indirect benefits, had or had not been rendered. Whether in a given case such services have been rendered, depends upon the nature of the services and whether they came within the established principles of the law of salvage.

[2] A salvage service is a service which is voluntarily rendered to a vessel in need of assistance and is designed to relieve her from distress or danger either present or to be reasonably apprehended. McConnochie v. Kerr (D. C.) 9 Fed. 50, 53. Assistance to a vessel in a situation of actual apprehension, though not of actual danger, is salvage service. The Raikes, 1 Hagg. 247; The Phantom, L. R. 1 Adm. 58; The Joseph C. Griggs, 1 Ben. 81, Fed. Cas. No. 6,640. The degree of danger is immaterial in considering the nature of the service. The Westminster, 1 W. Rob. 232; The Lowther Castle (D. C.) 195 Fed. 604.

Salvage is the reward or compensation allowed by the maritime law for service rendered in saving maritime property, at risk or in distress,

by those under no legal obligation to render it, which results in benefit to the property, if eventually saved. Fretz v. Bull, 12 How. 466, 13 L. Ed. 1068; The Blackwell, 10 Wall. 1, 19 L. Ed. 870; Hughes' Admiralty, 127, 128, 129. The value of such a service and the amount of compensation to be awarded therefor are not to be estimated by the light of subsequent events, but of the facts which surround it at the time. The Lowther Castle (D. C.) 195 Fed. 604, 605, and cases cited.

[3] The elements to be considered in a case of salvage are the danger to the ship, actual or apprehended, the degree of danger from which the property was rescued, the labor expended and the promptitude, energy and skill displayed by the salvors in saving the property, the value of the property they employed in the service and the risks and damage to which it was exposed. The Pleasure Bay (D. C.) 226 Fed. 55, 56.

[4] Considering these elemental principles of the law of salvage in connection with the facts found by the District Court, we must inquire what services if any, were rendered the barge and whether they constitute salvage services.

The trial court found that the barge was endangered by fire upon and within the dry dock. To escape this danger the master had two ways open to him; first, to sink the dry dock, if he could, and float the barge out, and second, to stand by, accepting and relying upon the protection which the tugs were affording him. While there was controversy respecting the ability of the master to sink the dock without the assistance of skilled dock hands, it is certain he elected not to protect his barge by this one possible way open to his individual efforts, but relied for the safety of his barge upon the services being rendered by the tugs. Their efforts were directed against the fire, which was the thing that imperiled the barge. The object of their efforts was the preservation of the things which the fire threatened to consume, which included the barge quite as well as the dock in whose cradle it lay. It was apparent that if the dry dock could be saved, the barge would be saved. The converse is not true, for if in this situation the tugs had foolishly attempted to render a direct service to the barge by turning their streams upon it when it was not afire, the dock would have been consumed and the barge with it. What the tugs did was to attack the fire which endangered the barge, and its master, by his express admission, relied for the safety of his barge upon their efforts to extinguish the fire and remove the danger. While the direct service of the tugs was to the dock, the direct result of that service was protection to the barge, which the master elected to accept and rely upon in preference to protecting it by another method open to him. The fact that the services of the tugs were accepted by the barge is evidence that services were rendered the barge. The protection afforded and relied upon by the barge was not an advantage indirectly or incidentally arising out of a service directly rendered the dock, but was a direct protection which, when accepted and relied upon, amounted to a direct service to the barge.

The protection rendered was a service performed. As that service meets the requirements of the law of salvage, we are of opinion that the court committed no error in making the awards.

The decree below is affirmed.

NORTH BRITISH & MERCANTILE INS. CO. v. ROSE.

(Circuit Court of Appeals, Third Circuit. January 4, 1916.)

No. 1998.

1. INSURANCE ⊜624—ACTIONS—PARTIES—PERSONS TO WHOM LOSS IS PAYABLE.

In an action on a fire insurance policy which provided that the loss or damage, if any, should be payable to the R. Association as mortgagee as its interest might appear, the R. Association was not a necessary party, where it had received payment of the debt secured by the mortgage, though not from the mortgagor, and had assigned the mortgage, as, having no interest in the insured property, it was without interest legal or equitable in the contract of insurance and in the suit instituted upon it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1557–1570; Dec. Dig. ⊜624.]

2. MORTGAGES ⊜241—PAYMENT—ASSIGNMENT—OPERATION AND EFFECT.

Where a mortgagee received payment of a debt secured by mortgage from some one other than the mortgagor and assigned the mortgage, though such payment extinguished the debt to it, it did not discharge the obligation of the mortgage, which upon assignment became security for the payment of the debt due the assignee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 624–626; Dec. Dig. ⊜241.]

3. INSURANCE ⊜548—ACTIONS—CONDITIONS PRECEDENT—SUBMITTING TO EXAMINATION.

Pursuant to a provision of a fire insurance policy that insured as often as required should submit to examination under oath by any person named by the company, insured submitted himself to examination and produced a deed purporting to complete his title to the mortgaged premises. The insurance company's representative raised a doubt as to its genuineness and demanded that the writing be submitted to a handwriting expert. Insured declined to be further examined without counsel. Subsequently, on December 7th, there was a further conference between the insured, his attorney, and the insurance company's representative, at which insured refused to submit the deed to inspection or to submit himself to further examination, but on February 18th he wrote the insurance company submitting himself and his papers to examination, and his offer was rejected by the insurance company. *Held*, that insured's first refusal to submit himself to further examination was not as a matter of law a complete and final refusal to comply with the provisions of the policy constituting a failure to perform the conditions precedent to a right of action, notwithstanding his subsequent offer to submit himself to examination.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1354; Dec. Dig. ⊜548.]

4. EVIDENCE ⊜271 — ADMISSIBILITY — LETTERS — SELF-SERVING DECLARATIONS.

Under a fire insurance policy requiring insured to submit himself to examination by any person named by the company, insured did so submit

himself and his papers to examination, but afterwards withdrew from the examination. Subsequently through his attorney he receded from this position and offered to submit to further examination. In an action on the policy various letters between his counsel and the insurance company and its counsel respecting this offer and its rejection by the company were admitted in evidence. *Held*, that where, though the letters contained some rambling references to the controversy which if not connected with the offer and its rejection would have had no bearing upon the issues, the letters contained no evidence beyond the evidence of the offer and its rejection, their admission was not error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068–1079, 1081–1104; Dec. Dig. ⟸271.]

5. APPEAL AND ERROR ⟸262, 719—RESERVATION OF GROUNDS OF REVIEW.

In an action on an insurance policy, the alleged error of the trial court in submitting to the jury the question whether insured submitted himself to examination as required by the policy within a reasonable time was not reviewable, where defendant did not ask that this question be withheld from the jury and determined by the court, or except to its submission of the question, and no assignment of error specifically raised the question; an assignment of error being merely directed to several pages of the charge in which the trial judge considered this question, instructed the jury upon the law, and left the question of reasonable time for their determination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1582–1589, 1593–1595, 2968–2982, 3490; Dec. Dig. ⟸262, 719.]

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

Action by Martin A. Rose against the North British & Mercantile Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Leo Levy, of New York City, for plaintiff in error.

William Newcorn, of Plainfield, N. J. (W. D. Murray, of New York City, of counsel), for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The questions for review arose out of a policy of fire insurance, issued April 19, 1912, by the North British and Mercantile Insurance Company to Martin A. Rose. A portion of the insured property was burned on September 25, 1912. The owner instituted suit on the policy in the Supreme Court of the State of New Jersey by writ tested March 29, 1913. After removal of the cause to the District Court of the United States for the District of New Jersey, judgment on verdict was entered for the plaintiff.

[1, 2] The right of the insured to maintain this action is challenged on several grounds, the first of which is the non-joinder of the mortgagee named in the policy, or the non-joinder of its assignee. Only the question of the non-joinder of the mortgagee appears in the pleadings and assignments of error, the question of the non-joinder of the assignee, being developed in the briefs.

The policy contains a clause in the usual form for the protection of a mortgagee, as follows:

"Loss or damage, if any, under this policy, shall be payable to the Railroad Co-Operative and Loan Association as mortgagee (or trustee) as interest may appear. * * *"

The only mortgagee whose interest is specifically protected by the terms of the policy is the Railroad Co-Operative and Loan Association. The protection of the policy, by express terms, extends to this mortgagee, and neither by express terms nor by general language is protection extended to any other mortgagee or to an assignee of a mortgagee. It is contended by the defendant insurance company that the designated mortgagee is a proper and necessary party in an action upon the policy, citing McDowell v. St. Paul F. & M. Ins. Co., 207 N. Y. 482, 485, 101 N. E. 457; Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 South. 473; West Chester Fire Ins. Co. v. Coverdale, 48 Kan. 446, 29 Pac. 682; Hastings v. West Chester Fire Ins. Co., 73 N. Y. 141; Smith v. Union Ins. Co., 25 R. I. 260, 55 Atl. 715, 105 Am. St. Rep. 882. An examination of these cases discloses that in each the mortgagee, at the institution of the suit, had a present beneficial interest in the policy by reason of a subsisting interest in the property insured, and therefore the mortgagee was held to be either a necessary or a proper party in an action on the policy. Such is not this case.

By another clause in the policy, the defendant insurance company reserved an option to pay the mortgage debt and to receive an assignment of the mortgage, and generally to be subrogated to the rights of the mortgagee. Having in view this provision of the policy, it is suggested in the testimony that before the date of the institution of this suit, the insurance company paid the Railroad Co-Operative and Loan Association the mortgage debt and directed an assignment of the mortgage to a third party. Whether this be true or not is unimportant, for it developed at the trial that between the dates of the issuance of the policy and the institution of the suit, the Railroad Co-Operative and Loan Association, mortgagee, received payment of the debt secured by the mortgage, not from the mortgagor, but from someone else, and assigned the mortgage to the American Mortgage Company. This payment extinguished the debt to the mortgagee, but in no sense discharged the obligation of the mortgage, which upon assignment became security for the payment of the debt due the assignee. By this payment and the assignment of the mortgage, the Railroad Co-Operative and Loan Association was divested of interest in the mortgage and of insurable interest in the mortgaged premises, and its contract of indemnity with the insurance company was terminated. Smith v. Union Ins. Co., 25 R. I. 260, 55 Atl. 715. Being then without interest in the property mortgaged and insured, the mortgagee was without interest, legal or equitable, in the contract of insurance and in the suit instituted upon it. The mortgagee, therefore, was not a necessary party to the action. We make no ruling upon the right of the assignee, by motion of its own, to seek and obtain protection under the policy. The rights of the assignee are not at issue in this case. In view of the terms of the policy and of the restricted exceptions noted to the court's rulings, we fail to find that the court committed error in pro-

ceeding to trial and judgment without the assignee of the mortgagee being joined as a party.

The remaining questions had their rise in an examination to which the insured submitted himself after the fire, pursuant to a provision of the policy which reads:

"The insured, as often as required, shall * * * submit to examinations under oath by any person named by this company."

In the course of this examination, the insured was requested to produce evidence of his ownership of the property destroyed, under a provision of the policy, which provides, that:

"This entire policy * * * shall be void * * * if the interest of the insured be other than unconditional and sole ownership."

In compliance with this request, the insured produced a deed which, if valid, purported to complete title in himself. This deed was neither acknowledged nor recorded. It bore date April 18, 1912, one day before the date of the policy of insurance. The representative of the insurance company thought the ink of the signatures was fresh, suggested a doubt as to the execution of the deed upon its date, and demanded that the writing be submitted to a handwriting expert. This met with objection by the insured, who declined to be further examined without counsel. On December 7, 1912, there was another conference between the representative of the insurance company and the insured, with his attorney, at which the insured refused to submit himself to further examination and the deed to inspection.

On February 18, 1913, the insured, through his attorney, receded from this position and wrote the insurance company submitting himself and his papers to examination pursuant to the terms of the policy. This offer was rejected by the insurance company, and thereupon this suit was instituted. Thus were developed two questions, first, whether the insured fulfilled the requirement of the policy as to ownership of the property, and second, whether he performed the condition precedent to a right of action by submitting himself and his papers to examination.

The plaintiff's title to the property insured was evidenced by a number of conveyances between himself and a real estate corporation of which he was the principal stockholder. These conveyances were for part interests in the property, and, if valid, together placed in the plaintiff the sole title. The lack of acknowledgment and record of the deed of April 18, 1912, was not seriously urged against its validity. Sanford v. Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358; Baker v. German American Ins. Co., 133 App. Div. 496, 117 N. Y. Supp. 1104. Each deed bore a date prior to the date of the policy of insurance, and, excepting the one just referred to, all were recorded prior to that date.

The rulings of the learned trial judge in admitting evidence of the plaintiff's ownership of the insured premises and his instructions in submitting that issue to the jury were without error. In deciding that issue in favor of the plaintiff upon evidence which we deem suffi-

cient to support its verdict, the jury determined that the deed of April 18, 1912, was executed upon its date.

[3] The remaining questions for review presented in the brief and urged at the argument by the defendant, are (1) that the trial court erred in not determining as a matter of law, that the plaintiff's refusal in November 1912 to submit himself to further examination was a complete and final refusal to comply with the provisions of the policy in that regard, and that, notwithstanding his subsequent offer, it constituted a failure on the part of the insured to perform the condition precedent to his right of action; (2) that the trial court erred in submitting to the jury as questions of fact, (a) whether the insured by his entire conduct had performed the condition precedent required by the policy, and (b) whether the offer to re-submit himself to examination was made within a reasonable time; and (3) that the trial court erred in admitting and rejecting certain testimony affecting these issues.

We are of opinion that in the first matter complained of there was no error. If error existed in the second, there was no exception or assignment upon which it may be reviewed. The remainder of our inquiry, therefore, is restricted to the correctness of the rulings of the trial court on the evidence.

[4] The court correctly charged that the insured was required to submit himself and his papers to examination as a condition precedent to a right of action on the policy. It appears that in November 1912, the insured submitted himself and his papers to examination, but in December 1912, he withdrew himself and his papers from examination. As held by the learned trial judge, the declination to submit to further examination arrested the performance of the condition precedent required of the insured, and if nothing further had been done, no right of action would have accrued to him. But in February following, the insured, contemplating suit, receded from this position and openly offered to submit himself and his papers to examination. The insured's offer of re-submission was made by correspondence conducted between his counsel and the insurance company and its counsel. The whole of this correspondence was offered by the plaintiff and admitted in evidence. The subject of it was the refusal of the insured to submit to examination, his change of mind, his subsequent offer, and its rejection by the insurance company. The defendant contends that the original refusal was final, that a subsequent offer to submit himself to examination, in point of fact and time, cannot relieve the insured of his previous failure and cannot operate as the performance of the condition precedent. The direct point of two of the letters admitted in evidence is the offer by the insured and its rejection by the defendant. These letters were obviously relevant to the fact of submission. The rest of the corespondence relates to the same subject, in which each party indulges an inclination to present his side of the case in the best light. Yet when analyzed, the letters contain no evidence beyond the important evidence of the offer by the plaintiff and its rejection by the defendant. As they deal with nothing except the offer and its rejection, the letters do not introduce into the case new

and self-serving matters. They contain some rambling references to the controversy, which, if not connected with the offer and its rejection, would have no bearing upon the issues; yet their presence, while not necessary to the proofs, neither adds to nor detracts anything from them. We are therefore of opinion that the admission of the correspondence in evidence did not constitute error.

[5] The jury having determined by its verdict that the insured in fact submitted himself to examination, the question then arose whether he fully performed the condition precedent by submitting himself within a reasonable time. The court left that question to the jury as one of fact. The defendant now contends that it should have been determined by the court as a matter of law, urging that the testimony presents no disputed facts from which conflicting inferences may be drawn, requiring decision by a jury, Burr v. Adams Express Company, 71 N. J. Law, 263, 58 Atl. 609; Timlan v. Dilworth, 76 N. J. Law, 568, 71 Atl. 33, but, on the contrary, presents a sequence of undisputed facts calling for decision by the court. Wiggins v. Burkham, 10 Wall. 129, 132, 19 L. Ed. 884; Earnshaw v. United States, 146 U. S. 60, 67, 13 Sup. Ct. 14, 36 L. Ed. 887.

It is not necessary for us to determine whether there existed a dispute with respect to the evidence that controlled the question whether the matter was for the jury or for the court. It is sufficient to state that a very close examination of the record discloses no point addressed to the court by the defendant praying that the question of reasonable time be withheld from the jury and determined by the court, and reveals no exception to the submission of the question to the jury and no assignment of error specifically raising the question.

The twenty-second assignment of error is directed to several pages of the charge in which the trial judge considered at length the several transactions relating to the insured submitting himself to examination, which include the conduct of the insured, his counsel, the insurance company and its counsel, and in which the trial judge instructed the jury upon the law and left with the jury the question of what was reasonable time under the circumstances. In the absence of specific exception and of sufficient assignment of error, we are of opinion that the alleged error of the trial court in submitting the question of reasonable time to the jury is not before this court for review. The other questions raised by the many assignments of error, while receiving our careful consideration, are not of sufficient importance to require discussion.

The judgment below is affirmed.

BLALOCK, Collector of Internal Revenue, v. GEORGIA RY. & ELECTRIC CO.

(Circuit Court of Appeals, Fifth Circuit. December 16, 1915. Rehearing Denied February 2, 1916.)

No. 2807.

1. APPEAL AND ERROR ⟸750—ASSIGNMENT OF ERRORS—SUFFICIENCY.
As the object of the rule requiring an assignment of errors is to enable the court and the opposing counsel to know on what points the counsel for plaintiff in error intends to ask a reversal and to limit the discussion to these points, it is a commendable practice to assign only such rulings as are complained of as reversible error, and where plaintiff in error relied on the overruling of a demurrer to the petition for a reversal and assigned such ruling as error, the writ of error would not be dismissed, because of his failure to assign as error the rendition of the judgment adverse to him, especially in view of rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), which provides that the court at its option may notice a plain error not assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074–3083; Dec. Dig. ⟸750.]

2. PLEADING ⟸126—NEGATIVE PREGNANT.
In an action against a collector of internal revenue to recover back a part of the excise tax collected from a corporation on the ground that the corporation was not doing business during a part of the year for which the tax was collected, allegations of the petition that there were no earnings of the corporation from March 18th to December 31st, "subject to tax" on account of a lease of the corporation's property, and on account of its property being turned over to the lessee, was a negative pregnant, from which it was to be implied that the corporation did receive an unnamed amount of income, but that in the opinion of the pleader, such amount should be excluded from consideration in computing the amount of the tax.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261–263; Dec. Dig. ⟸126.]

3. INTERNAL REVENUE ⟸9—CORPORATE EXCISE TAX—VALIDITY.
The tax imposed by Comp. St. 1913, § 6300 et seq., on corporations organized for profit and engaged in business equivalent to 1 per cent. on the net income above $5,000 is valid as an excise on the privilege of doing business in a corporate capacity.

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

4. INTERNAL REVENUE ⟸9—CORPORATE EXCISE TAX—CORPORATIONS LIABLE.
A corporation subjects itself to the tax imposed by Comp. St. 1913, § 6300 et seq., by exercising the privilege of carrying on or doing business for any part of the year for which the tax is imposed.

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

5. INTERNAL REVENUE ⟸9—CORPORATE EXCISE TAX—COMPUTATION.
Comp. St. 1913, § 6300, provides that every corporation organized for profit and having a capital stock represented by shares and engaged in business shall pay annually a special excise tax with respect to the carrying on or doing business by it equivalent to 1 per cent. upon its entire net income from all sources during the year above $5,000. Section 6301 provides that such net income shall be ascertained by making certain deductions from the gross income received within the year from all sources. Section 6302 provides that there shall be deducted from the net income, the sum of $5,000, that the tax shall be computed upon

the remainder of such income for the year ending December 31, 1909, and for each calendar year thereafter, and that on or before the first day of March in each year a true and accurate return, setting forth the gross amount of income received during the year, etc., shall be made by corporations subject thereto. *Held*, that the amount of the tax is measured by the corporation's income during the entire calendar year in which the privilege of doing business is exercised, and not by its income during the part of the year that the privilege is exercised if the corporation does not carry on or do business during the entire year, as the prescribed tax is a single and indivisible one, and but one way of measuring the amount to be paid is provided.

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

In Error to the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Action by the Georgia Railway & Electric Company against A. O. Blalock, Collector of Internal Revenue for the District of Georgia. Judgment for plaintiff, and defendant brings error. Reversed.

Hooper Alexander, U. S. Atty., of Atlanta, Ga., for plaintiff in error.

Walter T. Colquitt and Ben J. Conyers, both of Atlanta, Ga., for defendant in error.

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

WALKER, Circuit Judge. [1] The writ of error is not subject to be dismissed because of the failure of the plaintiff in error to assign as error the rendition of the final judgment for the review of which, and of other proceedings in the case made a part of the record, the writ of error was prayed for and allowed. It is apparent that what the plaintiff in error really relies on as calling for a reversal of the judgment is the action of the court in overruling the demurrer interposed to the petition as amended. This ruling is plainly pointed out in the assignment of errors. The object of the rule requiring an assignment of errors being to enable the court and opposing counsel to see on what points the counsel for the plaintiff in error intends to ask a reversal of the judgment, and to limit the discussion to those points, it is a commendable practice to assign only such ruling or rulings as are complained of as reversible errors. Phillips, etc., Const. Co. v. Seymour et al., 91 U. S. 646, 648, 23 L. Ed. 341; Texas & Pacific Railway v. Archibald, 170 U. S. 665, 668, 18 Sup. Ct. 777, 42 L. Ed. 1188. Besides, the writ of error presents the record for review by this court, and the court, at its option, may notice a plain error not assigned. Rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii).

[2] It is apparent from the petition in the case, as it was amended, that the claim of the plaintiff was that the amount for which it was liable for the year 1912, under the statute providing that:

"Every corporation * * * organized for profit * * * and engaged in business in any state * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year" (Comp. Stat. 1913, § 6300 et seq.)

—should have been computed on its income from January 1, 1912, to March 18, 1912, after which latter date, when an alleged lease went into effect, it was claimed that the plaintiff did not do business within the meaning of the statute. The petition averred that "the amount of the income from January 1, 1912, to March 18, 1912, on which tax should be assessed is $415,377.99, and the tax should be $4,153.78." The averments of the petition do not show the amount of the plaintiff's income between March 18, 1912, and the end of that year, nor that it had no income during that period, nor that there was any mistake in the computation of the amount which the plaintiff had been required to pay if in making that computation it was permissible to take into account income received after, as well as up to and including, March 18, 1912. In an amendment to the petition it was averred:

"That there were no earnings of said Georgia Railway & Electric Company from March 18, 1912, to December 31, 1912, subject to tax under said act, on account of said lease aforesaid and on account of its property being turned over to said Georgia Railway & Power Company."

This statement is a negative pregnant, from which it is to be implied that the plaintiff did receive an unnamed amount of income during the period from March 18, 1912, to the end of that year, but that in the opinion of the pleader that amount should be excluded from consideration in computing the amount of the tax for which the plaintiff was liable.

The averments of the petition do not raise a question as to the liability of the plaintiff under the statute in question to pay a tax with respect to the carrying on or doing of business by it in the year 1912. It is distinctly shown that it did carry on business during part of that year, and it is admitted that part of the amount which had been paid was properly assessed. In this respect the case is unlike the one of McCoach v. Minehill Railway Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842. The lease under consideration in that case, which was held to have had such an effect that the corporation was not to be regarded as doing business in such wise as to make it subject to the tax imposed by the act of 1909, was made and went into effect many years before that act was passed. The opinion rendered in that case, as the one rendered in the somewhat similar case of Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428, does not deal with the question raised in the instant case, namely, whether in computing the amount of the tax for which the defendant in error became liable by carrying on business in the year 1912, only its income for the part of the year when the business was carried on is to be considered, leaving out of the computation its income during the remainder of the year.

[3-5] It is settled that the tax is valid as an excise on the privilege of doing business in a corporate capacity. Flint v. Stone Tracy Company, 220 U. S. 108, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; McCoach v. Minehill Railway Company, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842; United States v. Whitridge, 231 U. S. 144, 34 Sup. Ct. 24, 58 L. Ed. 159; Anderson v. Forty-Two Broadway Company, 239 U. S. 69, 36 Sup. Ct. 17, 60 L. Ed. —, October

term, 1915. For this privilege a corporation subject to the act is required to pay "annually" an amount to be ascertained in a way specified. The provisions of the act as to the returns required to be made by the corporation and as to the method to be pursued in ascertaining the amount payable (Comp. Stat. 1913, §§ 6301, 6302) show that the year which the lawmakers had in mind is the calendar year. It seems plain that a corporation subjects itself to the tax by exercising the privilege of carrying on or doing business for any time during the year. Billings v. United States, 232 U. S. 261, 280, 34 Sup. Ct. 421, 58 L. Ed. 596. The provisions of the act which prescribe the methods to be pursued in ascertaining the amount to be paid show that the amount is measured by the corporation's income during the entire calendar year in which the taxed privilege was exercised, and not by its income while the privilege was being exercised if the corporation was not carrying on or doing business during the entire year. The plain words of the act show that the measure of the amount to be paid by the corporation is "the entire net income over and above five thousand dollars received by it from all sources during such year." No authority is conferred upon the Commissioner of Internal Revenue to assess against a corporation subject to the act any amount less than that ascertained in the way prescribed by the act, or to reduce the amount to be paid because of the fact that during part of the year the corporation was not carrying on or doing business. There is no provision for prorating or lessening the amount to be paid in such a case. The prescribed tax is a single and indivisible one, and there is but one way of measuring the amount to be paid, and that is by the corporation's income during the calendar year in which the corporation subjected itself to the tax by carrying on or doing business within the meaning of the act. We find nothing in the act which indicates a purpose to confer the authority to assess and collect a less amount, or one computed in any other way, in the case of a corporation which ceased to carry on its business during a year in which it subjected itself to liability to pay the tax. The averments of the petition, as it was amended, show that the defendant in error so subjected itself by carrying on its business in the year 1912, and fail to show any noncompliance with the requirements of the act for the ascertainment of the amount it was required to pay.

It is suggested that the result of attributing such a meaning to the statute is to create an unjust inequality between corporations some of which are engaged in business during the entire calendar year and others during only a part of the year, while the amount to be paid by each is measured by its income during the entire year. A similar suggestion was made in the case of Billings v. United States, supra. That case involved the construction of section 37 of the Tariff Act of August 5, 1909 (36 Stat. 11, 112, c. 6), which provided in part as follows:

"There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure boat or vessel, not used or intended to be used for trade, now or hereafter owned or

chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton."

That act went into effect on August 6, 1909. It was held that a tax in the amount ascertained in the way provided for in the act was leviable and due on the 1st day of September, 1909, for a use covering that time of such a vessel as the act described, though such use did not extend throughout the year. In reference to the suggestion of inequality, the court said:

"The contention that inequality must be the result from making the tax depend upon mere use without reference to the extent of its duration addresses itself not to the question of power, and is therefore beyond the scope of judicial cognizance." Billings v. United States, 232 U. S. page 281, 34 Sup. Ct. page 424 [58 L. Ed. 596].

From the conclusions above stated it follows that there was a failure to show the existence of a right of the plaintiff to recover any part of the amount it had paid, and that the demurrer to the petition as amended should have been sustained. Because of the error committed in overruling that demurrer, the judgment is reversed.

COMMERCIAL TRUST & SAVINGS BANK et al. v. BUSCH-GRACE PRODUCE CO.

(Circuit Court of Appeals, Sixth Circuit. January 4, 1916.)

No. 2799.

1. BANKRUPTCY ⟸20—JURISDICTION OF COURTS OF BANKRUPTCY—EXCLUSIVENESS.

It is the general rule that the jurisdiction of a court of bankruptcy over the administration of the affairs of insolvent corporations is exclusive and paramount.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⟸20.]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⟸73—FORM AND REQUISITES.

An assignment for the benefit of creditors not properly sworn to and not accompanied by required inventories was wholly void under the law of Tennessee.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 287–293; Dec. Dig. ⟸73.]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⟸51—FORM AND REQUISITES.

The rule in Tennessee that the question whether an instrument is a general assignment for the benefit of creditors and subject to be defeated by noncompliance with statutory requirements must be determined from the face of the instrument, unaided by extrinsic testimony, does not mean that the purpose of the instrument or the fact that it embraces all of the debtor's property must be expressly stated in the instrument, but only that such purpose or fact must appear on the face of the instrument by at least fair inference or reasonable intendment.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 32, 208–211; Dec. Dig. ⟸51.]

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⟸51—FORM AND REQUISITES.

Such rule is a rule of proof, and it is competent for parties to a suit to admit the fact that an instrument is a general assignment for the benefit

of creditors, and hence where, in a suit by a receiver in bankruptcy to enjoin litigation in a state court, defendants admitted that a so-called trust deed involved in such litigation was a general assignment for the benefit of creditors, such admission would be accepted as an effective characterization of the nature of the instrument.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 32, 208–211; Dec. Dig. ⟸51.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit by the receiver of the Busch-Grace Produce Company against the Commercial Trust & Savings Bank and others. From a decree for complainant, defendants appeal. Affirmed.

Campbell Yerger, of Memphis, Tenn., for appellants.

S. E. Murray, of Memphis, Tenn., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On December 31, 1914, the Busch-Grace Produce Company executed, delivered, and caused to be registered a so-called trust deed of its property, real and personal, for the equal benefit of all its creditors, excepting, however, such claim as might be made for unearned rent under lease of the premises occupied by the produce company for business purposes. Six days later certain unsecured creditors of the produce company filed in a state chancery court of Tennessee a bill apparently framed under section 6103 of the Tennessee statutes, charging, among other things, that the produce company has "ceased to do business; its office is closed and its corporate franchise is not used; that such company is unable to pay its debts and is totally insolvent"; also, that the produce company has sold "its entire stock of merchandise and fixtures in bulk and not in the due and ordinary course of its business," contrary to the Tennessee Bulk Sales Law, which is chapter 133 of the Laws of 1901. The bill asked for a receiver and for the distribution of all the debtor's property among its creditors; it made no mention of the trust deed; the produce company's answer set up that instrument as a defense to the creditors' suit. On May 20, 1915, the state court made an order in that suit permitting appellant bank to become complainant in the place of the former complainants, and appellant accident company to file its claim in accordance with the laws of Tennessee, referring the cause to a master to take proofs and report whether or not the liabilities of the produce company were in excess of its assets, and whether or not it was a going concern. The state court has never appointed a receiver or taken the debtor's property into its custody, directly or indirectly. On June 2d following, the produce company was adjudged bankrupt upon its voluntary petition that day filed, and the cause remanded to a referee in bankruptcy, who was also appointed receiver. On the same day, after the filing of the bankruptcy petition, appellant gave notice of an application for the removal of the trustee under the trust deed, and the state court that day directed the trustee to pay to the receiver no funds in his hands

belonging to the produce company. (This was the first action taken by any state court respecting the so-called trust deed or the administration thereunder; the trustee, however, had partially executed his trust by collecting a large part of the assets and paying administration expenses, no distribution to creditors having been made. He was still engaged in executing his trust, but not under orders of court, when the bankruptcy proceedings were instituted.) On the next day the receiver commenced the instant suit by filing in the court below a bill against the bank and the accident company to restrain the further prosecution of the creditors' bill in the state court and for general relief. Five days later appellants answered this bill, denying the jurisdiction of the bankruptcy court to administer the assets in the hands of the trustee, claiming such trust deed (or assignment) to be valid under the laws of Tennessee; and on the same day appellants filed a further bill in the state court against the trustee under the trust deed to have him removed as trustee and another appointed in his place, and to restrain him from turning the assets over to the bankruptcy court. The trustee under the trust deed in fact recognizes the jurisdiction of the bankruptcy court over the assets remaining in his hands, and denies the jurisdiction of the state chancery court thereover. Upon final hearing (the last suit referred to having been brought before the court by amended and supplemental bill), the District Court enjoined the further prosecution of the creditors' bill in the state court, the bill for removal and substitution of trustee, and any further suits involving the assets of the produce company.

In the brief of appellants' counsel it is said that the sole question relates to "the validity under the state law and the effect in bankruptcy under the federal law" of the so-called trust deed. We accept this limitation of the issue, and the more readily as the creditors' suit seems to have been in essence a proceeding in insolvency (Smith v. Insurance Co., 6 Lea (Tenn.) 564, 569; Tradesman Pub. Co. v. Car Wheel Co., 95 Tenn. (11 Pick.) 634, 648-650, 32 S. W. 1097, 31 L. R. A. 593, 49 Am. St. Rep. 943), under which proceeding no lien was obtained or custody had—thus presenting no obstacle to the exclusive jurisdiction of the bankruptcy court. The case is not that of a judgment creditors' bill, the existence of a prior lien under which was recognized in Metcalf v. Barker, 187 U. S. 167, 23 Sup. Ct. 67, 47 L. Ed. 122, and Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128.

[1] As to the so-called trust deed: It is, of course, the general rule that the jurisdiction of a federal court of bankruptcy over the administration of the affairs of insolvent corporations is exclusive and paramount. Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; In re Yaryan Naval Stores Co. (C. C. A. 6) 214 Fed. 563, and cases cited at page 565, 131 C. C. A. 15. Appellants seek to bring this case within the rule recognized by this court in Re Farrell, 176 Fed. 505, 100 C. C. A. 63, where it was held (following Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377) that the jurisdiction of the Ohio state court over the administration of the debtor's assets under a general assignment for the benefit of creditors

under the Ohio laws, made more than four months before bankruptcy, was not disturbed by such subsequent bankruptcy.

Assuming, for the purposes of this opinion, that a general assignment for the benefit of creditors under the Tennessee statute is not a proceeding in insolvency, but has the same status and the same effect as to bankruptcy proceedings as such assignment under the Ohio laws, and as if the proceedings had been taken in the state court for administration under it before bankruptcy, it is clear that the Farrell Case has no application unless the so-called trust deed was when made a valid and enforceable instrument.

[2, 3] Appellee contends that the instrument was virtually a general assignment for the benefit of creditors. If so, it was wholly void under the Tennessee statutes and decisions because not properly sworn to and not accompanied by certain required inventories. Hill v. Alexander, 16 Lea (Tenn.) 496; Rosenbaum v. Moller, 85 Tenn. (1 Pick.) 654, 660, 4 S. W. 10. Appellants insist that the instrument was an ordinary trust deed, at most only a partial, as distinguished from a general, assignment for the benefit of creditors. It is the rule in Tennessee that the question whether a given instrument is a general assignment, and so subject to be defeated by noncompliance with the statutory requirements, may be determined only from the face of the instrument, unaided by extrinsic testimony. Steedman v. Dobbins, 93 Tenn. (9 Pick.) 397, 405, 24 S. W. 1133; Fertilizer Co. v. Thomas, 97 Tenn. (13 Pick.) 478, 482, 37 S. W. 220. These decisions, as we construe them, do not mean that to constitute an instrument a general assignment such purpose or the fact that it embraces all the debtor's property must be expressly stated in the instrument. Such purpose or fact must, however, appear on the face of the instrument by at least fair inference or reasonable intendment. If intended as a general assignment, the exclusion of one creditor would be disregarded by the express terms of the Tennessee general assignment law.

[4] The first impression from a reading of the detailed enumeration of the classes of property conveyed by the instrument would be that it was intended to cover all the debtor's property. On critical examination, however, it is seen that at least one class of property (provided the debtor had such), for instance, stocks in other corporations, is not covered by the enumeration. Possibly other unenumerated classes of property can be thought of, although no other such class now occurs to us. But appellants' answer to the bill in the instant case expressly states that:

"Said assignment [referring to the so-called trust deed] was a general assignment for the benefit of all creditors, pro rata, of the Busch-Grace Produce Company, and that the same was filed more than four months prior to the voluntary petition in bankruptcy in this case," etc.

We think the natural and obvious meaning of this statement is that the instrument was intended to be an assignment of all the debtor's property for the ratable benefit of its creditors. The statement was made presumably with knowledge whether it did so cover all the debtor's property, for the creditors' suit in the state court, in which

appellants were complainants, involved the question of the debtor's insolvency and what property it then had. The creditors' bill alleges that the "principal assets" of the produce company, aside from certain items of real estate, are "the proceeds realized by the sale of its stock of merchandise and fixtures and possibly a few book accounts, the value of which complainants are not definitely advised and do not know." No suggestion is made that in fact the produce company had any assets except such as are embraced within the specific classes enumerated in the instrument.

We think the rule testing the character of the instrument by what appears on its face is merely a rule of proof, and that it was competent for complainants to admit the fact in question, even though without such admission it could not otherwise be proven. We accordingly think it our duty to accept appellants' answer as an effective characterization of the nature of the instrument, presumably acted upon by the district court in making the decree complained of.

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

UNITED STATES ex rel. PROCTOR MFG. CO. v. ILLINOIS SURETY CO. et al.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 19.

1. UNITED STATES ⊂⊃67—SUIT ON BOND OF CONTRACTOR FOR PUBLIC WORK—FORM OF SUIT.

A suit on the bond of a contractor for public work under Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), is properly brought in equity.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⊂⊃67.]

2. UNITED STATES ⊂⊃67—SUIT ON BOND OF CONTRACTOR FOR PUBLIC WORK—NOTICE TO CREDITORS.

Notice to creditors of the pendency of a suit on the bond of a contractor for public work *held* in full compliance with the requirements of Act Aug. 13, 1894, as amended by Act Feb. 24, 1905.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⊂⊃67.]

3. UNITED STATES ⊂⊃67—SUIT ON BOND OF CONTRACTOR FOR PUBLIC WORK—INTEREST.

In such suit, where the amount due a creditor is capable of being ascertained by mere computation, interest may properly be allowed thereon prior to the date of final decree.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⊂⊃67.]

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

Suit in equity by United States, on the relation of the Proctor Manufacturing Company, against the Illinois Surety Company, impleaded. Decree for complainant and intervening creditors, and defendant appeals. Affirmed.

This cause comes here upon appeal from a decree of the District Court, Northern District of New York. The decree adjudged that the defendant Surety Company was liable on one of its bonds to the Proctor Manufacturing Company and certain intervening creditors. The bond was given on behalf of one Ambrose B. Stannard as surety in connection with his contract with the United States government for the building of a post office at Malone, N. Y.

The suit was instituted and prosecuted under the act of Congress of August 13, 1904, as amended February 24, 1905, for the price of labor and material furnished to the contractor. The section of this statute which is relevant to the controversy is a long one. It provides for the giving of surety bond by the contractors for the construction of any public building, conditioned that the contractor shall promptly make payment for all labor and materials supplied to him for the work. It gives to any person who has so furnished labor or material the right to intervene and be made a party to any action instituted by the United States on the bond, and to have his rights and claim adjudicated in such action and judgment rendered thereon, subject to the priority of the claim of the United States. It next provides that: "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and material shall, * * * (upon complying with certain requirements * * *) be * * * authorized to bring suit in the name of the United States * * * for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution."

These provisions are qualified by three provisos, as follows: "Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. * * * Provided further, that in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

Cookinham & Cookinham, of Utica, N. Y., for appellant.
D. B. Lucey, of Ogdensburg, N. Y., for appellee.
Richard R. Martin, of Utica, N. Y., for American Hardware Co.
W. F. Kimber, of New York City, for interveners.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] This cause was begun as an action at law; subsequently the District Judge by order transferred it from the law to the equity side of the court. Error is assigned to such disposition of the cause, but the point thereby raised need not be here discussed. It was disposed of adversely to appellants in our opinion in U. S. ex rel. Miller v. Mitchell, 212 Fed. 136, —— C. C. A. ——.

The proposition mainly relied upon on the argument was that the notice to creditors required by the third proviso above quoted was not given in conformity with the requirements of the statute. The provisions of the statute in that particular are intricate and in some respects inconsistent. The Supreme Court made short work of them

in Alexander Bryant Company v. New York Steam Filtering Company, 235 U. S. 327, 35 Sup. Ct. 108, 59 L. Ed. 253. But it is not necessary to apply the construction laid down in that case; the facts proved here show compliance literally with the terms of the statute.

Final settlement between the government and contractor was complete October 10, 1912. The period of six months within which the government alone could bring suit expired April 10, 1913. This suit was instituted by one of the creditors on June 9, 1913. It was therefore begun after performance and final settlement and within one year after such performance and settlement.

[2] Upon June 24, 1913, plaintiff submitted an affidavit to the court stating that it had made diligent efforts to ascertain the names of other creditors of the contractor in connection with the contract sued upon, who may be entitled to intervene, and gave a list of such creditors as it had been able to discover, with their addresses. Upon this affidavit the court ordered that to each of these creditors there should be sent by mail, postage prepaid, a copy of an order which the court had made on June 10, 1913. This order of June 10th stated that an action had been commenced in the District Court, Northern District of New York, against Stannard (the contractor) and his surety (the defendant) to recover for labor and material used in the construction of the United States post office at Malone, N. Y., on account of his contract for the construction of said post office building. It further stated that all persons who had furnished labor or material to the contractor for such construction and who had not been paid may, if they were entitled to intervene in said suit, have their rights adjudicated under the provisions of the acts of Congress. Copies of this order, which constituted the personal notice ordered by the court, were mailed to all known creditors on June 27th, except as to three who were served personally on June 28th, and July 8th. This in our opinion was a full compliance with the terms of the third proviso as to personal service, even if such proviso had not been practically eliminated by the recent decision in Alex. Bryant v. New York S. F. Company, supra. The circumstance that subsequently additional creditors may have been discovered and notified, or that subsequently additional notice may have been sent to these already notified, ex abundante cautela, is immaterial. The circumstance that the order of June 10, *1913*, contained a manifest error, directing publication to be made in a newspaper "prior to October 10, *1910*," is too trivial for discussion.

The order of June 11th, which was certainly a sufficient form of notice under the statute, was published once a week, viz. June 13, June 20, and June 27, 1913, in the Malone Evening Telegram, a newspaper of general circulation. This was in compliance with the statute; it was published in three successive weekly issues of the paper, and more than three weeks elapsed between the date of the first publication and the date on which, under the statute, the person notified might intervene. Moreover, the last publication was more than three months before October 10, 1913. The circumstance that the court did not direct that it should be published in that particular newspaper is of no importance; the last half of the third proviso does not re-

quire selection of the newspaper to be made by the court. There was full compliance, so far as newspaper publication is concerned, with the requirements of the third proviso, even if it had never been modified by the Supreme Court in 235 U. S. 327, 35 S. Ct. 108, 59 L. Ed. 253. The circumstance that subsequently a further advertisement was made in another newspaper is unimportant.

[3] The appellant also claims that the court below should have allowed no interest to the complainant, nor to any of the intervening creditors. The objection is based on the assumption that the claims were not liquidated until the court on November 13, 1914, determined in final judgment the amounts due to each of the claimants. It is said the claims could not, prior thereto, have been ascertained by a mathematical computation. Interest has been allowed on the various claims beginning May 1, 1914, that being the date of final hearing.

We find no error in the allowance of interest in the case of the intervening creditors. In the case of each of them the amount due was capable of being ascertained by mere computation, which is all that is required; the old common-law rule, which required that a demand should be liquidated or its amount ascertained, having been to that extent modified. Excelsior Terra Cotta Co. v. Harde, 181 N. Y. 11, 73 N. E. 494, 106 Am. St. Rep. 493. In the case of each of the intervening creditors the amount due was a mere matter of computation.

In the matter of the Proctor Manufacturing Company the facts are somewhat different from the facts as to the claims of the intervening creditors. At the hearing the Surety Company presented two claims, one for $60 for painting, and one for $40.72 for freight and cartage. The first of these the court disallowed; and the second it allowed. But the answer contained no reference to either of these credits subsequently claimed, and in such answer claimed no offsets. We do not see that there is any objection to be made as to the allowance of interest as against it.

Judgment affirmed.

MADISON COAL CORPORATION v. STULLKEN.

(Circuit Court of Appeals, Seventh Circuit. October 13, 1915.)

No. 2189.

1. APPEAL AND ERROR ⊜1001—REVIEW—VERDICT.

Where, in an action for the death of an employé the jury has found that defendant was negligent, their verdict can be reviewed by an appellate court only to ascertain whether there is any evidence to sustain it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. ⊜1001.]

2. MASTER AND SERVANT ⊜278—ACTION FOR DEATH OF MINE EMPLOYÉ—SUFFICIENCY OF EVIDENCE.

In an action for the death of a coal miner, who was killed by the falling of the roof of the room in which he was working after the firing of a shot, there was uncontradicted testimony that the room was examined the night before by a licensed mine examiner, as required by the state statute,

and that he found the roof safe; also that it was examined in the morning by the decedent before going to work. *Held*, that there was no evidence of any negligence on the part of the mining company which rendered it liable for the death of decedent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. ⊂⇒278.]

In Error to the District Court of the United States for the Southern Division of the Southern District of Illinois; Hon. J. Otis Humphrey, Judge.

Action at law by George C. Stullken, administrator of the estate of Anton Pekar, deceased, against the Madison Coal Corporation. Judgment for plaintiff, and defendant brings error. Reversed.

Plaintiff in error will be hereinafter designated as defendant and defendant in error as plaintiff. Plaintiff's intestate, herein termed the decedent, was killed while working in defendant's coal mine. Suit was instituted by plaintiff, and judgment for $3,000 recovered, to reverse which judgment the present writ of error was sued out.

Defendant owned and operated a coal mine near the village of Glen Carbon, in Madison county, Ill. Decedent was employed in the mine as a shooter and loader; that is, it was his duty to shoot or blast the bedded coal, and then load it into the truck or car provided for that purpose. The declaration contains two counts, the first of which is based upon the Illinois mines and mining act, and charges a willful violation thereof by defendant, in that defendant willfully failed to provide a certificated mine examiner, who within 12 hours preceding the 11th day of October, 1912, visited and inspected said room in said mine, and inscribed on the walls of said room the month and day of inspection and placed a mark on the said dangerous place in the roof of said room, etc., which dangerous condition of said room was known to defendant through its said mine examiner; that the rock, slate, clod, etc., composing said roof was loose and liable to fall; that by reason of defendant's willful violation of said act decedent was permitted, notwithstanding, to enter said room to, and did, work in the scope of his employment, and while so engaged was, by reason of such negligence, killed by the falling of said loose mass of slate, etc. The second count is predicated upon negligence at common law of defendant in failing to furnish decedent a reasonably safe place in which to work.

Under the Illinois mining act the mine manager was required to have the mine examined by a certificated mine examiner within 12 hours preceding every day upon which the mine was to be operated. This mine examiner was required to mark on some suitable place on the walls, other than the face of the coal wall, the day and month of his examination, and, in case dangerous places were found, to place a conspicuous notice of that fact at such place. He was then to make a daily record in a book kept for that purpose. The miner, by section 23, is required to sound and thoroughly examine the roof of his working place before commencing work. If he finds dangerous places, he is not to work there, except to make those places safe. He is required to properly prop and secure his place for his own safety with materials provided for that purpose. A right of action is given for injuries received by reason of a willful violation of the act by the owner. The statute further provides for the application of the provisions of the so-called workmen's compensation act, whereby, if an employé elects to accept the terms of that act and the employer does not, then, in cases like the present one, the defenses of assumed risk, negligence of fellow servant, and contributory negligence are not available, save that the last named may be considered by the jury in reducing damages. Plaintiff did, and defendant did not, elect to take the benefit of that act.

On the day of the accident decedent entered room 5, twentieth stub entry,

first west south, of said mine, at about 7 o'clock in the morning, together with his son Albert, who, in mining parlance, was termed his "buddy." The two had worked in this room 5 for four days prior to October 11, 1912, the day of the death. As was his duty under the statute, decedent, according to the testimony of Albert, tested the roof of the room, which was approximately 7 feet high, by striking it with a pick, including the part which afterwards fell, just before beginning his work in the morning. Albert says "it sounded a little bit loose to me," referring to the test of the portion which fell. Thereafter these two, finding no danger sign, proceeded to shoot the face of the coal. The body of the coal was undercut with a punching machine, leaving an opening under the wall to be shot. Then the face of the mass was divided into six or seven so-called "boards," so that one board might be shot out at a time. Holes were drilled in these sections, and two pounds of powder placed in each. The first hole was shot off by means of a short fuse. While the room was still full of smoke, so that he could hardly see, Albert returned to fire the second shot. He called his father, who had gone into room 6, back to No. 5, to hold a carbide lamp, in order that he might see to fire the second shot. After the second fuse was lighted, and before the shot went off, Albert ran to the opening, he says, and in so doing passed his father, standing in the fatal spot, about 18 feet from the face of the coal. Just after he had passed him, the mass of slate, etc., fell and crushed decedent. He returned and tried to lift the mass of stone off of him, but could not, and then ran for safety. After the explosion he procured help and released his father, but found him already dead. After the second shot the room floor was found to be strewn with chunks of coal, other débris, and broken timbers. Albert says this was the result of the second shot.

Murray, a licensed mine examiner, testified that he had examined the room in which the accident occurred the night before using his so-called sounding rod; that he had tested the roof thereof and found it to be solid and safe, and had placed the figures "10/11," meaning October 11, 1912, upon the wall of the room, and had made his report in the book provided for that purpose as required by the statute. He found no bad place, and consequently posted no warning notice or mark. Lee King, employed as a so-called face boss, testified that he went into said room 5 at about 2 o'clock p. m. of the day of the accident and about 45 minutes before it happened. It was his duty to examine the room, and he did so. He tested the walls, and found them safe, and proceeded to mark off a cross-cut. When closely cross-examined, neither he nor Murray would swear that they remembered testing the particular spot from which the fatal mass fell, but both declared themselves morally certain that they did. Room 5 was about 30 feet wide across the face of the coal and more than 18 feet deep. The record does not disclose its exact area, but the roof was of considerable extent. They both are sure they tested all of it with their sounding or examining rods.

The suit was instituted in the state court and removed to the District Court. No exception was taken to the instructions of the court, save as to so much thereof as assumed the validity of the workmen's compensation act aforesaid. The court submitted to the jury the following special interrogatory: "Do you find from the evidence that the mine of the defendant was examined by a duly licensed mine examiner, and did the mine examiner file a report that the mine was safe for work on the morning of the 11th day of October, 1912?" to which the jury made answer, "No." To this answer defendant excepted.

For errors, defendant assigned that the verdict was contrary to the law and the evidence respectively; that the court refused to instruct the jury at the close of plaintiff's evidence, and again at the close of all the evidence, to find defendant not guilty; that the court refused to instruct the jury to disregard each of the counts of the declaration at the conclusion of the evidence of plaintiff, and again at the conclusion of all the evidence; that the court held the Illinois workmen's compensation act to be constitutional. Other errors are assigned, covering features of the compensation act referred to in the judge's charge, to which no exception was saved. Further facts appear in the opinion.

C. H. Burton, of Edwardsville, Ill., for plaintiff in error.
Geers & Geers, of Edwardsville, Ill., for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] The jury having found the defendant guilty of negligence as charged in both of the counts of the declaration, it remains only for the court to determine from the record whether there was evidence produced sufficient to sustain the verdict. It is not our duty to weigh the evidence. That is for the jury. Express Co. v. Ware, 20 Wall. 545, 22 L. Ed. 422; N. Y. L. E. & W. R. R. Co. v. Estill Leonard, 147 U. S. 617, 13 Sup. Ct. 444, 37 L. Ed. 292; Dower v. Richards, 151 U. S. 658–663, 14 Sup. Ct. 452, 38 L. Ed. 305.

[2] It is clear from the evidence that the room 5 was inspected by Inspector Murray on the night preceding the accident and marked as aforesaid. There is no evidence to the contrary, while the evidence that such inspection was had is clear and convincing. There was no attempt to examine the roof or walls between the shots, nor any evidence as to the effect thereon of the first shot. Indeed, the room seems to have been too full of smoke to have made possible any inspection by decedent or his son. The statute only required the owner to have the mine inspected on the preceding evening. There is nothing to show what changes took place between the time of inspection and the time of the accident. The first shot may have loosened the mass. There was no visible sign of the dangerous condition. In Wilkins v. Madison Coal Corporation, abstracted in 188 Ill. App. 416, decided July 28, 1914, by the Appellate Court of the Fourth District of Illinois, it is said:

"It is contended by counsel for appellee that a dangerous condition did in fact exist, and the mere fact that the examiner did not ascertain it would not excuse appellant from liability. This is probably true as a legal proposition, if such physical facts were disclosed as ought to have caused the mine examiner to see the danger, and that in passing upon the dangerous condition his judgment was at fault and failed to appreciate the danger that the physical facts indicated. We do not understand that, if there are no physical facts indicating a dangerous or unsafe condition, the appellant could be made liable simply because it afterwards turned out that a latent danger, not discoverable, really existed and an injury resulted therefrom."

In the present case, the inspection having been made in accordance with the statute, the burden was on plaintiff to show that in fact the roof in question was defective and that such defect was discoverable to one using due care and diligence. Practically the only question presented is: Was the roof of the mine in a safe condition when the examiner had finished testing the same, or, if not, was the defect such, at the place where the mass fell, that it could, by the use of due care and diligence on the part of the examiner, have been detected? Certainly the facts of the fall of the slate and the consequent death of decedent do not make out a case of negligence. Granting that the evidence is sufficient to show that on the next morning, and approximately 12 hours after the inspection, the roof at the place where the slate, etc., fell down, "sounded a little loose" to Albert, the time intervening

the inspection and the testing by decedent is not accounted for either by any fact evidence or by testimony of experts (see Walsh v. W. P. Rend Collieries Co., infra, at this term) to the effect that the conditions existing on the morning of the accident would or would not indicate that there was a patent defect when the examiner made his examination the previous evening. And the jury cannot substitute for evidence a conjecture or a "retrospective presumption." Keller v. United States, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066. If the roof had become dangerous after inspection, as may have been the case, so far as the evidence discloses, then it became the duty of decedent to have discovered the danger and to have protected himself from accident thereby. He was a miner of 32 years' standing, and must be presumed to have appreciated the danger of a place in the roof which sounded loose. We can conceive of no reasonable method defendant could have adopted to secure the decedent against accident better calculated to attain that end than that which was provided in the present case. Nor are we able to discover from the record any negligence on its part in the premises. Therefore we are constrained to hold that both the general and the special verdicts are unsupported by the evidence.

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

WALSH v. W. P. REND COLLIERIES CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1915.)

No. 2193.

EVIDENCE ⟸513—DANGEROUS CONDITION OF MINE—EXPERT TESTIMONY.

In an action for the death of a car driver in a coal mine, who was killed by coal and slate which fell from the roof of the entry, plaintiff was entitled to the testimony of a duly qualified expert in answer to hypothetical questions based on the evidence, giving his opinion as to the safety of the entry and as to whether the means used to support the roof at the place of the injury were proper, or were inadequate and unsafe.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318; Dec. Dig. ⟸513.]

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

Action at law by J. H. Walsh, administrator of the estate of Lorenzo Nanni, alias Nanna, deceased, against the W. P. Rend Collieries Company. Judgment for defendant, and plaintiff brings error. Reversed.

Decedent of plaintiff in error, termed plaintiff hereinafter, was killed by falling slate and coal in the mine of defendant in error, hereinafter called defendant, in the latter's coal mine at Rend City, Franklin county, state of Illinois, on July 17, 1911. From the record it appears that he was employed by defendant as a mule driver, whose duty it was to deliver empty cars at the entrance to the various rooms along the entries where miners were digging coal, and to haul the loaded cars along the entry to the "parting" or shaft bottom. He would drive his mule with the empty car along the entry to the

switch, then detach the mule and turn him into an adjoining room. The car would then descend by gravity to the desired point. The driver would then hitch onto a loaded car in the room adjoining the switch and pull it to the so-called "parting" or shaft bottom. While engaged in this routine, the accident occurred.

The declaration contains three counts. The first count charges violation of the Illinois mining statute of 1911 by defendant in willfully failing to have the mine examiner to observe and make a record of the fact that the roof and walls of the roadway in the mine were in a dangerous condition, and in not taking the statutory steps for keeping the men from entering the mine while unsafe. Count 2 charges a further violation of the same statute by willfully permitting decedent to enter and pass through said dangerous roadway, when defendant knew the roof was insufficiently supported, and there to remain not under the direction of the mine manager, whereby decedent was killed. Count 3 is the common-law count for failure to furnish a safe place for decedent to work in, after notice and promise to repair, etc. The jury found the defendant not guilty.

Plaintiff sued out the present writ of error, and alleges as grounds for such writ certain rulings of the trial court as to the admissibility of the testimony of one Taylor as an expert touching the condition of the mine, which will be stated in the opinion, the introduction in evidence of certain state certificates of the mine manager and examiner, in excluding the mine examiner's report when a part thereof had been admitted in evidence, and the denial of plaintiff's motion to strike out the testimony of one Steve Gosnell.

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

Moses Pulverman, of Benton, Ill., for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). Under the condition of the record, the only material matter before us is as to the error of the court in admitting and rejecting certain evidence. Plaintiff introduced one James Taylor as an expert and proceeded to put questions to him as such. This witness was the son of a miner. He had commenced mining at 8 years of age; had served as tripper, driver, mine manager, superintendent, and state mine inspector, which latter position he had filled for about 23 years. Evidently his experience was such as to qualify him to testify as an expert in cases such as this. He was not personally familiar with conditions existing in the mine in question at the time of the accident. He was asked three hypothetical questions, all of the facts of which we find to be reproduced in substance from the evidence adduced in the case.

First. After reciting the condition of the mine at the time of the accident, he was asked:

"Have you an opinion as to whether or not that condition is safe?"

To this defendant interposed a general objection, which the court sustained, with the remark:

"I was going to submit that question to the jury; that is for the jury. They know as much about it as he does, and probably more, because they have been hearing the evidence."

Second. After again detailing, in substance, the condition of the mine at the time of the accident, the witness Taylor was asked:

"Do you know what is the proper way to support the roof?"

Again defendant's counsel interposed a general objection, which the court sustained, with the statement:

"This roof did fall. There is no question about that. * * * That demonstrated that it was not safe. * * * Now, that is not the issue here. The issue is whether by reasonable examination, such an examination as people in that sort of industry would make through a mine inspector, or licensed mine inspector, would have discovered that dangerous condition. Of course, the mine is not an insurer. * * * Either keep the men out or make it safe. That is the command of the law when its condition is known, or it could have been known by the exercise of reasonable care, as the statute requires."

Counsel then stated that he wanted to show by the witness that the mine could have been—

"made safe by what is known as a switch frame—to have him describe what a switch frame is. That is the substance."

Third. Witness was asked whether, in view of the conditions already described,

"if a fall of stone occurred, so that a large stone fell north of this switch in the entry I have described, that the stone fell upon a car standing north of the switch, that there were two props or more placed east of the track and north of the switch, one from four to six feet north of the switch in the roadway, and the other several feet north of that, that one of these props, the northernmost, or, if there were three, then two of the props, the northernmost, were fallen over, or at any rate leaned against the rib on the east, and that other rock had broken off from the rock which had fallen on the car, the rock on the car being a large rock which might weigh 800 or 900 pounds, have you an opinion as to what might have caused this fall?"

This question was objected to and the objection overruled. The witness answered:

"Yes, sir."

By plaintiff: "What is that opinion?"

Objected to by defendant's counsel as theoretical. Thereupon the court sustained the objection. To all of the foregoing rulings of the court, excluding said testimony, plaintiff saved exceptions. What it was expected the witness would have sworn to, had he been permitted to testify, was as follows, viz.:

First, that the conditions described in the hypothetical question submitted to him and the conditions described in the plaintiff's testimony at the first northwest entry in the neighborhood of room 25 were unsafe in his opinion.

Second, that the fall described in the hypothetical question submitted to him might have been caused by contact with one of the props in the east side of said roadway or one of the legs supporting the cross-bars by a mule or a person, and even by a very slight collision sufficient to jar the support, or that it might be caused by a change in position in the loose stone or top coal described in said hypothetical question, and without any contact with the props or legs by any person or animal, or that it might have been caused by the mere weight of the overhanging stone over said cross-bar described in the hypothetical question, or that it might have been caused by any other number of causes; further, that the witness has in his observation seen falls caused by such causes stated. And the plaintiff further expected to prove by said witness that the fall described in the testimony of the plaintiff might have been caused by any one of a number of causes similar to those heretofore described herein in this statement.

Third, that plaintiff expected said Taylor to testify that said condition described in the hypothetical question submitted to him could have been made safe so far as the danger of the fall from the large stone was concerned by

removing said large stone; and also that said condition could have been made safe by building a switch frame consisting of a bar extending across the roof at the room neck supported by one leg at either side of said room neck at the north and south with other bars extending westerly from said bar across said room neck across the entryway by upright legs of timber. That plaintiff further expected said Taylor to testify that such method of constructing switch frames was a common method of making entries safe at the points at which rooms open therein, frequently used in mines throughout the state of Illinois. That plaintiff further expected said Taylor to testify that to merely support portions of the roof by props between the track and the rib was a dangerous method. That said method was dangerous for a number of reasons, among which was the danger of collision with said props by persons or animals, who might be in said roadway, and by reason of the fact that the support was not as thorough as crossbars supported by uprights or such an arrangement as a switchframe.

On the other hand, defendant's expert Gosnell was permitted to testify that "the place was safe" on the morning of the accident. When plaintiff asked that such statement "be stricken out, unless the grounds for the statement be put in evidence," the court said:

"Well, now, this man is a licensed examiner, * * * and I suppose he has been subjected to examination to sustain his qualifications. That being true, he has a right to express his opinion. That is not conclusive on the jury at all. It is simply for their consideration. They may give it whatever weight they may think it entitled to, in view of all the other evidence in the case. * * * The motion is overruled."

To which ruling an exception was saved.

This holding we understand to be the law in such cases, subject, however, to the right of plaintiff to cross-examine; but we know of no principle of evidence which would justify the ruling of the court upon the same question in the case of the witness Taylor. We are not prepared to say from the evidence that the matters propounded to Taylor are as well understood by the jury as by an expert. We are not sufficiently advised in mining matters by the evidence to say that the supporting of the roof by props, as is shown in the evidence to be the case here, which defendant claims could be knocked down by a blow or push from the singletree used in moving the coal car, was a proper construction. Nor do we think that fact was so patent that the jurymen were justified in assuming it. Coal mining is a special calling, and its requirements are not so obvious to one not versed in regard to them as to warrant the exclusion of expert evidence to elucidate them. As was said by this court in Brazil Block Coal Co. v. Hotel, 192 Fed. 108, 112 C. C. A. 448, with reference to a charge of failure to supply props as required by the statute:

"On this issue it was plaintiff's right, not only to depict before the jury the room's physical condition, from which the jury might judge of the possibility and propriety of using timbers to support the dangerous rock in the roof, but also to offer the testimony of himself and others, as experts, that the use of timbers was the proper method under the circumstances as they existed."

It was just as competent for Taylor to be allowed to say that he considered the conditions existing in the mine as unsafe as it was to allow Gosnell to say that in his judgment they were safe. The fact that the one would be responding to a hypothetical question, while the

other testified from knowledge of the circumstances, would be a matter for the jury to weigh. The witness Taylor should have been allowed to answer the question propounded to him as an expert. Under the common-law count they were material and proper, and their exclusion was error. It is unnecessary to consider their bearing upon the statutory counts. We think the mine examiner's report should have been admitted in evidence. There was no error in admitting the state certificates of the examiner and mine manager.

For the reason stated, the cause is reversed, with direction to grant a new trial.

BILLINGS v. SITNER.*

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

No. 1071.

1. ALIENS ⟸54—DETENTION AND RETURN OF IMMIGRANTS—DETERMINATION OF RIGHT TO ENTER.

Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 906, § 24 (Comp. St. 1913, § 4273), provides that every alien, not appearing to the examining immigrant inspector to be clearly and beyond a doubt entitled to land shall be detained for examination by a board of special inquiry. Section 17 (section 4265) provides that the physical and mental examination of arriving aliens shall be made by medical officers of the Public Health and Marine Hospital Service, who shall certify for the information of the immigration officers and boards of special inquiry all physical and mental defects or diseases observed by them. Section 10 (section 4255), provides that the decision of a board of special inquiry, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis, or with a loathsome or dangerous contagious disease, or with any mental or physical disability bringing the alien within any of the classes excluded from admission to the United States. *Held*, that a board of special inquiry has no right to base its decision on the right of an alien to admission on the certificate of the inspecting medical officer, without exercising its own judgment, after considering, not only the certificate, but whatever other evidence there may be touching the alien's right to enter.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

2. ALIENS ⟸54—DEPORTATION—HEARING.

Under Immigration Act 1907, § 21 (Comp. St. 1913, § 4270), providing that, in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of that act, or that an alien is subject to deportation, he shall cause such alien, within three years after landing or entry, to be taken into custody and returned to the country whence he came, where an alien excluded by a board of special inquiry was by mistake released from custody, and subsequently arrested on a departmental warrant, a hearing to enable him to show cause why he should not be deported was authorized by the statute, and he could not have been lawfully deported without such an opportunity to be heard.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

3. ALIENS ⟸54—DEPORTATION—HEARING.

An alien, arrested on the warrant of the Secretary of Labor for deportation, was denied a fair hearing where the immigration officers did

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

*Rehearing denied January 6, 1916.

not exercise their own judgment as to whether he should be deported, but considered themselves bound by the decision of a medical examiner and the report of a medical board that he was feeble-minded.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂⊃54.]

4. HABEAS CORPUS ⊂⊃111—DISCHARGE—CONDITION.

In a habeas corpus proceeding, by an alien not given a fair hearing before being ordered deported, the court properly discharged him from custody; but the order discharging him should have been conditional, and to be effective only in case the immigration officer should fail to give him a fair hearing within a reasonable time.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 100; Dec. Dig. ⊂⊃111.]

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

Habeas corpus by Simon Sitner against George B. Billings. From an order discharging the petitioner, defendant appeals. Reversed and remanded.

Leo A. Rogers, of Boston, Mass. (George W. Anderson and William C. Matthews, both of Boston, Mass., on the brief), for appellant.

William H. Lewis, of Boston, Mass., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. [1] Sitner, an alien immigrant, arrived at Boston May 7, 1913, and was detained for examination before a board of special inquiry according to section 24 of the Immigration Act. 34 Stat. 898, as amended by 36 Stat. 263 (Comp. St. 1913, §§ 4244, 4247).

After hearings on May 8 and 10, 1913, the board voted on the latter date to exclude him. It appears from the facts agreed by the parties that the board so voted because it assumed that a certificate by the medical officer who had examined him under section 17 of the act, to the effect that he was feeble-minded and his vision was defective, of itself bound the board to exclude, notwithstanding any other evidence.

We agree with the District Court that this assumption was erroneous, and prevented the hearing from being the fair hearing required by law. Section 10 of the act provides that the board's decision "based upon the certificate of the examining medical officer" shall be final as to the rejection of aliens affected with mental or physical disability which would bring them within the excluded classes. But this cannot mean that the certificate is to take the place of a fair hearing by the board. Such a construction would result in giving the inspecting medical officer, instead of the board, the power of final decision. Although immigration rule 17, subdivisions 4, 5 (note), state that the board is "virtually compelled" to base its decision upon the certificate, we hold that it has no right to do so without exercising its own judgment, after considering not only the certificate, but whatever other evidence there may be touching the alien's right to enter. The District

Court had previously so held in another case. Re Joyce, 212 Fed. 282, 285.

[2] After the above vote to exclude him, Sitner was by mistake released from the custody of the immigration officers. The mistake having been discovered, he was arrested on a warrant issued May 15, 1913, by the Secretary of Labor under section 21 of the act. The warrant, in pursuance of immigration rule 22, subdivision 4, directed the immigration inspector to grant him a hearing to enable him to show cause why he should not be deported. The act provides for such a hearing in such cases. Low Wah Suey v. Backus, 225 U. S. 460, 467, 32 Sup. Ct. 734, 56 L. Ed. 1165. Nor without such an opportunity to be heard on the questions involving his right to be in this country can an alien be lawfully deported. Japanese Immigration Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721. Even if the board of special inquiry had admitted Sitner, instead of excluding him, the Secretary might have ordered him deported, if the second hearing called for by the warrant had resulted in a contrary decision. Pearson v. Williams, 202 U. S. 281, 26 Sup. Ct. 608, 50 L. Ed. 1029.

[3] The hearing directed by the warrant was held May 16, 1913, before the Commissioner General and an Assistant Commissioner of Immigration. A report dated May 20th was afterward presented to the Assistant Commissioner, made by a medical board, convened on that day for the examination of Sitner, and consisting of three medical officers, such as required by section 17 of the act. Their report set forth that they—

"found him to present such a degree of mental deficiency as to justify certification as feeble-minded in accordance with official instructions governing the medical examination of aliens."

Also that:

"He is markedly near-sighted and has loss of third finger of right hand."

The Assistant Commissioner thereupon, after reciting the proceedings on May 8th and 10th at the hearing before the board of special inquiry, found that no new evidence presented at the hearing before him on May 16th affected in any manner the decision made by that board on May 10th; also that:

"The decision of the medical examiner is controlling, and the said certificate is further strengthened and fortified by the report of the medical board sitting this day."

He therefore recommended deportation, and upon his findings and recommendation the Secretary of Labor issued a warrant for Sitner's deportation on May 29, 1913.

It has been further agreed by the parties in the District Court that in making his above finding and recommendation the immigration officer—

"acted in the belief that he was bound to recommend deportation of said alien upon the decision of the medical examiner and report of the medical board under the rules and regulations of the Immigration Department, notwithstanding any other evidence."

We are obliged, upon this admission, to take the same view of the hearing under the warrant as that above taken regarding the earlier hearing before the board of special inquiry, and for the like reasons. While an excluding decision, to be final in such a case, must be based upon a medical certificate, the act has not given the power of finally determining the question of an alien's right to enter the country, even if he is afflicted with physical or mental disability, to any medical board, any more than to the medical examiner. The immigration officer or officers before whom the alien was to show cause not having exercised their own judgment, nor regarded anything beyond the medical certificates, it cannot be said that Sitner had a fair hearing under the warrant.

Sitner's petition for a writ of habeas corpus was filed July 15, 1913. The answer, filed as of January 13, 1914, set up in justification of his detention only that he was held under the above warrant for his arrest issued May 15, 1913. It made no reference to the hearing upon that warrant, nor to the subsequent warrant for his deportation issued May 29, 1913. These matters, however, were brought before the court by the agreed statement of facts, which has been referred to, filed in the District Court January 17, 1914. On January 19, 1914, the court granted Sitner's petition and ordered the writ to issue. From the order granting the petition and issuing the writ no appeal was taken, and it has not been assigned as error.

The writ having issued, there was a hearing before the court on January 26, 1914. It does not appear that the Immigration Commissioner, to whom the writ was directed and upon whom it was served, made any return thereof as required by Rev. Stat. §§ 756, 757 (Comp. St. 1913, §§ 1284, 1285), certifying the true cause of Sitner's taking and detention, or that such return was traversed by Sitner as provided by section 760 (section 1288). The hearing appears to have been without any pleadings subsequent to the writ by either party. It was, as stated in the opinion of the District Court, dated January 26th, "upon the question whether the petitioner was entitled to admission into the United States." The Commissioner relied, without offering other evidence, on the records of the board of special inquiry and of the inspectors before whom the hearing upon the warrant issued May 15, 1913, had been had. Sitner introduced medical and other evidence tending to show that he was not feeble-minded, and, as the opinion states, testified in person, so that the court could exercise its own judgment as to his mental condition. The court found that he was neither feeble-minded nor physically or mentally defective, within the meaning of section 2 of the act (section 4244), that he was entitled to enter, and ordered his discharge. From this order, entered February 5, 1914, the Commissioner has appealed.

[4] No error is made to appear in the findings or rulings of the court upon the evidence before it at the hearing on the writ. Neither the medical certificates nor the findings at either hearing before the immigration officers were conclusive upon the court. As we agree with the court that neither hearing had been the fair hearing required to justify deportation, we think Sitner was rightly discharged.

The order discharging him, however, was made six months before our decision in U. S. v. Petkos, 214 Fed. 978, 131 C. C. A. 274. Had it been made in view of that decision, it would doubtless have been made, not final, but conditional, and to be effective only in case the immigration officers should fail to give Sitner the fair hearing on lawful evidence to which he was entitled, and for which the warrant under which he was held provided, within a reasonable time. For the reasons there stated, we think this the course best calculated to secure proper administration under the act, in cases involving only an alien's right to admission, and, so far as we can see, there are no special circumstances in this case rendering a different course more desirable. Our order will therefore be:

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings in accordance with this opinion.

THE J. RICH STEERS.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

Nos. 46, 47.

1. NAVIGABLE WATERS ⊂=14—HARBORS—DEPOSIT OF REFUSE—CONSTRUCTION OF STATUTE—UNAVOIDABLE ACCIDENT.

Under Act June 29, 1888, c. 496, 25 Stat. 209, as amended by Act Aug. 18, 1894, c. 299, 28 Stat. 360 (Comp. St. 1913, § 9933 et seq.), prohibiting under penalty the dumping of refuse in New York Harbor, and which provides in section 3 that "neither defect in machinery nor avoidable accidents to scows or towboats * * * shall operate to release the owners and master and employés of scows and towboats from the penalties hereinbefore mentioned," the only defense in case of machinery is an accident which was unavoidable, and neither the breaking of a part not shown to have been inspected, although there was a general inspection, by reason of which a scow dumped part of her load, nor the breaking of a link in a chain shown to have been sound, and which was therefore insufficient for the load put upon it, is sufficient to sustain such defense.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 31–42; Dec. Dig. ⊂=14.]

2. NAVIGABLE WATERS ⊂=14—HARBORS—DEPOSIT OF REFUSE—LIABILITY OF VESSEL—"BOAT OR VESSEL USED OR EMPLOYED."

Under section 4 of act of June 29, 1888, which provides that "any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby," a tug which had no other connection with the violation than that of towing the offending scow is not used or employed in such violation.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 31–42; Dec. Dig. ⊂=14.]

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

Suits in admiralty by the United States against the steam tug J. Rich Steers and scow No. 8 H. S. Inc., Henry Steers, Incorporated, claimant, and against steam tug Princess, Peter Cahill claimant, and scow

Guiding Star, John G. Mulligan claimant. Decrees for respondents, and libelant appeals. Modified.

Appeals in two cases from decrees dismissing libels against tugs and tows under the act of June 29, 1888, as amended, to prevent injurious deposits within New York Harbor and adjacent waters.

H. Snowden Marshall, U. S. Atty., of New York City (E. B. Barnes, Asst. U. S. Atty., of New York City, of counsel), for appellant.

Charles Thaddeus Terry, of New York City (Edward Ward and W. McMahon, both of New York City, of counsel), for the J. Rich Steers and another.

Harrington, Bigham & Englar and T. C. Jones, all of New York City, for the Guiding Star.

Foley & Martin, William J. Martin, and G. V. A. McCloskey, all of New York City, for the Princess.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. [1] The act of June 29, 1888, as amended by the act of August 18, 1894, provides that no refuse, dirt, ashes, etc., shall be deposited in the tidal waters of New York harbor or its adjacent or tributary waters, but that they shall be dumped within such limits as shall be prescribed by the Supervisor of the Harbor. Congress was authorized to enact this law under its power to regulate commerce.

Section 3 provides:

"And any deviation from such dumping or discharging place specified in such permit shall be a misdemeanor, and the owner and master, or person acting in the capacity of master, of any scows or boats dumping or discharging such forbidden matter in any place other than that specified in such permit shall be liable to punishment therefor as provided in section one of the said act of June twenty-ninth, eighteen hundred and eighty-eight; and the owner and master, or person acting in the capacity of master, of any tug or towboat, towing such scows or boats shall be liable to equal punishment with the owner and master, or person acting in the capacity of master, of the scows or boats; and, further, every scowman or other employé on board of both scows and towboats shall be deemed to have knowledge of the place of dumping specified in such permit, and the owners and masters, or persons acting in the capacity of masters, shall be liable to punishment, as aforesaid, for any unlawful dumping, within the meaning of this act or of the said act of June twenty-ninth, eighteen hundred and eighty-eight, which may be caused by the negligence or ignorance of such scowman or other employé; and, further neither defect in machinery nor avoidable accidents to scows or towboats, nor unfavorable weather, nor improper handling or moving of scows or boats of any kind whatsoever shall operate to release the owners and masters and employés of scows and towboats from the penalties hereinbefore mentioned."

Section 4 provides:

"* * * Any boat or vessel used or employed in violating any provision of this act, shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against, summarily by way of libel in any district court of the United States, having jurisdiction thereof."

With the law in this condition the forward middle pocket of scow No. 8, in tow of the tug J. Rich Steers, dumped its contents before

reaching the dumping ground. This was due to the breaking of a pawl which prevented the chain holding the bottom doors of the pocket closed from running out. The scow Guiding Star, which had been towed by the tug Princess to Edison's plant in South Brooklyn and there laid up to await a change of tide, dumped her first forward pocket in the absence of the tug, as the result of the breaking of a link in the bridle chain which held the bottom door closed. There was evidence of general overhauling and inspection of the scows without discovery of any defect in their appliances. The District Judge dismissed the libel against the tug Steers and Scow No 8, saying:

"Here, though the scow had been recently overhauled and also inspected immediately before going out, the scow dumped because the pawl suddenly broke. Defective machinery is by the terms of the statute no excuse. I think, however, that defective machinery means machinery unsuited for the purpose or out of repair and does not refer to a sudden breaking down of properly installed and inspected machinery. In this case, therefore, the libel should be dismissed."

He dismissed the libel against the tug Princess and scow Guiding Star, saying:

"At the trial I dismissed the libel in the case of Tug Princess and Scow Guiding Star because the scow had been overhauled the month before the accident and inspected that day. The dumping was occasioned apparently by the sudden breaking of one of the bridle chains and I deemed the accident unavoidable."

Congress evidently did not intend the prohibition to be absolute. If it had the specification of certain things which should not be defenses would have been useless and unmeaning. We think machinery adequate, appropriate, properly installed, and properly maintained must have been presupposed. From the provision that avoidable accidents shall be no excuse it is plainly to be implied that accidents which are unavoidable shall be a defense. Accordingly, we think that the only defense in the case of machinery is a defect that is unavoidable. Let us apply the act so construed to the cases in hand. In each the dumping resulted from a breaking down of the machinery of the scow. In the case of scow No. 8 no sufficient examination of the pawl was made either before or after it broke, nor was the court informed of the character of the pin or support upon which it was pivoted nor whether the pawl itself or the pin or support broke and what the break showed as to the character and condition of the iron. This was quite inadequate proof of unavoidable accident.

In the case of scow Guiding Star a link in the chain parted. The testimony, however, was positive that there was no defect in the link at all, the necessary conclusion being that it broke because insufficient for the load put upon it. The District Judge erred in treating this as an unavoidable accident. If in this way damage had been done to another vessel in a collision the accident could not have been treated as inevitable. To establish such a defense it is necessary either to show the precise defect which caused the accident and that the defendant was not wanting in any lack of ordinary care in relation to it or else to show all possible causes and that the defendant was not wanting in ordinary care as to any one of them. The Edmund Moran,

180 Fed. 700, 104 C. C. A. 552; The Lackawanna, 210 Fed. 262, 127 C. C. A. 80.

[2] We think, however, that the libels against the tugs were rightly dismissed. Section 4 of the act personifies the vessel and makes her liable to the pecuniary penalties if "used or employed in violating any provision of this act." The pecuniary penalty is a fine of not less than $250 nor more than $2,500 as prescribed in section 1. Judge Addison Brown in the case of The Emperor (D. C.) 49 Fed. 751, held that a tug which had no other connection with the violation than that of towing the scow, was not so "used or employed." We approve his decision. On the other hand, Judge Benedict held in The Bombay (D. C.) 46 Fed. 665, that a steamer going down the harbor whose firemen dumped ashes into the river was so "used and employed." We approve this decision also. Accordingly, the libels should have been sustained against the scows, as being so used and employed. The decrees are modified by directing the court below to impose a penalty of $250 against each scow.

CONNELLEY v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. December 9, 1915.)

No. 1988.

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

A railroad company which operates its trains in a proper and customary manner is not chargeable with negligence which renders it liable for the killing by one of such trains of a trackwalker, who assumes the risk from such danger as necessarily incidental to his employment.

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

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by Ellen Connelley, administratrix, against the Pennsylvania Railroad Company. Judgment for defendant (221 Fed. 508), and plaintiff brings error. Affirmed.

Francis Rawle and Joseph W. Henderson, both of Philadelphia, Pa., for plaintiff in error.

John Hampton Barnes, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Mrs. Ellen Connelley, administratrix of Thomas Connelley, brought suit against the Pennsylvania Railroad Company. Her cause of action was for damages alleged to have accrued to her by virtue of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]), through the negligence of said railroad in

causing the death of Thomas Connelley, her husband and its employé. She recovered a verdict and judgment in that court. On writ of error sued out by the railroad, this court, in an opinion reported at 201 Fed. 54, 119 C. C. A. 392, 47 L. R. A. (N. S.) 867, reversed the judgment recovered by Mrs. Connelley. Reference to that opinion avoids needless repetition of the facts. The question involved in that writ and in the present one was whether the proofs showed any negligence on the part of the railroad which constrained submission of the question of negligence to the jury. It was there in substance held there was no such proof; that a railroad trackwalker employed to walk over, watch, and repair tracks where there is a constant passing of trains, necessarily assumes the risk of being struck by trains properly operated; and that no negligence on the part of the railroad was shown by the proofs in the case; and that plaintiff was not entitled to recover. Thereupon plaintiff petitioned the Supreme Court for a writ of certiorari, and that court (in pursuance of a stipulation filed, see 231 U. S. 764, 34 Sup. Ct. 327, 58 L. Ed. 472), but without any expression on the merits of the case, reversed the judgment of this court and remanded the cause for retrial in the court below. On such retrial the only testimony give was the viva voce testimony of three witnesses who had been called at the former trial, viz., Mrs. Ellen Connelley, the widow of the decedent, John J. Fredericks, and Harry Hurst, and the reading of the testimony, at the former trial, of William Rowan who had since died. Neither Mrs. Connelley nor Hurst was present at the accident, and Fredericks, while present on the train which struck the decedent, did not see him struck or before he was struck. The proof as to the accident itself was confined to the rereading of the testimony of William Rowan, who was the only witness. Thereupon the trial judge gave binding instructions in favor of the defendant. The plaintiff then sued out the present writ. We see nothing in the account of the accident itself, in the surroundings of the accident as testified to by Fredericks, or in the testimony of Hurst in reference to the rules, which changes the aspect of this case from what it was when heretofore before this court, or which leads this court to differ from the views expressed on the merits of the case in its previous opinion. We restrict ourselves, therefore, to restating that part of our former opinion which summarizes such views, viz.:

"It is an obvious fact that many occupations, as for example a powder mill operator, a structural iron worker, a diver, a blaster, a trackwalker, necessarily subject those who follow them to great dangers. When therefore a man contracts for such employment, he knows and takes on himself the risks and dangers incident to such dangerous work. His assumption of those obvious and unavoidable risks is in the very nature of things part of his employment. It follows therefore that the employer violates no legal duty to the employé in failing to protect him from dangers which cannot be escaped by any one doing such work. Narramore v. Cleveland, C., C. & St. L. Ry. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.

"It is obvious that, even where a railroad operates its trains and moves its switch drafts in a proper and careful manner, trackwalkers and repairmen are necessarily subjected to great risks. Their very occupation is one of constant peril. Indeed, it follows from the nature of such employment that

the duty of self-preservation has to rest on them, for no adequate protection, other than self-protection, can be afforded them. And such has been the reasonable holding of the law. Thus in Norfolk & W. Ry. Co. v. Gesswine, 144 Fed. 56, 75 C. C. A. 214, it was said: 'This man was one of a number of men who were employed as sectionmen on the railroad. They were engaged in repairing the track, taking out rails, putting in new ones, taking out crossties and putting in new ones, and hewing them into proper form and shape, and were working on the railroad track, while the trains were being operated in the usual way; manifestly, a place of danger. A railroad does not suspend the operations of its trains until the track can be put in order, and the proposition to these sectionmen was, "We will run the trains and operate the road as heretofore, as we ordinarily do, and between trains you must do this work and look out for yourselves to avoid being injured by the trains," and the sectionmen accept the employment upon these terms, and if an accident occurs, and they are hurt while the trains are being managed and operated in the usual and ordinary way, they can have no just ground of complaint against the railroad. It is not the fault of the railway company.'

"So, also, in Aerkfetz v. Humphreys, 145 U. S. 418 [12 Sup. Ct. 835, 36 L. Ed. 758], where an experienced trackman was injured by a moving train in a switching yard, it was said: 'Under such circumstances, what negligence can be attributed to the parties in control of the train, or the management of the yard? They could not have moved the train at any slower rate of speed. They were not bound to assume that any employé familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming and switch engines moving forward and backward would have simply tended to confusion. * * * It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employés who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendant.'

"Indeed, in thus making self-protection the substantial safeguard of trackwalkers and sectionmen, the law is reasonable and just, for no other dependable safeguard can be afforded their perilous work in the practical operation of railroads. As said in Keefe v. Railway Co., 92 Iowa, 182 [60 N. W. 503, 54 Am. St. Rep. 542], 'these rules are founded upon the necessities of the business of operating railways,' and in Rosney v. Erie R. Co., 135 Fed. 311 [68 C. C. A. 155]: 'An elaborate system of signals by ringing bells, sounding whistles, swinging lanterns, and waving flags, designed to cover the erratic movements of switching engines and extra freight trains, would quite likely have tended to complicate and confuse the situation.'

"This rule has the uniform support of courts in all sections of the country. Morris v. Boston & M. R. R., 184 Mass. 368 [68 N. E. 680]; Bancroft v. Boston & M. R. R., 67 N. H. 466 [30 Atl. 409]; Railroad Company v. Hester, 64 Tex. 401; Carlson v. Cincinnati, S. & M. R. Co., 120 Mich. 481 [79 N. W. 688]; Pennsylvania R. Co. v. Wachter, 60 Md. 395.

"In view of these decisions, it is clear therefore that, so long as the defendant railroad used its terminal tracks by running its trains properly thereon and in the usual way, the duty of guarding himself against such trains rested on Connelley, and a study of this testimony leads to the sad conclusion that the death of this unfortunate man was due to his own momentary disregard of the peril of his situation. To aid these trackwalkers in taking care of themselves, the railroad required them to go in pairs, and, indeed, Connelley's companion called his attention to the enveloping steam, and advised their moving aside. Obviously self-preservation, the steam-enveloped position he was in, together with the knowledge that trains were constantly moving, should have led the decedent to heed the warning, instead of making chance and not care the insurer of his safety. The failure of decedent to heed this timely warning and step aside undoubtedly cost him his life. The railroad had taken the additional step of placing a brakeman on the switch-

ing train. He was on watch and had the emergency brake ready, but the steam which enveloped Rowan and Connelley until they were struck made it just as impossible for the brakeman to see them as it was for them to see the approaching train."

The judgment below is therefore affirmed.

HAZELWOOD DOCK CO. v. PALMER et al.

(Circuit Court of Appeals, Third Circuit. November 1, 1915.)

No. 1989.

1. ADMIRALTY ⟸16—JURISDICTION—LIENS—BY WHAT DETERMINED.
Where a libel alleged facts which entitled libelant to a maritime lien, the jurisdiction of a court of admiralty of the cause was not affected by the fact that it found the allegations to be untrue, and that libelant was not entitled to a lien.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 23–28, 191–205; Dec. Dig. ⟸16.]

2. COURTS ⟸405—FEDERAL COURTS—JURISDICTION OF CIRCUIT COURTS OF APPEALS.
In such case a decree for respondent was on the merits and not for want of jurisdiction, and an appeal by libelant lies to the Circuit Court of Appeals and not to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099; Dec. Dig. ⟸405; Appeal and Error, Cent. Dig. §§ 156, 3302.]

3. ADMIRALTY ⟸121—DECREE DISMISSING LIBEL—POWER TO AWARD COSTS.
Also, in such case the court had power to award costs.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 795, 796; Dec. Dig. ⟸121.]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in admiralty by the Hazelwood Dock Company against Hugh J. Palmer and Marian G. Palmer. Decree for respondents, and libelant appeals. Affirmed.

Lowrie C. Barton, of Pittsburgh, Pa., for appellant.

Samuel H. Bradshaw, of Pittsburgh, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Hazelwood Dock Company filed a libel based on a written contract against a certain houseboat whereof Hugh J. Palmer and Marian G. Palmer, his wife, were owners. The owners subsequently appeared and claimed the boat. The libel, as subsequently amended, asserted a claim for repairs under section 1 of the Act of Congress of June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. 1913, § 7783), which provides:

"That any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or

domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

On final hearing the court decided the proofs did not disclose a case of repairs to a houseboat owned by the claimants, but in reality the claim was for the construction of such houseboat by the libelant under contract, and furnishing it to the Palmers. From a decree dismissing the libel with costs to the claimants, the libelant took this appeal.

The questions here involved are, first, whether, as contended by the appellant, the contract was for repairs to a vessel; second, whether the court had power to award costs; and, third, whether, as contended by the appellees this court is without jurisdiction of this appeal.

The questions involved are so intermingled we discuss them together. The pleadings in the cause, as amended, alleged the Palmers were the owners of a flatboat; that they "applied to the said libelant to repair said flatboat and build thereon a cabin for their use as a houseboat"; and that the parties "entered into a contract whereby said libelant was to repair said flat, furnish the material, and do the work necessary to make a boat of the size, dimensions, and kind according to the terms of the contract between them." It will therefore appear the case stated was one for "furnishing repairs * * * upon the order of the owners of such vessel," and, if it was sustained by proof, warranted entry of a decree adjudging the libelant "shall have a maritime lien on the vessel, which may be enforced by a proceeding in rem."

Of such a case and controversy, the District Court was given express statutory jurisdiction. Indeed, if the respondents had demurred on the ground of lack of jurisdiction, their demurrer would have been overruled on the face of the averments in the libel. Having jurisdiction to enter the final decree above stated, it necessarily follows the District Court had jurisdiction to take the proofs and from them ascertain the facts which would warrant the entry or refusal of such decree. A court's jurisdiction is its authority to hear and determine a cause. Its decision in a particular case has nothing to do with its jurisdiction of the cause. Decision is a sequence of jurisdiction, not its source. It follows therefore that in the case in hand the jurisdiction of the District Court as a court of admiralty over this cause is clear, since it had statutory authority to hear and determine the alleged claim of the libelant for repairs. Such question of repairs it accordingly heard and decided, and, having found the case was one of original construction, and therefore not one of repairs, it dismissed the libel. The libelant in this appeal alleges error in the court's exercise, not in its assumption, of jurisdiction. This, libelant has an undoubted right to do; and of that right it cannot be deprived by the respondent's contention that libelant's appeal should have been taken to the Supreme Court on the ground of alleged lack of jurisdiction in the court below. To this contention, that libelant's appeal should have been to the Supreme Court, we cannot yield. The libelant is not challenging the jurisdiction of the court below, for its libel

asserts and states a case of alleged repair, which is the statutory ground for such jurisdiction. Libelant does not call in question the court's jurisdiction, but an alleged error in exercising its jurisdiction. This alleged wrongful exercise of a rightfully assumed jurisdiction is the only question the libelant desires to raise on appeal, and the jurisdiction to pass on that question is vested, not in the Supreme Court, but in the Circuit Court of Appeals. The appeal being therefore properly before us, we find no error was committed by the court below. The facts showed the libelant made no repairs for the respondents on the houseboat in question. The so-called repair work which the libelant did was done on a hull which libelant itself bought and paid for. The respondents had neither title nor claim to the hull while the houseboat was being built, and acquired no ownership of it until it was completed and delivered to the respondents in pursuance of a prior contract in writing between them and the libelant, wherein the libelant agreed, for the sum of $800, payable in installments, to thereafter furnish respondents with a boat of certain dimensions, and the respondents agreed not to take the boat away from the vicinity until it was paid for in full. The right of the libelant to a decree turns on its establishing the fact that it had repaired a vessel owned by the respondents. This fact it failed to prove, and the court, after full and final hearing on bill, answer, and proof, entered a decree dismissing libelant's unsustained libel.

We agree with the conclusion reached by the court below that "the libelant is not entitled to a lien, and the libel must be dismissed at plaintiff's costs." The contention that the court below was without power to award costs cannot be sustained. This libel was not dismissed for want of jurisdiction, but because libelant had not established by proof the lien which by its pleadings it invoked the jurisdiction of the court to decree. Decisions such as Citizens' Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451, do not apply to a case like the present. On the contrary, it is in line with Lowe v. Benjamin, 1 Wall. Jr. 187, Fed. Cas. No. 8,565; The City of Florence (D. C.) 56 Fed. 236.

For the reasons stated, we are of the opinion the case was rightly decided by the court below, that it had power to award costs against libelant, and that this court has jurisdiction of this appeal. The view we have taken renders it unnecessary to decide whether this houseboat was a vessel within the meaning of the act. The decree below will be affirmed.

ROBINSON v. CARBON STEEL CO.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 40.

CORPORATIONS ⊂=316—CONTRACT WITH OFFICER—VALIDITY.

Evidence *held* insufficient to establish a valid oral contract between a corporation and its president that the latter should receive half the profits of a contract made by the corporation by him as president; it not being shown that it was authorized or ratified by the board of directors, or even known to more than one of them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401, 1402, 1404–1406, 1408, 1409, 1412–1414; Dec. Dig. ⊂=316.]

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

Action at law by Elsie G. Robinson against the Carbon Steel Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

This cause comes here upon writ of error by the plaintiff to review a judgment of the District Court, Southern District of New York. The plaintiff sues as assignee of Frank B. Robinson under a certain contract alleged to have been entered into by Robinson with the defendant. Recovery is sought for upwards of $110,000 unpaid balance of one-half of the profits arising out of certain contracts for the furnishing and erecting certain materials in the construction of what is known as the Manhattan Bridge in the city of New York. At the close of plaintiff's case motion was made for nonsuit and the same was granted. This disposition of the case of course eliminated a set-off or counterclaim which was pleaded in the answer.

John C. Wait, of New York City (Thomas H. Keogh, of New York City, of counsel), for plaintiff in error.

Frank S. Gannon, Jr., and Royal E. T. Riggs, both of New York City (Royal E. T. Riggs, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. From October, 1905, until 1911, Robinson was a director and from the early part of 1906 until 1911 he was president of the defendant corporation at a salary of $12,000 and later of $15,000 a year, and during all that period he was attending to the business of defendant. On June 15, 1906, the city of New York entered into a contract for the erection of the bridge with the Ryan-Parker Construction Company. On May 6, 1907, the latter company contracted in writing with defendant company for the wire cable work required. Thereafter the defendant contracted in writing with John A. Roebling Sons & Co. for the supply of wire for the bridge and caused to be incorporated a subsidiary company known as the Glyndon Contracting Company for the purpose of erecting the cables; it also entered into a contract in writing with the last-named company for such erection. All these contracts were signed for defendant com-

pany by Robinson as its president. They were all carried out, defendant received its payment from the Ryan-Parker Company, and out of the money thus received paid Roebling Sons and the Glyndon Company. Plaintiff contends that after such payments there remained with defendant a very large sum ($400,000), representing its profits under the Ryan contract of May 6, 1907. It is further contended that Robinson is entitled to one-half of these profits by virtue of an oral contract which, it is asserted, he made with the company of which he was president. The theory is that it was known by Robinson and Ryan that the proposed contract for the wire would be a profitable one, that Ryan was willing to give it to Robinson personally, that the latter was willing that the defendant should do the work and share the profits, and that it was agreed between the parties that, if Robinson would get the Ryan Company to enter into the written contract for steel wire with defendant Carbon Steel Company, the latter as compensation for his services in so doing would pay him one-half of any profits which it might make out of such contract.

We do not understand that even this plaintiff contends that a president of a corporation has any authority to bind the company to a secret agreement, known only to himself, whereby he is to share personally in the profits which his company may make out of a contract with a third party which the president has secured or is about to secure for it. The proposition is that the contract on which plaintiff relies was made with Robinson personally by John D. Slayback, who at the time was a director and the treasurer of defendant. The only witness to the making of such an agreement was Robinson himself. He testified:

"I told him [Slayback] that I could get the contract personally for the erection of the cables over the Manhattan Bridge and that I could place it possibly with the Roeblings or with some other concern, or I could do it myself; that Roebling would probably want all the profit, and I thought I could get somebody to do it for about one-third of the profit, and I probably could do it myself and make all the profit; that I was just coming back with the Carbon, and, being quite a stockholder, if he wanted an opportunity I would let the Carbon Steel Company do the work and share the profit, or I would let Roebling do it, or some other concern, or do it myself. He [Slayback] said he would be only too happy to do it if I could carry the deal through; that he was only too glad to accept it and would gladly give me half the profits."

At this interview Robinson, who was acting for himself, could not also represent the company, and Slayback, a single director and the treasurer, had no power, without authorization by the board of directors, to bind the company to any such agreement with its president. Of any such authorization prior to the conversation between Slayback and Robinson here is not a particle of evidence. Nor is there anything to show that the board of directors or executive committee ever expressly ratified such contract. The business of the company seems to have been conducted in a rather slipshod way, and there might be a fair argument that nonaction by the directors after they knew the facts might be taken as indicating ratification. But there is not sufficient proof on which to base this argument. The directors of defendant were:

In 1905–6: Kilduf, Hemphill, Brenner, Howland, Keith, McGrew, and Robinson.

In 1906–7: Robinson, J. D. Slayback, Wetmore, Silverthorne, Hemphill, E. F. Slayback, and M. S. Payne.

In 1907–8: Robinson, J. D. Slayback, Wetmore, E. F. Slayback, H. E. Payne, Buchanan, and Baldwin.

In 1908–9: Robinson, J. D. Slayback, E. F. Slayback, Alby, Buchanan, Fitzpatrick, and Baldwin.

There is no direct evidence that any of these had any knowledge of this agreement with the president to divide the profits earned on the steel wire contract with Ryan, except Robinson and J. D. Slayback. A number of checks drawn by the defendant to the order of Robinson for varying amounts and aggregating about $90,000 were put in evidence. These checks were all paid. But these were all signed by Robinson, president, and J. D. Slayback, treasurer, except one, which was signed by Buchanan, vice president. In the absence of further proof, the jury would not have been warranted in finding that the other directors, or even Buchanan, had knowledge that Robinson was drawing out of the treasury large amounts of money, in addition to his salary, as profits on a contract between defendant and the Ryan Company. There was a failure to show either authorization or ratification of the contract sued upon, and the trial judge properly refused to let the case go to the jury.

There was an exception to the refusal of the court to allow Ryan to testify to conversations he had with Robinson; the object being to show that Ryan was offering the option or privilege of taking the steel wire contract to Robinson personally. It is not necessary to consider this point. Robinson had testified that the option was offered personally to himself. Coming here, as the case does, after a nonsuit, this statement of Robinson must be taken as true, and Ryan's corroboration would add nothing to it.

Judgment affirmed.

CLARKSON v. FISHER et al.

(Circuit Court of Appeals, First Circuit. December 7, 1915.)

No. 1155.

APPEAL AND ERROR ⊂⊃694—RECORD—MATTERS PRESENTED FOR REVIEW.

The facts found by the District Court and by a master cannot be revised by the Circuit Court of Appeals, where the proofs are not included in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915; Dec. Dig. ⊂⊃694.]

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

Receivership action against the Walpole Tire & Rubber Company, in which Geoffrey T. Clarkson filed a claim, which was opposed by

Robert C. Fisher and others. From a decree disallowing the claim, said claimant appeals. Affirmed.

Cornelius W. Wickersham, of New York City (Cadwalader, Wickersham & Taft, of New York City, on the brief), for appellant.

Lee M. Friedman, of Boston, Mass. (Swift, Friedman & Atherton, of Boston, Mass., on the brief), for appellees.

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

PUTNAM, Circuit Judge. This is an attempt on the part of the minority stockholders to enforce rights in equity against a corporation known as the Sealomatic Inner Tube Company with reference to its rights to a process for either a patent or a secret method for constructing automobile tubes known as Sealomatic inner tubes, and improvements thereon. The litigation has particular reference to enforcing on behalf of the corporation a contract with one Tinkham, who is made a party defendant, and who was alleged to have obligated himself to the amount of $100,000, for the benefit of the corporation. Unfortunately the contract is not shown by a literal recital of its terms or reference to any copy thereof in the record. The brief by the appellant, who was the complainant below, alleges that Tinkham received $400,000 in capital stock at par, and "agreed to advance from time to time to that company, as and when it should be needed, money up to $100,000, to be used in providing and equipping the company for the manufacture of the tubes referred to."

The brief also states that, after Tinkham made his initial payment of $16,000, he paid in no further sums, so that, apparently from those allegations, $84,000 is in issue. The brief also alleges that the corporation in question, including a second corporation, which became interested in connection with it, turned over the attempts to manufacture the valveless inner tubes to its own chemists, and because they were unsuccessful in those attempts now endeavors to excuse itself on the ground that the inner tubes were without commercial value. The claims, which take the form of proof of claims under a receivership, and not under a bill in equity, contain a prayer for relief in so many elements that it is impossible to gather from them the precise terms of the obligation assumed by Tinkham. Taking the record as a whole, it would seem that the purport of Tinkham's agreement was to furnish funds to conduct the experiments required for developing the patent, or the secret method of manufacture, or whatever it was, and this accounts for the findings with which the master, to whom the proof of claims was referred, closed his report, in the following terms:

"(1) Upon consideration of all the evidence I find, and so report, that the Sealomatics patent had no commercial value, and that the inner tubes produced under the Sealomatics patent were of no commercial value.

"(2) Upon all the evidence in the case I find, and so report, that there was no conspiracy entered into by the Walpole Rubber Company—(a) to prevent the Valveless Inner Tube Company from calling upon Tinkham for the balance of $100,000, viz., $84,000; (b) to prevent the Valveless Inner Tube Company from continuing its business.

"(3) Upon all the evidence in the case I find, and so report, that the Walpole Rubber Company did not wrongfully take possession of the property and office of the Valveless Inner Tube Company.

"(4) Upon all the evidence in the case I find, and so report, that the failure of the Valveless Inner Tube Company was not caused by any act or acts of the Walpole Rubber Company.

"I do not consider it necessary to rule upon the question raised at the hearings as to whether the claimant has any standing in the capacity in which he has presented his proof of claim because upon all the evidence in the case I find, and therefore report, that neither the Walpole Rubber Company nor the Walpole Tire & Rubber Company has wrongfully deprived the Valveless Inner Tube Company of any property or valuable rights as alleged by the claimant, and therefore there is nothing due from the Walpole Tire & Rubber Company to said claimant, and therefore his claim for damages should be denied."

The proceedings are subject to many criticisms, and are very complicated. All we need to refer to, however, is the findings of the master quoted. We find in the report no opinion of the learned Judge of the District Court, and only a decree giving effect to the conclusion of the master. The record shows, however, aside from the insufficient statement of the obligation assumed by Tinkham, that the case is full of questions of fact, which lie at the very foundation. Indeed, the brief for the complainant, now the appellant, contains the following statement:

"Nevertheless, based largely on the testimony of the Walpole's own officers and employés, the master has found that the Sealomatics patent had no commercial value, and that the Walpole Company is in no way responsible for its acts of commission and omission, which resulted in the entire downfall of the enterprise."

This, of course, leads the mind directly to the impression that the whole proceedings involve only a mere wreck, leaving nothing of such value as requires the attention of a court in equity, according to the well-settled rules; but, however this may be, what we have cited from the proceedings shows that it is impossible for us to revise the facts found by the master and the court below, as the proofs which lie at their foundation are not included in the record. According to the well-settled rules in equity in the federal tribunals, we are unable without these proofs to revise the decision of the District Court, and it is plain, on examining the record, that what is thus involved is the essence of the case, although it is reached by a long road, through a confused line of circumstances.

The decree of the District Court is affirmed, and the appellees recover their costs of appeal.

CARDOZO v. BROOKLYN TRUST CO.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 31.

1. BANKRUPTCY ⟸282—CORPORATIONS—ACTION BY TRUSTEE TO RECOVER PREFERENCE.

The trustee for a bankrupt corporation may maintain an action, under section 66 of the New York Stock Corporation Law (Consol. Laws, c. 59), against a trustee under a will to recover payments made when insolvent and with intent to prefer the creditor paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 426; Dec. Dig. ⟸282.]

2. BANKRUPTCY ⟸303—CORPORATIONS—PREFERENCES TO CREDITORS—CONSTRUCTION OF STATUTE—"WITH INTENT OF GIVING A PREFERENCE."

Under such statute, in order to constitute a payment one "with intent of giving a preference," the payor must have known or expected it to have that effect, and the fact alone that a corporation was insolvent when it made payments to certain creditors is not sufficient to prove an intent to give a preference to such creditors; but where, in addition, it had disposed of practically all of its live assets and discontinued its business, such an intent may be fairly inferred.

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

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

Suit in equity by D. Henry Cardozo, Jr., trustee in bankruptcy of A. W. Blanchard, Incorporated, against the Brooklyn Trust Company, trustee under a will for John and Howard Gibb. Decree for complainant, and defendant appeals. Affirmed.

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

[1] In this suit the trustee in bankruptcy of A. W. Blanchard, Incorporated, seeks to recover from the defendant, as trustee of the estates of John and Howard Gibb, a payment made in alleged violation of section 66 of the New York Stock Corporation Law. I see no reason why the complainant should not maintain this suit under the state statute. The evidence leaves no doubt in my mind, moreover, that A. W. Blanchard, Incorporated, "was insolvent, or its insolvency was imminent," within the terms of the statute, at the time of the transaction in question. It is equally plain that the trust company was not "a purchaser for a valuable consideration without notice," within the exception of the statute.

[2] The remaining issue is whether the transaction in question was "with the intent of giving a preference to any particular creditor over other creditors of the corporation." The statute refers to the intent of the debtor, without regard to the creditor's intent or to his knowledge of the insolvency of the debtor. Wright v. Gansevoort Bank, 118 App. Div. 281, 103 N. Y. Supp. 548; Wright v. Williams Skinner Mfg. Co., 162 Fed. 315, 89 C. C. A. 23; Irish v. Citizens' Trust Co. (D. C.) 163 Fed. 880; Munson v. Genesee Iron & Brass Works, 37 App. Div. 203, 56 N. Y. Supp. 139; Kingsley v. First National Bank, 31 Hun, 335. But this intent to prefer is essential. Dill & Collins v. Morison, 159 App. Div. 583, 144 N. Y. Supp. 894. The statute so provides. The mere fact, therefore, that a corporation is shown to be unable to pay all its debts, does not necessarily render a payment or transfer by it in the

usual course of business ineffectual or require it to suspend. Keiley v. Mechanics' & Traders' Bank, 15 N. Y. Supp. 173.

What, then, is the meaning of "intent to prefer" as used in the statute? In the sense that a person is said to intend the natural consequences of his acts, it may be argued that any payment to one creditor at a time when a corporation is unable to pay all creditors manifests an intention to prefer the creditor who is actually paid. But this is obviously not the meaning of the statutory requirement of an intent to prefer in addition to insolvency, for such a construction would render the required intent superfluous and virtually eliminate it from the statute. It seems to me that the true meaning is that, to constitute a preference, the corporation or its officers making a payment must have known or expected that it would have that effect. Irish v. Citizens' Trust Co. (D. C.) 163 Fed. 880. The statute is meant to apply when the corporation is confronted with the problem: How are the assets of the corporation to be used, not in carrying on its business, but in meeting its obligations. Olney v. Baird, 7 App. Div. 95, 110, 40 N. Y. Supp. 202. In other words, the question is whether the payment was made in contemplation of insolvency and winding-up as an impending fact, or in contemplation of continuing business in good faith. And this question must be determined, of course, as an inference from the surrounding facts. The statute is undoubtedly drastic, but the state courts have shown no disposition to construe it narrowly. Cole v. Millerton Iron Co., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; Munson v. Genesee Iron & Brass Works, 37 App. Div. 203, 56 N. Y. Supp. 139.

When the Blanchard Company sublet to Stringer, and sold to him its machinery, tools, and furniture, it parted with all its live assets, and stripped itself of the capacity for carrying on a garage business. Realizing on this transaction only $500 in cash, Blanchard rented an office at his former place of business in Liberty street, and sought (apparently without success) to conduct, not a garage, but an automobile sales agency, and it is not entirely clear whether this was his own business or the company's business. He took with him from the Flatbush avenue garage three old automobiles of little or no value (to only one of which he had title), various automobile sundries and supplies, the cost price of which was $3,000, and book accounts, aggregating "between $10,000 and $15,000." Before the sundries and supplies were removed, Stringer bought for $400 all, it is a fair inference, that were of any real value. The remainder were stored at Liberty street, and there is no proof that anything was ever realized upon them. Blanchard's estimate that 90 per cent. of the book accounts were good and collectible is preposterous, in view of the situation. The company had been in dire financial straits for four months, and it is fair to infer that every possible effort had been made to realize upon outstanding accounts. There is no proof of what, if any, amount has ever been collected. If may be said, therefore, with substantial accuracy, that this transaction stripped the company of all its assets. In view of the further fact that the business in which it had been engaged was then and there actually discontinued, I am of opinion that the payment to the defendant was made in contemplation of insolvency and with intent to prefer it over other creditors, although the final collapse was avoided for some nine months thereafter.

Decree for complainant.

Cullen & Dykman and F. L. Durk, all of Brooklyn, N. Y., for appellant.

Leonard H. Davidow, of New York City (George Edwin Joseph and Leonard H. Davidow, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. A majority of the court affirm the decree upon the opinion of Judge Veeder.

SOUTHERN COTTON OIL CO. v. CENTRAL OF GEORGIA RY. CO.

(Circuit Court of Appeals, Fifth Circuit. December 21, 1915.)

No. 2706.

1. PLEADING ⟸37—PRESUMPTION AS TO FACTS NOT PLEADED.
In an action against a carrier for services in the wharfage and handling of goods, where neither the petition nor the agreed statement of facts, which was adopted as defendant's answer, showed that plaintiff was not the owner or shipper of the goods, it would be presumed that it was the shipper.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 87, 88; Dec. Dig. ⟸37.]

2. CARRIERS ⟸32—CHARGES—DISCRIMINATION—ALLOWANCES.
Under Comp. St. 1913, § 8569, requiring carriers subject thereto to file with the Interstate Commerce Commission, and print and keep open to public inspection, schedules showing all rates, fares, and charges, and stating all privileges or facilities granted or allowed, and all rules or regulations changing or affecting such rates, fares, and charges, a carrier cannot pay a shipper for the shipper's services in the wharfage and handling of goods, unless the charges therefor are specified in a duly published schedule or tariff.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. ⟸32.]

3. CARRIERS ⟸30—CHARGES—SCHEDULES—CANCELLATION BY INTERSTATE COMMERCE COMMISSION.
Where a schedule filed by a carrier and specifying certain allowances for wharfage and handling was directed by the Interstate Commerce Commission, in a proceeding before it, to be canceled, the commission's decision eliminated such allowances from the filed tariff.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. ⟸30.]

4. CARRIERS ⟸32—CHARGES—ACTIONS—RIGHT TO RECOVER.
Where, under a carrier's duly published schedule or tariff, it would have been a violation of law for it to voluntarily pay a shipper for the shipper's services in the wharfage and handling of goods, the shipper was not entitled to a judgment requiring the carrier to pay for such services.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. ⟸32.]

Pardee, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of Georgia; Wm. I. Grubb, Judge.

Action by the Southern Cotton Oil Company against the Central of Georgia Railway Company. Judgment for defendant (204 Fed. 476), and plaintiff brings error. Affirmed.

Geo. W. Owens, of Savannah, Ga., for plaintiff in error.

T. M. Cunningham, of Savannah, Ga., for defendant in error.

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

WALKER, Circuit Judge. [1-4] Neither the petition in this case nor the agreed statement of facts, which was adopted as the defend-

ant's answer, shows that the plaintiff was not the owner or shipper of the goods for services of the plaintiff in the wharfage and handling of which at Savannah recovery was sought. The contrary not appearing, it may be presumed that the plaintiff was the shipper of the goods. The carrier was not entitled to pay the shipper for such services unless the charges therefor were specified in a duly published schedule or tariff. U. S. Comp. St. 1913, § 8569. It appears from the statement of facts that the only schedule ever filed by the defendant which specified this charge for wharfage and handling was one which, in a proceeding instituted by the defendant before the Interstate Commerce Commission, and before this suit was brought, was directed by that body to be canceled. The effect of that decision, which, so far as appears, has not been directly attacked, was to eliminate such allowances from the filed tariff. American Sugar Refinery Co. v. Delaware, L. & W. Ry. Co. (D. C.) 200 Fed. 652.

The case, then, is that of a shipper seeking to recover of a carrier for services in connection with a shipment for which no allowance is specified in a filed tariff. The plaintiff was not entitled to a judgment of the court requiring the defendant to pay for services, the payment for which voluntarily by it would be a violation of a statute. As the averments of the petition and the agreed statement of facts did not show that the plaintiff was entitled to recover any part of the amount sued for, it could not have been legally prejudiced by the action of the court in dismissing the petition.

It follows that the judgment should be affirmed.

PARDEE, Circuit Judge, not concurring.

SEIDLER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 23.

INTERNAL REVENUE ⊂⊃47—"MANUFACTURE OF OPIUM FOR SMOKING PURPOSES"—WHAT CONSTITUTES.

Adding water to an extract of opium, which is itself smokable in order to make it milder for smoking purposes, is not a "manufacture of opium for smoking purposes" within the meaning of Act Oct. 1, 1890, c. 1244, § 36, 26 Stat. 620, imposing an internal revenue tax on such manufacture.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144–150; Dec. Dig. ⊂⊃47.

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

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

Criminal prosecution by the United States against Herman Seidler. Judgment of conviction, and defendant brings error. Reversed.

George Gordon Battle, of New York City (Isaac H. Levy and John Manning Battle, both of New York City, of counsel), for plaintiff in error.

H. Snowden Marshall, U. S. Atty., of New York City (Roger B. Wood and Edward W. McDonald, Asst. U. S. Attys., both of New York City, of counsel), for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The plaintiff in error was convicted of manufacturing opium for smoking purposes without complying with the provisions of section 36, c. 1244, Laws 1890, relating to the internal revenue, and sentenced to ten days' imprisonment and the payment of a fine of $300. Sections 36 and 40 read:

"Sec. 36. That an internal revenue tax of ten dollars per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes; And no person shall engage in such manufacture who is not a citizen of the United States and who has not given the bond required by the Commissioner of Internal Revenue."

"Sec. 40. That a penalty of not more than one thousand dollars, or imprisonment not more than one year, or both, in the discretion of the court shall be imposed for each and every violation of the preceding sections of this act relating to opium by any person or persons; and all prepared smoking opium wherever found within the United States without stamps required by this act shall be forfeited.

The testimony showed that the defendant had added water to Wyeth's Aqueous Extract of Opium, which is made for therapeutical purposes, and then smoked it; also, that the extract itself, though strong, can be smoked, but is made milder by adding water to it.

The defendant excepted to the refusal of the court to charge the jury:

"1. The mixture of Wyeth's Extract of Opium with water for the purpose of making it less thick and strong, so that it can be more easily smoked, is not the manufacture of opium for smoking purposes within the statute."

He also excepted to the answer of the court to the following question of the foreman of the jury:

"The Foreman: Taking Wyeth's Extract and adding water to it, is that manufacturing? The Court: Yes, if the defendant took Wyeth's Extract which was not fit for smoking purposes, that is, that is not opium made for smoking purposes, and in order to make such that he could smoke, added water to it, that was a part of a process of manufacturing opium for smoking purposes. Although only the last part of it, nevertheless that was a manufacture."

We cannot agree that adding water to an extract of opium, which is itself smokable, is a manufacture of opium for smoking purposes. The character of the article is not thereby changed. It would be as fair to say that grinding coffee beans was manufacturing coffee for drinking purposes, or that adding water to raw whisky was manufacturing whisky for drinking purposes. To manufacture an article, as stated in Anheuser-Busch Association v. United States, 207 U. S. 556, 28 Sup. Ct. 204, 52 L. Ed. 336, implies a change in its nature—"there

must be transformation; a new and different article must emerge having a distinctive name, character or use." Congress has no authority to exercise police power in the states, and a revenue law should not be strained for the purposes of conviction.

The judgment is reversed.

PLANTEN v. GEDNEY.

(Circuit Court of Appeals, Second Circuit. October 5, 1915.)

No. 307.

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

On motion by defendant to recall and amend mandate. Decree amended.

For former opinion, see 224 Fed. 382.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The decision of this court did not hold defendant responsible for the folded slips he had placed in his boxes. It does not seem to us that the decree goes any further; but, if there be doubt as to its terms, it may be amended by adding the clause:

"Nothing herein contained shall be construed to require the defendant to account for the use of small circulars, such as those marked Defendant's Exhibit V, used by him prior to the registration of complainant's trade-marks in 1907 and 1908, displaying the words 'When purchasing ask for Gedney's C. & C. Capsules, better known as Gedney's Black Capsules,' in small inconspicuous type, folded up and placed inside his boxes, nor for his advertisements to wholesale druggists in evidence in this suit prior to that time: Provided this shall not prevent the complainant from maintaining a suit against defendant for unfair competition on any grounds."

It will not be necessary to recall the mandate; upon exhibition of this decision to the judge who made the decree, he will add the clause above quoted.

In re FLANIGAN.

(District Court, E. D. Pennsylvania. December 15, 1915.)

No. 5404.

1. BANKRUPTCY ⊂=288—COLLECTION OF ASSETS—SUMMARY JURISDICTION.
In a bankruptcy proceeding, the trustee applied for a summary order requiring the bankrupt's wife to surrender to him an insurance policy, naming her as beneficiary, but reserving to the bankrupt the right to change the beneficiary. The wife claimed to own the policy by assignment from the husband in consideration of the payment of premiums. Pending the proceeding the bankrupt died, the policy was paid, and a sum equal to its cash surrender value was deposited to await the outcome of the controversy. *Held*, that the exercise of summary jurisdiction over the wife could not be justified on the theory that she never had possession of the money representing the cash surrender value, as it was the policy, and not such money, the surrender of which was originally sought, and, moreover, there was no money representing the cash surrender value, as the policy was never surrendered, and the only money was the face of the policy, which was payable to the beneficiary.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⊂=288.]

2. BANKRUPTCY ⊂=143—PROPERTY PASSING TO TRUSTEE—INSURANCE POLICIES.
Under the law of Pennsylvania (Act April 15, 1868 [P. L. 103, § 1]), providing that insurance taken out on the life of a husband for the benefit of, or bona fide assigned to, his wife or other dependent relative, is immune from the attack of creditors, such a contract of insurance does not pass to the husband's trustee in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. ⊂=143.]

3. BANKRUPTCY ⊂=143—PROPERTY PASSING TO TRUSTEE—INSURANCE POLICIES.
If an insurance policy authorizes insured to change the beneficiary at will, the ancillary or collateral contract giving him the right to surrender the policy and receive the surrender value passes to his trustee in bankruptcy, unless there has been a bona fide assignment of the whole policy, including the right to the cash surrender value.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. ⊂=143.]

4. BANKRUPTCY ⊂=288—COLLECTION OF ASSETS—SUMMARY JURISDICTION.
Where third persons interfere with property in the hands of the bankruptcy court because in the actual custody and possession of the trustee, or where the bankrupt has possession of property which he is unjustly withholding, the court will issue summary orders.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⊂=288.]

5. BANKRUPTCY ⊂=288—COLLECTION OF ASSETS—SUMMARY JURISDICTION.
Where a third person under a claim of ownership is in possession of property claimed to belong to a bankrupt, the bankrupt's right thereto must be established in a plenary action, though the claim of right must be a real one, and not a mere pretense, especially in view of Bankr. Act July 1, 1898, c. 541, § 23, 30 Stat. 552 (Comp. St. 1913, § 9607), giving Circuit Courts jurisdiction of controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees as such and adverse claimants concerning the property acquired or claimed by the

trustees, in the same manner and to the same extent as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⟹288.]

6. BANKRUPTCY ⟹302—COLLECTION OF ASSETS—SUMMARY JURISDICTION.

Where the summary process of a bankruptcy court is invoked against a third person, and jurisdiction is made to appear by an averment of want of title in such third person, or that the title asserted is merely colorable, and the third person sets up title, the averments as to his want of title, or that the title asserted is merely colorable, must be made good by the proofs.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. ⟹302.]

7. BANKRUPTCY ⟹293—COLLECTION OF ASSETS—SUMMARY JURISDICTION.

Where, in a summary proceeding to compel the wife of a bankrupt to turn over to the trustee a policy naming her as beneficiary, which she claimed had been assigned to her in consideration of the payment of premiums, she did not consent to the exercise of summary jurisdiction over her, but persistently challenged such jurisdiction, the proceeding must be dismissed, as she had a right to insist upon her claim of title being passed upon in a plenary action, if she so desired.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. ⟹293.]

In Bankruptcy. In the matter of Joseph J. Flanigan, bankrupt. On petition for review of order of referee. Order reversed and vacated, and petition dismissed.

E. Spencer Miller, of Philadelphia, Pa., for claimant.

G. A. Swayze and James J. O'Brien, both of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. In the view we have taken of this case a short outline statement will put us in possession of all the facts necessary to an understanding of the controlling questions involved. We will give in the order named the facts admitted; those in controversy and those of the latter found by the referee.

Joseph J. Flanigan on May 5, 1902, took out a policy of insurance for $10,000 on his life in the Equitable Life Assurance Society. It was made payable to his wife, Margaret Flanigan, in case she survived him, and otherwise to his estate. On February 5, 1915, a petition in bankruptcy was filed, followed in due course by an adjudication and the election of a trustee. The bankrupt disclosed the existence of the policy by filling in the usual forms provided for the purpose accompanying his schedules. The policy was then in force, the premiums having been paid to May 5, 1915. It had an agreed surrender value of $2,500. The policy itself was not in the possession of the bankrupt, but of his wife. The trustee demanded it of her, that he might surrender it, in order to receive its surrender value from the insurance company or from the bankrupt. The wife refused to give it up, claiming it to be her property. The trustee thereupon filed his petition, setting forth the facts, and praying for a sum-

mary order on the wife "to turn over the policy" to him. An order in the nature of a rule to show cause was allowed. The wife answered, challenging the jurisdiction of the referee in summary proceedings, and setting up that her title to the property was derived by contract entered into in 1902, when the policy was transferred and delivered to her in consideration of payments of the premiums. She further averred that such payments had been made by her, and the policy had since been in her possession as her property. A hearing was had upon petition, answer, and proofs. No witnesses were called or evidence offered by the wife, she standing upon her right to establish her ownership in the policy through a plenary action. The trustee, however, called the wife as under cross-examination. She testified in support of the claim made by her. The husband was also called by the trustee. No witnesses were called to contradict either, except that it was argued the testimony of the husband did not wholly support that of the wife. Pending the proceedings the husband died, and by arrangement the company paid the policy and the sum of $2,500 was deposited in bank in the joint names of the trustee and of Mrs. Flanigan to await the outcome of the controversy. The referee found the fact of the payment of the premiums against the wife, and that she had no other claim to the insurance than as the beneficiary of the policy. He further found that, as under the terms of the policy the husband had power to change the beneficiary at will, the trustee was entitled to the $2,500 deposited. He thereupon entered an order directing the moneys on deposit to be paid to the trustee. The referee, except by the making of the order, did not pass upon the question of jurisdiction. There was no finding or suggestion that the claim of the wife was merely colorable.

The petition for review assigns for error: (1) The entertaining summary jurisdiction by the referee; (2) his conclusion that the title of the wife must rest upon a contract, which is itself based upon a consideration; (3) his finding that the premium moneys paid were not the moneys of the wife; and (4) his finding that the testimony of the wife was not credible.

Discussion.

[1] Unless this case is the proper subject of summary proceedings, it is unnecessary and (if its merits are to be determined elsewhere) unprofitable for us to discuss any of the grounds for review other than the first. In the absence of any discussion by the referee, we must turn to the brief of counsel for the trustee to learn upon what the exercise of summary jurisdiction is based. It admits that the title to property in the possession of a third party under a claim adverse to that of the bankrupt estate cannot be asserted in summary proceedings. The assertion is made, however, that Mrs. Flanigan is not such claimant, because, although she had the policy (title to which she claimed), she did not have in her possession (what is now in dispute) the $2,500 representing the cash surrender value of the policy, the constructive possession of which was in the husband. The distinction made overlooks the fact that the order asked for originally

was "to turn over the policy," and that by agreement the policy was surrendered to the insurance company and the $2,500 substituted in its place. Moreover, the argument based upon any such distinction would lead to the conclusion that the wife is entitled to the whole $10,000. In point of fact there is no money representing the "cash surrender value," because the policy was never surrendered. The only money is the $10,000 insurance money, and all of that, by the express terms of the policy, was payable to the beneficiary. The argument of the trustee, moreover, overlooks the difference between the thing to which a party may be entitled and what through this may further be secured. A policy of insurance, it is true, is merely "the written evidence of a contract." So also is a bond. The owner of the contract may, however, in each instance, secure whatever is due under it. Indeed, this is the basis of the whole claim of the trustee. It is only incidentally or through the act of Congress that he becomes entitled to the "cash surrender value" at all. Indeed, strictly speaking, under the Bankruptcy Law he gives up all claim to the policy, and, in consequence, to the receipt of the cash surrender value from the insurance company, upon being given an equivalent sum by the bankrupt.

A view of the actual situation makes this clear. Congress had in direct contemplation a policy of insurance payable to the bankrupt or his estate. The right of the bankrupt in the contract would be a chose in action, and the title to this as property would pass, along with the other property of the bankrupt, to and vest in the trustee. It would not ordinarily be practicable for the trustee to continue the premiums, and in consequence he would surrender the policy and receive the cash surrender value. The bankrupt might be of such an age or in such a state of health that the cancellation of the policy would be a loss to him, without any further benefit to the bankrupt estate than the cash surrender value. The Bankruptcy Act gives the bankrupt the privilege of paying within a limited time the cash surrender value to the trustee. If the money is paid, the title to the policy reverts to the bankrupt, clear of the claims of all creditors who prove their debts. It is evident that in the one case the trustee collects from the insurance company the cash surrender value through and by his ownership and control of the policy. In the other case he obtains, not the surrender value, but an equivalent sum, through the same means, by giving up the ownership and control of the policy to the bankrupt. If the bankrupt declined to pay the trustee, and the trustee kept the policy alive, instead of surrendering it, the insurance moneys, when they became payable, would be payable to the trustee. If the trustee did not have the ownership and control of the policy, but it had been bona fide and for value assigned, and belonged to some one else having an insurable interest, the trustee could neither surrender it to the insurance company nor sell it to the bankrupt, and in consequence could get nothing. The fact (as is the case here) that the policy names the wife as beneficiary does not in principle alter the rights of the trustee. What passes to him by operation of the bank-

rupt law is all the property of the bankrupt which, broadly speaking, is subject to the claims of creditors.

[2, 3] The laws of Pennsylvania provide that insurance taken out on the life of the husband, for the benefit of or bona fide assigned to his wife or other dependent relative, is immune from the attack of creditors. Such a contract of insurance, therefore, does not pass to the trustee. A policy of insurance, however, does not evidence a simple contract of insurance, but in addition to this a number of ancillary or collateral contracts, one of which is to pay the surrender value. The naming of a beneficiary is nothing more than a direction to the insurance company to pay the insurance moneys when they become payable to such beneficiary. If the insured may change the beneficiary at will, he still owns the other contract, which gives him the right to cancel the policy and receive the surrender value. This right passes to his trustee in bankruptcy and may be exercised by the trustee. Hence the ruling (followed by the referee in this case) that where there is nothing more than the naming of the wife as beneficiary, and this is revocable by the husband, there the trustee may surrender the policy and receive the surrender value, and he does not lose this right unless paid an equivalent sum. If, however, there had been a bona fide assignment to the wife of the whole policy, including the right to the cash surrender value as well as the insurance moneys; and a fortiori, if the assignment had been for value, or before any debts were contracted by the husband, so that the policy was the property of the wife, the trustee could not surrender the policy or successfully claim its surrender value. This is in effect just what the wife in the present case claims. Of course, if her claim is not a valid one; if, for instance, her claim of title was based upon the payment of a consideration which had not in fact been paid (as the referee has found in this case), and there had been in fact no transfer to her of the policy by the bankrupt, then the trustee could assert the right which would be found to be in him. This brings us, however, to the question of whether her claim of right can be thus determined in summary proceedings.

[4-6] A few general observations may clear the view of this question for us. A trustee in bankruptcy is a double representative. He is the hand of the court in its dealings with those concerned with the administration of the bankrupt estate. He is also the successor of the bankrupt to all rights which accrued before the bankruptcy. The bankrupt himself, and all the property and effects which come into the possession of the trustee, and all persons who come into the bankruptcy proceedings, are subject to the jurisdiction of the court. Third persons, however, are not so subject. This gives us the guide to when summary process may be invoked and when resort must be had to plenary actions. If any one assumes to interfere with property which has passed into the hands of the court, because in the actual custody and possession of the trustee, or if the bankrupt has possession of property which he is unjustly withholding from his trustee, there the court will issue its summary orders. If, however, a third person is in possession of property under a claim of ownership, to which the bank-

rupt also makes claim, there the right of the bankrupt must be established in a plenary action. The claim of right must, of course, be a real one, and not a mere pretense. Hence we have the doctrine of colorable titles, or claims of right which are merely colorable. The provisions of the Bankrupt Law follow the line of these general principles. They are set forth in section 23, with the exceptions noted. When, therefore, summary process is invoked against a third person, and jurisdiction is made to appear by the petition, it is disclosed by an averment of want of title in the possessor, or that any title asserted is merely colorable. If title is set up by such third person, these averments must be made good by proofs. This probably explains the effort made by the trustee to disprove title in the claimant by proof of a negative. It is worthy of being noted that the petition itself in this case admits the claim of title by the wife, without any suggestion of its being merely colorable. The facts were passed upon by the referee and are argued before us precisely as they would be in a plenary action. It would therefore at least seem that the case is not one of summary jurisdiction. The conclusion to which we are led by these general principles is supported by all the cases among which we need only refer to Harris v. Bank, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528; In re Green (D. C.) 207 Fed. 693; In re Blum, 202 Fed. 883, 121 C. C. A. 241.

[7] The silence of the referee upon the subject of jurisdiction sends us upon the search for possible reasons for upholding it. There is some support in the cases for the application of the affidavit of defense rule, and to entertain jurisdiction when the facts advanced as proofs of title set up would not support the claim if admitted to be true. There is possible room in one aspect of the wife's claim for the application of this doctrine if it be accepted as applicable. The referee, however, has clearly not taken this view, because he plants his ruling upon a refusal to find the facts which, under the authority of King v. Supreme Council, 216 Pa. 553, 65 Atl. 1108, he seems to concede would support title in the wife. Consent would, of course, confer jurisdiction; but we clearly are not justified in finding such consent. The wife has consistently stood upon the assertion of what she deems her rights. She refused to surrender the policy because she claimed to own it. By her answer, as already stated, she challenged the jurisdiction. She refused to submit her proofs to the referee, and offered none, although giving testimony when called by the trustee as a witness. She reasserted her denial of jurisdiction when assigning errors in the rulings of the referee and in her petition for review. When the case was called for argument, the attention of her counsel was directed to her right to have the merits of her claim passed upon; but she still stood upon her right to refuse. This right must be accorded her without stint, and not grudgingly, but because it is her right. If she prefers to have her rights determined in other proceedings or in another forum, we see no escape from the conclusion that she is within her rights in refusing to submit herself to summary process.

This conclusion leads to the direction that the order of the referee

be reversed and vacated, and the petition upon which it is founded dismissed; and it is accordingly so ordered, with leave to the trustee to assert his claim of title to the policy or the money on deposit in any appropriate form of action.

MATHIESON et al. v. CRAVEN et al.

(District Court, D. Delaware. November 8, 1915.)

No. 271.

(Syllabus by the Court.)

1. WILLS ⊂⊃820—DEVISE—EQUITABLE CHARGE—"RAISE OUT OF OR CHARGE UPON."

Where a testator devised certain farms in fee in trust and directed the trustee, on the attainment of the age of twenty-one years by the youngest of the testator's sons who should live so long, to "raise out of or charge upon" them such sum of money as should be sufficient to equalize the shares of his sons in his estate, he thereby created an equitable charge or trust attaching to the farms from and after his death, although such charge could not be ascertained in amount until the making of an appraisement of the farms as directed in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114–2119, 2121; Dec. Dig. ⊂⊃820.]

2. WILLS ⊂⊃608—CONSTRUCTION—RULE IN SHELLEY'S CASE.

While the rule in Shelley's Case applies equally to equitable and legal estates it is necessary to its operation that the estate of the ancestor and the limitation to the heirs be of the same quality, namely, both legal or both equitable, and the rule, therefore, has no application where the first estate is the subject of an active trust, and there is a limitation over of the estate discharged of the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372–1378: Dec. Dig. ⊂⊃608.]

3. INFANTS ⊂⊃34—JURISDICTION—ORPHANS' COURT—COURT OF CHANCERY—PROPERTY OF MINORS.

In Delaware jurisdiction over the application of minors' property to their maintenance and education is, in the absence of a valid trust to that end, committed by statute to the Orphans' Court, and is not possessed by the Court of Chancery.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 64, 67; Dec. Dig. ⊂⊃34.]

4. EQUITY ⊂⊃87—LIMITATION OF ACTIONS—OPERATION OF STATUTE.

The bill in this case having been filed to enforce payment of money charged on land as a legacy, and no legal remedy existing for the enforcement of such charge, and the exclusive remedy being in equity, no statute of limitations is applicable to the suit either directly or by analogy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242–244, 395; Dec. Dig. ⊂⊃87.]

5. WILLS ⊂⊃826—LEGACY—CHARGE ON LAND—ENFORCEMENT OF PAYMENT—LACHES.

The period of twenty years should, in the absence of laches or special equities requiring the bringing of suit earlier, be allowed for the institution of proceedings for the enforcement of such a charge.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2128–2138; Dec. Dig. ⊂⊃826.]

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6. EQUITY ⊂⊃67—"LACHES."

Laches with respect to the bringing of suit is unreasonable and inequitable delay in proceeding for the enforcement of a demand or right viewed in the light of the circumstances of the particular case, and is essentially an equitable defense, not depending like the operation of a statute of limitations upon the mere lapse of time, but upon the equity or inequity of permitting the asserted claim or demand to be enforced.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191–196; Dec. Dig. ⊂⊃67.

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

7. EQUITY ⊂⊃79—LIMITATION OF ACTIONS ⊂⊃174—SUIT BY CASE TO CESTUI QUE TRUST—LACHES.

Whenever a trustee is barred by the statute of limitations from maintaining suit the cestui que trust represented by him is also barred; and probably a similar principle of representation applies to trustee and cestui que trust with respect to laches, whereby the laches of the former during the continuance of the trust relationship will be imputable to the latter; but it must be laches during the existence of the relationship and while the trustee is legally able to act.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 227; Dec. Dig. ⊂⊃79; Limitation of Actions, Cent. Dig. §§ 659–661; Dec. Dig. ⊂⊃174.]

8. VENDOR AND PURCHASER ⊂⊃231—BONA FIDE PURCHASERS—RECORDING OF INSTRUMENT—PURPOSE OF STATUTE.

The statutes of Delaware providing for the recording of deeds concerning lands and tenements nowhere declare that the record shall per se be notice to the world or any individual of the contents of the documents recorded, the object of the law being merely the protection of subsequent bona fide creditors, mortgagees and purchasers for value against prior deeds, by requiring their grantees within a reasonably short time to have them recorded in public offices where the record of their contents will be readily accessible to all persons using reasonable and ordinary care and diligence in the examination of titles; and the provisions of law relating to the recording of wills, while not prescribing any period within which they shall be recorded as in the case of deeds, have, nevertheless, a generally similar purpose.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. ⊂⊃231.]

9. VENDOR AND PURCHASER ⊂⊃231—BONA FIDE PURCHASERS—EXAMINATION OF TITLE—NEGLIGENCE—NOTICE.

It would have been gross negligence on the part of any one competent and undertaking to examine the title to and charges or encumbrances, if any, on the farms, not to have carried his examination back at least twenty years from the date of search, especially in view of the fact that the common law presumption of payment does not arise until the expiration of that period; and an examination covering a period less than twenty years would have disclosed to proposed purchasers matters of record of such character as to put them in the absence of culpable negligence upon inquiry which, if pursued with reasonable care and diligence, could not have failed to acquaint them with the existence of the charge in question, or at least to deter them from purchasing save consciously at their peril.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. ⊂⊃231.]

10. VENDOR AND PURCHASER ⊂⊃231—BONA FIDE PURCHASERS—NOTICE—VENDOR AND PURCHASER.

Purchasers of real estate are chargeable with knowledge or notice of those facts, of record or suggested by the record, of which they or their

attorneys could not have remained in ignorance save through an omission to observe any proper degree of care and diligence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. ⟸231.]

11. VENDOR AND PURCHASER ⟸231—BONA FIDE PURCHASERS—EFFECT AS NOTICE—THIRD PERSONS NOT DEALING WITH TITLE—"CONSTRUCTIVE NOTICE."

There is an essential difference between the situation of the purchasing defendants and that of the complainants, in that the former were put upon inquiry and the latter were not; for while the recording or registry of a deed or other instrument relating to land is constructive notice of its contents to all persons subsequently dealing with the title, it does not so operate with respect to third persons not so dealing and innocently ignorant of any rights which may be affected by such deed or instrument.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. ⟸231.]

In Equity. Suit by Catharine P. Mathieson and her husband against Thomas J. Craven, as executor of and trustee under the will of Thomas Jamison, deceased, and others. Decree for complainants as to certain defendants, and bill dismissed as to others.

Walter J. Willis, David T. Marvel, and Josiah Marvel, all of Wilmington, Del., for complainants.

John H. Rodney and Alexander B. Cooper, both of Wilmington, Del., for defendant Green.

John Biggs and Armon D. Chaytor, Jr., both of Wilmington, Del., for defendant Biggs.

Josiah O. Wolcott, of Wilmington, Del., for defendants Lofland.

Thomas F. Bayard, John P. Nields, and Herbert H. Ward, all of Wilmington, Del., for defendant Craven.

James W. Lattomus, of Wilmington, Del., for defendants Jamison and others.

BRADFORD, District Judge. On a former occasion a demurrer to the bill in this case was overruled (164 Fed. 471), and since then the evidence has been taken, consisting of voluminous testimony, many exhibits and sundry stipulations, and the case has been twice elaborately argued by counsel on both sides. During the progress of the suit numerous amendments of the pleadings, both as to parties and to subject-matter, have been made. The complainants in the bill in its final form are Catharine P. Mathieson and George F. Mathieson, her husband. Mrs. Mathieson is a grandchild of Thomas Jamison, late of Red Lion Hundred, Delaware, who made his will June 3, 1864, and died in December of the same year, and she and her husband have prosecuted the suit for the enforcement of alleged rights and interests claimed to be vested in her under that will. The defendants are Thomas J. Craven, as executor of and trustee under the will, Eliza C. Green, Lawrence Lofland and Martha Lofland, John F. Biggs, Clarence Jamison (of Delaware), Charles Jamison, James Sartin, Raymond Jamison, Albert Jamison, Florence Jamison, Clarence Jamison (of Pennsylvania), Helen Grebb, Oliver V. Jamison and Laura Jami-

son. The testator when he made his will, and when he died, was the owner of certain personal property, and was seized in fee of three farms, among others, in New Castle County, Delaware, commonly known as the Jamison Corner farm, hereinafter referred to as the Corner farm, containing about 200 acres, in St. Georges Hundred, the Capelle farm, containing about 212 acres, in Red Lion Hundred, and the Homestead farm, containing about 230 acres, in St. Georges Hundred. The testator left to survive him three minor sons, Edgar, Clarence and Oliver, and three daughters, Anna, Agnes and Laura. In and by his will the testator made provision for his three daughters, and after directing the payment of his debts and funeral expenses, and making certain bequests, unnecessary to consider in this connection, provided, among other things, as follows:

"I order and direct the property on which I now reside called 'Damascus,' situated in Red Lion Hundred aforesaid, to be sold as soon after my decease as conveniently may be without sacrifice, and I hereby authorize and empower my executor to sell the same at public or private sale, for the best price or prices which can be gotten for the same, and to make, execute and deliver to the purchaser good and sufficient deeds of conveyance therefor.

"I give, devise and bequeath unto my said executor and the guardian hereinafter named and appointed for my minor children, all my estate real and personal not hereinbefore otherwise disposed of, to have and to hold the same unto them, or the survivor of them, the survivors' heirs and assigns, in trust nevertheless for the uses, intents and purposes hereinafter set forth and declared.

"To have and to hold the farm known as the 'Jamison Corner Farm,' containing about two hundred acres, situated in St. Georges Hundred, in trust to raise thereout the sum of four thousand dollars in such manner as they may deem most advantageous, or to make the same a charge upon the land, the principal and interest thereon payable to my said trustees for purposes hereinafter mentioned, subject to this charge to suffer my son Albert Jamison to use, occupy, rent and receive the rents, issues and profits of said farm during the term of his natural life, for his proper use and benefit. In case of the death of the said Albert leaving a child or children, or the issue of such, remainder to said child or children or the issue of any such child or children, their heirs and assigns free and discharged from the aforesaid trust. In case of the death of the said Albert without leaving issue, then remainder over to my sons Edgar, Clarence and Oliver, and their issue, the heirs and assigns of such issue, subject to the same conditions and limitations as their own shares are respectively subject to under this will. * * *

"To have and to hold the farm known as the 'Capelle Farm' containing about two hundred and twelve acres, situated in Red Lion Hundred, and the farm known as the 'Homestead Farm,' containing about two hundred and thirty acres, situated in St. Georges Hundred aforesaid, in trust, to rent the same to good and careful tenants at the best cash or share rents attainable, as in their judgments shall be most advantageous, and to collect, expend and invest the same as hereinafter provided, until the majority of my youngest son who shall live to attain the age of twenty-one years, then to raise out of or charge upon the said farms respectively, such sum or sums as shall be necessary to make equal the shares of my sons Edgar, Clarence and Oliver as hereinafter provided, and subject to such charge and conditions.

"To permit and suffer my son Clarence to use, occupy and rent and to receive the rents, issues and profits of the said 'Capelle Farm' during the term of his natural life for his proper use and benefit, and in case of the death of the said Clarence leaving a child or children, or the issue of such, remainder to such child or children or the issue of such, their heirs and assigns, free and discharged from the aforesaid trust.

"To permit and suffer my son Oliver to use, occupy and rent, and to receive the rents, issues and profits of the said 'Homestead Farm' during the term

of his natural life, for his proper use and benefit, and in case of the death of the said Oliver leaving a child or children, or the issue of such, remainder to such child or children or the issue of such, their heirs and assigns, free and discharged from the aforesaid trust.

"To invest all the rest and residue of my estate, not herein otherwise disposed of, in bonds and mortgages as aforesaid, interest payable semi-annually, and keep the same so invested until the majority of my youngest son who shall live to attain the age of twenty-one years; whereupon, I desire my trustees aforesaid to have the said 'Capelle Farm' and the said 'Homestead Farm' valued at their just and true value in money by three substantial men of the neighborhood, and that to such valuation the trustees shall add the four thousand dollars and all interest accrued thereon which hereinbefore is charged upon the 'Jamison Corner Farm,' and all the rest and residue of my estate invested as first directed in this Item, and also any other legacies or devises to which my said sons Edgar, Clarence and Oliver may become entitled, and the aggregate sum thus ascertained to apportion in equal shares among my sons Edgar, Clarence and Oliver, and their issue, the issue in all cases taking their parents' share. In the said apportionment my said son Clarence to take the said 'Capelle Farm' with such incumbrances or additions as may be necessary to equalize the shares of the said Edgar, Clarence and Oliver, and the said Oliver to take the 'Homestead Farm' with such like incumbrance or addition, but the share of the said Edgar shall be in money, invested in good bonds and mortgages as aforesaid, the interest payable to him, after such apportionment, semi-annually during his natural life and from and immediately after his death the principal and all interest accrued thereon payable to his child or children or the issue of such.

"The rents and profits arising from the Capelle and Homestead farms and the interest of all sums invested as in this Item prescribed, and so much thereof as shall be necessary, shall be expended by said guardian in the maintenance and education of my said sons Edgar, Clarence and Oliver.

"And the residue if any invested for their benefit, first deducting yearly a sum not exceeding one hundred and fifty dollars, to be expended on each of the said farms to keep the same productive and in good condition.

"In case of the death of any of my said sons Edgar, Clarence and Oliver without leaving any child or children or the issue of such, the share of the one so dying shall go to the survivor or survivors and the issue of such as may be deceased, subject to the same conditions and limitations as their own shares respectively hereinbefore designated.

"It is my will and I hereby appoint and request my esteemed friend shall have the guardianship of any child or children living at my decease, during the minority of such; and I urge that the utmost care be given to their moral training and education.

"I nominate and appoint my valued friend Thomas J. Craven my executor, and the said executor and guardian, trustee to effect the trusts hereinbefore set forth and declared."

Letters testamentary on the above will were granted July 27, 1866, to Craven, therein named as executor and trustee, who forthwith duly qualified and undertook the administration of the estate, and accepted as sole trustee the trusts imposed by the will; the testator having failed to fill the blank left in the will for the name of the guardian who was to be co-trustee with Craven. All the debts and funeral expenses of the testator and all legacies, pecuniary charges or demands mentioned in his will, except that for the benefit of Edgar Jamison and his surviving children or issue, have been fully paid and satisfied. Edgar died May 1, 1886, leaving to survive him two minor daughters, Catharine, born February 2, 1878, who married George F. Mathieson, and is one of the complainants, and Vesta, born December 17, 1879, who married James D. Bastian, and is still living. Oliver, the

youngest son of the testator, attained the age of twenty-one years May 1, 1878. Shortly thereafter it appears that Craven, without being judicially discharged from his trusteeship under the will, but with the consent of the three sons of the testator, ceased to act as trustee and removed to New Jersey, where he has continued to reside. But there is evidence, as hereinafter particularly referred to, to the effect that before doing so he appointed William M. Stuckert, Purnal J. Lynch and John P. Hudson, three substantial men of the neighborhood, to appraise at their just and true value in money the Capelle farm, the Homestead farm and the Corner farm, who proceeded to and did appraise the three above mentioned farms respectively at the sums hereinafter mentioned. Notwithstanding the sale, pursuant to the will, of the Damascus farm, and the payment to the executor of the purchase money therefor of $6,782.83, it is clearly established by the evidence that the testator's estate was at the time of the attainment by Oliver of his majority and thereafter indebted to the executor, and that there was not at or since that time any personal property of the estate left to be invested and kept invested in bonds and mortgages as contemplated by the testator until such attainment of full age by Oliver and the appraisement of the farms as provided in the will. Aside from the prayers for subpœna and answer and other and further relief, the bill prays in substance that the amount due to Catharine P. Mathieson, including principal and interest, under the will be ascertained and declared an equitable lien from and after the death of the testator upon the Corner, Capelle and Homestead farms in the proportions provided in the will; that their present owners be declared to hold the same subject to the above-mentioned equitable lien of Mrs. Mathieson; that Craven as trustee, or some other trustee to be appointed, be ordered and directed to raise out of the several farms the amount due to her by sale, mortgage or otherwise as the court may direct within three months; and that certain owners of portions of the above named lands and premises be restrained from conveying the same until the further order of the court.

[1, 2] The testator devised and bequeathed all his estate, real and personal, with the exception of silverware, household furniture, goods and chattels, and the Damascus farm, supposedly to two trustees, which accounts for his use of language in the plural, instead of the singular, but in fact, owing to failure to fill the above mentioned blank, only to Craven, in trust, among other things, to have and hold the Corner farm, and "to raise thereout the sum of four thousand dollars, in such manner as they may deem most advantageous, or to make the same a charge upon the land, the principal and interest thereon, payable to my said trustees for purposes hereinafter mentioned," and "subject to this charge to suffer" his son Albert "to use, occupy, rent and receive the rents, issues and profits of said farm during the term of his natural life, for his proper use and benefit," with remainder "in case of the death of the said Albert leaving a child or children or the issue of such" to "said child or children or the issue of any such child or children, their heirs and assigns, free and discharged from the aforesaid trust," but "in case of the death of the said Albert with-

out leaving issue, then remainder over to my sons Edgar, Clarence and Oliver, and their issue, the heirs and assigns of such issue, subject to the same conditions and limitations as their own shares are respectively subject to under this will." Albert Jamison died during the lifetime of the testator without leaving issue. It is unnecessary to inquire whether, had he survived his father, he would have taken an estate tail in the Corner farm, on the one hand, or, on the other, only a life estate therein, with remainder in fee to his children or their issue; for in either event, having died without leaving issue, it was the clear intent of the testator that that farm should enure to the benefit of his other sons, such intent coinciding with the principle of law preventing a lapse of the devise under such circumstances. Mowatt v. Carow, 7 Paige (N. Y.) 328, 336, 32 Am. Dec. 641. The manner and conditions in and on which the farm was to be held depended solely upon the testator's intention, to be ascertained from the will as a whole, and which when so ascertained, must control. Jacobs v. Wilmington Trust Co., 9 Del. Ch. 400, 80 Atl. 346; In re Reed's Estate, 7 Pennewill (Del.) 30, 76 Atl. 617. It was to be "subject to the same conditions and limitations as their own shares are respectively subject to under this will." This is in marked contrast with the provision that in the event of Albert surviving the testator and leaving a child or children, or issue of such, the Corner farm should go to such child, children, or issue, and their heirs and assigns, "free and discharged from the aforesaid trust." The provision for the raising or charging of the $4,000 upon or out of the farm will be more particularly referred to hereinafter. It might be inferred from the phrase "remainder over to my sons, Edgar, Clarence and Oliver, and their issue," if standing alone, that what was to pass to them comprised both the legal and the equitable estate in the land united and coextensive, in contradistinction to an interest or estate, either wholly or partially of an equitable nature only. But this is an impossible construction when the will is read as a whole. What was to pass was to be subject to the same conditions and limitations as the shares of Albert's brothers—"as their own shares are respectively subject to under this will." The conditions and limitations under which the Capelle and Homestead farms were to be held and enjoyed were thus made applicable to the Corner farm. Edgar's share in his father's estate, aside from his participation in the rents and profits of land until the attainment of his majority by the youngest son of the testator who should live so long, was to consist wholly of personal property, or of a fund raised out of or charged upon real estate, or of both. And in so far as there was a difference between the conditions and limitations of such personal property or fund, and those applicable to the Capelle and Homestead farms it must be held that the Corner farm was intended by the testator to be subject to those applicable to the holding and enjoyment of the other two farms. Without pausing now to consider whether or not there was a difference between the personal property or fund and the farms with respect to the conditions and limitations, it is absolutely clear that the trustee was clothed with an active trust touching both real estate and personalty until the

youngest son should become of age and an appraisement of the farms should be made pursuant to the directions of the will. The testator provided that the Capelle and Homestead farms should be held "in trust to rent the same to good and careful tenants at the best cash or share rents attainable, as in their judgments shall be most advantageous, and to collect, expend and invest the same as hereinafter provided, until the majority of my youngest son who shall live to attain the age of twenty-one years, then to raise out of or charge upon the said farms respectively such sum or sums as shall be necessary to make equal the shares of my sons Edgar, Clarence and Oliver." He further directed his trustees as follows:

"To invest all the rest and residue of my estate, not herein otherwise disposed of, in bonds and mortgages as aforesaid, interest payable semi-annually, and keep the same so invested until the majority of my youngest son who shall live to attain the age of twenty-one years; whereupon, I desire my trustees aforesaid to have the said 'Capelle Farm' and the said 'Homestead Farm' valued at their just and true value in money by three substantial men of the neighborhood, and that to such valuation the trustees shall add the $4,000 and all interest accrued thereon which hereinbefore is charged upon the 'Jamison Corner Farm,' and all the rest and residue of my estate invested as first directed in this Item, and also any other legacies or devises to which my said sons, Edgar, Clarence and Oliver may become entitled, and the aggregate sum thus ascertained to apportion in equal shares among my sons, Edgar, Clarence and Oliver, and their issue, the issue in all cases taking their parent's share. In the said apportionment my said son Clarence to take the said 'Capelle Farm' with such incumbrances or additions as may be necessary to equalize the shares of the said Edgar, Clarence and Oliver, and the said Oliver to take the 'Homestead Farm' with such like incumbrance or addition, but the share of the said Edgar shall be in money invested in good bonds and mortgages as aforesaid, the interest payable to him, after such apportionment, semi-annually during his natural life and from and immediately after his death, the principal and all interest accrued thereon, payable to his child or children or the issue of such."

Albert having died before his father without child or issue, as before stated, the Corner farm passed under the will to Craven as trustee and was held by him on trusts similar to those above quoted relating to the Capelle and Homestead farms. This conclusion is in perfect harmony with the broad and expressed intention of the testator, that the shares of Edgar, Clarence and Oliver should be equal, and that Edgar's share should consist wholly of personalty. It was the purpose of the testator that, in the above mentioned event, his three remaining sons should equally have the benefit of the Corner farm and this could be as easily and fully effected by its being held in trust for Clarence and Oliver equally as in any other manner. Being "subject to the same conditions and limitations" as the shares of the three other sons, it would enter into the basis of the appraisement directed in the will, and Edgar, Clarence and Oliver would, under the provision for the adjustment and equalization of shares equally have the benefit of that farm. It could lead to no difficulty or embarrassment. As Clarence and Oliver were to take the Capelle and Homestead farms respectively subject to such adjustment and equalization, so, likewise subject, they would together take in equal shares the Corner farm. And Edgar through such adjustment would have his equal third share

in money securities from a fund raised out of or charged upon the three farms. Any other conclusion, I think, would be based solely upon speculation, lead to confusion and defeat the plainly expressed intention of the testator. The testator nowhere declared that on Albert's death without child or issue the Corner farm should go to Edgar alone, or that Edgar's share should not consist of personalty. Indeed, the provision that such share should so consist followed that relating to the death of Albert without issue, and it is not to be assumed that, in the absence of an explicit statement to the contrary, the testator did not mean what he expressly declared without qualification. Further, not only any assumption that the testator intended that Edgar should in the specified event have had real estate instead of personalty would be inconsistent with the declaration that his share should consist of personalty, but it would have been extremely improbable that if the testator had such an intention he should have provided that the Corner farm should go to Edgar, Clarence and Oliver instead of to Edgar only. And it is further to be observed that in view of the difference between the conditions and limitations applicable under the will to personalty and those applicable to the farms, much confusion and uncertainty would naturally result from the mixture of real estate and personalty in Edgar's share. The assumption, which has been indulged in by some of those connected with the subject-matter of this suit, that on Albert's death without child or issue during the life-time of his father the Corner farm should pass in equal shares to Edgar, Clarence and Oliver would, unless the court should find a repeal purely by implication of the express provision that Edgar's share should consist of personalty, result in its consisting of both real estate and personalty—personalty so far as his share of the value of the Homestead and Capelle farms is concerned, and real estate as to his share in kind of the Corner farm. This, it seems to me, would be a wholly inadmissible construction of the will.

Oliver, the youngest son, having attained his majority May 1, 1878, it was Craven's duty under the trust imposed upon him, which he had accepted, as soon as practicable thereafter to have an appraisement made as provided for in the will. It is contended by the defendants that such appraisement was a condition precedent to the existence of any charge on the farms in favor of Edgar Jamison and his surviving children or issue, and that no such appraisement was made. If the trustee had omitted to cause it to be made he would have been derelict in the discharge of his duty under the trust. Careful examination of the evidence, notwithstanding some minor inconsistencies and contradictions, has satisfied me beyond all reasonable doubt that the trustee caused an appraisement to be made pursuant to the provisions of the will. Oliver, having attained his majority more than six months previously, joined, November 18, 1878, with Clarence and Edgar in a written request to the trustee in which they said:

"In accordance with the provisions of the will of our Father, Thomas Jamison, Dec'd, we have to request you to authorize John P. Hudson, Esq., William M. Stuckert, Esq., and Purnell J. Lynch, Esq., three substantial men of the neighborhood, to place a valuation upon the three farms, viz., the

'Capelle Farm,' the 'Homestead Farm' and the 'Jamison Corner Farm,' and to apportion the same as required by the terms of said will."

Craven, in his amended answer as trustee, under oath states:

"After refreshing his recollection by examination of certain papers in his possession, that to the best of his recollection, information and belief, between the date of November 18th, 1878, and the 8th day of August, A. D. 1879, being after the time the said Oliver V. Jamison attained his majority and became the age of twenty-one years, upon the joint request of Clarence Jamison, Oliver V. Jamison and Edgar Jamison, this defendant appointed William M. Stuckert, Purnell J. Lynch and John P. Hudson, three substantial men of the neighborhood, to appraise the Capelle Farm, the Homestead Farm and the Jamison Corner Farm, lately of Thomas Jamison, deceased, and that said appraisers did, between the dates above mentioned, appraise said three farms respectively at their just and true value in money."

Craven testified to the effect that he, after Oliver attained his majority, at the written request of Edgar, Clarence and Oliver above quoted, appointed Stuckert, Lynch and Hudson to appraise the farms as provided in the will; that he showed the written request to one or two of the three men whom he had appointed and explained to them why he wanted them to act as appraisers; and that the two papers, Complainants' Exhibits 1 and 17, "show that I must have appointed these men, and it shows they made an appraisement," but that he does not know "what became of that appraisement." Exhibit 17 is the written request for the appointment of appraisers, and Exhibit 1 is a paper in the handwriting of Craven, under the hands and seals of Craven and Edgar, dated August 8, 1879, in which Craven states:

"I hereby give up the control and management of the Jamison Corner Farm belonging to the Estate of Thomas Jamison (deceased) and by and with the consent of Edgar Jamison appoint Oliver V. Jamison to rent and manage and receive the rents, profits, &c. of the same and he to pay Edgar Jamison the sums due and that may become due him as interest from the appraisement of the real estate of the Jamison estate."

Edgar, August 8, 1879, signed a paper, attested by Richard T. Cann (Defendants' Exhibit D), in which he said:

"I hereby release Thomas J. Craven as trustee of the Jamison estate from all claim or claims of interest that is due or may become due on the one-third part of the appraisement of my father's est."

Purnal J. Lynch, eighty years old when giving his evidence, testified:

"Q. Did you and Mr. William M. Stuckert and Mr. John P. Hudson, at Mr. Craven's request, appraise the three farms left by Thomas Jamison at the time of his death? (Objection.) A. We agreed upon a price on each farm, to the best of my knowledge. Q. Who requested you to put a price on these farms? A. Mr. Craven asked me to meet there and fix a price. * * * Q. What did you three men do after Mr. Craven asked you to fix a price? A. We agreed upon a price, I think. Q. What was the price, or valuation, or appraisement fixed by you on the Homestead Farm? A. I think it was twenty-two thousand dollars. Q. What was the price, or valuation, or appraisement fixed by you three men on the Capelle Farm? A. Fourteen thousand dollars, to the best of my knowledge. Q. What was the price, or valuation, or appraisement, which you three men fixed for the Jamison Corner Farm, if you so fixed it? A. Twelve thousand dollars. Q. What was the total valuation put upon the three farms by you three men? A. Forty-eight thousand dollars. * * * X. After you appraised the farms,

did you do anything more? A. I think we put the price on a piece of paper and give it to Thomas Craven, or just made a little memorandum of it, that is, Mr. Craven did. * * * X. When is the next time, after the time when you appraised them, that you thought anything about, or tried to think anything about, the transaction? A. I never tried to think about it. I didn't know and I couldn't tell you anything about it. I forgot all about it until they mentioned it to me. I had forgotten it entirely until it came to my memory again. I know now that I recollect meeting Thomas Craven there. * * * X. Didn't you talk with Mr. Craven about it? A. Yes, sir; I talked with Mr. Craven. X. Lately, I mean? A. Two years ago. * * * X. At that time, Mr. Lynch, when you met Mr. Craven here, did you then remember that you had put a valuation on the farms? A. I told him I had a slight remembrance of it. * * * X. After Evans talked with you, how soon was it that you began to remember the valuations? A. I never once studied much about it until after Mr. Craven asked me to meet him, and I told Mr. Craven then that I didn't believe I knew much about it, and I didn't give him much satisfaction; but I got to thinking about it, thinking it over, and it came back to me. * * * X. Didn't you talk over with somebody, so as to bring it back to your mind, this appraisement? A. No, sir. X. How did you remember the figures? A. They came to my mind. They came to my mind and I remembered about going there and Thomas Craven asking me to go there. * * * X. In your examination in chief you said that you three men agreed on a price for each farm, 'I think.' You used the words 'I think'? A. Yes, sir. X. Are you positive about it? A. I should say, to the best of my knowledge. That is all that I can say. No, I wouldn't say positively; I wouldn't. X. Haven't you talked it over with somebody lately to bring back to your mind these figures? A. Nobody knew anything about it. I didn't know anything about it. No, sir; not a word to anybody. I saw nobody to talk to about it. No, it came back to me, I thought a great deal over it, got to studying about it, laying at nights studying about it. * * * X. When did it first come to your mind that you did make an appraisement? A. I don't know. I got to studying about it after I met Mr. Craven here, but I don't know when it was done. X. When, to the best of your knowledge, was it you met Mr. Craven here? A. It has been two years ago anyhow, I think. I have never been here since, I know. * * * X. You, at first, told Mr. J. Frank Biggs that you didn't appraise them? A. And I told Tom Craven so, too. I told you awhile ago I intended to write to Tom afterwards, but I didn't. I thought I would see him at some time and tell him if it was very necessary. * * * R. Q. Why did you intend, and for what purpose did you intend, to write to Mr. Craven? (Objection.) A. Because I had told him I didn't know anything about it. R. Q. After you had told him that you knew nothing about it did you recollect the circumstances before you saw me [Mr. Marvel] in the fall of 1911? A. Yes, sir. I intended to write. I wanted to explain it, to rectify the mistake I made. * * * R. Q. What mistake? A. I told him I didn't ever have anything to do with it, didn't appraise the property, that I didn't know anything about it, and I wanted to tell him that I had had."

The manner in which Lynch, notwithstanding his advanced age, stood the long and wearying cross-examination to which he was subjected, affords persuasive evidence of his intelligence and truthfulness. During his cross-examination he was confronted with what purported to be an affidavit made by him before Charles K. Lloyd, notary public, September 2, 1908, stating that he did "not recollect of ever appraising or putting a valuation upon the 'Capelle Farm' or 'Homestead Farm' or any other real estate devised under the last will and testament of Thomas Jamison," and that "to the best of his knowledge and belief, the said farms and real estate never were appraised or valued by him; and that he never acted in the capacity of appraiser of, or put a value

upon, any of the real estate of Thomas Jamison, deceased, under the instructions" of his will. I do not attach much importance to this paper for several reasons. In the first place, Lynch positively denied making such affidavit, and testified to the effect that he was sure that if he executed it he was not in a condition to do it. The notary before whom Lynch subscribed his name was not produced as a witness nor his absence accounted for; nor the draftsman of the paper, nor the person or persons who induced Lynch to sign it, nor any one to state the circumstances under which he signed or his condition at that time; and there is no attempt whatever to account for the failure to adduce such evidence. Further, as has already appeared, Lynch had virtually forgotten the transaction of the appraisement, and did not recall it until about two years before giving his testimony in 1912. Again, no witness has been produced to assail Lynch's veracity or integrity. Still further, he was declared by Clarence, Edgar and Oliver in the written request to Craven to appoint appraisers to be one of the "substantial men of the neighborhood." And the fact that Edgar had sufficient confidence in his character and ability to appoint him, November 28, 1883, trustee for the discharge of important and delicate trusts and discretionary powers (Defendants' Exhibit No. A–9), is evidence that he was regarded as a man of judgment, integrity and discretion. And finally, Lynch is corroborated as to the making of an appraisement of the three farms shortly after Oliver attained his majority by an overwhelming weight of evidence both documentary and oral. Oliver Jamison testified as follows:

"Q. Did Thomas J. Craven, as executor and trustee under your father's will, have the farms appraised and a valuation placed upon them after you became twenty-one years of age? (Objection.) A. He did. Q. Who were the appraisers selected by Thomas J. Craven to place that valuation? A. William M. Stuckert, John P. Hudson and Purnal J. Lynch. Q. What valuation, Mr. Jamison, if you know, did they place upon the Homestead Farm? (Objection.) A. Twenty-two thousand dollars. * * * Q. What valuation did they place upon the Capelle farm? (Objection.) A. Fourteen thousand dollars. * * * Q. What valuation did they place upon the Jamison Corner farm? (Objection.) A. Twelve thousand dollars. Q. When was this done? (Objection.) A. Soon after I became of age. * * * Q. Were Purnal J. Lynch, William M. Stuckert or William H. Stuckert, whichever you have it, and John P. Hudson, substantial men of the neighborhood at that time? A. They were considered three of the best men in the neighborhood. Q. They lived in the locality of the farms? A. Yes, sir; all their lives, I guess. Q. After the appraisement was made and the valuations were placed upon the farms, was the interest coming to Edgar, under your father's will, paid to Edgar after that time? (Objection.) A. Yes, sir. * * * Q. Mr. Jamison, was the interest paid to Edgar on his share as found by the valuation and apportionment? A. It was."

Oliver's testimony as to the appraisement of the farms has been assailed or criticized because he stated on cross-examination that he was not present with Stuckert, Lynch and Hudson at the time he says they made the appraisement and did not see it actually made. But such objection to the evidence given by him is not sufficient to avail against his positive statement that an appraisement was made by the three men named resulting in a valuation of $22,000 for the Homestead farm, $14,000 for the Capelle farm, and $12,000 for the Corner farm;

for the reasons that on the written request of himself and his two brothers Craven appointed the three appraisers, and they met presumably pursuant to their appointment, as testified to by Oliver, and that he subsequently, as he testified in effect, made settlements with Edgar Jamison upon the basis of a valuation of the testator's real estate in accordance with an appraisement as stated by him. The testimony of Oliver on cross-examination powerfully supports and corroborates his statement given in chief, and also the testimony of Lynch that the three farms were appraised at $22,000 for the Homestead farm, $14,000 for the Capelle farm, and $12,000 for the Corner farm, aggregating $48,000. It appears from the evidence, and is not disputed, that at and prior to the time of the appraisement, through the sufferance of Craven, Oliver had entered into possession of the Homestead farm, Clarence of the Capelle farm, and Edgar or his representative of the Corner farm. While Oliver in his direct examination had testified to the effect that interest was paid by him to Edgar on his share as found by the appraisement, there was no statement of the amount of the interest so paid. But on cross-examination he testified to the effect that owing to the difference in the appraised value between the Homestead farm and the Capelle and Corner farms, he paid interest to his brothers on the sum of $6,000. The total valuation of the three farms being $48,000, and the Homestead farm having been appraised at $22,000, Oliver was in the enjoyment of real estate worth $6,000 more than the equal third part of the total valuation of the three farms, namely, $16,000. The addition of $2,000, parcel of this $6,000, to the $14,000, representing the appraisement of the Capelle farm, and of $4,000, the remainder of the $6,000, to the $12,000 representing the appraisement of the Corner farm, exactly equalizes the shares of the three surviving sons of Thomas Jamison, and accordingly Oliver paid to his brothers the exact amount necessary to equalize the three shares so far as beneficial enjoyment was concerned, on the basis of an aggregate valuation of $48,000 of which $22,000 represented the Homestead farm and the payment of interest on $6,000 to his two brothers is potent evidence against any other valuation than that testified to, not only by Oliver, but by Lynch, the only surviving appraiser. Edgar, Clarence and Oliver having, November 18, 1878, joined in the written request to Craven for the appointment of appraisers to value the three farms in question, the fact that they united December 15, 1879, shortly before he moved to New Jersey in a written statement (Defendants' Exhibit H) that he had "duly proceeded in the execution of the said will, and of the trusts therein to him confided," necessarily carried with it, in the absence of any evidence showing or tending to show any change of view on their part with respect to the desirability of an appraisement of the three farms, a strong presumption that he had caused an appraisement and valuation to be made as requested. That there was an appraisement of the three farms shortly after Oliver attained his majority has been established beyond question, by documentary as well as oral evidence, and both Lynch and Oliver agree as to the amounts at which the three farms were respectively valued. No witness has been produced to show that the valuation made by the three appraisers was other than

that stated by the witnesses for the complainants, namely, $22,000 for the Homestead farm, $14,000 for the Capelle farm, and $12,000 for the Corner farm. The loss or destruction of the written embodiment of the results of the appraisement cannot serve to defeat a just demand of the complainants based upon such results. It was the duty of the trustee before he withdrew from and abandoned his trust to obtain and preserve for the protection of the interests of the surviving children or issue of Edgar durable evidence of the values placed upon the farms by the appraisers acting under his appointment; and his nonfeasance in that respect cannot be permitted to prejudice the rights of the beneficiaries of the trust. Attention is drawn by the counsel for the defendants to the fact that Oliver, in a verified petition (Defendants' Exhibit E–E) to the Chancellor for leave to borrow $303.56 on the security of the Homestead farm, stated that it had been appraised at $18,000. In view of the relatively small amount he wished to borrow, so far as the granting of his application was concerned, it was wholly immaterial whether the farm was worth eighteen, or eight, or twenty-eight thousand dollars, and consequently there was not the same probability that, after the lapse of ten years from the making of the appraisement, the actual amount at which it had been appraised would be as clearly recalled by him as if the margin between the value of the farm and the amount to be borrowed had been comparatively slight. He evidently relied upon the draftsman of the petition for he says, "I don't know that I read that affidavit over." Certainly the circumstances were not such at the time of the presentation of the petition as to recall so clearly to Oliver's mind the amount of the appraisement as the payment out of his pocket of the interest on $6,000, as to which he was interrogated during his examination, in order to equalize the shares of the surviving sons, which payment is practically inexplicable on any other assumption than an appraisement as testified to by both Lynch and himself. It satisfactorily appears from the documentary as well as the oral evidence that there was not at the time of the appraisement of the three farms, nor thereafter, any personal estate applicable to the share designed by the testator for the benefit of Edgar Jamison and his children or issue. Consequently, as the real estate was the only fund to answer the purpose of the trust after Oliver attained his majority, $16,000, being one-third of the total value of the three farms, was intended by the testator to be raised out of or charged upon them for the benefit of Edgar Jamison and his children or issue.

If Albert had lived the $4,000 charged upon the Corner farm would have been added to the amount of the appraisement of the Homestead and Capelle farms for the purpose of the equalization and apportionment of the shares of Edgar, Clarence and Oliver. But the above sum of $4,000 was not so added, for the reason that owing to Albert's death during the life-time of his father the Corner farm was included in the appraisement, and thus it was immaterial whether that farm should be included without the charge upon it, on the one hand, or, on the other, subject to such charge, as in the latter case the amount of the charge would necessarily be added to the value of the farm less the charge.

It has been urged that as the trustee was obliged "to raise out of or charge upon" the farms the sum or sums of money necessary to equalize the shares of Edgar, Clarence and Oliver only upon the attainment of the age of twenty-one years by the youngest son who should live so long, no charge or liability of any kind for the $16,000, representing the share of Edgar and his children or issue, or any part of it, could attach to the land before that time. But this position is untenable. There was from the testator's death an equitable charge on the farms for the whole or such portion of Edgar's share as could not be paid out of the personal assets of the estate, although that charge was not and could not be ascertained in amount before the appraisement. The charge was a trust fastened to the land as a liability, for it was a trust to raise money out of it or charge money upon it. There was no gift of a legacy eo nomine. But this is unimportant. There was, not a discretionary power, but a mandatory provision that money should either be raised out of the land and invested for the benefit of the objects of the testator's bounty, or be charged upon it for their benefit. The testator had a clear intention that the land should be answerable for so much money as was directed to be raised out of or charged upon it, and that intention must control, in accordance with the principle enunciated by Chief Justice Marshall in Smith v. Bell, 6 Pet. 68, 8 L. Ed. 322, that "the first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law." In Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138, the court had under consideration the following provision in a will:

"I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized, possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best."

It was held, reversing the lower court, that under the above provision there was a valid and enforceable trust in favor of the testator's mother and sister, although the language was a request to his wife, who was the devisee and legatee "to make such gift and provision for them as in her judgment will be best," and stated its conclusion as follows:

"On the whole, therefore, our conclusion is that each of the complainants in these bills [the mother and sister of the testator] is entitled to take a beneficial interest under the will of David D. Colton, to the extent, out of the estate given by him to his wife, of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and the amount and value of the fund from which it must come. It will be the duty of the court to ascertain after proper inquiry, and thereupon to determine and declare, what provision will be suitable and best under the circumstances, and all particulars and details for securing and paying it."

In the course of the opinion the court said:

"The object, therefore, of a judicial interpretation of a will is to ascertain the intention of the testator, according to the meaning of the words he has

used, deduced from a consideration of the whole instrument and a comparison of its various parts in the light of the situation and circumstances which surrounded the testator when the instrument was framed. These rules of construction, indeed, apply to every written instrument, although in deeds and some other formal documents the long usage of the law has, in certain cases, required the use of technical words and phrases to accomplish particular effects. No technical language, however, is necessary to the creation of a trust, either by deed or by will. It is not necessary to use the words 'upon trust' or 'trustee,' if the creation of a trust is otherwise sufficiently evident. If it appear to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. No general rule can be stated that will determine when a conveyance will carry with it the whole beneficial interest, and when it will be construed to create a trust; but the intention is to be gathered in each case from the general purpose and scope of the instrument."

It is unnecessary to multiply authorities on this point. Colton v. Colton has often been cited with approval, but never, so far as I am aware, questioned or criticized by the Supreme Court. Nor have the principles of testamentary construction there enunciated failed of universal acceptance. But whatever may be thought of the sufficiency of the grounds disclosed in that case to support a trust, as distinguished from a discretionary power or an expression of mere hope or desire, all reasonable question is excluded here, as the direction to raise money out of the land or charge the same thereon is purely mandatory. In view of the form of language before the Supreme Court the complainants there obviously were in a less favorable position than the complainants here with respect to securing a judicial establishment of a trust.

The testator intended that in the fund provided for by him for the benefit of Edgar and his children or issue, Edgar should have a life interest and his surviving children or issue should on his death take absolutely the corpus or capital of the fund. The defendants, however, contend that an exclusive and absolute right to the fund vested in Edgar alone; that he executed a release to Craven as executor and trustee December 15, 1879, from all claims, suits and demands relating to the testator's estate, reciting that Craven had "fully accounted for and paid over all of the said estate to the parties entitled to receive the same, according to the provisions of the said will"; and that the complainants have no right or interest whatsoever in the charge, if one ever existed. In support of their contention the defendants have referred to Shelley's Case, and to the rule, that although that case bears upon estates of freehold and has no application whatever to personal chattels or estate, where personal property is bequeathed in language which if applied mutatis mutandis to real estate would expressly or by implication create an estate tail, it vests absolutely in the person who would be the immediate donee in tail and devolves, upon his death, upon his personal representative, and not upon his heir in tail (2 Jarm. Wills, 348), and to the provision in the will that "in case of the death of any of my said sons Edgar, Clarence and Oliver without leaving any child or children or the issue of such, the share of the one so dying shall go to the survivor or survivors,

and the issue of such as may be deceased," &c. And hence it is argued that the language of the will touching the limitation of the fund charged upon the farms would if applied to real estate create an estate tail by implication, and therefore that the sole and exclusive right to the fund charged upon the farms vested in Edgar. But this conclusion is palpably unsound. While the rule in Shelley's Case applies equally to equitable and legal estates it is necessary to its operation that the estate of the ancestor and the limitation to the heirs must be of the same quality, that is to say, both legal or both equitable. It has no application where the first estate is the subject of an active trust, and there is a limitation over of the estate discharged of the trust. Edgar's life interest in the trust fund to be raised out of or charged upon the farms was the subject of an active trust and on his death the corpus of the fund was to go absolutely and free from all trusts to his surviving children or issue. The trust was active, and not dry or passive during Edgar's life-time. Craven was "to invest all the rest and residue of my estate, not herein otherwise disposed of in bonds and mortgages as aforesaid, interest payable semi-annually, and keep the same so invested until the majority of my youngest son who shall live to attain the age of twenty-one years." And included in the trust is the provision:

"The share of the said Edgar shall be in money invested in good bonds and mortgages as aforesaid, the interest payable to him, after such apportionment semi-annually during his natural life and from and immediately after his death the principal and all interest accrued thereon payable to his child or children or the issue of such."

The general limitation over in case of the death of any of the testator's sons without leaving children or issue, above mentioned, cannot do away with the fact that there was an active trust during Edgar's life-time. It seems clear that Edgar was to have a life interest in the fund, and his children were to take by way of executory bequest upon his death. State v. Warrington's Ex'r, 4 Har. (Del.) 55; Jones v. Rees, 6 Pennewill (Del.) 504, 69 Atl. 785, 16 L. R. A. (N. S.) 734; Gross v. Sheeler, 7 Houst. (Del.) 280, 31 Atl. 812. The trust for raising or charging the fund was one of which not only Edgar but his surviving children or issue were the beneficiaries. The right of his children on his death to receive the fund ascertained by the appraisement representing his share of the testator's estate was not derived from Edgar, but directly from the testator. The latter intended that the income of that fund accruing during the lifetime of Edgar should be received and enjoyed by him, but he provided that the principal should on his death go to his surviving children or issue absolutely and free from any trust. This was the testator's plain, unmistakable intent as disclosed by the terms of the will. While Edgar might enjoy or otherwise dispose of his life interest in the fund, no act, consent or omission on his part, however meritorious his intent, could deprive his children of the bounty provided for them by their grandfather.

[3] The defendants place much reliance upon the sheriff's sale and deed under what is known as the Worth mortgage as a muniment of

the title claimed by them. The circumstances attending that transaction are as follows. The testator having provided guardianship for his children, but omitted to name a guardian, John P. Belville was on his own petition, February 20, 1865, appointed by the Orphans' Court for New Castle County guardian of Edgar, Clarence and Oliver, who at that time were infants under fourteen years of age. Belville after his appointment as guardian entered upon and continued in the exercise of that office. Subsequently, in or about February, 1874, Craven presented a petition to the Chancellor of Delaware, setting forth in substance that by the will real estate of the testator, consisting of the three farms in question, was held by the petitioner in trust for the three minor children, Edgar, Clarence and Oliver; that the net rents of the farms were not at that time sufficient "comfortably to board, clothe and educate the said minors"; that the guardian, Belville, was then in arrears with persons with whom he had contracted debts for the minors to the amount of $800 or more; that the petitioner did not then possess sufficient funds arising from the said estate to pay "the present liabilities on account of the said minors"; and that if he, Craven, "could be authorized to borrow as trustee under the will of Thomas Jamison a sum not exceeding twelve hundred dollars for a few years he thinks that then he will be able to pay the sum out of the increased rent of the estate, and that sum would now relieve the condition of the guardian and enable him to pay up the amount of the indebtedness against the said minors." Craven therefore prayed that the Chancellor "allow him to borrow upon the best terms he may be able, the sum of twelve hundred dollars, as trustee or in his own name for the use of the said trust estate with which to pay the liabilities now standing against the said minors for maintenance." On this petition the Chancellor, February 20, 1874, ordered that the petitioner be "authorized and empowered to borrow on account of the trust estate the sum of twelve hundred dollars for the period of three years, to be reimbursed by the rents and profits of the trust estate, and that the sum or so much thereof as may be necessary, be applied to the payment of debts now accrued and unpaid for the support, maintenance and education of Edgar Jamison, Clarence Jamison and Oliver Jamison, the three minor children of Thomas Jamison, deceased, to be expended by their guardian, John P. Belville, who shall give receipts to the trustee for the same and be chargeable with it as for other moneys received on account of the said minor children." There was some contention between counsel whether the Chancellor signed or authorized the entry of the above order. If he did not, no order was made by him authorizing or attempting to authorize the trustee to borrow money for the above purpose. An order, however, in the above form was entered of record. Craven testified in substance that he was orally authorized by the Chancellor to execute a mortgage to secure the repayment of the sum to be borrowed. But on this point his testimony is loose and unsatisfactory, and in no aspect of the matter could serve to enlarge or in any manner modify the scope of his authority as evidenced by the recorded order of the Chancellor. The purpose of the trustee's

application was to get authority to borrow money, not only to provide for future education and maintenance, but to "relieve the condition of the guardian and enable him to pay up the amount of indebtedness against the said minors." Craven purporting to act as trustee executed, April 10, 1874, a mortgage of the three farms in fee to Worth to secure the payment of $1,200 on or before April 10, 1877, it being recited in the mortgage that on account of the trust estate he "was authorized by a decree of the Chancellor of the State of Delaware to borrow the sum of twelve hundred dollars as by the said order made February 20th, A. D. 1874, and recorded at New Castle in Chancery record Book D, page 493, will more fully appear." On the assumption that the Chancellor possessed power or jurisdiction to make the order of February 20, 1874, the authority conferred by it upon Craven was strictly limited to the borrowing of the sum therein mentioned upon the credit of rents and profits of the farms thereafter to be received, and did not extend to the pledging or mortgaging of the principal or corpus of the real estate in fee. There is not a word either in that order or in the petition on which it was made pointing to the execution of a mortgage in fee. In the absence of authority conferred by the will it is impossible, I think, to support the order under any construction which would extend it to the execution of a mortgage in fee. Certainly neither the Orphans' Court nor the Chancellor by virtue of its or his statutory jurisdiction was empowered to make an order having such operation. The following statutes of Delaware were in force at the time the Chancellor made the order, namely:

Section 17 of chapter 96 of the Revised Code, entitled "Of the Orphans' Court," providing as follows:

"Sec. 17. The court may direct a guardian to expend a specified sum in the maintenance and education of his ward, or the repair, or improvement of his real estate; and may also direct such portion of the wood, or timber, growing upon the land of the ward as may not be necessary for the use of the same, to be cut and sold for the same purpose. Without such directions, a guardian shall not be allowed to exceed the clear income of the ward's estate."

And section 2 of chapter 78 of the Revised Code, entitled "Of Guardians and Wards," providing, among other things, as follows:

"Sec. 2. A guardian shall have the care of his ward's person, and the possession and management of his real and personal property; and shall have authority * * * to sell personal property of the ward of a perishable nature; and also, by leave of the Orphans' Court, to sell any other property."

Authority "to sell any other property" in this connection is restricted to any other property of the ward. Edgar, Clarence and Oliver had not, nor had any of them, either at law or in equity, any right or interest in or claim to the principal of the fund which the testator intended and provided should go to the surviving children or issue of Edgar Jamison. Under the will neither Clarence nor Oliver had any right to the income of that fund during the life of Edgar, for such income was given to him, and not to them, during his natural life; and equally, neither Edgar Jamison nor either of his two brothers

had any right to the principal of the fund after Edgar's death, for it was given by the testator, not to them or any of them, but to Edgar's children or issue. The principal of the fund being limited to Edgar's children or issue on his death could not be directly or indirectly appropriated by any court for the maintenance and education of the testator's children (Perry on Trusts, § 619), whatever might be the power of the court to order a sale subject to such trust, charge or liability touching the principal. In Stephens v. Howard's Ex'r, 32 N. J. Eq. 244, it was held that the court of chancery had power to apply a part of the principal of a legacy in advance of the time fixed by the will for its payment, for the support of infant legatees. But the decision was based upon the ground that the legatees were under the will wholly and solely entitled to the principal as well as the interest. The court said:

"Their title to the subject of the gift is as perfect now as though the right to it had been cast upon them by the statute of distribution, but they have no right to present payment; on the contrary, the testatrix has very plainly said that they shall not be paid now, but at a future time. The question is one of power. Has the court power to direct the payment of these legacies in advance of the time fixed by the will? As a general rule, courts are just as much bound by the terms of a will as are the beneficiaries under it—it is a law unto them as well as unto the legatees. * * * The source of the power it is easy to trace. It is found in the fact that the infant is the absolute owner of the property, no other person having either a present or prospective legal interest in it," &c.

If the Orphans' Court could not have made a valid order for the mortgaging in fee of the farms in such manner that they could be sold under the mortgage free and discharged of the trust or charge in favor of the surviving children or issue of Edgar, a fortiori the Chancellor lacked that power in the absence of authority in that behalf conferred by the will. The proviso to section 1, chapter 95 of the Revised Code, entitled "Of the Court of Chancery," conferring jurisdiction upon that court, declares, among other things, that "the Chancellor shall not have power to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court, or jurisdiction, of this state." Jurisdiction over the application of minors' property to their maintenance and education is, in the absence of a valid trust to that end, committed by statute to the Orphans' Court, and hence does not fall within the jurisdiction of chancery. The latter court "could not order a sale for the purpose of paying the debts; there being for this a provision, made by statute in another jurisdiction, the Orphans' Court," &c. Rambo, Ex'r, v. Rumer, 4 Del. Ch. 9, 15. So, for precisely the same reason, in the absence of a provision in the will authorizing it, the Court of Chancery had no power to direct the sale or disposition of any portion of the rents and profits or corpus of the farms or any interest therein for the education and maintenance of the minor sons of the testator. From these considerations it follows that whatever power the Chancellor had to make an order for the application of the trust estate or its income to the maintenance or education of Edgar, Clarence and Oliver, or any of them, originated in and was restricted by the terms of the trust cre-

ated by the will. No language was used by the testator to support an implication of power on the part of the guardian or trustee to dispose of the corpus of the land in the event of an insufficiency of rents and profits for the maintenance and education of Edgar, Clarence and Oliver. On the contrary the language of the testator is such as to exclude such an idea; for he provided, not that a specified sum or an amount sufficient for maintenance and education should be raised out of rents and profits, but merely that the rents and profits, and the interest on all sums invested as in that item prescribed, and "so much thereof as shall be necessary" should be expended for that purpose, and further, that the residue, if any, be "invested for their benefit, first deducting yearly a sum not exceeding one hundred and fifty dollars, to be expended on each of the said farms, to keep the same productive and in good condition." The testator in using the phrase "deducting yearly," which necessarily involves a yearly deduction, clearly contemplated a continuing receipt of rents and profits during a course of years, and excludes any idea that a sale or mortgage in fee of the premises was authorized by the testator in connection with the maintenance and education of his three sons. Further, any idea that, although the sum of $150, to be yearly deducted, was to be expended on the farms to "keep the same productive and in good condition," the testator intended that the farms might be alienated and lost to his family through a sale or mortgage of the fee, is wholly inadmissible. Hence it is clear that the Chancellor had no power on the petition of the trustee to authorize the sale or alienation, directly or indirectly, of any property not belonging to the wards or any of them, namely, the corpus or principal of the fund directed to be raised out of or charged upon the farms, on the attainment of his majority by the testator's youngest son who should live so long, for the benefit of Edgar's children or issue, for the purpose of enabling the guardian to provide for the maintenance and education of Edgar, Clarence and Oliver, or to reimburse either the trustee or guardian for moneys expended for that purpose. As any order to that effect would have been unauthorized and void, the Chancellor, in directing the reimbursement out of rents and profits, recognized a restriction which the circumstances of the case rendered essential to a valid exercise of his jurisdiction.

The trustee having procured the order of February 20, 1874, executed without authority, April 10, 1874, to Bently Worth a mortgage in fee covering the three farms, which only some four years afterwards were appraised and valued at $48,000, in the aggregate, to secure the payment of the sum of $1,200 mentioned in the order, in three years, with interest payable semi-annually. There were some peculiar or unusual incidents connected with the Worth mortgage transaction. Action was brought on it by Worth April 26, 1880, against Craven as trustee, and the defendant failing to defend or appear in the suit judgment was obtained May 31, 1880, for $1,200, together with interest from October 12, 1879. From this it would appear that the semi-annual payment of interest which fell due last before the bringing of the suit had been paid. Craven, who removed to New Jersey at the beginning of February, 1880, states that he was not served with process

in and had no knowledge of the suit or of the judgment therein until long afterwards. The return on the writ of scire facias, however, was "Made known to Thomas J. Craven, Trustee under the last will, &c., of Thos. Jamison, Dec'd, and William H. Barnett, Oliver Jamison and Clara Jamison personally May 15, 1880." William J. Eliason states that he, acting as deputy sheriff of New Castle County, personally served Craven with process. Be that as it may—and I attach little, if any, importance to the point—execution process issued October 8, 1880, and it appears that the sheriff sold, November 1, 1880, the Corner farm to Edgar for $500, the Capelle farm to Clarence for $500, and the Homestead farm to Oliver for $500. At the time suit was brought on the mortgage the three sons were all of full age, and the appraisement of the three farms had been made as provided in the will. The $1,500 representing the aggregate amount at which the farms were struck off at the sale was slightly in excess of the $1,200, principal of the Worth mortgage, together with interest and costs. Sheriff's deeds were executed in December, 1880, to Edgar, Clarence and Oliver for the three farms respectively. The circumstances under which Craven executed the mortgage to Worth, the fact that all of the farms which had been appraised and valued at the sum of $48,000 were sold under a mortgage of only $1,200, and the manner in which the farms were bought at sheriff's sale, point unmistakably to some arrangement between Worth, and Edgar, Clarence and Oliver for the accomplishment of some purpose other than the mere collection by Worth of the amount loaned to Craven on account of maintenance and education. Oliver states positively that there was an agreement between himself and his brothers and Worth with respect to a sale of the farms under the mortgage; that it was "an agreement for Bently Worth to foreclose his mortgage and give us a clear title to the property. Edgar wanted the Corner farm and he got the Corner farm after the sale, and Clarence got his and I got mine. It was done merely to give us a clear title to the property"; that in the purchase of the three farms at the sale under the Worth mortgage no money was paid to the sheriff or to Worth in any way; but that after the sale Edgar, Clarence and Oliver borrowed some money from Worth and paid the purchase price. It does not appear that Worth at the time of the sheriff's sale under the mortgage was in any pressing need of the mortgage money. The contrary may be inferred; as the evidence is to the effect that he did not exact payment until some time had elapsed after the sale. Further, at the time suit was brought on the mortgage the three sons were all of full age, as before stated, and chargeable with knowledge of the contents of their father's will, and, from the evidence, documentary as well as oral, knew of the appraisement and valuation of the farms. They knew or were chargeable with knowledge of the provision that "the share of the said Edgar shall be in money invested in good bonds and mortgages as aforesaid, the interest payable to him, after such apportionment, semi-annually during his natural life and from and immediately after his death the principal and all interest accrued thereon payable to his child or children or the issue of such." It is a noticeable fact that Catharine, Edgar's eldest daughter, had been born February

2, 1878, and Vesta, his younger daughter, December 17, 1879. It is also noticeable in this connection that Craven states in his answer that after the appraisement of the farms Oliver, Clarence and Edgar "mutually agreed, as a convenient method of securing the benefits provided for them under the will of their father * * * each to take one of said farms so appraised as aforesaid, and to enjoy the same as life tenants thereof"; and that "under said family settlement" Edgar was to have the "income and benefits" of the Corner farm; and further, that Craven testifies that he had been advised by his counsel in 1879 with respect to an arrangement between Edgar, Clarence, Oliver and Craven, under which the three sons were to possess and enjoy the respective farms, that they "had a life estate in these farms, and Edgar could take the Corner farm, but he couldn't spend it." There is no evidence that at the time judgment was rendered on the Worth mortgage Edgar, Clarence and Oliver were unable or thought themselves unable to pay the amount of the indebtedness on account of their maintenance and education; and, in the absence of such evidence, to assume that they, the beneficiaries to so large an extent in the trust of the three farms, of full age, and with such an indulgent creditor as Worth to deal with, were unable to raise a little more than $1,200, is too severe a tax even upon credulity. I am unable to reconcile the conduct of Edgar, Clarence and Oliver in connection with the sale under the Worth mortgage with either an intention or a desire on their part that the provisions of the will in favor of Edgar's surviving children or issue should be carried out. Their action, under the circumstances then existing, rather indicates a purpose on their part to promote their own interests, regardless of the rights of such children or issue.

Much reliance is placed by the defendants upon the case of Jamison v. McWhorter, 7 Houst. (Del.) 242, 31 Atl. 517, decided June 3, 1885. It was a "case stated on questions reserved by the Superior Court for New Castle County." The action was brought upon an agreement between Clarence and Leontine J. McWhorter, whose brother married one of Clarence's sisters, for the sale and conveyance of a part of the Capelle farm by the former to McWhorter. McWhorter refused performance on his part on the ground of insufficiency of title. The case is incorrectly reported; for it is made to appear that Judge Houston, who delivered the opinion of the court, dissented, and that Chief Justice Comegys, who dissented, delivered the opinion of the court; and it also appears that there is no syllabus representing the opinion of the court, and the only printed syllabus represents the dissenting opinion of the Chief Justice. Nowhere in the case is anything said touching the effect of the provision in the will directing an appraisement of the farms. It appears, however, from the report that the counsel for the plaintiff made the statement that it was "admitted that the trustee has performed the duties specifically enjoined upon him"; and that "the trustees took the estate to manage until the majority of the youngest child, then to raise a charge upon the same for the purpose of equalizing the property," etc.; and that "the youngest child came of age May, A. D. 1878"; and that "it is confidently assumed that when the youngest child arrived at majority, and the

duties of the trustees had been performed," &c. These circumstances afford strong grounds for an inference that the court was led to believe that there was sufficient personalty in the estate to equalize the shares without raising anything out of the real estate or, on the other hand, that the shares had been duly equalized by the trustee pursuant to the provisions of the will. The principal question in the case was whether Clarence took an estate tail under his father's will, or a life estate with remainder in fee to his children or issue. The effect of the sheriff's sale under the Worth mortgage was also alluded to more or less incidentally. Judge Houston in the course of the court's opinion used the following language:

"In the view which I have taken of the question already considered and disposed of by me, it is not for me to enter into the consideration of the remaining question as to the title conferred on the purchaser by the sale under the mortgage given by the trustee pursuant to the order of the Chancellor, but if it were necessary for me to consider and decide that I should be obliged to hold under the facts and circumstances of this case that the mortgagee had a legal right to execution and sale on the mortgage at any time after the failure of the trustee for three years to pay it, and being seized as such of the legal estate in the premises when he so mortgaged them by the authority of the Chancellor, the purchaser took the legal title to them at the sheriff's sale upon it."

This expression of the learned judge was purely dictum. He expressly refrains from deciding the point, although he indicates what his opinion would be "if it were necessary for me to consider and decide." The case could not have been decided on the two grounds as they were mutually exclusive of each other and could by no possibility co-exist. If the sheriff's sale under the Worth mortgage was effectual it conveyed a fee simple title to the grantees and there could have been no question of an estate tail left for the decision of the court. The fact that the court decided there was an estate tail excludes all idea that there was a fee simple title under the sheriff's sale. As opposed to the dictum above referred to is the language of the Chief Justice who said:

"With respect to the question of title acquired by Clarence Jamison under the sale by the sheriff in execution of the mortgage made by the trustee under the order of the court of chancery of New Castle County—there does not appear to be in the will of the testator any authority to make a mortgage of the premises to raise money for the maintenance and education of the testator's sons; nor was there any, as it appears to me, in the said court to make such order. The whole proceedings for sale of the Capelle Farm, therefore, appear to have been without authority."

The ground of the decision appears on its face. It was that "under the provisions of the will of Thomas Jamison, Clarence Jamison as devisee therein took an estate tail in the premises devised in trust for him." This of necessity refutes the contention that the decision was based in whole or in part upon the ground that the sheriff's sale under the Worth mortgage conveyed the fee or had any efficacy. After the above decision was made the action of Edgar, Clarence and Oliver with respect to the transmission of title to the three farms was predicated solely upon the assumption that they were tenants in fee tail. They and their wives executed June 29, 1885, a deed to John F. Biggs

for the purpose of barring the supposed entail, in which it was recited that "it is desired to bar the said entails so that the said Clarence Jamison shall hold the said 'Capelle Farm' hereinafter described in fee simple, and Oliver Jamison shall hold in fee simple the 'Homestead Farm,' and Edgar Jamison shall hold the 'Jamison Corner Farm' in fee simple." And the several reconveyances by Biggs to Edgar, Clarence and Oliver of the same date equally recognize that they were executed for the same purpose. Neither in the deed to Biggs nor in the deeds from Biggs is any reference made to the sheriff's sale or deed under the Worth mortgage, but all of them recite or expressly recognize that the three sons were tenants in fee tail under the will—a position wholly inconsistent with the idea that they were tenants in fee simple under the sheriff's deed, and indicative of the fact that they placed no reliance whatever upon it. Catharine and Vesta were not parties to or represented in the case of Jamison v. McWhorter, and were in no sense bound by the decision. Nor was that isolated decision of such a character as to establish a rule of property. No single decision could have that effect aside from its soundness. The court seems to have given no consideration to the fact that the farms were held by the trustee upon an active "trust, to rent the same to good and careful tenants at the best cash or share rents attainable, as in their judgments shall be most advantageous, and to collect, expend and invest the same as hereinafter provided, until the majority of my youngest son who shall live to attain the age of twenty-one years," &c.; nor to the question how far the active nature of the trust during a portion of the life-time of the testator's sons would not at least during that period prevent the uniting of the legal remainder over with the life interest under the rule in Shelley's Case; nor to the question whether, if an estate tail was created by the testator, it must not have existed from the time of the speaking of the will, and if so, how it was that what was not an estate tail at the time of the testator's death became such during the lifetime of his sons on the attainment by Oliver of his majority; nor to the question whether the testator in providing that in the event of the death of any of his sons "without leaving any child or children or the issue of such, the share of the one so dying shall go to the survivor or survivors, and the issue of such as may be deceased," did not in view of his express mention of "child or children," contemplate a failure of children or issue living at the time of the death of the son entitled to such share. In Daniel v. Whartenby, 17 Wall. 84 U. S. 639, 21 L. Ed. 661, which was an action of ejectment for the recovery of lands in Delaware, the court, referring to cases relating to the creation of estates tail by implication or otherwise than by express use of the term, said:

"In this class of cases in the English courts the doctrine of Shelley's Case is applied unless there are circumstances which clearly take the devise out of of that rule. Every doubt is resolved in favor of its application. Here, we think, the tendency should be otherwise."

But whatever may be thought of the soundness of the holding in Jamison v. McWhorter, it is wholly unimportant so far as the rights of the surviving children of Edgar are concerned whether Clarence

and Oliver took under the will a fee simple estate in the three farms, or an estate tail, or a life estate with remainder to their children or their issue; for whatever their estate, the farms were charged with the amount of the share, so far as unpaid out of the personal property, ascertained by appraisement as directed in the will, of which the income was to be received by Edgar during his life and the principal by his surviving children or issue. If it be assumed that Clarence and Oliver took an estate tail, while the entail could be barred under the laws of Delaware, the fee simple into which it was converted would still remain subject to the charge, that charge being wholly unaffected by the change. Clarence and Oliver took their respective shares, whether legally or equitably, expressly "subject to such charge." There was no claim, demand or interest in the estate paramount to the charge. All the debts of the testator had been fully paid and there was nothing which could support any jurisdictional action by a court calculated to destroy or injuriously affect the rights of Edgar's children in the charge or incumbrance intended for their benefit. Edgar, as already stated, died May 1, 1886, Catharine then being eight years and three months old, and Vesta six years and four and one-half months. Craven's accounts, remaining of record in the office of the register of wills for New Vastle County, show that at, before and after the time Oliver became of full age, and when the appraisement was made, there was no money or personalty of the testator applicable to the share intended for Edgar and his surviving children or issue. Thus Catharine and Vesta immediately on the death of their father became absolutely entitled under the will of their grandfather and the appraisement made pursuant to its provisions, to receive, in equal shares, the sum of $16,000, being the one-third part of the total valuation of the farms, and being the sum to be raised out of or charged upon them for the benefit of Edgar during his life and after his death for the benefit of his surviving children or issue. That sum was the amount of the charge upon the land in question; and there was a right, wholly beyond control, alienation or release by their father, vested in the two children, to receive and enjoy it. The trustee did not raise or charge the above mentioned sum or any part of it in accordance with the directions of the will. But this omission on his part could not destroy the rights of the children. Notwithstanding such omission, the charge, by virtue of the will and the appraisement, coupled with the absence of personalty applicable to it, existed at the time of the death of Edgar, and was enforceable by them or somebody authorized to represent them in that behalf.

It is contended by the defendants that on the assumption that Catharine and Vesta had a right on the death of Edgar to proceed for the enforcement of their claim of $16,000, there has been such laches on their part as to bar any equitable remedy. But on careful consideration of the evidence I am unable to reach such a conclusion. Until within two years next before the bringing of this suit they were in total ignorance of their rights under the will of their grandfather and the appraisement of the farms made pursuant thereto; nor until that time had either of them constructive notice of those rights or any in-

formation which reasonably should have put them, or either of them, upon inquiry. Catharine states in substance that at the time of the death of her father she was living with her mother in St. Georges, Delaware, which was also the place of residence of her father; that after his death she lived in St. Georges with her mother and sister about three years; that then she went to Newark, Delaware, and lived with Mrs. Lyle, her mother's mother, for two years; that then she went to Elkton, Maryland, where she lived for five years; that she married George F. Mathieson, one of the complainants, in 1896; that she was working in the Felton House, in Elkton, doing "upstairs work" when she was married; that she continued to live in Elkton about three years after her marriage; that she then went to New York where she lived for a few months; that she then went to Chicago where she lived for a few months; that she then went to St. Louis where she and her husband had their home for about six years; that then they went to Nelsonville, Ohio, where they lived one year and two months, until April, 1907; that they then moved to Philadelphia, where they have since resided; that since her father's death she has very seldom communicated with her mother; that after moving to Elkton she did not revisit Delaware for about eighteen years; that since her father's death, with the exception of Oliver, her uncle, she has never seen any of her father's relatives; that she has never seen Oliver since leaving Delaware; that she didn't see much of her mother; that her mother "seemed to think we had our living to make, and she was employed all the time, and she never had time to visit us. * * * The same way with me: I didn't have time to visit her"; that she and her mother wrote to each other from time to time at irregular intervals; that neither of her uncles Clarence and Oliver ever wrote to her; that she "never received a letter from any of my father's people. They have all just been strangers to me"; that she never thought much about her father's people; that "they never seemed to take any interest in us, and I never thought of them. If I wanted a favor I always went to strangers"; that she first learned that she had an interest in her grandfather's estate in 1905; that in 1904 she received a small sum of money from Biggs, who stated that it was her share of the estate of her grandfather; that she and her sister talked it over and decided to see counsel; and that in 1905 they got a report from their counsel that their grandfather left a will in which provision was made for them; that that was the first time she ever knew or heard of a will made by her grandfather; that neither her father nor mother nor any of her relations had ever given her any information on the subject, and that she has never in any manner released or abandoned her interest under the will. Vesta states in substance that none of her father's brothers since his death ever wrote to inquire for or visit her mother, her sister or herself; that she first learned in 1905 that the testator left a will; that in 1904 she received a letter from Biggs to the effect that there was a small amount of money representing her share from a strip of land; that "then I thought about it, and I talked with my sister, and wrote to my sister, and we thought that there ought to be more, and we inter-

viewed our counsel"; that "in 1905, we learned that my grandfather had left a will"; that before 1905 she did not know that he had left either a will or any estate or property of any kind; and that she communicated to her sister, Catharine, the contents of a letter dated October 20, 1904, received from Biggs. The above letter produced in evidence by the witness (Complainants' Exhibit No. 15) is as follows:

"Wilmington, Del., Oct. 20, 1904.

"Mrs. Vesta Jamison Bastian
"809 Buttonwood St. Phila.

"Dear Madam:

"I am sorry not to have been at my office when you called. Please find inclosed herewith my check for $11.37 in payment of your share, less costs of satisfaction 25 cts. paid by me for you.

Statement

Am't of your share	$11.34
Int. from May 18 to Oct 18	.28
	11.62
Costs	.25
	$11.37

"I have written to your sister at 2740 Grand Ave. St. Louis, Mo., and presume that she will not come here for so small an amount, but will execute a power of atty. for me to receive the money and satisfy the record. You might tell her that you have gotten your share and that I am ready to pay her. The purchaser paid $11.34 into court, and your mother will be entitled to the interest on that sum while she lives and at her death it would go to the heirs at law of Edgar Jamison. You and your sister will get it at her death if you are living; it being the dower interest of your mother.

"Yours truly
J. Frank Biggs."

There is no oral or documentary evidence in the case in any respect contradicting or weakening the testimony of Catharine and Vesta that they were wholly ignorant and uninformed as to their rights under the will of their grandfather until 1905. On the contrary, their statements are corroborated and substantiated by both direct and circumstantial evidence. George F. Mathieson states in substance that he first learned in 1904 of the claim set up by his wife; that she got a letter from Wilmington in which there was a check for eleven dollars and some odd cents; that "we had a little talk about it and I said there must be something back of that. So she consulted a lawyer and then she found out that there was something back of it"; and that it was in 1905 that he learned of the interest of his wife in her grandfather's estate. Mrs. Jamison, Edgar's widow and mother of Catharine and Vesta, states in substance that she knew that Thomas Jamison left a will; that she had never seen it and did not know its contents; that her husband never talked to her about it; that she never knew that her two daughters or either of them had any interest in the estate of the testator; that she never told or discussed or talked to them about any interest they might have under his will; that she thought she and her children had an interest in the Corner farm of which Oliver had possession; that she looked to Oliver for her living from that farm; and that she had told her children that "we had the farm,"—referring to the Corner farm. One naturally would

suppose that information, if any, which they might have received touching their grandfather's estate and the appraisement of the farms and their interest in the charge thereon, after the death of their father, would have come from Craven who caused the appraisement to be made, and knew or should have known of their existence before removing to New Jersey in February, 1880, and was chargeable with knowledge of their rights, or from their father or their uncles, Clarence and Oliver Jamison. But it does not appear that any of them dropped a single word to these minor children or to anybody representing them to apprise them of their rights. Oliver Jamison states in substance that he as trustee of the Corner farm paid the rents and profits after the death of Edgar for about three years to his widow, the farm thereafter being sold under a mortgage; that he never informed Catharine and Vesta, or either of them, of the provisions in the will in their favor, or any other provision it contained; that they never inquired of him or made demand touching any claim or interest under the will; that he had never paid them any money or secured from them any release touching the provisions in their favor in that will; and that he never saw or had any communication from them after they left Odessa, when, he supposes, one was about six, and probably, the other was seven or eight. John T. McWhorter, who married Laura Jamison, an aunt of Catharine and Vesta, stated in substance that after Edgar's death he lost sight of Mrs. Jamison and her two children; and that they never communicated with or visited his family, and no members of his family visited them. Margaret M. Jamison, wife of Clarence, stated in substance that since Edgar's death she had known little of his widow and her two children; that she does not know what became of them; and that they had not visited her family or in any way communicated with her or her family. Craven states in substance that his removal to New Jersey was about or a little after the time that Edgar was married; that there was no other property than the three farms in question to be divided between Edgar, Clarence and Oliver; that he had never as executor, trustee, or in any other capacity, raised out of the farms by lien or otherwise any sum of money to be held or set aside for the benefit of Edgar and his children; that he had never paid any money to such children; that he had never released or discharged the farms from any legacies which were or might have been charged upon them for Edgar or his children; that he never saw Mrs. Mathieson or had any communication with her; that she had never released or discharged him from raising anything that might be due to her out of the farms; that nobody had ever asked him whether money bequeathed under that will to those children had been paid; that he never made any inquiry prior to this suit whether Edgar had any children; that he never bothered himself in any way as to Edgar's immediate family; that after he moved from Delaware he never know who owned the farms; that he never gave any notice to anybody, either the owners of the farms or otherwise, that there was any lien or charge of any kind upon the farms under the will; that he never gave notice to anybody that the personal property of the testator was not suffi-

cient to pay Edgar Jamison's share in money; and that he removed to New Jersey possibly six months after the appraisement by Lynch, Hudson and Stuckert was made.

The defendants examined certain witnesses for the purpose of showing statements by Catharine and Vesta and their mother indicating such knowledge or information on their part as to whatever rights the two daughters had under the will as to make them chargeable with laches in not sooner proceeding for the enforcement of such rights. The testimony thus adduced, however, falls far short of establishing knowledge or notice on the part of either of the daughters of the rights asserted in the bill in this suit, or of any matter or thing which could reasonably put them upon inquiry. Thomas J. Green, son of Sarah Eliza Green, states in substance that he knew Vesta when she was living with his mother in Odessa; that Vesta was eight or nine years old when she went to live with his mother, and continued to live with her about thirteen or fourteen years; that he lived there three or four years immediately after Vesta first went there; that when he left she was eleven or twelve years old; that he saw her during a period of five or six years after he ceased to live with his mother; that he heard Vesta say while he was living with his mother that "she had some money coming to her, if she wasn't cheated out of it," when she came of age; that "sometimes, if she had a right smart to do she would say to us boys, 'There will be a time, when I get my money, that I won't have to work so hard,' or something to that effect, you know. That is all I ever heard her say about it"; that he doesn't know how often she made a remark to that effect, but "I heard her say several times, like a small child, because she was nothing but a child then." Lettie V. Green, wife of the last mentioned witness, states in substance that she had Vesta as a pupil while she was teaching school at McDonough; that she began teaching there twenty years before testifying and continued to teach for a period of three years; that Vesta was then at the house of Mrs. Green, the mother of her husband; that during that period she had heard Vesta say that "she had been cheated out of money"; that she does not know that the remark related to her grandfather's estate; that she "heard her say that she had money coming to her that she had been cheated out of"; that "when she had work to do, and it was something she didn't want to do, she would say, 'I wouldn't have to do this if I hadn't been cheated out of the money that was coming to me'"; that Vesta did not tell her whether the money she referred to was "money from her grandfather's estate." Abraham S. Mote states in substance that he had known Josephine Jamison, the mother of Catharine and Vesta; that he made her acquaintance "a little past fourteen years ago, I judge"; that she lived at his house from April to September and in the following year probably three or four weeks; that he knew Catharine, who stayed at his house about five or six months; that Mrs. Jamison said "her daughter would be entitled to her father's share, but she was afraid they were going to cheat her out of it"; that he could not say whether Catharine heard this remark; and that he heard Mrs. Jamison make such a remark about two or three times.

Mary McCrea states in substance that she knew Catharine who fourteen years before the taking of testimony lived at the witness' home in Elkton; that she heard Catharine and her mother talking about money that she expected to get from her grandfather's estate; that the witness said "Do you expect money, Kit?" and she answered "Yes, I expect some from my grandfather's estate"; that since the beginning of this suit she and Catharine were talking about things they would like to have, and the witness said "Kit, did you ever get your money?" and she said, "No; it has never been settled"; that in the conversation fourteen years before the taking of her testimony "they were speaking about hard work, and about working out. Kit worked out, and she says, 'Well, if I had some of my grandfather's money I wouldn't have to work out"; and that witness then asked her if she expected some and was told she did. Anna Cleaver states in substance that she is a sister of Thomas J. Green and knew Vesta when she was young; that she heard her say that she ought to have had money from her grandfather's estate, but "was cheated out of it"; and that Vesta made this remark within two years after she went to live with Mrs. Green. Sarah Eliza Green states in substance that she knew Vesta; that she heard Vesta say that "they were entitled to money but they were cheated out of it when she was younger"; that "of course, after she [Vesta] grew up she didn't say anything more to me about it, but this was while she was small"; that it was immediately after Vesta came to live with witness, when she was about seven years old, that she made the above statement; that Vesta "hadn't clothes, you know, and she told me that was the reason why she hadn't clothes, that she would have had clothes, and better clothes, but they were cheated out of their money which their father had coming from their grandfather. She said that she had had money coming from her grandfather, but they were cheated out of it, and that was the reason why they were so poor"; that Vesta "didn't keep talking about it. She talked about it when she was younger. I don't know just when, but she didn't say anything more about it. When she grew up she didn't talk any more to me about it, and I didn't say anything more to her about it" until after this suit was commenced; that witness doesn't think Vesta "talked anything about it after she got to be about ten or maybe eleven, somewheres along there." Vesta states in substance that she did not say to Mrs. Cleaver and Mrs. Green that she had been cheated out of moneys coming from her grandfather's estate, but that the property to which she referred in her statement to them was the Corner farm. Catharine in answer to the testimony of Mote states in substance that she never heard her mother state that she (Catharine) was entitled to some money coming from her grandfather's estate. Mary McCrea, a witness for the defendants, having been recalled and examined on behalf of the complainants, states in substance by way of correction of her testimony as originally given that she did not hear Catharine say that the money she was expecting was from her grandfather's estate,—that being merely supposition on the part of the witness,—but did hear her "speak about getting this money from some farm, and I thought of course, it was her grandfather's farm, * * * from some farm and from her husband out

west." Mote, a witness for the defendants, having been recalled and examined on behalf of the complainants, states in substance by way of correction of his testimony as originally given, that he did not hear Mrs. Jamison say that her daughter Vesta was expecting money from her grandfather's estate. He further testified as follows:

"X. When you were here before and testified you said that Mrs. Jamison said that her daughter, referring to Kitty, would be entitled to her father's share, but she, Mrs. Jamison, was afraid they were going to cheat her out of it. Is that correct? A. Wait until I study it up a bit. Yes, sir; that is correct, because I don't know of anybody else she expected money from, only her husband. * * * X. That was the drift of her talk, was it, the substance of it, I mean? A. As I remember, that has been fifteen years ago."

Eliza C. Green, also a witness for the defendants, having been recalled and examined on behalf of the complainants, testified by way of correction of her testimony as originally given, as follows:

"Q. Mrs. Green, in your testimony before, you testified that you heard Mrs. Bastian, now it is, then Vesta Jamison it was, while she was living with you speak of some moneys which she ought to have had but had been cheated out of, coming from some estate. Do you have any clear recollection whether or not that was money coming from her grandfather's estate? (Objection.) Q. Do you have any recollection of whose estate it was? A. I used to hear her speak about her father's and the Jamison Farm. She said that was her father's and that she and her sister should have had that, but that they were cheated out of it, the Jamison Farm. Q. The Jamison Farm? A. The Jamison Farm. She has gone by there with me before now and she would always say, 'that ought to have been my sister's and my farm, but we were cheated out of it.' * * * Q. Mrs. Green, did you ever hear her say anything about any moneys coming from her grandfather's estate? A. Not in her younger days I didn't. Q. Did you ever at any time? A. I heard her say so last winter when she was down to see me. * * * X. Mr. Willis asked you this question: 'It was immediately after the time that she came to live with you that she had this conversaion you spoke of'? A. That I spoke of, yes, sir. She hadn't clothes, you know, and she told me that was the reason why she hadn't clothes, that she would have had clothes, and better clothes, but they were cheated out of their money which their father had coming from their grandfather. She said that she had had money coming from her grandfather, but they were cheated out of it, and that was the reason why they were so poor.' A. I guess I must have got tangled in her saying that, but this is what she told me last winter. I must have got tangled in it, must have got it in that way, because I don't remember her ever saying anything about her grandfather when she was little, only since, as I told you, in the winter when she was down to see me, and then she told me about her grandfather. I suppose I must have got a little tangled in it. I don't know, but that is correct. I can't call to mind at all any time that I ever heard her speak about her grandfather when I had her, and after the farm was sold I didn't hear her say anything more about her father's estate. R. Q. Which farm did you refer to? A. The Jamison Corner farm. She talked about that a good bit. R. Q. By 'last winter' do you mean the winter of 1911? A. Yes, sir; the winter of 1911 when she was down to our house, she spoke of her grandfather. If I said it otherwise, I got a little tangled because I never heard her say anything about any grandfather in her younger days, about having any money, or any money coming to her from her grandfather."

The insufficiency of the foregoing evidence to establish knowledge or even the faintest suspicion in either Catharine or Vesta of their rights under the trust or charge created by the testator and payable on the death of their father is too manifest for discussion. The remarks

made by them in their childhood as to their supposed rights evidently had reference, as stated by the witnesses, to the Corner farm, of which Edgar, and subsequently Oliver, as trustee, had gained possession, and the rents and profits of which had been received by Edgar until his death and for some three years thereafter by his widow from Oliver prior to the sale and conveyance of that farm by the sheriff under the mortgage hereafter referred to given by Edgar and his wife to American Fire Insurance Company March 31, 1886. In view of the promptness with which Catharine and Vesta took action for the investigation and enforcement of their rights after hearing from Biggs in 1904, it is, to say the least, highly improbable that had they or either of them received an inkling as to those rights at an earlier date and after reaching years of discretion, proceedings would not have been taken with equal promptness. The evidence shows that they were not, certainly before their marriage, in such financial condition as to render an assertion of their rights to the bounty intended for them by their grandfather a matter of indifference.

[4] Before considering the law of laches it is proper to say that no statute of limitations applies either directly or by analogy to this suit. The bill is filed to enforce payment of money charged by will on land as a legacy. No legal remedy exists for the enforcement of this charge, and as the exclusive right is in equity the statute of limitations is inapplicable. In Perkins v. Cartmell's Adm'r, 4 Har. 270, 42 Am. Dec. 753, where it was held by the Court of Errors and Appeals of Delaware that a legacy charged on land is not within the statute of limitations, the court said:

"These statutes in their terms are confined to actions at law, and do not extend to suits in equity. But courts of equity consider themselves within their spirit and meaning; and that sound policy and public convenience require their adoption. Hence it is an established rule, that where the statute bars the legal remedy, it shall bar the equitable remedy in analogous cases, or in reference to the same subject matter, and where the legal and equitable claim so far correspond, that the only difference is, that the one remedy may be enforced in a court of law, and the other in a court of equity. * * * The result clearly follows, that if no statute of limitation bars the case at law, the same, or the analogous case in equity is not barred."

But although no statute of limitations applies in terms or is applicable by analogy to a proceeding for the enforcement of a money charge on real estate, the court proceeded to say touching courts of equity:

"Upon general principles of their own, independently of the statutes of limitation, they have always discountenanced laches and neglect; and refused their aid to stale demands where the party has slept upon his right, or acquiesced for a great length of time. * * * The defence founded on presumptions from lapse of time, is not peculiar to courts of equity. At common law, although as has been said, it was a rule that a right never dies; presumptions were always raised from lapse of time, independently of the statutes of limitation. * * * The lapse of twenty years raises the presumption, that bonds, judgments, decrees, recognizances and other matters of record have been satisfied; and unless repelled by circumstances explaining the delay, or by evidence of an acknowledgment of the debt within that period, the presumption is conclusive, and is a complete bar under the plea of payment. A legacy charged upon land is within the same principle. No sufficient reason can be given for making any distinction in this respect between it, and the case of a judgment or recognizance binding on lands."

[5, 6] That the period of twenty years should in the absence of laches or special equities requiring the bringing of suit earlier, be allowed for the institution of proceedings for the enforcement of such a charge against real estate was recognized by the Court of Errors and Appeals in the later case of Rice v. Pennypacker et al., 5 Houst. (Del.) 279, 353, 354. It is unnecessary to refer to other decisions. The common law presumption of payment arising from the lapse of twenty years, to which courts of equity accord effect, cannot defeat the complainants. That period could not begin to run until the $16,000 charged on the land became due and payable under the terms of the will, which did not occur until Edgar's death May 1, 1886. The bill was filed April 21, 1906, less than twenty years thereafter, and not only is there no scintilla of evidence that the whole or any portion of the charge has ever been paid, but the contrary has been proved beyond controversy. Whatever may be the rights of the present holders of the farms as alleged bona fide purchasers for value,—a subject hereinafter considered,—I do not think the complainants can be defeated on the ground of laches. Laches with respect to the bringing of suit is unreasonable and inequitable delay in proceeding for the enforcement of a demand or right viewed in the light of the circumstances of the particular case. No rigid rule as to lapse of time is applicable. It is essentially an equitable defense, and does not depend, like the operation of a statute of limitations, upon the mere passage of time, but upon the equity or inequity of permitting the asserted claim or demand to be enforced. Halstead v. Grinnan, 152 U. S. 412, 14 Sup. Ct. 641, 38 L. Ed. 495; Alsop v. Riker, 155 U. S. 448, 15 Sup. Ct. 162, 39 L. Ed. 218; Galliher v. Cadwell, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; Lasher v. McCreery (C. C.) 66 Fed. 834, 841; Godkin v. Cohn, 80 Fed. 458, 465, 25 C. C. A. 557; Sayers v. Burkhardt, 85 Fed. 246, 29 C. C. A. 137; Wheeling Bridge, &c., Co. v. Reymann Brewing Co., 90 Fed. 189, 195, 32 C. C. A. 571; Hanchett v. Blair, 100 Fed. 817, 827, 41 C. C. A. 76; Ritchie v. Sayers (C. C.) 100 Fed. 520, 537. In Halstead v. Grinnan the court said:

"The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defence, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them. There must, of course, have been knowledge on the part of the plaintiff of the existence of the rights, for there can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend."

And in Galliher v. Cadwell it is said that the cases on laches "proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum." In view of the evidence the suggestion that there was actual laches on the part of Catharine or Vesta or either of them is preposterous.

[7] It is urged, however, by the defendants that even if it be assumed that there was no laches in fact on the part of the complainants,

no relief can be granted because, as is argued, Craven as trustee, and Stuckert, as guardian, represented both Catharine and Vesta and were guilty of laches which was imputable to those children. This position is untenable. Many decisions have been cited for the purpose of supporting it, but they have no legitimate application here. It is a well settled rule that whenever the right of action vested in a trustee is barred by the statute of limitations the right of the cestui que trust represented by him is also barred. Meeks v. Olpherts, 100 U. S. 564, 569, 25 L. Ed. 735; Hill on Trustees, 267, 504. It may be and probably is true that a similar principle of representation applies to trustee and cestui que trust with respect to laches, and that the laches of the former during the continuance of the trust relationship will be imputable to the latter. So far as Craven is concerned, it would in any aspect that might be taken of the case be an extremely harsh application of the rule to hold that by reason of any failure on his part disclosed by the evidence to execute the duties of his trust Catharine and Vesta should be prejudiced in their right to receive the amount charged under the will upon the farms for their benefit. He gave up and absolutely relinquished the trust he had assumed, as far as it was possible to do so without a judicial discharge, and took a release as trustee from Edgar, Clarence and Oliver nearly six years before the death of Edgar, upon the happening of which the share of Catharine and Vesta first became payable, they only at that time being ascertained as Edgar's surviving children. If the doctrine of representation applies to a purely equitable demand, and the crucial question relates to the effect of laches on the part of the person who has been constituted trustee, the laches, to be imputable to the cestui que trust, must be laches during the existence of the relation of trustee and cestui que trust. But it is unnecessary to decide the question whether in the view of a court of equity under the circumstances disclosed in this case that relationship could or should be recognized as subsisting at the time of Edgar's death. For whatever may have been Craven's nonfeasance as trustee prior to Edgar's death, the sum of $16,000, charged on the farms, on the happening of that event became payable, not to Craven, but to Catharine and Vesta absolutely and free of all trusts. The right to sue for its recovery was vested exclusively in them, and Craven was wholly without right or title, legal or equitable, to sue for or receive it.

He could not have maintained suit for the principal before Edgar's death, for until then it was not payable; and since it became payable by reason of his death it was payable exclusively to the children. Being under no duty and having no right after Edgar's death to enforce the charge, he could not be guilty of laches in omitting to sue, and consequently there was no laches to be imputed to Catharine and Vesta. Whether Craven omitted to do what he should have done during Edgar's life-time is an inquiry not pertinent to the question of representation with respect to the principal of the fund on or after his death. Craven was charged with the duty of raising out of or properly charging upon the farms the provision for Edgar and his children. But the actual raising of the $16,000 out of the farms and its investment, or

the securing of the payment of that sum by mortgage or other appropriate lien, however advantageous, was not necessary to the existence of the charge. That was created by the will in connection with the appraisement and the lack of personalty applicable to it. His failure to perform these mandatory acts during Edgar's life-time could not furnish the basis of a suit by him against the owners or holders of the farms in which he could have represented and bound the interests of his cestui que trustent. It may be possible that had Catharine and Vesta, or somebody duly representing them, become seasonably aware of their rights, a suit might have been brought against Craven based upon his failure to perform the above mentioned mandatory acts. But such possibility of suit could not be substituted for their right, in the absence of laches, to enforce the trust or charge against the land, for the performance of such acts by him was not essential to the existence or enforcement of their rights. In Brown v. Higgs, 8 Ves. 561, 574, Lord Chancellor Eldon after referring to sundry decisions said:

"The principle of that case, and of Richardson v. Chapman, which went to the House of Lords, and all these cases, is, that, if the power is a power which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion, whether he will exercise it, or not; and the court adopts the principle as to trusts; and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those for whose benefit he is called upon to execute it."

Whether Craven's non-feasance with respect to the mandatory provisions referred to was calculated to prejudice purchasers of the farms is a question addressed, not to any fanciful representation by him of Catharine and Vesta, but to the equities attending and growing out of the purchase.

The contention that Stuckert as guardian of Catharine and Vesta was guilty of laches imputable to them cannot be sustained. There is no evidence that he at any time knew or had heard of the charge on the farms in favor of Catharine and Vesta. Nor does it appear that he had knowledge of any facts which could serve as a basis for constructive or implied notice to him of the existence of such charge. There is no evidence that he was ever told or that he ever mentioned that either Catharine or Vesta had an interest in the estate of the testator. Such knowledge or notice cannot be inferred from the fact that he was one of the appraisers of the farms. The duty of Hudson, Stuckert and Lynch under the will was at the proper time merely to appraise the farms. They had nothing whatever to do with the equalization of the shares, and the raising or charging of the share for Edgar and his children or issue. Craven was exclusively charged with those duties. Nor did the performance of their duty by the appraisers in any way involve knowledge on their part or notice to them whether at that time there was any, and if so, what amount of personalty included in the estate applicable to the equalization of shares or the payment of the share just specified. Stuckert was appointed guardian June 11, 1887, on the petition of Edgar's widow; Catharine then being about nine years and four months old, and Vesta seven

years and six months. The petition in stating that each of the minors was entitled to "a personal estate of about the value of ——— dollars; and to real estate, situate in Saint George's Hundred of about the annual value of about two hundred dollars," clearly did not refer to the rights or interests of the minors under the will of the testator, but to their supposed rights or interests with respect to the Corner farm. Under the will they were not entitled to any real estate, but in the deed of July 18, 1885, for the Corner farm from Edgar and his wife to Oliver as trustee, which subsequently became ineffective under the terms of the trust, there was a provision for their taking real estate on certain contingencies. Further, the guardian was required to give bond in the penal sum of only $2,000 for each of the minors, whereas if it had been known or had appeared that Catharine and Vesta were entitled to receive the amount of the charge in their favor under the will and the appraisement, amounting to $16,000, both the petition and order for the appointment of the guardian would have been very different. These circumstances exclude, I think, any reasonable deduction of notice, actual or constructive, to Stuckert of the existence of the rights of Catharine and Vesta in the charge on the farms, and consequently of any laches imputable to them by reason of their relationship to their guardian. But further, Stuckert could not have represented the two children before his appointment as guardian, under any aspect of the case. And such appointment was made considerably less than twenty years before the filing of the bill.

[8] There being no laches, actual or imputed, on the part of Catharine and Vesta, or either of them, and the bill having been filed within twenty years after the charge on the farms became payable to them, and no part of the same having been paid, the question is now presented whether the defendants holding the farms are purchasers for value without notice and as such entitled to protection against the enforcement of the charge. At one time I had a strong impression that with the exception of Biggs they were so entitled to protection; but a full reargument of the case on this point and careful reflection have wholly removed that impression. The proposition advanced on behalf of the complainants, however, that the recording of the will and the various deeds, mortgages and other muniments of title was per se notice to the world, and therefore to the defendants, of their contents, I am not prepared to sustain. The statutes of Delaware provide for the recording of wills, and deeds concerning lands and tenements; in the former case declaring that the record or an office copy thereof "shall be sufficient evidence in respect to both real and personal estates," and in the latter that the record or an office copy thereof "shall be sufficient evidence." The statutes nowhere declare that such record or copy is per se notice to the world or any individual of the contents of the document recorded. Such an idea is not warranted either by the language or obvious purpose of the statutes. It is provided with respect to a deed concerning lands and tenements that if it be not duly recorded within three months (formerly a year) after its execution and delivery it "shall not avail against a subsequent fair creditor, mortgagee or purchaser for a valuable consideration unless it shall appear

that such creditor when giving the credit, or such mortgagee or purchaser when advancing the consideration had notice of such deed." Section 17, c. 83, Del. Rev. Code. The object of this provision is the protection of subsequent bona fide creditors, mortgagees and purchasers for value, against prior deeds by requiring their grantees within a reasonably short time to have them recorded in public offices where the record of their contents will be readily accessible to all persons using reasonable and ordinary care and diligence in the examination of titles. The provision of law relating to the recording of wills does not prescribe any period within which they shall be recorded as above set forth in the case of deeds, but in both cases the purpose of the recording is the same. Wade in his work on the Law of Notice, § 96, in reference to American registry and recording acts says:

"They are intended to furnish the best and most easily accessible evidence of the titles to real estate, to the end that those desiring to purchase may be fully informed of instruments of prior date, affecting the subject of their contemplated purchases."

[9] I am satisfied that the owners or holders of the Homestead, Capelle and Corner farms at the time they purchased and took title to the same were chargeable with notice or knowledge of the existence of the charge thereon in favor of Catharine and Vesta. Clearly it would have been gross negligence on the part of any one competent and undertaking to examine the title to and charges or incumbrances, if any, on the farms, not to have carried his examination back at least twenty years from the date of search; especially in view of the fact that the common law presumption of payment does not arise until the expiration of that period.

The defendant Biggs, who holds the Homestead farm, claims title thereto immediately under the sheriff's deed to him executed December 9, 1903, pursuant to a sale under the mortgage of Oliver Jamison and wife to the State of Delaware, dated April 21, 1888. This mortgage was executed about fifteen years and seven months before the deed under which the present holder immediately claims title, and refers to the real estate covered by it as being the same premises conveyed by Biggs to Oliver June 29, 1885, by deed recorded, etc. That deed refers expressly, as has appeared, to barring the entail under the will of the testator. The defendants Lawrence Lofland and Martha Lofland, who hold the Capelle farm, claim title thereto immediately under a deed from John A. Harris, Jr., and wife to them executed March 25, 1902, and mediately under a deed from Clarence Jamison and wife to John N. McCrone, executed October 27, 1885, which last mentioned deed was executed sixteen years and five months before the deed under which the present holders immediately claim title, and refers to the real estate conveyed by it as being the same premises conveyed, inter alia, to Biggs by Oliver, Clarence and Edgar, "to bar the several estates tail therein mentioned and this conveyance being executed to complete the same and put the fee simple title of the above described premises in the said Clarence Jamison." The defendant Eliza C. Green, who holds the Corner farm, claims title thereto immediately under a deed from

Louis M. Hass and wife and Henry A. Hass and wife to her executed March 6, 1905, and mediately under the sheriff's deed to Charles F. Perot, executed June 12, 1893, pursuant to a sale under the above mentioned mortgage of Edgar Jamison and wife to American Fire Insurance Company, dated March 31, 1886. This mortgage was executed less than nine years before the deed under which the present holder immediately claims title, and refers to the real estate covered by it as the same land which Biggs granted and confirmed unto Edgar Jamison June 29, 1885, by deed duly recorded, &c. This deed, as before stated, expressly refers to the barring of the entail under the will of the testator mentioned in the deed of the same date to Biggs from Edgar, Clarence and Oliver and their wives. All the deeds, mortgages, judgments, writs, petitions, orders or decrees constituting links in the chain of title of the holders of the Homestead farm, the Capelle farm and the Corner farm, are matters of record in New Castle County open to inspection by all interested in them. The holders of the three farms are obliged to and do claim and trace title under the will. In 2 Redfield on Wills, 210, it is said:

"It seems to be well settled that where lands are held by subsequent bona fide purchasers for value, but who are obliged to trace title through a devise, whereby a charge is created upon the lands for the payment of legacies, such purchasers will be constructively affected with notice of such charge, and equity will enforce it upon the lands in their hands."

In Pomeroy's Eq. Juris. § 626, it is said:

"Wherever a purchaser holds under a conveyance, and is obliged to make out his title through that deed, or through a series of prior deeds, the general rule is firmly established that he has constructive notice of every matter connected with or affecting the estate which appears, either by description of parties, by recital, by reference, or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title."

[10] In the case under consideration, while the will provided for a charge on the farms, such charge was to be only to the extent to which the share intended for Edgar and his children or issue could not be paid out of the personalty belonging to the estate on hand on the attainment of his majority by the youngest son who should live so long and the appraisement of the farms. But the matters of record were of such a character as to put the proposed purchasers, in the absence of culpable negligence, upon inquiry which, if pursued with reasonable care and diligence, could not have failed to acquaint them with the existence of the charge in question, or at least to deter them from purchasing save consciously at their peril. Had there been any proper examination of title and search for incumbrances, express reference to the supposed estate tail under the will would have been discovered in the chain of title only fifteen years and seven months before the deed to Biggs, sixteen years and five months before the deed to the Loflands, and in less than nine years before the deed to Eliza C. Green. In view of such express reference it would have been gross negligence not to examine the provisions of the will, duly recorded, and to find that the testator devised the three farms to

Craven,—the death of Albert during the life-time of the testator theretofore appearing in the deeds constituting the chain of title,—in trust to raise out of or charge upon the farms the provision intended for the benefit of Edgar and his children or issue, and to find that such charge should exist to the extent to which such share for Edgar and his children or issue could not be paid out of the personalty, and to find that on the attainment of his majority by the youngest son of the testator who should live so long an appraisement was to be made of the farms, which appraisement was to enter into the computation of the amount of the above mentioned share. Knowledge of these provisions in the will would inevitably have suggested the pursuit of several inquiries essential to the protection of the proposed purchasers. Being chargeable with knowledge from the face of the will that Craven was to have an appraisement of the farms made, and that the share intended for Edgar and his children or issue was to be a charge upon the farms except in so far as personalty belonging to the estate was applicable to it, and that such share was to go on the death of Edgar to his children or issue, there was a duty to make certain inquiries on these points which could not be omitted in the exercise of due care and diligence on the part of the proposed purchasers or the attorneys representing them. To ascertain whether an appraisement of the farms had been made, the most natural and obvious course was to communicate with Craven on the subject, who, on the face of the will, was charged with the duty of having the appraisement made. To ascertain whether there was any personalty of the estate applicable to the share intended for Edgar and his children or issue, the most natural and obvious course was to examine the records in the office of the register of wills, which would have resulted in disclosing the fact that there was no personalty whatever applicable to such share. To ascertain whether Edgar left children to survive him, the most natural and obvious course was to communicate with Craven, Edgar's widow, or the members of the Jamison family. Had this course been pursued in all human probability the existence and whereabouts of Catharine and Vesta would have been ascertained. It does not appear that any attempt was so made or in any other manner to discover their existence prior to 1904, when it was discovered by Biggs through information from Oliver; and it does not appear that if proper effort had been made their existence would not have been ascertained at a much earlier period. Biggs in his testimony throws no light on this subject. The purchasing defendants are chargeable with knowledge or notice of those facts of which they or their attorneys could not have remained in ignorance save through an omission to observe any proper degree of care and diligence. Pomeroy states (Vol. 5, § 27):

"Knowledge of facts which would put a person of ordinary prudence and diligence on inquiry is, in the eyes of the law, equivalent to a knowledge of all the facts which a reasonably diligent inquiry would disclose."

In Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437, 12 Sup. Ct. 239, 246 (35 L. Ed. 1063), the court quoted with approval the following rule stated by the Virginia Court of Appeals:

"Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a bona fide purchaser. He is bound not only by actual, but also by constructive notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice."

In Northwestern Bank v. Freeman, 171 U. S. 620, 629, 19 Sup. Ct. 36, 39 (43 L. Ed. 307), the court said:

"A purchaser is charged with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed."

In Ochoa v. Hernandez, 230 U. S. 139, 164, 33 Sup. Ct. 1033, 1042 (57 L. Ed. 1427), the court said:

"It is a familiar doctrine, universally recognized where laws are in force for the registry or recording of instruments of conveyance, that every purchaser takes his title subject to any defects and infirmities that may be ascertained by reference to his chain of title as spread forth upon the public records."

Hall v. Livingston et al., 3 Del. Ch. 348, cited by the defendants, is not in point here, for the reason that the trust which it was sought to establish against land held by a subsequent purchaser for value was of a parol or oral nature, created by his vendor in favor of the complainant, the trust not being disclosed or suggested either in the deed by which the vendor acquired title or in that to the subsequent purchaser for value. The matter relied on as notice to the purchaser of the existence of the trust was wholly dehors the deeds or their record, consisting of oral suggestions to the purchaser by third persons; one of them being "a mere vague suspicion" thrown out during a conversation "directed to another point," and the other the expression of "only vague and indefinite suspicion, pointing to nothing, and in itself carrying no notice." The Chancellor naturally held that the evidence showed "at most, a want of extreme caution." In declaring that the purchaser could not be affected with notice of the trust unless the facts were so clear and undoubted as to make it fraudulent in him afterwards to take and hold the property, the court indulged in language uncalled for by the facts and in conflict with the American doctrine of notice arising from registry or recording as appears from the decisions and text books above cited, which are wholly at variance with the proposition that mala fides on the part of a subsequent purchaser for value is necessary to affect him with notice of the existence of a prior trust or equity, disclosed or suggested in the deeds through which he is compelled to trace his chain of title. United States v. Detroit Lumber Co., 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499, was also a case in which it was sought to establish notice, not from anything appearing or suggested on the face of any deed or its record, but solely from extraneous facts. No record sug-

gested any infirmity of title or anything to put a proposed purchaser upon inquiry, and the court declared in substance that to affect the purchaser for value with notice the question was not, whether he had the means of obtaining and might by prudent caution have obtained knowledge of the fact, but whether not obtaining it was the result of gross or culpable negligence. This case does not, however, in any degree impair the force of the later case of Ochoa v. Hernandez, 230 U. S. 139, 164, 33 Sup. Ct. 1033, 1043 (57 L. Ed. 1427), in which it was declared, as above stated, that "where laws are in force for the registry or recording of instruments of conveyance * * * every purchaser takes his title subject to any defects and infirmities that may be ascertained by reference to his chain of title as spread forth upon the public records."

The defendant Biggs contends that even were it true, which he denies, that by reason of his participation in the conveyancing for the purpose of barring the supposed entail, in which reference was made to the will, he was charged with notice of its contents, he is nevertheless a purchaser from a bona fide purchaser and consequently is entitled to protection. This position cannot be maintained, as he became purchaser under a sheriff's sale under the mortgage of Oliver and his wife to the State of Delaware, dated April 21, 1888, which refers to the deed from Biggs to Oliver of June 29, 1885, expressly referring to the barring of the supposed entail under the will.

It is argued that as the testator constituted Craven trustee, he thereby endorsed him to all whom it might concern as one fully competent and willing to discharge his fiduciary duties, and therefore that purchasers of the farms without actual knowledge of dereliction on Craven's part should be protected against Edgar's children claiming under the will. This contention, whatever may be its plausibility, is unsound. It could be made equally with respect to all trustees appointed by deed or will, and if carried to its logical result it would present the reductio ad absurdum that negligent or careless purchasers who by reason of inattention or indifference failed to ascertain the condition of the property purchased by them should be protected as against wholly innocent objects of the testator's bounty. The statement of the proposition is its refutation.

It would seem that approximately the same degree of care and investigation might reasonably be expected to be observed by the defendants for the purpose of ascertaining whether the land sought to be acquired was clear of charges, as by the complainants, who, in the absence of definite information acted merely on surmise based upon the communication from Biggs, in ascertaining whether they had an interest in such land. But however this may be, the exercise of only a reasonable degree of care and diligence was all that was necessary to acquaint them with the facts learned by the complainants.

[11] An essential difference between the situation of the defendants and that of the complainants is that while the former were put upon inquiry the latter were not. The recording or registry of a deed or other instrument relating to land is constructive notice of its contents to all persons subsequently dealing with the title, but it does not so operate

with respect to third persons not so dealing and innocently ignorant of any rights which may be affected by such deed or instrument. As declared in Foster v. Mansfield, Coldwater, &c., Railroad, 146 U. S. 88, 99, 13 Sup. Ct. 28, 32 (36 L. Ed. 899), "If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights." This statement, of course, assumes innocent ignorance, as in the case of Edgar's children.

There being absolute innocence and a total absence of laches on the part of Catharine and Vesta, and culpable negligence on the part of the present owners or holders of the farms in omitting to pursue obvious inquiries suggested on the face of the public records, making them chargeable with notice of the rights of Edgar's children in the premises, the complainants are entitled to a decree. An apportionment of the amount due and payable to the complainants as between the three farms is readily made. Their aggregate value determined by the appraisement made by Hudson, Stuckert and Lynch is $48,000, and no personalty having been applicable to the share intended for Edgar during his life-time and his children or issue after his death, $16,000, being one-third of the aggregate valuation, is chargeable upon the three farms as the amount payable to Catharine and Vesta in equal shares on the death of their father May 1, 1886. After deducting $16,000 from the total valuation of $48,000, the sum of $32,000 is left, representing what must be taken as the net value of the three farms for the purposes of equalization and apportionment, to be equally divided between Clarence and Oliver. For those purposes $10,666.66, being one-third of the total net value of the real estate represents the average net value of each of the three farms. The Homestead farm which was appraised at $22,000 represents $11,333.33 more than its net value for the purposes of equalization and apportionment. The Capelle farm which was appraised at $14,000 represents $3,333.34 more than its net value for the above purposes. The Corner farm which was appraised at $12,000 represents $1,333.33 more than its net value for those purposes. The excess of the aggregate of the sums at which the three farms respectively were appraised over the aggregate amount of their net value for the purposes of equalization and apportionment amounts, and necessarily must amount, to the sum of $16,000, which became payable to Edgar's surviving children under the provisions of the will and the appraisement. This sum must be declared chargeable against the three farms respectively as follows: On the Homestead farm $11,333.33, on the Capelle farm $3,333.34, and on the Corner farm $1,333.33, these respective sums to bear interest at the rate of six per cent. per annum from May 1, 1886, until the principal be paid. But as these respective sums with interest represent all which became due and payable to Edgar's surviving children, and as Vesta and her husband were by amendment dropped out of the case and have not since become parties to it by intervention or in any other manner, the complainants in right of Catharine P. Mathieson are entitled to receive only one-half of the above mentioned sum of $16,000, distributed as follows: $5,666.66 on account of and as charged against the Homestead farm, $1,666.67 on account of and as charged against the Capelle farm, and

$666.67 on account of and as charged against the Corner farm, together with interest thereon as above mentioned. The complainants are entitled to a decree declaring the above mentioned sums of $5,666.66, $1,666.67 and $666.67 charges upon the Homestead farm, the Capelle farm and the Corner farm respectively, payable to the complainants in right of Catharine P. Mathieson, together with interest as above mentioned; and providing that in case the owners of the said farms, or any of them, shall make default for the period of sixty days next following the date of the decree in paying to the complainants the sum or sums charged against the farm or farms of the owner or owners so making default, a trustee, to be appointed by the court, shall expose and sell such farm or farms at public sale in the manner and at the time and on the terms and conditions to be prescribed by the court for the satisfaction of the sum or sums due, charged and payable out of such farm or farms, and shall pay into court the net proceeds of sale, to be applied and disposed of under the order and direction of the court; and reserving to the court jurisdiction of this suit and the right to make from time to time such further orders and decrees therein as may be necessary to effectuate its object and as to justice shall appertain. The bill must be dismissed as against all defendants other than the owners of the three farms. Let a decree in accordance with this opinion be prepared and submitted.

In re R. H. PENNINGTON & CO.

(District Court, W. D. Kentucky, at Owensboro. November 9, 1915.)

1. BANKRUPTCY ⇐16—JURISDICTION OF COURTS OF BANKRUPTCY—PRINCIPAL PLACE OF BUSINESS.

Under Bankr. Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 545 (Comp. St. 1913, § 9586), providing that courts of bankruptcy shall have jurisdiction to adjudge persons bankrupt who have had their principal business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months or the greater portion thereof, where a corporation had offices in several cities, neither its articles of incorporation nor the fact that the larger amount of its property was located in one of such cities was conclusive as to its principal place of business, and this was an open question, to be determined by the facts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. ⇐16.]

2. BANKRUPTCY ⇐47—VOLUNTARY PROCEEDINGS—OBJECTIONS BY CREDITORS.

While creditors may contest any petition in involuntary bankruptcy, no provision is made for contesting a voluntary petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 41, 42; Dec. Dig. ⇐47.]

3. BANKRUPTCY ⇐18—JURISDICTION OF COURTS OF BANKRUPTCY—PROPER DISTRICT FOR PROCEEDINGS.

A corporation, whose articles of incorporation showed that its domicile and place of residence was in O., in the Western district of Kentucky, had offices in different cities. Certain creditors filed a petition in involuntary bankruptcy in Indiana, but before the return day the corporation filed a voluntary petition in the Western district of Kentucky. *Held,*

that the mere filing of the involuntary petition did not give jurisdiction to the Indiana court, and the burden of proof was on the petitioning creditors to show to the satisfaction of the Kentucky court that the corporation's principal place of business was in Indiana, and where they failed to do this the court for the Western district of Kentucky would take jurisdiction, especially as the jurisdiction of that court, depending upon domicile or residence, was clearly established, while the location of the corporation's place of business was doubtful, and moreover it would seem that a voluntary proceeding takes precedence over an involuntary proceeding, unless the involuntary proceeding is first heard or has gone to an adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 22; Dec. Dig. ⟸18.]

In Bankruptcy. In the matter of R. H. Pennington & Co., a corporation, bankrupt. On hearing on voluntary petition, opposed by certain creditors. Adjudication granted.

Isidor Kahn, of Evansville, Ind., for petitioning creditors.
W. P. Sandidge, of Owensboro, Ky., for R. H. Pennington & Co.

EVANS, District Judge. On November 4, 1915, the petition in this case was filed by R. H. Pennington & Co. It is a corporation organized under the laws of Kentucky, and in filing its petition it acted in obedience to a resolution passed by its board of directors. Pursuant to section 539 of the Kentucky Statutes, in April, 1903, it filed articles of incorporation in the clerk's office of the Daviess county court, in one of which articles it was specified that:

"The principal office and place of business of said company should be Owensboro, Daviess county, Ky."

On the 6th its petition, in due course, was presented to us for an adjudication. Shortly afterwards on that day Mr. Kahn, of Evansville, communicated with the clerk by telephone, inquiring when the matter would be heard, and asking that it be postponed until the 9th inst., saying that he was much engaged in the trial of a case which was then in progress at Evansville, and which could not be concluded until the 8th. He was advised that the petition would be set for hearing on the morning of the 8th, unless arrangements could be made between himself for the petitioning creditors in a petition which he said had been filed in Evansville, and the counsel for the petitioner here, who lived at Owensboro, Ky. No arrangements seem to have been made between them, for the counsel of both appeared here on the 8th at the opening of the court, and it then developed, as shown by the papers then filed and the motion then made by Mr. Kahn and his associate, Mr. Anderson, in behalf of the creditors who had filed the petition at Evansville, that on the 2d an involuntary petition in bankruptcy had been filed by Harding & Fuller, the Evansville Packing Company, and the Speed Printing & Publishing Company, three creditors of R. H. Pennington & Co., in the District Court of the United States for the District of Indiana at Evansville, in which those creditors had alleged that said R. H. Pennington & Co. had committed certain acts of bankruptcy, and in which petition upon those grounds they had prayed that said corporation be adjudicated bankrupt. Thereupon the said petitioning creditors insisted that there should be no adjudication in this case here, because of the previous pendency of

their petition in involuntary bankruptcy filed in the District Court of Indiana. At the hearing it was stated by Mr. Kahn, of counsel in the latter case, in answer to our inquiry, that the return day fixed in the subpœna issued upon the petition filed in Evansville was November 12th. In this situation, and upon the issues made as stated, the testimony was heard, mainly upon the issue as to what was the principal place of business of R. H. Pennington & Co.

[1] Without undertaking to state the details of the testimony, it will suffice to say that the corporation was organized in April, 1903, and then commenced business in Owensboro, Ky., and probably in Henderson, Ky., as well. Subsequently a large part of its business was conducted in the city of Evansville, Ind.; but while the president of the corporation now lives in Evansville, its secretary lives in Owensboro, Ky., and its vice president in Henderson, Ky. Where the directors reside, or who they are, was not shown. All of the meetings of the directors and all the meetings of the stockholders have been held in Owensboro, Ky. The principal books of the corporation have been kept there, all its dividends were declared and paid there, and, although it continued business at Owensboro, it had branches in Henderson, Ky., Evansville, Ind., and also in St. Louis, Mo. It appears from the schedules filed in this court with the petition of R. H. Pennington & Co. that the larger amount of its "property" was located in Evansville, Ind., though that fact of itself is not material, except as it may or may not indicate where the "principal place of business" of the company is located. Upon all the testimony we have reached the conclusion that its principal place of business is at Owensboro, Ky. If there were any doubt upon the testimony, we should be inclined to think that the proper course would be to yield to the provisions of the articles of incorporation in determining where the corporation's principal place of business is, although the fact that such articles fix a named city as the principal place of business is not always conclusive of the question. Under the Bankruptcy Act the question should be treated as an open one, to be determined by the facts. Consequently we have heard and considered all the testimony offered, and have reached the conclusion already stated. Among the authorities examined in this connection are 1 Loveland on Bankruptcy (4th Ed.) pages 404, 405, and cases cited.

Bankr. Act, § 2 (1), empowers a District Court to adjudge any person a bankrupt who, being unable to pay his debts, has had his place of business, or has resided or had his domicile, within its territorial jurisdiction for the preceding six months or the greater portion thereof. Section 4 (a) provides that:

"Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."

Section 4 (b) provides that:

"Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except any municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt." Comp. St. 1913, § 9588.

Section 59 (a) provides that:

"Any qualified person may file a petition to be adjudged a voluntary bankrupt." Comp. St. 1913, § 9643.

[2] While creditors may contest any petition in involuntary bankruptcy, no provision is made for contesting a petition in voluntary bankruptcy. In re Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. Rep. 692.

[3] Under the statutory provisions referred to the debtor filed its voluntary petition in this court, as it had the unquestionable right to do, inasmuch as it had resided and had its domicile in this district at all times since April, 1903. Whether or not the District Court for the District of Indiana had jurisdiction of the petition in involuntary bankruptcy filed on November 2d depended altogether, as we take it, upon whether the debtor's principal place of business was at Evansville, Ind. That appears to be the sole ground upon which jurisdiction of the petition filed there could be based. But the petition there was filed first, and it has been argued that the District Court there had first acquired jurisdiction by the filing there of the petition in involuntary bankruptcy. The mere filing of the petition, however, does not give jurisdiction, nor establish facts upon which jurisdiction may depend. In a contest here over the matter the burden of proof must be upon the petitioning creditors in the proceeding there to show to the satisfaction of the court that the debtor's principal place of business was in Evansville, inasmuch as the articles of incorporation, prima facie, show that the domicile and place of residence of the debtor is and has always been at Owensboro, Ky., as fixed in those articles. The creditors who are opposed to having the adjudication made in this case, and who had filed the petition in involuntary bankruptcy at Evansville, Ind., have failed to show to our satisfaction that the debtor's principal place of business, within the meaning of the Bankruptcy Act, is at Evansville. Hence we think this court has jurisdiction over the Kentucky corporation.

There is another consideration. Any debtor has the right to file a petition in voluntary bankruptcy if he is unable to pay his debts. This right has been exercised in this case, and it has been frequently decided that a voluntary proceeding by the debtor takes precedence over an involuntary proceeding, unless the latter is first heard or has gone to an adjudication. In re Waxelbaum, 98 Fed. 589, 591; In re Stegar, 113 Fed. 978; Collier on Bankruptcy (10th Ed.) page 766; In re Lachenmaier, 203 Fed. 32, 121 C. C. A. 368. See, also, the somewhat analogous case of Burdick v. Dillon, 144 Fed. 737, 75 C. C. A. 603.

The precise question before us, unlike cases heretofore decided, is in a contest between a voluntary and an involuntary proceeding, both of which are not pending in the same district, and has not, so far as we can find, been adjudicated. But we are strongly inclined to think, with Judge Brown in Re Waxelbaum, 98 Fed. 591, and Judge Jones in the Case of Stegar, 113 Fed. 978, and with the elementary authorities, such as Collier on Bankruptcy (9th Ed.) page 766, that the voluntary petition should take precedence, as there can be a prompt adjudication—relief which is also sought in the involuntary case—and

we have the assurance that certainly that jurisdiction which depends upon domicile or residence has been clearly established, while that which depends upon the location of the debtor's place of business is, to say the least, doubtful.

We have been referred also to section 32 of the Bankruptcy Act (Comp. St. 1913, § 9616), and to General Order No. 6 (89 Fed. v, 32 C. C. A. v), prescribed by the Supreme Court, and both may be important; but as we hear the case here first, and have no doubt of our jurisdiction, and as all want an adjudication, we think no action need be taken under those provisions. Upon the whole, while regretting that the burden of the administration of this estate will be imposed upon this court, instead of that in Indiana, we have concluded that it is our duty to take jurisdiction upon the two separate grounds: First, that this is a voluntary petition by the debtor, the residence and domicile of which are clearly and certainly in this district, where the question is first heard, and can be first determined; and, second, that, upon the testimony, we have found that the principal place of business of the debtor, within the proper meaning of that term, as used in the Bankruptcy Act, is Owensboro, Ky.

There will therefore be an adjudication of bankruptcy in this case.

POSTAL TELEGRAPH-CABLE CO. v. INGRAHAM et al.

(District Court, D. Maine. December 11, 1915.)

No. 744.

1. TELEGRAPHS AND TELEPHONES ⟸10—USE OF STREETS—PERMITS.
   Where a permit for the erection and maintenance of telegraph poles and wires in a street was not signed by the mayor and aldermen of the city, or a majority of them, but by the clerk in their behalf, any irregularity therein was made good by acquiescence in the use of the street for 25 years.
   [Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. ⟸10.]

2. TELEGRAPHS AND TELEPHONES ⟸10—USE OF STREETS—PERMITS—"FRANCHISE."
   A permit granted by the mayor and aldermen of a city for the erection of telegraph poles and wires in a street, and duly made use of, though granted without any legal consideration being paid therefor and in general terms without any limit, is not revocable at will, but constituted a franchise which is assignable, and could not be terminated or substantially modified, except for good cause. See Owensboro v. Cumberland Telephone & Telegraph Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. Ed. 1389.
   [Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. ⟸10.
   For other definitions, see Words and Phrases, First and Second Series, Franchise.]

3. TELEGRAPHS AND TELEPHONES ⟸10—USE OF STREETS—POWERS OF CITY COUNCIL.
   The reasonableness of an order of the mayor and aldermen of a city requiring telegraph wires to be placed underground may and should be

determined, not only by existing conditions, but by conditions the existence of which can be foreseen, or by reference to coming demands which are apparent.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. ⟸10.]

In Equity. Suit by the Postal Telegraph-Cable Company against William M. Ingraham and others. Decree for complainant.

Woodman & Whitehouse and Arthur Chapman, both of Portland, Me., for complainant.

James A. Connellan, Corp. Counsel, of Portland, Me., for defendants.

PUTNAM, Circuit Judge. The respondents named herein are alleged to have been the mayor and aldermen of the city of Portland, and to have had general jurisdiction of the matters to which this bill relates. On the 2d day of August, 1915, the board of mayor and aldermen of the city of Portland passed the following order:

"City of Portland, Maine. In Board of Mayor and Aldermen.

"August 2, 1915.

"It is hereby ordered that all permits for the construction and maintenance of poles and wires upon the public highway and street known as St. John street, between Park avenue and Danforth street, heretofore issued and given by the municipal officers of the city of Portland to the Postal Telegraph-Cable Company, be and the same are hereby revoked, and the Postal Telegraph-Cable Company is hereby ordered to remove all said poles and wires now maintained or in process of construction upon said St. John street, between Park avenue and Danforth street. Said removal of said poles and wires to be made and completed within 60 days from the date of the granting of a permit to said Postal Telegraph-Cable Company to lay conduits for the carrying of pipes, wires, and cables under the surface on the easterly side of St. John street, between Park avenue and Danforth street; such laying of said conduits for the carrying of pipes, wires, and cables beneath the surface of the street to be subject to the approval of the commissioner of public works and to the city electrician of the city of Portland: Provided, said Postal Telegraph-Cable Company makes application for such permit within 7 days after the date of the passage of this order; and provided, that said poles and wires be entirely removed and said conduits for carrying said pipes, wires, and cables installed and completed within 60 days from the granting of said permit; and provided, further, that the first work done in the laying of said conduits for carrying the said pipes, wires, and cables be in the section of St. John street from the end of the present paving to the offices of the Maine Central Railroad now under process of construction. If the said Postal Telegraph-Cable Company does not make application for a permit to place their or its pipes, wires, and cables underground, and to install conduits for said pipes, wires, and cables underground, then said removal of said poles and wires must be made within 60 days of the date of the passage of this order. And the city clerk of the city of Portland is hereby authorized, directed, and instructed to have a certified copy of this order served upon the Postal Telegraph-Cable Company by service upon its Portland manager, agent, or representative on Tuesday, August 3, 1915, and if unable to make service as aforesaid by the use of reasonable diligence, then and in said event as soon thereafter as possible."

[1] The bill alleges that the erection of the poles and wires in question was authorized by a permit issued to the Commercial Union Telegraph Company on February 3, 1890, and this is admitted to have

been assigned to the complainant. This permit is not impugned by the answer to the bill, but seems to be now criticized by counsel. We understand that this criticism is on the ground that the act of 1885 (St. Me. 1885, c. 378, § 2) on which this permit is said to rest required permits of this character to be in writing, and signed by the mayor and aldermen. Neither the answer to the bill, nor the brief of counsel, point out specifically and clearly what the defect was in the proceeding of 1890. We understand it is that the permit then issued was not under the manual signatures of the mayor and aldermen then in office, or of a majority of them, but, like the major part of the proceedings of that board, was signed by the clerk in their behalf. We are not prepared to say that the rule, "Facit per alium, facit per se," applies to proceedings of this character; but any irregularity of such a nature must be held to have been made good by so long an acquiescence as we find here.

[2, 3] The fundamental question in the case, and the point on which the order of August 2, 1915, properly rests, is that until within a few years the general belief and impression of the legal profession has been that any permit which is granted without any legal consideration being paid therefor, and in general terms without any limit, was revocable at will. This has lately been found and determined by the Supreme Court of the United States not to be in accordance with the law, but these permits constitute a franchise which is assignable and which cannot be terminated, or substantially modified, except for good cause, or for some constitutional power, supported by some special reasons in favor thereof. A reference to Owensboro v. Cumberland Telephone & Telegraph Company, 230 U. S. 58, 33 Sup. Ct. 988, 57 L. Ed. 1389, decided in June, 1913, sufficiently illustrates what we refer to in this connection; and the decisions of the Supreme Court of the United States of late have contained numerous illustrations of the power of the Legislature with reference to imposing on quasi corporations the duties and the cost of contributing to the various improvements which are apparently required by developing modern necessities. With reference, however, to rights and requirements in either direction, a certain degree of reasonableness is demanded. With regard to the shifting of franchises like those involved here in the imposing of novel obligations and in the development of new rights and relations, the question of reasonableness is always determined by conditions already accrued and existing; but no doubt it may be determined, and should be determined, not only by existing conditions, but by conditions the existence of which can be foreseen in a growing city or town, or in special localities where the coming demands are apparent.

[4] The difficulty, however, with the order of August 2, 1915, in the present case, is that it takes no account of the propositions which we have explained. It is radical and substantial in its terms, and by its letter destroys what exists, and leaves in the place of it only a right to apply for new franchises. It is possible that, in view of all the circumstances, courts might construe the real purpose of the order in harmony with the principles and decisions to which we have

referred; but, as we are not clear that this will be done, the prudent course is to set aside the order of August 2, 1915, absolutely, and permit the institution of new proceedings, which can easily be accomplished.

The bill will be sustained; and the complainant may offer a draft decree within 10 days from the filing of this opinion, and the respondents may offer corrections thereof within 10 days thereafter.

BERRY v. MOBILE & O. R. CO. et al.

(District Court, W. D. Kentucky, at Paducah. December 18, 1915.)

No. 57.

1. REMOVAL OF CAUSES ⊜107—MOTIONS TO REMAND—SPEAKING MOTIONS.
   A motion to remand a case always raises some question of law arising upon the record, and a "speaking" motion is improper.
   [Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225–232, 234; Dec. Dig. ⊜107.]

2. REMOVAL OF CAUSES ⊜86—PETITION FOR REMOVAL—VERIFICATION—AMENDMENT.
   In an action by a citizen of Kentucky against a citizen of Tennessee and a corporation which was a citizen of Alabama, the petition showed the citizenship of plaintiff and the corporation, and that the amount in controversy exceeded $3,000, and the citizenship of the individual defendant was shown by his petition to remove to the federal court, verified by his attorney. *Held* that, as his citizenship was easily within the attorney's knowledge, it would seem that the attorney's verification was sufficient under Judicial Code (Act March 3, 1911, c. 231) § 29, 36 Stat. 1095 (Comp. St. 1913, § 1011), requiring petitions for removal to be duly verified, and that the state statutes respecting the verification of pleadings would not apply, but if there were any defects in the verification they might be cured by the filing of an amended affidavit.
   [Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166–179; Dec. Dig. ⊜86.]

3. COURTS ⊜340—UNITED STATES COURTS—CONFORMITY TO STATE PRACTICE.
   Conformity Act June 1, 1872, c. 255, § 5, 17 Stat. 197 (Comp. St. 1913, § 1537), applies only in the absence of direct legislation upon a subject by Congress.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 900; Dec. Dig. ⊜340.]

At Law. Action by C. C. Berry against the Mobile & Ohio Railroad Company and another. On motion to remand. Motion overruled.

W. A. Berry, of Paducah, Ky., for plaintiff.
Kane & Bullock, of Bardwell, Ky., for defendants.

EVANS, District Judge. [1] This action by C. C. Berry, a citizen of Kentucky, was commenced in the state court against the Mobile & Ohio Railroad Company, a citizen of Alabama, and Chas. Estes, a citizen of Tennessee. Instead of joining in one petition for the removal of the action to this court, each of the defendants filed a sepa-

rate petition to effect that object. Each petition was verified by the attorney for the petitioner, and he happened to be the same person in each instance. After the filing of the transcript in this court, the plaintiff moved to remand the case to the state court, and, instead of confining himself to that, went on in the paper to make statements of fact, and finally verified them. This was a novel procedure, and was made more so when the defendant filed an answer to the motion, which was also verified. The motion to remand always raises some question of law arising upon the record, and a "speaking" motion is about as indefensible as a "speaking" demurrer.

[2] Disregarding these anomalies, we proceed to discuss the real question presented. The motion is based upon the objection that the petitions for removal were not "duly verified," within the meaning of section 29 of the Judicial Code, which provides that a defendant who deems himself entitled to remove a case from a state court "may make and file a petition duly verified in such suit in such state court."

Previous to the enactment of the Judicial Code on March 3, 1911, there was no requirement that petitions for removal should be verified, but Congress evidently thought, and so legislated, that such petition should be supported by oath. It, however, did not fix any standard by which we could determine what should be "due" verification. Of course, verification by the defendant in person would always be proper, and literally the language might require that course; but at once we encounter the necessity for an exception, for a corporation (which is embraced in the general language of the section) could not itself make the oath, and Congress knew, and must have had in contemplation, not only that fact, but the further fact that individuals might not always be able to verify petitions for removal within the time allowed. Many accidents or unavoidable conditions might prevent that. Hence it used general language, and it is not improbable that Congress intended that the discretion of the court might be exercised in determining whether, upon the circumstances of a given case, the petition was "duly" verified. The word "duly" is sufficiently ambiguous in this connection to sometimes demand construction to give effect to the real intention of Congress, which was to have the sanction of an oath to the petition for a removal of a cause from the state court.

Under these circumstances, and looking broadly to the reason of the case, it is not unfair to assume that what Congress had in mind was that petitions for the removal of causes (which should only state such facts as bear upon the right to remove) should have the sanction of and the assurance given by the oath of some person who knows the facts. Hence, while the petition of Estes covers many statements which it was not necessary for him to make, and which were, to that extent, immaterial, and need not, for that reason, have been made or verified, his petition does show the required diversity of citizenship. This fact was easily within the knowledge of the attorney whose verification showed it to the court, and we think sufficiently gave the sworn assurance contemplated and required by section 29, in the absence of more specific language in that statute. As the plaintiff in his petition avers himself to be a citizen of Kentucky, the other three

essential facts upon which the right of removal must be based were: First, that the amount in controversy exceeded $3,000, and that fact is shown by the plaintiff's petition, wherein it is sought to recover $20,000 in damage and costs; second, that the defendant railroad company is a citizen of Alabama, which is also distinctly shown by the plaintiff's petition; and, third, that the defendant Estes is a citizen of Tennessee. The two first of these facts, as does plaintiff's citizenship, appear plainly from the record, and the latter from the petition for removal, which has been verified by the attorney. The existence of the facts thus shown seems to make very clear the right to remove the action.

We incline, therefore, to hold that the statutory requirement has been met, not only as to the defendant railroad company, which could not personally verify its petition, but also by the verification of Estes' petition by his attorney.

[3] The learned counsel for the plaintiff insists that under the "Conformity Act" we must be governed by the Kentucky Code of Practice in determining what is due verification, and that the question must be settled according to the provisions of section 117 of the Code. He, however, overlooks the well-settled rule that the Conformity Act applies only in the absence of direct legislation upon a subject by Congress. That body, in respect to the removal of causes, has itself regulated the whole subject, including the procedure therefor, and has left no room for the operation of state rules of practice. Indeed, there are no Code provisions in Kentucky respecting the removal of causes, and, if there were, they would be superseded by the Judicial Code.

Without passing upon the question, but accepting for this occasion the views of counsel, we nevertheless conclude that, if there be anything defective in the affidavits to the two petitions for removal, those defects may be cured by amendment. The defendants respectively having heretofore tendered and asked leave to file a further and amended affidavit to each of the petitions for the removal of the action, those amended affidavits may be filed, as they appear sufficiently to conform to the requirements of section 117 of the Kentucky Code of Practice.

Considering the whole case, we conclude that the motion to remand should be and it is overruled, and an order to that effect will be entered.

UNITED STATES ex rel. FONG ON v. McCARTHY.

(District Court, S. D. New York. January 4, 1916.)

1. HABEAS CORPUS ⇐4—REVIEW OF ORDERS OF DEPORTATION—SCOPE OF REVIEW.

Under Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 479 (Comp. St. 1913, § 4313), providing that any person of Chinese descent found unlawfully in the United States may be arrested and removed to the country whence he came, but that any such Chinese person convicted before a commissioner of a United States court may, within 10 days from such conviction, appeal to the Judge of the District Court, on habeas corpus by a person of Chinese descent ordered deported by a United States commissioner, the court will not determine whether there is any evidence upon which the commissioner could act, since the evidence may be reviewed upon an appeal, and, where there is an opportunity to review the whole case, habeas corpus searches only the jurisdiction of the court over the person and over the subject-matter.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. ⇐4.]

2. HABEAS CORPUS ⇐4—REVIEW OF ERRORS.

Habeas corpus may not be made to do the work of a writ of error.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. ⇐4.]

Habeas corpus by the United States, on relation of Fong On, against Thomas D. McCarthy. Judgment against petitioner.

The proceeding comes up on return to a writ of habeas corpus issued to the marshal of the district, who holds the relator on an order of deportation to China issued by the United States commissioner for the Southern district of New York. The relator is a person of Chinese descent who has been held by the commissioner as a laborer without certificate under section 6, c. 60, of the Act of May 5, 1892, as amended by section 1, c. 14, of the Act of November 3, 1893 (27 Stat. 25, 28 Stat. 7 [Comp. St. 1913, § 4320]). At the hearing it was conceded that the relator was a person of Chinese descent and that he had no certificate, but that the government failed to make any proof that he was an alien or a laborer. The commissioner called upon the relator to prove these facts, relying upon section 3, c. 60, of the Act of May 5, 1892, 27 Stat. 25 (Comp. St. 1913, § 4317). The theory of the writ is that the government must put in some proof that the relator was an alien before he can be excluded from the United States, and that section 3 either is not intended to cover such a case or is unconstitutional. The relator urges that the writ will search the record to see whether there is any evidence upon which the commissioner could act; to that extent it involves a question of law.

John Neville Boyle, of New York City, for relator.
Edwin M. Stanton, of New York City, for the United States.

LEARNED HAND, District Judge (after stating the facts as above). [1] The proceedings were taken under section 13 of the Act of September 13, 1888, one provision of which gives a Chinese person convicted before a commissioner appeal to the Judge of the District Court for the district, upon which appeal all the evidence may be reviewed. Were it not for this right I am inclined to think that the writ would lie. Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. —;

Zakonaite v. Wolf, 226 U. S. 272, 274, 275, 33 Sup. Ct. 31, 57 L. Ed. 218. The same rule appears to apply in removal cases where there is no other review. Hyde v. Shine, 199 U. S. 62, 84, 25 Sup. Ct. 760, 50 L. Ed. 90; Greene v. Henkel, 183 U. S. 249, 261, 22 Sup. Ct. 218, 46 L. Ed. 177. The question is not so clear in commitments by a magistrate to await trial. In Ex parte Bollman, 4 Cranch, 75, 2 L. Ed. 554, Ex parte Jones (C. C.) 96 Fed. 200, and Re Martin, 5 Blatch. 303, Fed. Cas. No. 9,151, the court reviewed the testimony and discharged the relator for its insufficiency, but the contrary seems to have been held in Horner v. United States (No. 2) 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266, and Ex parte Rickelt, 61 Fed. 203.

[2] Where, however, as here, there is an opportunity to review the whole case, habeas corpus searches only the jurisdiction of the court over the person and over the subject-matter. Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849; Matter of Gregory, 219 U. S. 210, 31 Sup. Ct. 143, 55 L. Ed. 184. It is an old rule that habeas corpus may not be made to do the work of a writ of error. Dimmick v. Thompkins, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110. While the writ is not discretionary, it is not intended to duplicate other adequate procedure, or to enable a review to be made up in numerous parts. If the court is acting wholly out of its jurisdiction, a different question arises.

PAPERNOW v. STANDARD OIL CO. OF NEW YORK (two cases).

(District Court, D. Rhode Island. December 15, 1915.)

Nos. 2804, 2805.

1. JURY ⟸53—DISQUALIFICATION—PRIOR SERVICE.

Judicial Code (Act March 3, 1911, c. 231) § 275, 36 Stat. 1164 (Comp. St. 1913, § 1252), provides that jurors in the courts of the United States shall have the same qualifications "subject to the provisions hereinafter contained" as jurors of the highest court of law of the state. Section 286 (section 1263) provides that no person shall serve as a petit juror in any District Court more than one term in a year, and that it shall be sufficient cause of challenge that the juror has been summoned and attended court as a juror at any term within one year. *Held*, that as section 286 deals specifically with the question of prior service it is exclusive of state statutes on the same subject, and prior service as a petit juror in the state court does not disqualify one to serve as a petit juror in the federal court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 259, 341; Dec. Dig. ⟸53.]

2. NEW TRIAL ⟸54—WAIVER OF ERRORS—DISQUALIFICATION OF JURORS.

Where a party had an opportunity to challenge jurors and did not exercise that right, the disqualification of a juror does not entitle him to a new trial after verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 112–114; Dec. Dig. ⟸54.]

At Law. Two actions by Matthew Papernow and Louis Papernow against the Standard Oil Company of New York. Verdict for defendant, and plaintiffs petition for a new trial. Petition denied.

Philip S. Knauer, of Providence, R. I., for petitioners.

Barney & Lee and Walter H. Barney, all of Providence, R. I., for respondent.

BROWN, District Judge. After verdict for the defendant the plaintiffs petition for a new trial on the ground, first, that the verdict was against the evidence; and, second, that one of the jurors, within two years of the time of trial, had served as a petit juror in the state court.

I am of the opinion that upon the evidence the jury was justified in finding a verdict for the defendant, and that the verdict was not against the weight of evidence.

[1] The second ground proceeds upon the assumption that service as a petit juror in the state court works as a disqualification to serve as a petit juror in the federal court. I am of the opinion that this contention is unsound.

Section 275 of the Judicial Code of the United States, which relates to qualifications and exemptions of jurors, is limited by the expression "subject to the provisions hereinafter contained." Section 286, therefore, must be read in connection with section 275, and as it deals specifically with the question of prior service, is exclusive of the provisions of the state statute on the same subject. Morris v. United States, 161 Fed. 672, 88 C. C. A. 532; Walker v. Collins, 50 Fed. 737, 1 C. C. A. 642.

[2] Furthermore, according to the great weight of authority, when the party has had an opportunity for challenge, and has not exercised the right, no disqualification of a juror entitles him to a new trial after verdict. See cases cited in Kohl v. Lehlback, 160 U. S. 293, 300–302, 16 Sup. Ct. 304, 40 L. Ed. 432; Ryan v. Riverside and Oswego Mills, 15 R. I. 436, 8 Atl. 436; Sprague v. Brown, 21 R. I. 329, 43 Atl. 636; Guckian v. Newbold, 23 R. I. 553, 51 Atl. 210.

Petition for new trial denied.

DENISON v. McNORTON.

(Circuit Court of Appeals, Sixth Circuit. January 10, 1916.)

No. 2675.

1. MASTER AND SERVANT ⟸332—INJURIES TO THIRD PERSONS—EXISTENCE OF RELATIONSHIP—QUESTIONS FOR JURY.

Defendant, whose family consisted of himself, his wife, four sons, and a daughter, all living at home, owned an automobile, which was used, not only in taking him and his sons to and from their places of business and for some other business purposes, but also for purposes of pleasure and recreation for the family on weekdays and also on Sundays, and was more or less in constant use. It was usually driven by one of the sons, and principally by the son W., about 20 years old. On a Sunday, when the father and mother were away from home, all of the children, accompanied by a family friend, went on an automobile trip; the car being driven by W. The automobile, while so driven by W., struck and injured plaintiff. *Held*, that it was competent for the jury to infer that there was at least an implied authority in W. to drive the car, and that such driving was in the service of the father in providing recreation for the family, especially in view of the fact that all the members of the family at home were participating at the time in the use of the car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274–1277; Dec. Dig. ⟸332.]

2. MASTER AND SERVANT ⟸301, 302—INJURIES TO THIRD PERSONS—EXISTENCE OF RELATIONSHIP.

The owner of an automobile is not liable for the negligence of his son in driving the automobile because of the relationship of father and son, nor because of his ownership of the car, and his liability must rest upon the relationship of principal and agent, or that of master and servant, and the act complained of must be done within the scope of the son's employment in conducting the father's business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1219–1217, 1221, 1225, 1229; Dec. Dig. ⟸301, 302.]

3. MASTER AND SERVANT ⟸301—INJURIES TO THIRD PERSONS—EXISTENCE OF RELATIONSHIP.

The authority of the son of an automobile owner to represent his father in driving the automobile need not be expressed in words, but may be implied from the precedent course of conduct.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210–1216; Dec. Dig. ⟸301.]

4. MASTER AND SERVANT ⟸301—INJURIES TO THIRD PERSONS—EXISTENCE OF RELATIONSHIP.

The son of an automobile owner, through whose negligence a third party is injured, need not be a hired chauffeur in order to make his relation to his father an employment by the father.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210–1216; Dec. Dig. ⟸301.]

5. MASTER AND SERVANT ⟸302—INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT.

Where a father provides an automobile for the purpose of furnishing members of his family with outdoor recreation, the use of the car for such purpose by a member of the family is within the scope of the father's business, and the application of this rule is not altered by the fact that the car is used during business hours for business purposes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217, 1221, 1225, 1229; Dec. Dig. ⟸302.]

6. MASTER AND SERVANT ⊂=332—INJURIES TO THIRD PERSONS—EXISTENCE OF RELATIONSHIP.

In an action for injuries to a person struck by defendant's automobile while driven by his son, evidence *held* not to show conclusively that the son had no right to use the car without his father's express permission, and that he was using it surreptitiously, but at most to make a question of fact.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274–1277; Dec. Dig. ⊂=332.]

7. MASTER AND SERVANT ⊂=301—INJURIES TO THIRD PERSONS—EXISTENCE OF RELATIONSHIP.

That an automobile trip, participated in by all members of defendant's family who were at home, was suggested and promoted by the son, who was driving the car when it struck plaintiff, did not necessarily deprive the trip of its distinctive character as for the pleasure and recreation of the entire family, so far as at home.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210–1216; Dec. Dig. ⊂=301.]

8. MASTER AND SERVANT ⊂=332—INJURIES TO THIRD PERSONS—EXISTENCE OF RELATIONSHIP—QUESTIONS FOR JURY.

In an action for injuries to a person struck by defendant's automobile driven by his son, evidence *held* not to show conclusively that plaintiff was negligent, but at most to make a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274–1277; Dec. Dig. ⊂=332.]

9. APPEAL AND ERROR ⊂=1064—HARMLESS ERROR—INSTRUCTIONS.

In an action for injuries to a person struck by defendant's automobile while crossing the roadway adjoining the public square in the city of Cleveland, the court charged that a statute limiting automobiles to a speed of 8 miles an hour in business and closely built-up portions of the city applied to the place where the accident occurred. One of the occupants of the car, who was riding with the driver, testified that they had been going only 6 miles an hour, and had not been going faster than that at any time through the congested district, and that he knew the law allowed them to run 8 miles an hour, and knew that if they were going more than that they were breaking the law. *Held* that, in view of the apparent nature of the district where the accident occurred, the instruction, if erroneous, as invading the function of the jury, was obviously nonprejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. ⊂=1064.]

10. APPEAL AND ERROR ⊂=263—RESERVATION OF GROUNDS OF REVIEW—NECESSITY OF EXCEPTIONS.

A criticism in the brief and oral argument of an instruction to which no exception was taken must be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516–1523, 1525–1532; Dec. Dig. ⊂=263.]

11. APPEAL AND ERROR ⊂=274—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF EXCEPTIONS.

In an action for injuries to a person struck by an automobile, the court charged that under a statute the driver was negligent if the automobile was running more than eight miles an hour. Defendant excepted to "that portion of the court's charge in which he stated that a violation of the state law is negligence per se, without calling attention to the fact that such negligence contributed to the accident or was the proximate cause thereof." Rule 10 of the Sixth Circuit (150 Fed. xxvii, 79 C. C. A. xxvii) requires exceptions to the charge to state distinctly the several matters of law to which exception is taken. *Held*, that an alleged error in the

instruction, as charging that the violation of the statute was negligence per se, instead of merely evidence of negligence, was not reviewable, as the natural interpretation of the exception would be that it was intended to call attention to a supposed lack of instruction that the negligence, to be actionable, must be the proximate cause of the accident.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605–1607, 1624, 1631–1645; Dec. Dig. ⊂⊃274.]

12. NEGLIGENCE ⊂⊃140—PROXIMATE CAUSE—INSTRUCTIONS.

Where, in an action for injuries to a person struck by an automobile, the court charged that the burden was on plaintiff to show that the driver's negligence proximately or directly produced the injuries, it was not bound to separately apply this requirement to each specific ground of negligence relied on.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 378–381; Dec. Dig. ⊂⊃140.]

13. APPEAL AND ERROR ⊂⊃1064—HARMLESS ERROR—INSTRUCTIONS.

In an action for injuries to a person struck by an automobile, the court charged that under a statute the driver was negligent if the automobile was running more than 8 miles an hour. The driver's testimony indicated that, after seeing plaintiff and her daughter in the street at a distance of 25 to 50 feet, and seeing one of them stop, he took it for granted that both would stop, and did not again look until within 5 to 8 feet of plaintiff. *Held*, that the instruction, if erroneous, as charging that violation of the statute was negligence, instead of evidence of negligence, was harmless, as the driver's own testimony would naturally lead to a finding that he was negligent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. ⊂⊃1064.]

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Action by Ida McNorton against W. C. Denison. Judgment for plaintiff, and defendant brings error. Affirmed.

Tolles, Hogsett, Ginn & Morley and Westenhaver, Boyd & Brooks, all of Cleveland, Ohio, for plaintiff in error.

Howell, Roberts & Duncan, of Cleveland, Ohio, for defendant in error.

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

KNAPPEN, Circuit Judge. The defendant in error (who was plaintiff below), while crossing the roadway adjoining the public square in the city of Cleveland, was struck by defendant's automobile, driven by his son William, sustaining severe injuries, on account of which this suit was brought. At the close of the testimony defendant asked direction of verdict in his favor, which was denied, and the case submitted to the jury, which gave verdict for plaintiff, on which judgment was entered. The grounds relied upon for reversal are: (1) That defendant is not liable for the alleged negligence of the son in operating the automobile, for lack of relation of master and servant; (2) that plaintiff is conclusively shown guilty of contributory negligence; and (3) error in the charge to the jury.

[1] 1. Defendant was actively connected with a manufacturing corporation; his home was about seven miles from his business; his immediate family consisted of defendant, his wife, four sons, and one daughter, all living at home; two of the sons as well as the daughter were adults, one of the adult sons being engaged in the business with which the father was connected; the third son (William) was about 20 years old, and was employed in the same business; the fourth was 16 or 17 years old, and still in school. The defendant owned the car, which was used, not only for taking him and his sons back and forth between home and business (as well as for some business purposes), but also for purposes of pleasure and recreation for the family, not only on weekdays, but on Sundays. As one of the sons expressed it:

"The car was more or less in constant use when in proper condition."

No chauffeur was kept, and this car was the only one defendant or any member of his family had. The father drove comparatively seldom; usually one of the sons drove, and it is fairly inferable that William was usually the one to drive when in the car, by reason of his greater experience as driver. The mother and daughter never drove, but were frequently taken out in the car; the driving being done by one of the sons, and inferably more often by William. We state the case, as we must, most favorably to plaintiff. On the day of the accident, which was Sunday, the father and mother were away from the city on a few days' absence; the four sons and the daughter remaining at home. An automobile trip to a resort some 60 miles distant being planned, the daughter put up and took a lunch for the refreshment of the party; the car carrying the four sons and the daughter, as well as another man, a friend of the family, who, as the daughter testified, was "visiting us." The maid was the only member of the household left at home.

[2-4] The general principles involved are familiar: The father is not liable for the son's alleged negligence merely because of such relationship; his liability, if any, must rest upon the relationship of principal and agent, or that of master and servant. Defendant's mere ownership of the machine is not enough to create liability for his son's negligence (Lotz v. Hanlon, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. [N. S.] 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731); to have that result the act complained of must have been done within the scope of the son's employment and in conducting what is called the father's business (Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L. R. A. [N. S.] 1091, Ann. Cas. 1914C, 1082), although the authority to so represent the father need not be expressed in words, but may be implied from the precedent course of conduct. Nor need the son have been a hired chauffeur in order to make his relation an employment by the father. Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701; Smith v. Jordan, 211 Mass. 269, 271, 97 N. E. 761.

[5] As to whether the son was engaged in the father's business: It is the rule, supported by the better weight of authority (although

there are cases seemingly taking a contrary view),[1] that where a father provides an automobile for the purpose of furnishing members of his family with out door recreation, the use of the car for such purpose is within the scope of the father's business, analogously to the furnishing of food and clothing or ministering to their health. Missell v. Hayes, 86 N. J. Law, 348, 349, 91 Atl. 322, and following; Davis v. Littlefield, 97 S. C. 171, 81 S. E. 487; Stowe v. Morris, 147 Ky. 386, 390, 144 S. W. 52, 39 L. R. A. (N. S.) 224; Moon v. Matthews, 227 Pa. 488, 76 Atl. 219, 29 L. R. A. (N. S.) 856, 136 Am. St. Rep. 902; Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091, 51 L. R. A. (N. S.) 970. And, obviously, the fact that the car was used during business hours for business purposes would not alter the rule otherwise applicable to a use (out of business hours, including Sundays), for the enjoyment and recreation of the family.

Assuming, for the purposes of this opinion, that defendant would not be liable if the accident occurred during a merely permissive use of the machine—that is to say, while the son was driving the car for his own pleasure, and notwithstanding it was being kept in part for the recreation of the family, and an implied consent that the son use it for his own pleasure (Doran v. Thomsen, 76 N. J. Law, 754, 71 Atl. 296, 19 L. R. A. [N. S.] 335, 131 Am. St. Rep. 677; Parker v. Wilson, 179 Ala. 361, 368, 60 South. 150, 43 L. R. A. [N. S.] 87) [2]—we think it clear that unless the tendency of the evidence as we have stated it is conclusively overcome by the testimony to which we are about to allude, it was competent for the jury to infer that there was at least an implied authority in the son to drive the car on the occasion in question, and that such driving was in the service of the father in providing recreation for the family (Stowe v. Morris, supra; Smith v. Jordan, supra; Missell v. Hayes, supra; Moon v. Matthews, supra; Bourne v. Whitman, supra; Davis v. Littlefield, supra; Kayser v. Van Nest, supra, 125 Minn. at page 279, 146 N. W. 1091, 51 L. R. A. (N. S.) 970; Guignon v. Campbell, 80 Wash. 543, 545, 141 Pac. 1031).

A significant feature of this case, which distinguishes it from some of the cases relied on by defendant, is the fact that all the members of defendant's family (so far as at home) were participating in the use of the car; there being no other occupant except a family guest. The importance of this consideration is illustrated by the cases of Doran v. Thomsen, supra, and Missell v. Hayes, supra. In the former case the father was held not liable for the negligence of his daughter in driving the car for her own pleasure, notwithstanding its purchase by the father for the use of his family, and his implied consent that the daughter use it for the purpose stated. In the latter case, where the accident occurred while one of the sons was driving the car, which contained also defendant's wife and daughter, together with a guest of the son and a guest of the daughter, the facts were held sufficient to support a finding that the son was acting as the servant of his

[1] See Schumer v. Register, 12 Ga. App. 743, 746, 78 S. E. 731.

[2] See, to the contrary, Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351; Davis v. Littlefield, 97 S. C. 171, 81 S. E. 487.

father, and within the scope of his employment as such. The fact that the car was occupied by the father's immediate family and their guests was held to distinguish the case from Doran v. Thomsen.

[6] There was, however, in the instant case, testimony on defendant's part that none of the family excepting the mother had the right to use the car without express permission from the father, that they had no right to use it when the father was absent from home, and that neither he nor the mother had given permission to use the car on this Sunday of their absence; and defendant's counsel in briefs characterize the expedition as "surreptitious and without paternal permission, guidance, or sanction." Assuming that, if the above characterization must be accepted, defendant would not be liable (Riley v. Roach, 168 Mich. 294, 134 N. W. 14, 37 L. R. A. [N. S.] 834; Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946), we think the jury was not conclusively bound to accept that view. The testimony presented merely a question of fact, involving credibility; it was reasonably possible for the jury to regard it as improbable, in view of the regular practice of the family, the previous conduct of defendant respecting the use of the automobile, and the facts that one of the members of the family, when sworn as a witness for plaintiff, had testified that "we use the machine whenever it is not in use in business; any one that gets to the machine first usually drives it," without at the time making any mention of the necessity of previous permission, and that another member of the family testified, upon cross-examination, that "on Sunday the family, or different members of the family, used the machine for pleasure or for automobile rides," and that "I didn't consider that I was disobeying his [the father's] instructions when I went out that morning." The testimony that during a given period the garage keeper was forbidden to let either of defendant's sons take the car without express permission might not unreasonably be thought to refer only to its use during business hours, when likely to be needed for business purposes, or during the time that its repainting had been arranged for.

[7] It scarcely need be said that the fact (as alleged) that the son William suggested and promoted the expedition does not necessarily deprive it of its distinctive character as for the pleasure and recreation of the entire family, so far as at home. We think the evidence sufficient to sustain a finding that in operating the car at the time of the accident the son William was lawfully representing defendant.

[8] 2. At a point about 165 feet south of the place of collision the automobile, which had been going west, turned north, thus coming directly toward plaintiff, who was crossing or about to cross the roadway, going west. There was evidence tending to show negligence in operating the automobile, both in maintaining a speed of 25 miles or more per hour in a "business and closely built up" portion of the city (the statute permitting but 8 miles), and in otherwise failing to use due attention and care to avoid collision. Indeed, that the proof lacks such tendency is not alleged here.

There was testimony on defendant's part that at a speed of 25 miles an hour the machine could not be stopped within less than 50 to 75

feet, at a speed of 15 miles within less than about 25 feet, and that at 8 miles it could be stopped within about 10 feet; that the car was stopped within 15 feet after the brakes were applied; and that it ran but a very few feet after the collision, and did not carry or drag plaintiff. The latter and her daughter, who was with her, testified that before crossing the driveway they looked both to the right and the left and saw no automobile. The argument in support of the claimed contributory negligence is that, in view of the testimony, the car could not have been running 25 miles per hour when it came down the driveway headed toward plaintiff, and that it must have been actually in this driveway and in view when plaintiff last looked to the left, and that she therefore saw or should have seen it. Of course, testimony contrary to reason or established physical facts must be disregarded; but, accepting as true the testimony as to the distance within which the car could be stopped, the argument in support of the claimed contributory negligence not only involves one or more disputed propositions of fact, but ignores the consideration that plaintiff may well have been confused and disturbed by the appearance of a street car bound south (in the opposite direction from that in which the automobile was running), and which stopped temporarily on the near side of the crossing on which plaintiff was passing, and thus near her and on her right hand, and which she said she was afraid would strike her. We cannot say that plaintiff's contributory negligence was conclusively established. It was, at the most, a question of fact for the jury.

[9, 10] 3. Defendant in brief and oral argument complains of three features of the charge to the jury; the first being an instruction that the 8-mile limit applied to the district where the collision occurred. This instruction, if not within the province of the court, as invading the function of the jury, was obviously nonprejudicial, in view of the apparent nature of the district.[3] Defendant evidently did not consider the instruction harmful, for no exception was taken to it, and for this reason, if for no other, the criticism must be disregarded.

Another criticism of the charge is addressed to an instruction that a violation of the city ordinance regulating the running of automobiles would be "some evidence of negligence to be considered" by the jury, with all the evidence in the case. But this instruction also passed unchallenged by exception.

[11-13] The remaining criticism relates to an instruction that, in view of the Ohio statute (G. C. § 12604), the driver was negligent if the automobile was running at more than 8 miles an hour. Defendant's contention is that violation of the statute is merely evidence of negligence, and not negligence of itself. We are not called upon to

[3] One of defendant's sons, who sat on the front seat with the driver, testified that the automobile was going at a rate of only 6 miles an hour, adding: "We hadn't been going faster than that at any time through the congested district. I knew the law allowed us to run at 8 miles an hour, and knew if we were going at more than 8 miles an hour, we were breaking the law." The driver (William) testified that he was running only 7 or 8 miles an hour.

consider the correctness of this instruction, in view of the exception relied upon to sustain it, which we copy in the margin.[4]

Rule 10 of this court (150 Fed. xxvii, 79 C. C. A. xxvii) requires that exceptions to the charge "must state *distinctly* the several matters of law to which exception is taken." The well-known object of this requirement is to pointedly challenge the trial court's attention to the actual complaint made, and thus give opportunity for correction or modification. We think the natural interpretation of this exception would be that it was intended to call attention to a supposed lack of instruction that such negligence, in order to be actionable, must have been the proximate cause of the accident, and that it would not naturally occur to the trial court that it was aimed at a distinction between negligence per se and evidence of negligence. The jury was later told that the burden was on plaintiff to show that the driver's negligence "proximately or directly produced" plaintiff's injuries. The court was not bound to separately apply this requirement to each specific ground of negligence relied on.

We think, moreover, that as a practical proposition defendant was not in any event prejudiced by the instruction in question, for we think the driver's own testimony would naturally lead to a finding that he was negligent, in that after seeing plaintiff and her daughter "out in the street," and at a distance of 25 to 50 feet, and seeing one of them stop, he took it for granted that both would stop, and so did not look again until he heard a warning call from his brother, when the automobile was within 5 to 8 feet of the plaintiff, and it was too late to avoid collision.

Finding no error to defendant's prejudice, the judgment of the District Court is affirmed, with costs.

PERKINS v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 21, 1915.)

No. 1365.

1. CRIMINAL LAW ⟸48—RESPONSIBILITY FOR CRIME—"INSANITY."
Insanity, to be available as a defense to a criminal prosecution, must reach the degree of failure to understand the difference between right and wrong.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 53-58; Dec. Dig. ⟸48.

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

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[4] "Defendant excepts to that portion of the court's charge in which he said that a violation of the state law is negligence per se, without calling attention to the fact that such negligence contributed to the accident or was the proximate cause thereof."

2. CRIMINAL LAW ⊂⊃48—RESPONSIBILITY FOR DRUGS—DRUNKENNESS OR INTOXICATION FROM DRUGS.

Drunkenness or intoxication or delirium from a drug used with knowledge that it is likely to produce intoxication or delirium is not an excuse for crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 53-58; Dec. Dig. ⊂⊃48.]

3. CRIMINAL LAW ⊂⊃57—RESPONSIBILITY FOR CRIME—INSANITY RESULTING FROM DRUGS.

The long-continued use of alcohol or other drugs, though voluntary, may produce delirium tremens, or other mental derangement violent enough to amount to insanity, and make its victim not responsible under the law for offenses committed by him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 65, 69, 70; Dec. Dig. ⊂⊃57.]

4. CRIMINAL LAW ⊂⊃48—RESPONSIBILITY FOR CRIME—INSANITY RESULTING FROM DRUGS.

A person committing a homicide while in a frenzy, produced by an overdose of chloral prescribed by a physician, was guilty of murder or manslaughter, according to the circumstances, if the physician's prescription, or the realized effect of a former dose, or both together, warned him before he had lost control of himself that he might be thrown into an uncontrollable frenzy, as though a patient is not presumed to know that a physician's prescription may produce a dangerous frenzy, he is bound to take notice of the warning appearing on a prescription, especially if he reads the prescription.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 53-58; Dec. Dig. ⊂⊃48.]

5. CRIMINAL LAW ⊂⊃48—RESPONSIBILITY FOR CRIME—INSANITY RESULTING FROM DRUGS.

If defendant had good reason to infer from the terms of a physician's prescription, or the oral instructions of the physician, or from the effect of a former dose of the chloral prescribed, or from all these together, that a larger dose would produce unconsciousness, he was not legally responsible for acts committed in a violent frenzy, produced by such larger dose, and which he had no reason to anticipate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 53-58; Dec. Dig. ⊂⊃48.]

6. CRIMINAL LAW ⊂⊃48—RESPONSIBILITY FOR CRIME—INSANITY RESULTING FROM DRUGS.

If defendant was so frenzied by a dose of chloral innocently taken under the direction of a physician as to be thrown into a mental state placing him beyond his own control and beyond the realization of what might be the ill effect of an overdose, he was not legally responsible for acts committed in a frenzy produced by such overdose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 53-58; Dec. Dig. ⊂⊃48.]

7. HOMICIDE ⊂⊃309—QUESTIONS FOR JURY—"MANSLAUGHTER"—"VOLUNTARY MANSLAUGHTER"—"INVOLUNTARY MANSLAUGHTER."

Penal Code, Act March 4, 1909, c. 321, § 274, 35 Stat. 1143 (Comp. St. 1913, § 10447), provides that "manslaughter" is the unlawful killing of a human being without malice; that it is of two kinds "voluntary," upon a sudden quarrel or heat of passion, and "involuntary," in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. Defendant, while a

passenger on a steamship, appeared in the saloon insufficiently clothed, and when told by the master to return to his room and put on other apparel, fired his pistol, without notice and without provocation, until every chamber was empty, killing another passenger and wounding the master. The defense was insanity, caused by an excessive use of alcohol and an overdose of chloral. *Held*, that the court did not err in refusing to submit involuntary manslaughter, as the term "involuntary" implies absence of intention to kill, and if defendant was chargeable as a sane man with any intention at all, the firing of the pistol showed an intention to kill.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652–655; Dec. Dig. ⊂⊃309.

For other definitions, see Words and Phrases, First and Second Series, Involuntary Manslaughter; Manslaughter; Voluntary Manslaughter.]

8. HOMICIDE ⊂⊃294—INSTRUCTIONS—INSANITY AS DEFENSE.

On a trial for homicide, in which the defense was insanity caused by indulgence in alcohol and drugs, the court charged that insanity must proceed from disease of the mind in some way, or from an act of the providence of God; that it must be an involuntary insanity on the part of the human being; that it must be an insanity produced by disease, whether the disease was temporary or permanent, proceeding as diseases did from an act of God, so that he was incapable at the time of understanding what he was doing, and that he was committing an infraction of the law, but that at the time he was, by something beyond his personal voluntary control, put in that condition. *Held*, that the distinction, thus broadly stated, between insanity produced by disease, coming as an act of God, and that produced by man's own voluntary act was not sound, as actual mental disease, amounting to insanity as distinguished from ordinary intoxication, excuses even when brought about by voluntary dissipation or other vices.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. ⊂⊃294.]

9. CRIMINAL LAW ⊂⊃1172—HOMICIDE ⊂⊃294—INSTRUCTIONS—INSANITY AS DEFENSE—HARMLESS ERROR.

On a trial for homicide in which the defense was insanity, a physician, whom defendant consulted shortly before the homicide, testified that from defendant's description of his symptoms he feared that defendant might be on the verge of delirium tremens, and that he prescribed chloral as a sedative for defendant's nerves. Defendant testified that he had been drinking more than usual, and after this increase was having frightful visions and hallucinations before he took the chloral, and that the chloral resulted in greatly increased terror and hallucinations. Physicians testified that the prescribed dose of chloral might produce a condition of delirium like that produced by drinking. *Held*, that it was erroneous and prejudicial to charge that there was no evidence of delirium tremens except the testimony of the physician that the symptoms described by defendant made him think defendant was on the verge of delirium tremens, as evidence that he had symptoms indicative of the approach of delirium tremens, and that he afterwards acted as if he did have it, was evidence thereof additional to the apprehensions of the doctor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. ⊂⊃1172; Homicide, Cent. Dig. § 605; Dec. Dig. ⊂⊃294.]

10. CRIMINAL LAW ⊂⊃48—RESPONSIBILITY FOR CRIME—INSANITY RESULTING FROM DRUGS.

If delirium amounting to insanity was produced by a dose of chloral, taken in good faith in accordance with a doctor's prescription under the

belief that it would be a sedative, and in that state of delirium defendant committed a homicide, he was guilty of no legal offense, though the chloral might have been harmless but for a settled state of mental disorder produced by habitual drinking.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 53–58; Dec. Dig. ⊂⊃48.]

11. CRIMINAL LAW ⊂⊃785—WEIGHT AND SUFFICIENCY OF EVIDENCE—EXPERT EVIDENCE.

The testimony of experts is admitted as valuable because based on their special knowledge, derived not only from experience, but from the experiments and reasoning of others, communicated by personal association or through books or other sources, and while it is more or less valuable, according to the source from which it comes, the general proposition that it is of low value unless based on personal experience is not sound, and it was error to charge in effect that the testimony of medical experts, not based on personal experience, was of low value.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776–1781, 1889–1894; Dec. Dig. ⊂⊃785.]

12. CRIMINAL LAW ⊂⊃1172—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

On a trial for homicide in which the defense was insanity caused by taking an overdose of chloral, while an instruction that defendant was presumed to know what effect chloral had was not correct as a general proposition, it was harmless, where defendant had express warning from the prescription of the physician who prescribed chloral not to take more than a certain quantity, and knew that it was a drug that would affect the nerves, and was notified by the terms of the prescription that serious results would follow an overdose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. ⊂⊃1172.]

13. CRIMINAL LAW ⊂⊃412—EVIDENCE—DECLARATIONS OF ACCUSED—ADMISSIBILITY.

On a trial for homicide, where the defense was insanity caused by excessive drinking, and an overdose of chloral prescribed by a physician, the physician's testimony as to defendant's description of his symptoms from which he feared that defendant was on the verge of delirium tremens, was admissible, since wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 894–917, 919–935; Dec. Dig. ⊂⊃412.]

14. CRIMINAL LAW ⊂⊃1170—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

On trial for homicide where the defense was insanity, the exclusion of a physician's testimony as to defendant's description of his symptoms was not prejudicial, where the substance of his complaints to the physician was afterwards admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. ⊂⊃1170.]

15. CRIMINAL LAW ⊂⊃1172—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

On a trial for homicide, in which the defense was insanity, while it would have been better to refrain from alluding by way of illustration in the charge to the Thaw Case, such allusion was not sufficiently prejudicial to warrant a reversal, if there had been no other error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. ⊂⊃1172.]

16. CRIMINAL LAW ⟸762—INSTRUCTIONS—EXPRESSION OF OPINION AS TO GUILT.

In the federal courts, the trial judge is allowed a large latitude in expressing his opinion as to defendant's guilt, so long as he leaves the ultimate issue of guilt or innocence to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. ⟸762.]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

George B. Perkins was convicted of manslaughter, and he brings error. Reversed.

See, also, 221 Fed. 109.

W. C. Miller and J. P. K. Bryan, both of Charleston, S. C., for plaintiff in error.

Francis H. Weston, U. S. Atty., of Columbia, S. C., and J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The indictment in this case charged the defendant with the murder of F. W. R. Hinman, on the Clyde Line Steamer Mohawk, on a voyage from New York to Charleston, in November, 1914. The trial resulted in a verdict of manslaughter and a sentence of three years' imprisonment. Error is assigned in the exclusion of evidence and in the instructions to the jury.

The case made by the government was this:

About 8 o'clock on November 11, 1914, while Mr. Hinman and his wife were sitting in the saloon of the Mohawk, conversing with the master and other passengers, the defendant appeared, in his bare feet and clothed only in pajamas and a raincoat. He inquired about a wireless message, and made other remarks, either irrelevant or incoherent. Upon being told by the master that he should return to his room and put on other apparel, without notice and without provocation, he fired a pistol through his raincoat pocket at the master and passengers until every chamber was empty. The first shot wounded the master, and two of the later shots killed Hinman. Mrs. Hinman testified that while firing she heard the defendant say "there was others on the boat that he wanted besides." After the shooting the defendant was seized by the order of the master, and carried to Charleston in irons.

The defense was insanity, caused by the use of alcohol and drugs. In support of this plea it was proved that the defendant was an accomplished artist in interior decoration and furnishing, a man of high character, thoughtful and considerate of others. All of the circumstances, as well as the direct evidence, showed plainly not only an absence of motive for the killing, but a lack of acquaintance with the persons present at the tragedy, which tended to disprove actual malice toward any of them. According to the testimony of Horton, defend-

ant's brother-in-law, with whom he lived in Boston, on his return from Europe after the beginning of the war he was without occupation, drank more than usual, and was nervous and restless; and it was in consequence of this condition that he started on a water trip to the South. Dr. Roberts, a physician in New York, to whom the defendant went for advice on his arrival in New York, just before sailing on the Mohawk, testified that he complained of severe headache, great mental strain, nervousness, and insomnia, accompanied by hallucinations; that from these complaints he feared the defendant might be on the verge of delirium tremens, although he did not regard the delirium imminent, nor did he regard the condition serious. He prescribed for the headache phenacetine and caffeine citrate, with the direction that if one powder failed to relieve, it was to be repeated in four hours, and as a sedative for the nervousness, two ounces of chloral hydrate in solution, one teaspoonful, containing 15 grains, to be taken every six hours, to be stopped after three doses. This physician testified that he had never known ill effects from the quantity of chloral prescribed; that the usual effect is a quiet sleep, though on some patients the effect was a period of mental excitement, sometimes going on to delirium, but that such an unfavorable effect was a mere possibility.

Dr. Wilson, a physician of high standing in Charleston, testified as an expert that the effect of 15 grains of chloral might be sleep or an excitement indistinguishable from alcoholic intoxication, with possible hallucinations. As to the effect of the 15 grains followed by 465 grains, he said the patient might be very rapidly plunged into profound coma from which he would never awaken; he might be plunged into a coma from which he might awaken; or that preceding the coma he might be plunged into a state of violent excitement and then fall into a coma. Dr. Wilson further testified that the tendency among medical men and alienists is to regard chloral as a very dangerous drug, and that some even condemn it unqualifiedly on account of the occasional danger. In some cases he said it has developed suicidal tendencies. He expressed the opinion that, given in large doses, it might produce delirium.

The defendant's story was this: For nine years before 1909 he had been a total abstainer, but in that year was a moderate drinker of wines and beer. For some time before leaving Boston he had been depressed on account of the loss of his position, and had begun to drink somewhat more. When he got to New York he was suffering from violent indigestion produced by his dinner. Before leaving Boston he spent a sleepless night, haunted by uncanny visions. Finding himself very nervous on the following morning, he consulted Dr. Roberts, who was a personal friend, and discussed with him his nervous condition and the propriety of going to a sanitarium. The result was an agreement between the defendant and the doctor that a sea trip would be more advisable. The doctor then gave the prescription above mentioned. He had the prescription filled, and began taking the caffeine powders at the drug store, repeating the dose every four hours. When he embarked on the ship he was still feeling nervous

and unwell, and ate little luncheon or dinner; but his testimony shows that he was quite sane. On going to bed the first night he heard demoniacal voices and threats from imaginary persons of turning electricity on him. He reasoned about the matter, supposing his condition to be due to malarial fever, and was conscious of feeling relief when his roommate came in. He was greatly frightened, and attempted to call a physician, but there was none on the ship. He went to the toilet several times in his pajamas and raincoat. He took none of the chloral that night. There was nothing unusual in his conduct the next day, and he was not troubled much with the imaginary voices, but real voices seemed unnaturally loud. He drank nothing during the day but two bottles of beer. Finding himself very nervous on the evening of the second day, he went to bed, putting his pistol under his pillow, as was his habit in traveling, though he had left it in his trunk the night before. He poured into a glass what he supposed to be a teaspoonful of the liquid containing chloral to produce sleep. The defendant thus testifies as to his condition just after taking the medicine, immediately before the homicide:

"Q. When you took that teaspoonful what happened then after that? A. Well, after that I began to be very much more nervous, and very quickly I became nervous, and then came the worst period that I have ever known since I was born. I don't think that I ever felt such agony in my life as I did after that medicine. I don't know whether the medicine had anything to do with it, but I know that immediately I heard the most demoniacal noises, voices of demons that were cursing me. They were laughing the worst laughter that I ever heard in my life, and the only voice that said anything intelligent was one that said, 'Get the battery ready now,' and then I thought I was in for the same accursed experience of last night. Q. What was the condition of your head? A. My head was spinning. I was so frightened that I could hardly stand. My hand was shaking. I don't know whether it was more the sensation of a man in deadly terror, or one who was drunk, but I never felt so badly in my life before. Q. Had you ever taken chloral before? A. No; never in my life, not to my knowledge. In fact I did not know that this was chloral. The doctor asked me if I had taken chloral. I got the impression it was a derivative of chloral, but did not know what it was; I knew it was something strong. Q. In this condition can you describe your condition as clear to you; was it a clear state or cloudy state of mind? A. It was very, very cloudy state; it was like a very bad nightmare. The thing that obsessed me was the voices. I think they might well have driven a man mad, and I did not know whether they were voices from the other world, or whether I was going insane. I was sure they were not human voices. Q. Do you know whether you, at any time, have you any remembrance of taking any more of it? Any recollection, distinct or indistinct, of taking any more of the liquid? A. I have an indistinct recollection, but how true that is I am not prepared to say; I think that I opened the bottle, and put it to my lip, and said to myself, 'I will take enough now to make me sleep anyway.' Q. Is that very clear to you or is it hazy? A. The only thing that makes it seem clear to me is that I have a recollection of a very nasty taste, and I remember taking some clear water, and washed that down, and then I don't remember anything after that. Q. Have you any remembrance at all of going out of your room? A. I have not the slightest recollection of leaving my room at all."

As to his condition after the homicide, the defendant said:

"Q. When did you first know that there had been shooting or harm done to anybody on that ship? A. This is dealing with the time when my brain must have been very much under a cloud. I remember at the hospital, I have a vague recollection of having somebody unlock some handcuffs, then I re-

member speaking, or rather I don't remember anything, within that same period. I dont know when some one woke me up, and I looked over the foot of the bed, and it seemed as though there were a dozen or more people standing at the foot of my bed, and they were all very solemn, and I said to myself, 'I wonder if I am dead and all these people are standing around looking at me.' Then one of these people read a paper; I did not know what it was all about; I did not grasp it until my name appeared, and then something about killing somebody. Probably that was the warrant, but I did not know what it was all about, and I began thinking if I had killed somebody. This paper said that I was under arrest, I think, something like that. I said, 'Have I killed some one?' and this voice, the man who read the paper said, 'Yes, sir,' and I felt very troubled, and it struck me then, and I could not at that point believe that I had killed anybody, because I argued this way: 'If I have killed a man and I am a murderer, this man would not have said, "Yes, sir," to me, he would have said, "Yes." This is ridiculous if he said "sir" to me if I am a murderer,' and I don't remember how long it was before anything else happened."

Dr. Johnson thus testified as to a statement made to him by the defendant in the hospital:

"My recollection of what Mr. Perkins said with regard to that was that he did not know just what was in the drug, but thought it was chloral or some derivative of chloral; that he realized that it was some dangerous drug, and when he took the drug he took it for the purpose of ridding himself of these distressing impressions on his mind, such as the sights and the sounds as I recollect correctly, but especially the sounds that were worrying him at the time, and that he wished to be rid of them, and for that purpose he thought that if he took more of it, he would accomplish that purpose, but, not knowing what result would happen, whether he would be put in a great deal of pain, as I understood from him—I certainly remember his saying that he put his pistol under the pillow so that, in the event that it did not relieve him of these noises and so on, that were distressing him, he would shoot himself."

There was much elaboration of the testimony above collated, but enough is given to make clear the grounds upon which error is assigned.

The chief rules of law applicable to the case are these:

[1] 1. Insanity, to be available as a defense, must reach the degree of failure to understand the difference between right and wrong.

[2, 3] 2. Drunkenness is not an excuse for crime, but the long-continued use of alcohol or other drugs, even though voluntary, may produce delirium tremens, or other mental derangement violent enough to amount to insanity, and make its victim not responsible under the law.

3. Intoxication, or delirium, from a drug used with knowledge that it is likely to produce intoxication or delirium obviously stands on the same footing as intoxication from alcohol.

[4-6] 4. A patient is not presumed to know that a physician's prescription may produce a dangerous frenzy. But he is bound to take notice of the warning appearing on a prescription, and this obligation is, of course, stronger if he reads the prescription. If, for example, in this case, the prescription itself, or the realized effect of the first dose of the chloral, or both together, warned the defendant before he had lost control of himself that he might be thrown into an uncontrollable frenzy, then he would be guilty of murder or manslaughter according to the view the jury might take of the circumstances. If, on the other hand, the defendant had good reason to infer from the terms of the

prescription or the oral instructions of the physician, or from the effect of the first dose, or from all these together, that he would fall into unconsciousness from a larger dose, then he would not be legally responsible for acts committed in a violent frenzy which he had no reason to anticipate. If he was so frenzied by a portion of the medicine innocently taken under the direction of the physician that he was thrown into a mental state which placed him beyond his own control and beyond the realization of what might be the ill effect of an overdose, he would not be legally responsible. We cite the following, among the many authorities on the subject of insanity produced by the use of liquor or drugs which support these propositions: Tucker v. United States, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112; Davis v. United States, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499; Davis v. United States, 165 U. S. 373, 17 Sup. Ct. 360, 41 L. Ed. 750; United States v. Drew, 25 Fed. Cas. 913, No. 14,993; 1 Hale, P. C. 32; 3 Greenleaf, Ev. § 6; State v. Rippy, 104 N. C. 752, 10 S. E. 259.

In the light of these principles we consider the errors assigned in the charge:

[7] The defendant first submits that the District Judge improperly excluded the issue of involuntary manslaughter from the jury. Section 274 of the Penal Code of U. S. gives these definitions:

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

"First. Voluntary—upon a sudden quarrel or heat of passion.

"Second. Involuntary—in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

From the foregoing statement of the circumstances it seems plain that the real issues were whether the defendant killed the deceased while insane, or in such a condition of heat and passion due to stimulants as would reduce the killing from murder to voluntary manslaughter. There are no elements of involuntary manslaughter. The term "involuntary" implies the absence of intention to kill. The evidence shows beyond doubt that if the defendant was chargeable as a sane man with any intention at all, the firing of the pistol at the deceased showed an intention to kill.

[8] It is next insisted that the District Judge, in the following sentence and in other portions of the charge, denied to the defendant the defense of insanity from delirium produced by long indulgence in alcohol or drugs, or both, as distinguished from ordinary intoxication:

"I charge you that insanity must proceed from disease of the mind in some way. It must proceed, so to say, from the act of the providence of God, who creates and controls the operations of our bodies and minds when we follow and obey His natural laws. It must be an insanity that is an involuntary insanity on the part of the human being. It must be an insanity produced by disease whether that disease be temporary or permanent by disease proceeding, as diseases do, from the act of God so that he is incapable at the time of understanding what he is doing, and that he is committing an infraction of the law, but at the time he was, by something beyond his personal, voluntary control, put in that condition."

The distinction, thus broadly stated, between insanity produced by disease coming as an act of God and that produced by a man's own vol-

untary act is not sound, for real mental disease amounting to insanity, as distinguished from ordinary intoxication, excuses, even when brought about by voluntary dissipation or other vice. But consideration of the charge on this subject shows that the District Judge was, at the moment, drawing the distinction between intoxication or other derangement voluntarily brought on by indulgence immediately preceding the alleged criminal act, and insanity coming in the ordinary course of nature, and that he did not mean to say that a fixed diseased state of the mind, resulting from past indulgence in liquors or drugs, would not excuse. This is made plainer by the following instructions, given at the instance of the defendant:

"While the law does not excuse a crime committed by a person under the influence of intoxicating liquors, that is, in a fit of intoxication and while it lasts, yet if the accused was not intoxicated, that is, not drunk and under the influence of intoxicating liquor or any other intoxicating element voluntarily taken by him at the time of the homicide, but was insane from an attack of delirium tremens, resulting from past indulgence in intoxicating elements, so long past as to have resulted in a diseased mind and not the direct result of the accused's voluntary action at the time, such insanity is a complete defense to any criminal act, committed while so insane."

We should hesitate, therefore, to reverse the judgment for the error in the above-quoted general proposition laid down in the charge but for other fatal errors.

[9] The instruction was given to the jury that there was no evidence of delirium tremens, except the testimony of Dr. Roberts that the symptoms described to him by the defendant, and his attitude at the time, made him think he was on the verge of delirium tremens. This instruction was erroneous and prejudicial. The defendant himself testified that he had been drinking more than usual before he left Boston, and that after this increase he was having frightful visions and hallucinations before he took the chloral. It is common knowledge that such terrors are concomitants of delirium tremens. These symptoms, if they existed, tended to show a condition bordering on delirium. To this is to be added the testimony, above recited, from Dr. Wilson and Dr. Roberts, to the effect that a dose of 15 grains of chloral might produce a condition of delirium like that produced by drink, and the testimony of the defendant that while in this condition of excessive mental distress, bordering on delirium, he took the dose of chloral prescribed by the doctor, with the result of greatly increased terror of imaginary demons cursing and threatening him. It may be that this dose of chloral threw the defendant into the delirium commonly known as delirium tremens, with which he was already threatened from the continuous use of liquors. If the defendant had these symptoms indicative of the approach of delirium tremens, and afterwards acted as if he did have it, it cannot be said that there is no evidence of his having it except the apprehensions of the doctor.

[10] That the defendant was in some sort of delirium when he committed the homicide seems evident. The pivotal issue was this: If delirium amounting to insanity was produced by the dose of chloral, taken in good faith in accordance with the doctor's prescription, under the belief that it would be a sedative, and in that state of delirium

the defendant committed the homicide, he would not be guilty of any legal offense, although the chloral might have been harmless but for a settled state of mental disorder produced by habitual drinking. If, on the other hand, the defendant was not thrown into this condition by the prescribed dose of chloral, but by an excessive quantity, taken after he had realized the bad effects, if any, of the small quantity prescribed, or taken with notice from any source that it might put him out of his reason, then he would be responsible for the risk which he knowingly assumed in taking a larger quantity, and for his action in the delirium which ensued.

[11] It was on this question that the expert testimony became important in conjunction with the testimony of the defendant. The low estimate placed by the District Judge in his charge on the testimony of expert witnesses as to matters, connected with the science or art in which they are proficient, not within their personal experience, is not sustainable on principle or authority. This estimate is indicated by the following extracts from the charge:

"Now, I charge you that expert testimony has fallen into what I might term, in many respects, 'an undeserved disrepute.' You see in the papers jokes about the experts, especially in cases of insanity—so many come up on one side and swear he is sane; so many come up on the other side and swear that he is insane—but I charge you that expert testimony is admissible by law, and it is very valuable within its proper limitations, and that is the expert testimony of a man who knows something from his own experience. The expertness of a railroad engineer who runs an engine, speaking about what he does, is skilled testimony, the testimony of an expert mining engineer, who goes many feet under ground, as to the best ways of mining coal, is a further valuable adjunct to testimony, but when a man calls himself an expert and proceeds to speak expertly about matters not within his own knowledge and experience, then his testimony begins to be of less value, when he begins to speak from books, what other people have told him; for that depends upon what credit those other people were entitled to. You have a right, when a man says he is an expert; he has done so and so; he is on the stand before the jury—you have a right to cross-examine him as to what he testifies to have done; and, if he says that 'I myself gave 15 grains of chloral to a man, and he became insane,' no one can dispute that that is testimony of very high character; but when he testifies from the books, showing the experiences of another, you have no way of checking such observations, and what he states is only, so to say, hearsay testimony, unless it is corroborated by the witness' own experience. True expert testimony, based upon an intelligent man's life, long experience, and practice, gentlemen, I charge you, is testimony in court of a very high kind, but hypothetical or suppositious expert testimony in which you argue from conclusions, not from your own experience, but simply from the experience of others, I charge you may be of the very weakest kind. It is just like circumstantial testimony. Circumstantial testimony may be the strongest testimony in the world, because circumstances cannot lie, provided you have got enough circumstances and they are of the right kind, and it may be the very weakest testimony in the world, provided you have not got enough circumstances or they are of the wrong kind. Expert testimony may be very valuable if it is based upon proper foundations, but of very little value and insufficient if it is based upon foundations that are insufficient and illegal. All of us know in our knowledge that 20 years ago, we could take a medical book and read the positive opinion that malaria proceeded from what they called a miasma, or bad water; you now take a medical book, and they tell you it proceeds from neither of those causes, but proceeds from the bite of a mosquito. The same thing with yellow fever. The time was when they said diphtheria proceeded from sewer gases, and now they tell you it is a distinct infection, and our medical opinion varies, and medical books 20 years ago are now thrown

aside, and it may be quite within the limit of possibility that medical books used to-day 20 years from now will be as useless as now are those of 20 years ago. The question is what the reasonable inference, when a large number of the medical profession, in a very large number of cases, say in an enormous number of cases, may use chloral, because one physician used in perhaps not knowing his patient's physical condition with different results; to what extent does that cast upon this defendant here any presumption that he is insane?"

The knowledge of experts in any science or art would be extremely limited if it extended no further than inferences from phenomena falling within their own experience. Their testimony is admitted as valuable because based on their special knowledge, derived not only from experience, but from the experiments and reasoning of others, communicated by personal association or through books or other sources. It is more or less valuable according to the source from which it comes, but the general proposition that it is of low value unless based on personal experience is not sound.

The principle is thus well stated in 1 Wigmore on Evidence, 782, in the discussion of the reasons for the admission of evidence of physicians as experts:

"To deny the competency of a physician who does not know his facts from personal observation alone is to reject medical testimony almost in its entirety. To allow any physician to testify who claims to know solely by personal experience is to appropriate the witness stand to impostors. Medical science is a mass of transmitted data; the generalizations are rare which are the result of one man's personal observation exclusively; and the law cannot expect its petitioners to obtain these rare persons. The law must recognize the methods of medical science. It cannot stultify itself by establishing, for legal remedies, a rule never considered necessary by the medical profession itself. It is enough for a physician, testifying to a medical fact, that he is by training and occupation a physician; whether his source of information for that particular fact is in part or entirely the hearsay of his fellow practitioners and investigators is immaterial."

On this principle was based the remarks of the Supreme Court of the United States in Grayson v. Lynch, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. Ed. 230, on the competency and value of expert testimony offered in that case.

[12] Exception is taken to the following instruction:

"So, this man is assumed to know, if he knew what was chloral, what effects chloral has, but not only was he presumed to know, but he testifies that he did know, what was the dose he was instructed to take, what was his limitation. Therefore under the restrictions of those written directions he was actually advised of the dangerous character of the drug he was dealing with. Now, gentlemen, I charge you that if he disobeyed his physician directly, knowing what he was taking, and his intoxication proceeded from that, then if you find that he did it when actually intoxicated, then he is not excusable. If he followed his physician's directions strictly so far as he knew, then he would be excused, but if he disobeyed his physician, he is chargeable, from the very limitation expressed, as I construe that written direction, he is chargeable by that fact with the knowledge of the restrictions impressed upon him, and he is chargeable, therefore, with knowing that taking an excess of that was dangerous."

It is not correct to say, as a general proposition, that a man without expert knowledge is presumed to know the effect of chloral or of other drugs if he knows what it is; that is, what it is made of. In this in-

struction, however, there was no harmful error, because the defendant had express warning from the physician's prescription not to take more than a certain quantity. He knew it was a drug that would affect the nerves, and he was notified by the terms of the prescription that serious results would follow an overdose. As we have seen, unless the dose, taken in good faith under the physician's prescription, had thrown him in a state of uncontrollable delirium, he could not be allowed to take the risk of an overdose and visit the consequences on his fellow passengers. The objection to the definition of reasonable doubt is too refined.

[13] The testimony of Dr. Roberts as to the description the defendant gave of his symptoms just before going on the ship was competent on the issue of his mental and physical condition at that time.

"Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory, or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury." Insurance Co. v. Mosley, 75 U. S. (8 Wall.) 397, 19 L. Ed. 437; Northern P. R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977; 1 Greenleaf Ev., § 102.

[14] Upon objection made to this testimony the court erroneously held it incompetent. The record indicates, however, that this was not prejudicial, as the substance of defendant's complaints to Dr. Roberts was afterwards admitted.

[15] Exception is made to the portions of the charge which allude, by way of illustration, to Thaw and his victim, Stanford White. It seems evidently better in the trial of a case to refrain from allusion to other cases, especially recent cases, which have attracted attention and elicited strong popular prejudice or sentiment. There is danger in such allusion of tying the defendant in the minds of the jury to the person referred to; and this association in the minds of the jury evidently may be prejudicial to the defendant. We do not think, however, that if there were no other error there should be such an inference of prejudice as to warrant a reversal on this ground.

[16] The alleged indication of the District Judge in his charge that he thought the defendant guilty does not furnish ground for a new trial. A large latitude is allowed to a trial judge in the federal courts in expressing his opinion to the jury, so long as he leaves the ultimate issue of guilt or innocence to their decision; and but for the errors pointed out, we are not prepared to say that the District Judge went beyond his recognized powers.

Judgment reversed.

SWEET v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 27, 1915.)

No. 4298.

(Syllabus by the Court.)

1. PUBLIC LANDS ⟸52—ENABLING ACT—SCHOOL LANDS.
The Enabling Act of Utah grants the lands valuable for minerals, as well as all other lands in sections 2, 16, 32, and 36 in each township, not expressly excepted from the grant in section 6 thereof. Act July 16, 1894, c. 138, 28 Stat. 107, 109.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 139–142, 146, 147; Dec. Dig. ⟸52.]

2. STATUTES ⟸190—CONSTRUCTION.
Where the terms of a statute are clear and their meaning certain, construction has no place or office. The legal presumption is that the legislative body meant what it said, and it is the duty of the courts not to amend or revoke, but to give effect to, the enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. ⟸190.]

3. STATUTES ⟸212—CONSTRUCTION—EXCEPTIONS.
Where a legislative body makes a plain grant or provision, and makes no exception to it, the legal presumption is that it intended to make none, and it is not the province of the courts to do so. A fortiori, where a legislative body has made a clear grant or provision, and has itself carefully considered and expressly stated in its act the exceptions, the courts may not strike down the exceptions it has made, or add others which the enacting body excluded.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 289; Dec. Dig. ⟸212.]

4. STATUTES ⟸176—CONSTRUCTION—PUBLIC POLICY.
When the law-making power speaks in no uncertain terms upon a particular subject over which it has constitutional power to legislate, public policy in that particular case is what the statute enacts, and the statute may not be repealed or amended by the courts, on the ground that it is contrary to public policy, because the same legislative body has treated other particular subjects or cases in a different manner.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 255; Dec. Dig. ⟸176.]

5. PUBLIC LANDS ⟸52—GRANT—SCHOOL LANDS—UTAH.
The grant of lands to Utah for school purposes was not a sale, and neither section 2318, Revised Statutes (Comp. St. 1913, § 4613), nor Act May 10, 1872, c. 152, 17 Stat. 91, reserving mineral lands from sale is applicable thereto. Neither of them disqualified the Congress subsequently to grant public lands valuable for minerals for school or other public purposes, or modified or restricted the effect of such an absolute grant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 139–142, 146, 147; Dec. Dig. ⟸52.]

6. STATUTES ⟸225½—CONSTRUCTION—GENERAL AND SPECIAL LAWS.
Where general laws treating of many subjects and a law treating of one of those subjects, or one particular case, are inconsistent, they must, if possible, stand and be given effect together, the former as the general law, and the latter as the law of the particular case or subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 305; Dec. Dig. ⟸225½.]

7. UNITED STATES ⟸126—ACTIONS—RIGHTS OF UNITED STATES—COURTS.
The equities of the United States appeal to the conscience of a chancellor with no greater or less force than would the equities of a private individual in like circumstances.
[Ed. Note.—For other cases, see United States, Cent. Dig. § 115; Dec. Dig. ⟸126.]

Appeal from the District Court of the United States for the District of Utah; John A. Marshall, Judge.

Suit by the United States against Arthur A. Sweet, who died before decree. From a decree for plaintiff, Frederick A. Sweet, as administrator, appeals. Reversed and remanded, with directions.

A. C. Ellis, Jr., and Russell G. Schulder, both of Salt Lake City, Utah (W. H. Dickson, of Salt Lake City, Utah, and A. R. Barnes, Atty. Gen., of Utah, on the brief), for appellant.

William W. Ray, U. S. Atty., of Salt Lake City, Utah (David S. Cook, Asst. U. S. Atty., of Salt Lake City, Utah, on the brief), for the United States.

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

SANBORN, Circuit Judge. [1] By the terms of the Enabling Act of the state of Utah the United States granted sections 2, 16, 32, and 36 in every township in that state to the state for the support of common schools. The act contained no exception or reservation of mineral lands from this grant. 28 Stat. 107, approved July 16, 1894. In the year 1904 the state of Utah contracted to sell section 32 in township 15 south, range 8 east of Salt Lake meridian, to George T. Badger, who assigned his contract to Arthur A. Sweet in 1906. Sweet paid the state for the land and was demanding his deed when in 1907 the United States brought this suit against him to quiet the title in itself, on the ground that the section was well-known coal land when the state was admitted into the Union, and for that reason never passed to the state. The court below sustained the claim of the government and the administrator of the estate of Arthur A. Sweet, who had died meanwhile, appealed. He complains that the evidence established the fact that the land in question was not well-known coal lands, and that, if it was, it was granted to the state by the Enabling Act. Sections 6, 10, and 20 of that act contain the grant, and all the exceptions to and reservations from the grant, and they read in this way:

"Sec. 6. That upon the admission of said state into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed state, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools, such indemnity lands to be selected within said state in such manner as the Legislature may provide, with the approval of the Secretary of the Interior: Provided, that the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of

this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain."

"Sec. 10. That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only."

"Sec. 20. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the Legislature of said territory or by Congress, are hereby repealed."

[2] The United States now asks the courts to amend section 6 by adding thereto the words "nor shall any mineral lands be subject to the grant or the indemnity provisions of this section," and thereby to revoke the grant of the mineral lands in sections 2, 16, 32, and 36 clearly made by the terms of the section. But such an amendment and revocation would be violative of settled canons of construction and established principles of law. The Enabling Act is clear, free from even the shadow of an ambiguity. And when a statute is plain and its meaning is certain, construction has no place or office. The conclusive legal presumption is that the legislative body meant what it said, and the duty of the courts is to give effect to its acts, not to amend or repeal them. Brun v. Mann, 151 Fed. 145, 157, 80 C. C. A. 513, 525, 12 L. R. A. (N. S.) 154; United States v. Ninty-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; Johnson v. Southern Pac. Co., 117 Fed. 462, 465, 54 C. C. A. 508, 511; Swarts v. Siegel, 117 Fed. 13, 18, 19, 54 C. C. A. 399, 404, 405; St. Paul, M. & M. Ry. Co. v. Sage, 71 Fed. 40, 47, 17 C. C. A. 558, 565; Webber v. St. Paul City Ry. Co., 97 Fed. 140, 144, 38 C. C. A. 79, 83; Grainger & Co. v. Riley, 201 Fed. 901, 904, 120 C. C. A. 415, 418; United States v. Alamorgordo Lumber Co., 202 Fed. 700, 706, 121 C. C. A. 162, 168; First Nat. Bank v. United States, 206 Fed. 374, 377, 378, 124 C. C. A. 256, 259, 260, 46 L. R. A. (N. S.)1139; Soliss v. General Electric Co., 213 Fed. 204, 207, 129 C. C. A. 548, 551.

[3] Congress had the power to make or to withhold this grant in whole or in part. It had absolute power to reserve or except from the grant a part of or all the mineral lands in the state. Its attention was unavoidably called to the exceptions to the grant it would make, for it expressly provided in section 6 that lands in permanent reservations for national purposes should be forever excepted from the grant, and that lands in Indian, military, or other reservations should be excepted until the reservation was extinguished. Nevertheless it did not except or reserve mineral lands from the grant. And where a legislative body makes a plain grant or provision, and makes no exception to it, the legal presumption is that it intended to make none, and it is not the province of the courts to do so. A fortiori, is it true that, where a legislative body has made a grant or provision, and has itself carefully considered and specified the exceptions to it, the courts may not lawfully strike out the exceptions made, or add others which the enacting body excluded. Such a proceeding would pass the bounds of construction and would constitute reprehensible judicial legislation. Hobbs v. McLean, 117 U. S. 567, 579, 6 Sup. Ct. 870, 29 L. Ed. 940; Maxwell v.

Moore, 22 How. 185, 191, 16 L. Ed. 251; Sutherland on Statutory Construction, § 328; Cella Commission Co. v. Bohlinger, 147 Fed. 419, 425, 78 C. C. A. 467, 473, 8 L. R. A. (N. S.) 537; Omaha Water Co. v. City of Omaha, 147 Fed. 1, 13, 77 C. C. A. 267, 279, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; Chicago, M. & St. Paul Ry. Co. v. Westby, 178 Fed. 619, 631, 102 C. C. A. 65, 77, 47 L. R. A. (N. S.) 97; American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 205, 120 C. C. A. 644, 647; United States v. Alamogordo Lumber Co., 202 Fed. 700, 706, 121 C. C. A. 162, 168; United States v. Mo. Pac. Ry. Co., 213 Fed. 169, 173, 130 C. C. A. 5, 9.

[4, 5] Counsel for the United States seek to escape from the conclusion which the rules and principles to which reference has been made seem to compel, on the grounds that it is the settled public policy of the government to reserve mineral lands from sales and grants; that section 2318 of the Revised Statutes (Comp. St. 1913, § 4613) provided that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law"; that Act May 10, 1872, 17 Stat. 91, c. 152, § 1 (Comp. St. 1913, § 4614), declared that all valuable mineral deposits in lands belonging to the United States should be "free and open to exploration and purchase, and the lands in which they are found to occupation and purchase"; that the Supreme Court held in Mining Co. v. Consol. Mining Co., 102 U. S. 167, 26 L. Ed. 126, that the mineral lands in California were excepted from the grant to that state by Act March 3, 1853, 10 Stat. pp. 244, 246, c. 145, of sections 16 and 36 in each township for public schools; and that in Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423, that court held that the title of a claimant of a placer mine was superior to the claimant of a townsite in view of the provisions of Act May 10, 1872, section 2318, Rev. Stat., and the townsite laws, which expressly except mineral lands. Sections 2392, 2386, Rev. Statutes (Comp. St. 1913, §§ 4798, 4790).

There are many reasons why the contention that the courts should amend section 6 and revoke a part of the grant it so clearly makes, on the ground that the settled public policy of the United States is to except mineral lands from its grants, ought not to prevail. In the first place, Congress has declared in the Enabling Act itself in plain and positive terms that the public policy of the nation was to grant to the state of Utah section 2, 16, 32, and 36 in each township in that state, without any exception or reservation from that grant of mineral lands, for the support of common schools, and as the Supreme Court said in United States v. Trans-Missouri Freight Association, 166 U. S. 290, 340, 17 Sup. Ct. 540, 559, 41 L. Ed. 1007:

> "The public policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the law-making power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts." Dewey v. United States, 178 U. S. 510, 521, 20 Sup. Ct. 981, 44 L. Ed. 1170.

The Supreme Court has twice considered the very question here at issue, the question whether or not under a like grant of school lands to Michigan without an exception of mineral lands the courts could

lawfully enact that exception on the ground that such was the settled public policy of the nation, and has twice decided, after exhaustive arguments, that they could not lawfully do so. Cooper v. Roberts, 18 How. 173, 177, 178, 15 L. Ed. 338; Roberts v. Cooper, 20 How. 467, 484, 485, 15 L. Ed. 969; Minnesota Min. Co. v. National Min. Co., 11 Mich. 186; Id., 3 Wall. 332, 18 L. Ed. 42.

Moreover, while it has been the general practice of the United States to reserve mineral lands from homesteads, pre-emptions, sales, and grants to railroad companies, an examination of the grants of lands to states for school purposes demonstrates the fact that it has been the practice of Congress to determine and declare by legislative act, in each case, and not by any settled public policy, whether or not mineral lands shall be reserved from the grant. They were not reserved from the grant to Michigan. The grant to Utah is in substantially the same terms. They are not reserved from the grants of school sections to Wisconsin, Minnesota, Missouri, or Kansas, and the acts of February 18, 1873 (17 Stat. 465, c. 159 [Comp. St. 1913, § 4653]), and May 5, 1876, 19 Stat. 52, c. 91 [Comp. St. 1913, § 4654]), expressly provide that the public lands in those states are excepted from the provisions of the act of May 10, 1872 (17 Stat. 91), and of section 2318, Revised Statutes. The Enabling Act of Colorado (Act March 3, 1875, c. 139, 18 Stat. 474) expressly provides that all mineral lands shall be excepted from the operation of its grants. The Enabling Act of the state of Washington (Act Feb. 22, 1889, c. 180, 25 Stat. 676), grants the sixteenth and thirty-sixth sections in each township for school purposes, and then provides that, if either of these sections shall be found to be mineral lands, they shall not pass to the state, but other lands in lieu of them may be selected, and the same provision is found in the Enabling Acts of Idaho, Montana, North Dakota, South Dakota, and Wyoming. On the other hand, the Enabling Acts of Florida (Act May 17, 1856, c. 31, 11 Stat. 15), and of Oklahoma (Act June 16, 1906, c. 3335, 34 Stat. 273), grant the school lands without any reservation of the mineral lands and the latter act contains convincing evidence, in addition to the grant itself, that Congress intended to grant the mineral lands in the school sections, for it expressly provides that where the lands granted for school purposes are valuable for minerals the state shall not sell them prior to January 1, 1915, but that it may lease them and apply the proceeds to school purposes.

Thus it appears that mineral lands are not excepted from the congressional grants of school lands to Michigan, Minnesota, Wisconsin, Missouri, Kansas, Florida, and Oklahoma, that they are excepted by express provisions to that effect in the Enabling Acts which grant school sections to Washington, Idaho, Montana, North Dakota, South Dakota, and Wyoming, and that in the latter acts provision is made for the selection of indemnity lands. The grant of school lands to Utah is in substantially the same terms as the grant to Michigan, it contains no exception of mineral lands and no provision for indemnity lands in lieu of them, and the conclusion is unavoidable that the acts of Congress disclose no such settled public policy to except mineral lands from grants of school lands as would sustain the courts in amend-

ing a grant without such an exception by inserting it; but they demonstrate the fact that Congress has exercised its constitutional power to make grants with and without such an exception as its good judgment dictated, and they impose the duty on the courts not to amend or revoke them by construction, but to enforce them according to their plain terms and certain meaning.

Section 2318, Revised Statutes (U. S. Comp. Stat. 1901, p. 1423), invoked by counsel for the government, descended from a provision in section 5 of "An act concerning certain lands granted to the state of Nevada," approved July 4, 1866 (14 Stat. 86, c. 166). That act confirmed certain grants to the state of Nevada and made others. Section 5 related to surveys, and provided that in surveying the lands in Nevada the lines of the surveys might so vary that the forms of the tracts would be other than rectangular, and added:

"But in all cases lands valuable for mines of gold, silver, quicksilver or copper, shall be reserved from sale."

The form in which this provision now appears in the Revised Statutes is:

"In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law." Section 2318, Rev. Stat.

But this provision merely reserves from sale by the United States lands valuable for minerals. It does not prohibit the United States or its Congress from giving or granting such lands for educational or other public purposes, nor does it in any way restrict or limit its legislative power so to do. The grant here in question is not a sale, and section 2318 is inapplicable thereto.

For the same reasons the provision of the Act of May 10, 1872 (17 Stat. 91, c. 152, § 1), which declares that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be "free and open to exploration and purchase and the lands in which they are found to occupation and purchase," and the various statutes under which lands of the United States valuable for coal and other minerals may be acquired by miners fail to restrict or limit the power of Congress to make this grant, or to modify its plain meaning and effect. They are parts of the general laws of the United States relative to the sale and disposition of its public lands by the officers of its Land Department, and they in no way disqualify the Congress itself that made them from disposing of those lands by subsequent grants at any time before the rights of private parties have attached to them under the general laws. Moreover, if this view were incorrect, and if there were in any of the acts of Congress to which reference has been made, or in any other of its acts, a restriction or prohibition of the grant of the mineral lands in these school sections, the Congress which made such restriction or prohibition could repeal it in whole or in part, and it has clearly done so to the extent necessary to validate the grant of the mineral lands in the Utah school sections.

[6] In the first place, it has made by section 6 of the Enabling Act, a clear and certain grant of the four sections in each township, without exception or reservation of mineral lands, an enactment sufficient in

itself to relieve from any previous prohibition or restriction in the general laws, under the familiar rule that where general laws applicable to many subjects, and a special law treating one of those subjects, are inconsistent, they must be read together, and effect must be given, if possible, to both, to the former as the general law of the land, and to the latter as the law of its particular subject. Board of Com'rs v. Ætna Life Ins. Co., 90 Fed. 222, 227, 32 C. C. A. 585, 590; King v. Pomeroy, 121 Fed. 287, 294, 58 C. C. A. 209, 216; Christie-Street Com. Co. v. United States, 136 Fed. 326, 333, 69 C. C. A. 464, 471; Hemmer v. United States, 204 Fed. 898, 906, 907, 123 C. C. A. 194, 202, 203; Priddy v. Thompson, 204 Fed. 955, 959, 123 C. C. A. 277, 281; Gowen v. Harley, 56 Fed. 973, 978, 979, 6 C. C. A. 190, 195, 196; State v. Stoll, 17 Wall. 425, 436, 21 L. Ed. 650.

In the second place, the Congress by section 10 of this Enabling Act has provided that:

> The "proceeds of lands herein granted for educational purposes, except as hereinafter provided, shall constitute a permanent school fund, * * * and such lands shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only."

If the mineral lands in these sections were open to entry or acquisition under the coal land laws, or under any other laws of the United States, before this enabling act was passed, here is an express exemption of them from those laws, and a devotion of them to the school purposes of the state of Utah. If under section 2318 they were expressly reserved from grant as well as from sale, "except as otherwise expressly directed by law," here is an express direction by law that they shall be disposed of by grant to the state of Utah for the support of its common schools.

And, finally, to make assurance doubly sure, the Congress provided in section 20 of the Enabling Act that:

> "All acts or parts of acts in conflict with the provisions of this act, whether passed by the Legislature of said territory or by Congress, are hereby repealed."

If there were any previous acts of Congress in conflict with the grant of the four sections in each township in Utah, and all the land therein, whether valuable for mineral or not, they were, so far as they related to those sections, unavoidably repealed by this provision of the Enabling Act of Utah. And this review of the general and special legislation on this subject but serves to strengthen and confirm the conclusion that Congress intended to grant and did grant to the state of Utah by its Enabling Act all the lands valuable for minerals, as well as all the other lands, in sections 2, 16, 32, and 36 in each township in that state, except those expressly reserved by section 6.

[7] It is contended that the decisions of the Supreme Court in Mining Co. v. Consolidated Min. Co., 102 U. S. 167, 26 L. Ed. 126, and Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423, sustain the view that the courts should amend the Enabling Act of Utah by revoking its grant of the mineral lands in the school sections and adding to section 6 an exception of those lands from the grant. Let

us see. It is a familiar rule of construction that every decision of a court should be considered and given effect in the light of the facts which conditioned it. In the case in hand the United States had granted to the state of Utah by plain unequivocal words, without any exception of mineral lands, the four school sections in each township in 1894. Twelve years later the state contracted to sell this land to Mr. Badger. In reliance upon this plain grant and the state's contract with Badger, Mr. Sweet, the original defendant, purchased that contract, paid the purchase price of section 32, the land here in controversy, $1,920, to the state in 1907, and asked the state for his deed, when, for the first time the United States by this suit in equity sought to revoke its grant of that section and to recover the land. After waiting 12 years, and until the defendant had paid the full price of the land to the state, from which he could not recover it, before commencing its suit to amend its grant, and after waiting 6 years more before submitting its case to the court below, more than 18 years after the grant, the United States appeals to a court of chancery to revoke its plain grant of the mineral lands in this section 32, to impose a loss of $1,920 and interest upon the defendant, and by its judicial decision to except all mineral lands from the plain grant of them. The equities of the United States appeal to the conscience of a chancellor with no greater or less force than those of a private individual under like circumstances. State of Iowa v. Carr, 191 Fed. 257, 266, 112 C. C. A. 477, 486; United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 677, 67 C. C. A. 1, 10; United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25, 26, 27, 37, 38, 40, 41, 81 C. C. A. 221, 222, 223, 233, 234, 236, 237; United States v. Stinson, 125 Fed. 907, 910, 60 C. C. A. 615, 618; State of Michigan v. Jackson, L. & S. R. Co., 69 Fed. 116, 122, 16 C. C. A. 345, 351; United States v. Stinson, 197 U. S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; United States v. Chicago, M. & St. P. Ry. Co. (C. C.) 172 Fed. 271, 276; United States v. California & Oregon Land Co., 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. Ed. 354; Carr v. United States, 98 U. S. 433, 438, 25 L. Ed. 209.

And one who by material misrepresentation, or by silence when he ought to speak out, induces an innocent person to so change his situation that he will suffer substantial loss, if the former takes advantage of the truth which he misrepresented, or of the silence which he ought to have broken, is in equity estopped from so doing. If a private owner of this land had conveyed it to a third person, if that conveyance had become a public record immediately, if the grantee had contracted thereafter to convey it to a fourth person, and another had purchased that contract and paid the purchase price to the third person in reliance upon the conveyance 12 years after it was made, no court of equity would fail to hold that the grantor was thereafter estopped from avoiding that conveyance. And when to these facts are added the fact that the highest court in the land had twice held before Mr. Sweet bought the land in controversy that a grant in like terms conveyed the mineral lands in the school sections (Cooper v. Roberts, 18 How. 173, 177, 178, 15 L. Ed. 338; Roberts v. Cooper, 20 How. 467,

484, 485, 15 L. Ed. 969), all the equities in the case at bar are with the defendant.

What was the case of Mining Company v. Consolidated Mining Co., 102 U. S. 167, 26 L. Ed. 126? The plaintiff in that case sought to recover land in a school section under Act March 3, 1853, 10 Stat. pp. 244, 246, c. 145, from defendants, who were in possession of the land under mining claims which had been instituted in 1851, 1853, and 1863, under the mining laws and customs of Spain and the United States. Some of the defendants' claims had been instituted before the act of 1853 was passed, and there was a town of some 400 inhabitants on the land at that time. In the face of these claims and this possession, the claim of the plaintiff was originated by its predecessor in interest by an application in 1870 to the state of California to purchase the land from it, followed by a conveyance. The claims of the defendant had passed to patent in 1873, under the United States mining laws and customs. In other words, the claims of the defendants were prior in time, rested on the mining laws and customs, were supported by prior mining operations, possession, and occupation. The claims of the plaintiff were subsequent and apparently speculative, and the equities of the case were with the claimants under the mining laws.

The case now in hand and the Michigan case arise on plain grants of school sections in simple Enabling Acts, in special acts for these particular purposes. But the act of March 3, 1853, under which the Mining Company's Case arose, is a general law for the disposition of the public lands in California, and it is full of provisions relating to subjects other than those treated in the Michigan and Utah acts. It is entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights and for other purposes." It provides for the appointment of a surveyor general, for land districts and registers and receivers of land offices. Section 3 expressly prohibits the survey of mineral lands into sections, thereby effectually preventing the selection of school sections from mineral lands. Section 6 declares that all the public lands in California "with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the state for the purposes of public schools in each township," and with the exception of certain other lands and the mineral lands, shall be subject to pre-emption, homestead, etc., and in this quoted exception is the entire grant of the California school lands; section 6 excepts mineral lands from pre-emption; section 7 expressly provides that where any settlement has been made on school sections, or parts of them have been otherwise taken, lands in lieu thereof may be selected, "nor shall any person obtain the benefits of this act by a settlement or location on mineral land"; and the Supreme Court held, among other conclusions, that the settlement and occupation of the lands in the Mining Company Case excepted them from the grant under this section (102 U. S. 176, 26 L. Ed. 126), a fact inapplicable to the case in hand. Section 8 deals with "the public land not mineral lands." Section 12 grants to California 72 sections of land for public buildings, to be selected by the Governor, provided, however, that none of said selections shall be made of mineral lands or lands reserved

for any public purpose, etc.; and section 13 contains a similar grant and proviso.

The Supreme Court, perceiving the compelling equities of the defendant and of miners in California who had claimed and operated mines under the Spanish and United States customs and laws of mining before and after the passage of the act of 1853, reviewed that act, and influenced, among other things, by the prohibition of the survey into sections of mineral lands found in section 3 (102 U. S. 173, 174, 26 L. Ed. 126), the express reservation of mineral lands from pre-emption in section 6, and the express reservations of mineral lands from the grants in sections 12 and 13, held that it was not the intention of Congress by the act of 1853 to grant, and it did not grant, lands valuable for minerals to the state of California for school purposes, and that, even if it did, the lands in controversy were excepted from the grant by the settlement and occupation thereof prior to the time the act was passed. But none of the reservations or exceptions of mineral lands in the act of 1853 which led the Supreme Court to that conclusion, and no like reservations or exceptions, are found in the Utah act, although several grants of lands in addition to the grant of the school sections were made thereby, and a careful consideration of the act of 1853, the facts of the Mining Company's Case, and the exhaustive opinion therein have left no doubt that neither the decision in that case nor the reasons for it are controlling of or applicable to the case in hand. The facts and the grant in this case are not at all analogous to those in the Mining Company's Case. They are not only analogous, but substantially identical, so far as the legal question is concerned, with the Michigan Case, and the opinions in that case and the stronger reasons persuade that the decisions therein should control and that the grant of the school sections to the state of Utah should be held to include the mineral as well as the nonmineral land therein.

The opinion in Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423, has been thoughtfully read and considered. But that case presented for decision no question of the power of Congress to grant, or of the effect of its grant of lands for school or other public purposes, and whatever may be found in the opinion sufficiently general in its terms possibly to include that subject appears to have been said without intent to decide any such question in discussing the disposition of the public lands by the executive officers of the government under the general land laws. The question there at issue was whether claims to the land in dispute under the mining laws or claims to it under the townsite laws were superior, and the opinion and decision is neither controlling nor persuasive upon the issues in this case. Still less relevant is Brigham City v. Rich, 34 Utah, 130, 97 Pac. 220.

The opinion of Secretary Bliss in State of Utah v. Allen, 27 Land Dec. Dept. Int. 53, 55, to the effect that mineral lands were excepted from the grant of the school sections to Utah, and his opinion in Florida Central & Peninsular Railroad Co., 26 Land Dec. Dept. Int. 600, 601, that such lands were excepted from the grant of May 17, 1856, to Florida (11 Stat. 15), have not escaped consideration, but the reasons which have already been stated, perhaps at too much length,

have convinced that, so far as the grant to Utah is concerned, he and the court below were in error in their conclusion, and that Congress by the Enabling Act of Utah intended to grant, and did grant, the lands valuable for mineral in the school sections named as clearly and effectually as it granted any land whatever therein. This conclusion renders the consideration of the question whether or not the lands in controversy were known to be valuable for mineral immaterial, and it is useless to discuss it.

Let the decree below be reversed, therefore, and let the case be remanded to the court below, with instructions to render a decree for the defendant below.

MILNER et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1915.)

No. 4454.

1. PUBLIC LANDS ⟸52—GRANTS—EXCEPTION OF COAL LANDS.
   Whether public lands are to be classed as coal lands, and are excepted from a grant as such, does not depend on whether coal in paying quantity and of commercial quality is actually disclosed in the land, but may be determined by other circumstances, such as their location with reference to other known and proved coal land.
   [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 139–142, 146, 147; Dec. Dig. ⟸52.]

2. PUBLIC LANDS ⟸106—CERTIFICATION OF LAND UNDER GRANT—CONCLUSIVENESS OF FINDING.
   The certification of land by the Land Department under a grant which excludes from its operation mineral and coal lands is not conclusive upon the United States as to the character of the land, where the Department acted upon ex parte statements or proofs which were false and fraudulent.
   [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. ⟸106.]

3. PUBLIC LANDS ⟸52—CONSTRUCTION OF GRANT—EXCEPTION OF MINERAL AND COAL LANDS.
   The grant of lands to the state of Utah by Enabling Act July 16, 1894, c. 138, §§ 8, 12, 28 Stat. 109, 110, to be selected and used for the building and maintenance of a university, an agricultural college, etc., is qualified by the provision of Rev. St. 2318 (Comp. St. 1913, § 4613), that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law," and does not apply to mineral or coal lands.
   [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 139–142, 146, 147; Dec. Dig. ⟸52.]

4. PUBLIC LANDS ⟸120—SELECTIONS UNDER GRANT—CANCELLATION FOR FRAUD.
   Statements made in applications to a state for the purchase of lands to be selected by the state under a congressional grant, with respect to the character of the lands, and pursuant to which such lands were selected and certified to the state, *held* false and fraudulent, and to entitle the United States to a decree quieting its title to the lands.
   [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⟸120.]

Appeal from the District Court of the United States for the District of Utah; J. A. Marshall, Judge.

Suit in equity by the United States against Truth A. Milner, executrix of the will of Stanley B. Milner, deceased, and others. Decree for the United States, and defendants appeal. Affirmed.

H. C. Edwards, of Salt Lake City, Utah, for appellants.

William W. Ray, U. S. Atty., of Salt Lake City, Utah (David S. Cook, Asst. U. S. Atty., of Salt Lake City, Utah, on the brief), for the United States.

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

CARLAND, Circuit Judge. This is an action by appellee to quiet the title to 5,564.28 acres of land situated in the county of Carbon, state of Utah. It is claimed by appellee that whatever apparent interest appellants have in the land was obtained by fraud, with the exception of Peter N. Campbell, who claims to have a lien by mortgage. Appellee was granted the relief prayed for in the court below, and appellants appeal.

Before proceeding to discuss the questions involved on this appeal, it is proper to state that by sections 8 and 12 of the act of Congress approved July 16, 1894 (28 Stat. 109), there was granted to the state of Utah in the form of what is generally known as a "floating grant," many thousands of acres of land for the purpose of erecting an agricultural college, a school of mines, and a deaf and dumb asylum. Such lands were to be selected by the state from the unappropriated public lands of the United States in such manner as the Legislature thereof should provide, with the approval of the Secretary of the Interior. In 1896 the Legislature of Utah created a board of land commissioners and gave to it the control and management of the lands so granted. Laws Utah 1896, c. 80. The board was also empowered to select and register such lands, and after this was done it was its duty to take such action as was necessary to secure the approval of the Secretary of the Interior and a final transfer of said selected lands to the state.

Between December 10, 1900, and September 14, 1903, appellants Stanley B. Milner, Truth A. Milner, Harley O. Milner, and Samuel H. Gilson made application to said board of land commissioners to purchase the land involved in this action. The application to purchase by Truth A. Milner, who was the wife of Stanley B. Milner, was made by said Stanley B. Milner as the agent of his wife. The application to purchase made by Harley O. Milner was made by Stanley B. Milner as agent. The following is the form of the application to purchase made in each instance by the appellants:

"Agreement to Purchase Selected Lands.

"County of Salt Lake, State of Utah—ss.:

"Personally appeared before me, a notary public in and for Salt Lake county, Utah, Truth A. Milner, by S. B. Milner, Agt., of Salt Lake City, Utah, well known to me, who, being first duly sworn according to law, deposes and says

that he hereby makes application to the state board of land commissioners for the selection by the state of the following described grazing lands (name the class):

No. Acres 320

	Sec.	Tp.	R.	S.	L.	M.
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in satisfaction of any grant to the State.

"That he is a native-born citizen of the United States, over the age of 21 years, and that he has not purchased from the state of Utah, under the provisions of the land laws, more than four sections of grazing lands, or 320 acres of arid lands, or 160 acres of any other one class not named, together with the land now applied for; that he hereby agrees to purchase said land upon the following conditions:

"1. That after said lands shall have been selected by the state of Utah and a patent therefor has been issued to the state by the authorized officers of the United States, affiant will purchase the land at private sale at the rate of one dollar and 50 cents per acre on ten years' time, in accordance with the provisions of the law governing land sales.

"2. The sum of 80 dollars and ——— cents, being 25 cents per acre for the land embraced in the application, is herewith deposited with the state board of land commissioners to be applied as first payment on such land after the same shall have been patented to the state.

"3. That if the said land shall hereafter be determined to be mineral in character, or if any person other than the state shall be determined to have a superior right or claim to said land, then, in either of said events, the state of Utah shall be released from all obligations under this agreement.

"4. That he will not remove any timber from said land until he has executed to the state a bond conditioned that he will pay the full contract price for said land according to the terms of sale.

"5. That the state of Utah, by its proper officers, will agree to select said land in satisfaction of any of the government grants to the state in accordance with the laws of Utah, and, when so selected and patented to the state, will sell to affiant the same at private sale, for $1.50 per acre.

"Truth A. Milner,
"By S. B. Milner, Agent.

"Subscribed and sworn to before me this 17th day of April, 1901.
"[Seal] Ellridge L. Thomas, Notary Public."

"Salt Lake City, Utah, Apr. 22, 1901.

"The state of Utah hereby agrees to the foregoing conditions, and the order for said selection is hereby made and approved.

"By order of State Board of Land Commissioners. BYRON GROO, Secretary."

Each one of these applications was accompanied by an affidavit of each applicant, or his or her agent, of the tenor and effect following:

"State of Utah, County of Salt Lake–ss:

"April 18, 1901.

"S. B. Milner, Agent, being duly sworn according to law, deposes and says that he is the identical person who made application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said land from the state of Utah; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes, under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person

or persons; that said land is essentially nonmineral land; and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes.

S. B. Milner, Agent.

"Subscribed and sworn to before me this 18th day of April, 1901.

"[Seal] Ellridge L. Thomas, Notary Public."

The board of land commissioners appointed Heber M. Wells and Byron Groo, who were respectively the president and secretary of said board, as selecting agents for the state. When a list of lands had been selected, these selecting agents filed it in the United States local land office at Salt Lake City, Utah. Said list was accompanied by the joint affidavit of said Heber M. Wells and Byron Groo of the tenor and effect following:

"State of Utah, County of Salt Lake—ss.:

"We, Heber M. Wells and Byron Groo, authorized agents of the state board of land commissioners of the state of Utah, being first duly sworn, depose and say that the foregoing list of lands, hereby selected, is a correct list of a portion of the public lands selected by the state of Utah, under section 12 of an act of Congress entitled 'An act to enable the people of Utah to form a Constitution and state government, and to be admitted into the Union on an equal footing with the original states,' approved July 16, 1894; that all of the said lands are vacant, unappropriated, and are not interdicted, mineral, nor reserved lands, and are of the character contemplated by the grant in said act; that we have caused the lands mentioned to be carefully examined by agents and employés of the state as to their mineral or agricultural character; that there is not, to our knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to our knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs, or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that our application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof; that the said selections and those pending, together with those approved, do not exceed the total amount granted to the state for the purpose named.

"that the land contains no salt spring or deposits of salt in any form sufficient to render it valuable therefor.

Heber M. Wells,
Byron Groo,
"Agents for the State Board of Land Commissioners.

"Subscribed and sworn to before me this 15th day of September, 1903.

"Ellridge L. Thomas, Notary Public."

After the list of selected lands was filed in the local United States land office, the register and receiver of said land office made a certificate as follows:

"United States Land Office.

"Salt Lake City, Utah, September 15th, 1903.

"We hereby certify that we have carefully and critically examined the foregoing list of lands selected by the state of Utah, under the grant to it by the act of Congress, entitled 'An act to enable the people of Utah to form a Constitution and state government, and to be admitted into the Union on an equal footing with the original states,' approved July 16, 1894, and we have tested the accuracy of said list by the plats and records in the office, and we find the same to be correct; and we further testify that the filing of said

list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any part thereof, returned and denominated as mineral lands, or lands, nor claimed as swamp land; neither are there any homesteads, pre-emptions, nor other valid claim to any portion of said land on file or record in this office. We further certify that the foregoing list shows an assessment of the fees payable to us, and that the said state of Utah has paid to the undersigned, the receiver, the full sum of twenty dollars in full payment and discharge of said fees. Frank D. Hobbs,

"Register U. S. Land Office, Salt Lake City, Utah.

"Geo. A. Smith,

"Receiver U. S. Land Office, Salt Lake City, Utah."

The list of selected lands was then forwarded to the Commissioner of the General Land Office, accompanied by the following statement:

"State Board of Land Commissioners.

"Salt Lake City, Utah, September 15th, 1903.

"I, Byron Groo, secretary of the state board of land commissioners of the state of Utah, hereby certify that Heber M. Wells and Byron Groo are the duly appointed agents of said board for the selection of lands under the grants by the United States to the state of Utah. Byron Groo,

"Secretary State Board of Land Commissioners.

"List No. 52. Deaf and Dumb Asylum.

"List of Lands Selected by State of Utah.

"The undersigned, the duly authorized agents of the state board of land commissioners of the state of Utah, under and by virtue of the act of Congress entitled 'An act to enable the people of Utah to form a Constitution and state government and to be admitted into the Union on equal footing with the original states,' approved July 16, 1894, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby make and file the following list of selections of the surveyed, unappropriated, unreserved, nonmineral public lands of the United States lying within the state of Utah, said lands being selected and to be applied under section 12 of said act of Congress 'for the establishment and maintenance of a deaf and dumb asylum.' Heber M. Wells,

"Byron Groo,

"Agents for the State Board of Land Commissioners.

"Approved by Commissioner General Land Office December 1, 1904."

The application to purchase made by Stanley B. Milner was approved by the board of land commissioners on December 17, 1900, by the local land office on December 18, 1900, and the land certified to the state of Utah by the General Land Office June 22, 1901.

There were two applications by Truth A. Milner, by Stanley B. Milner, her agent. One was made April 19, 1901, approved by the board of land commissioners April 22, 1901, and by the local land office April 29, 1901, and the land certified to the state of Utah by the General Land Office December 23, 1901. The other was approved by the board of land commissioners April 2, 1902, by the local land office April 7, 1902, and the land certified to the state by the General Land Office July 9, 1902.

The application to purchase by Harley O. Milner, by his agent Stanley B. Milner, was approved by the board of land commissioners March 24, 1903, by the local land office March 30, 1903, and the land certified to the state of Utah by the General Land Office May 9, 1904.

The application to purchase by Samuel H. Gilson was approved by

the board of land commissioners December 15, 1903, by the local land office September 2, 1903, and the land certified to the state of Utah by the General Land Office December 1, 1904. The price agreed to be paid for the lands was $1.50 per acre, payable in ten annual installments. No patents from the state of Utah have been issued to the defendants for the lands in controversy, but the payments as required by the contracts of purchase have been made as therein provided.

The application to purchase and the affidavit accompanying the same, together with the representations of the selecting agents and the resulting certificate of the local land officers, was the evidence upon which the Commissioner of the General Land Office acted in approving the selections. It is claimed by the United States that the certification of the lands by the General Land Office to the state was obtained by fraud, in this: that the applicants to purchase and the selecting agents appointed by the board of land commissioners, together with the certificate of the local land officers, all showed the land to be nonmineral, and that there was no deposit of coal within the limits thereof.

The affidavit accompanying the application to purchase in each instance stated that the person making the affidavit was well acquainted with the character of the land, and with each and every legal subdivision thereof, having frequently passed over the same, that his personal knowledge of said land was such as to enable him to testify understanding with regard thereto, and that there was not to applicant's knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal.

Appellee claims that the lands for which applications to purchase were made were coal lands, and known to be such by the several applicants. The trial court found this to be true, and that the applications to purchase, and the action of the land office officials based thereon, should be canceled, and title to the lands quieted in the United States. Appellants seek to avoid and overthrow this claim on the part of appellee on the following grounds:

1. That there was no fraudulent intention on the part of the appellants in applying to purchase the lands.

2. That the lands were not and are not coal lands, because coal is not exposed in commercially available quantities upon each legal subdivision of 40 acres.

3. That the selection of the lands in question having been made in good faith by the state of Utah under the grant of the act enabling Utah to be admitted as a state, it is immaterial whether or not the defendants falsely and fraudulently deceived and misled the selecting officers of the state of Utah as to the character of the lands.

4. That the Secretary of the Interior having certified the lands to the state of Utah under its grant, such certification is conclusive as to the fact that the lands were of such character as to permit them to be selected under the grant.

[1] Applying the rule laid down by this court in United States v. Diamond Coal & Coke Company, 191 Fed. 786, 112 C. C. A. 272, and in the same case, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936, we

are of the opinion after a careful consideration of the evidence that the lands in controversy were at the time of their certification by the Secretary of the Interior to the state of Utah and at the several dates of purchase known coal lands. The same contention is made in this case as was made in the case cited, namely, that lands cannot be regarded as coal lands unless coal in quantity and quality to render its extraction profitable is actually disclosed within their boundaries. In answer to such a contention Justice Van Devanter in the case cited used the following language:

"There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate."

The evidence shows beyond question that the lands involved in this action lie along and adjacent to what is commonly known as the "Book Cliffs," or the "Book Cliffs Coal Fields," a sedimentary formation designated as cretaceous, extending from Castle Gate, Utah, eastward to and beyond the Colorado-Utah line. The cliffs themselves form the edge of a plateau, and the coal outcropping in the cliffs extends back from the escarpment beneath the plateau lands. Throughout these deposits the coal occurs interstratified with the sedimentary rocks. Three experts examined these lands for the government and testified at the trial as to their character, and all expressed the same opinion as to the character of the lands. These lands lie immediately north of and above a pronounced coal formation upon which at the date of purchase of the lands in question four well-known coal mines were being worked upon veins of coal varying in thickness from 7 to 22½ feet; said veins dipping directly into the lands in question. It appears that at no place within the lands involved in this action does the cover above the coal exceed 2,500 feet, and the evidence is uncontroverted that coal at such depth, and of such quality and quantity as carried by the veins dipping beneath these lands, can be profitably extracted, even though it be necessary that they be mined through shafts or inclines.

As to the fraudulent intent of appellants, they must be held to have intended the natural and probable result of their acts. Gilson and Milner were both men of mature years and had great experience in the business of mining. Gilson testified that some time in 1900 he and Stanley B. Milner entered into an agreement to acquire title to certain lands in Carbon county, Utah, and they were well acquainted with the character of the lands in question, and determined they were not coal lands because there was not disclosed upon their surface coal in quantity and quality to render its extraction profitable. The affidavit accompanying each application to purchase, as we have before stated, was to the effect that the applicant was well acquainted with the character of said lands and of every legal subdivision thereof, having frequently passed over the same, and from applicant's personal knowledge was able to state that there was no deposit of coal thereon.

[2] We are satisfied that appellants knew the character of the lands

in question, and, having made false statements in regard to the same, must be held to have intended to defraud. Counsel for appellants cite the case of Edmund Burke v. Southern Pacific Railroad Company, 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527, in support of their contention that the approval by the Secretary of the Interior of the selection list containing the lands in question is final and conclusive that the lands were of the character to be certified to the state of Utah under the grant of 1894. No support for any such contention can be found in that case as applied to the facts in the case at bar.

Justice Van Devanter in the Burke Case is careful to point out that the rule there announced as to the finality of the action of the Secretary of the Interior does not apply in cases where the officers of the United States have acted upon ex parte fraudulent and false statements. At 234 U. S. 689, 34 Sup. Ct. 915, 58 L. Ed. 1527, in the opinion it is said:

"Of course, if the railroad company knows at the time of receiving a patent that the lands covered by it are mineral, a case of fraud is presented which entitles the Secretary of the Interior to have the patent canceled, as was done in Morton v. Nebraska, 21 Wall. 660 [22 L. Ed. 639], and in Western Pacific Railroad Company v. United States, 107 U. S. 526, 108 U. S. 510, 2 Sup. Ct. 802, 862, 27 L. Ed. 621, 806. But, barring cases of fraud, the issuing of a patent by the Secretary of the Interior to the railroad company gives it an absolute title, not liable to be defeated by the subsequent discovery of minerals."

Again (234 U. S. 692, 34 Sup. Ct. 916, 58 L. Ed. 1527) it is said:

"Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a nonmineral land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers, who had no interest in the land at the time the patent was issued and were not prejudiced by it. Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 313 [8 Sup. Ct. 131, 31 L. Ed. 182]; Diamond Coal Co. v. United States, 233 U. S. 236, 239 [34 Sup. Ct. 507, 58 L. Ed. 936]; Germania Iron Co. v. United States, 165 U. S. 379 [17 Sup. Ct. 337, 41 L. Ed. 754]; Duluth & Iron Range Railroad Co. v. Roy, 173 U. S. 587, 590 [19 Sup. Ct. 549, 43 L. Ed. 820]; Hoofnagle v. Anderson, 7 Wheat. 212, 214, 215 [5 L. Ed. 437]."

In the case of Washington Securities Company v. United States, 234 U. S. 76, 34 Sup. Ct. 725, 58 L. Ed. 1220, Justice Van Devanter again said:

"It is contended also that the proceedings resulting in the patents were not ex parte, but adversary; that the land officers found the lands to be agricultural in character, and that this finding was conclusive upon the government. No doubt those officers found from the proofs submitted to them that the lands were agricultural and not coal lands, for that was a prerequisite to issuing the patents; but the proceedings were not adversary in any true sense of the term. The applications and proofs of the entrymen were strictly ex parte. The government was not called upon to make any adverse showing, no issue was framed, no hearing was had, and no one represented the government save in the sense that the land officers did so. As this court has often held, the findings of the land officers in such a proceeding, although not open to collateral attack, are not conclusive against the government when it sues to cancel the resulting patent upon the ground that it was obtained by means of false and fraudulent proofs. United States v. Minor, 114 U. S.

233 [5 Sup. Ct. 836, 29 L. Ed. 110]; McCaskill Co. v. United States, 216 U. S. 504, 509 [30 Sup. Ct. 386, 54 L. Ed. 590], and cases cited. In such a suit the action of the land officers is given appropriate effect by treating it as presumptively right and as requiring the government to carry the burden of proving the fraud by that class of evidence which commands respect and that amount of it which produces conviction. Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239 [34 Sup. Ct. 507, 58 L. Ed. 936]."

[3, 4] It is not the claim of appellee that the officers or selecting agents of the state of Utah or the land officers were guilty of fraud, but that they were imposed upon by the false statements of the appellants and relied upon the same as did the officers of the local land office at Salt Lake City. The applicants to purchase the land in question, the selecting agents of the state, and the land officers of the United States all acted on the theory that mineral lands or lands containing a deposit of coal did not pass under the grant. It is not claimed that such lands passed, in the briefs of counsel, and the pleadings practically admit the allegation of the bill that the lands granted were to be nonmineral. We are of the opinion, however, that no such contention could be sustained under the facts in this case. Section 2318, R. S. U. S. (Comp. St. 1913, § 4613), provides:

"In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

We held in Frederick A. Sweet, Administrator, v. United States, 228 Fed. 421, — C. C. A. —, that under section 6 of the act of July 16, 1894 (28 Stat. 109), which specifically granted sections 2, 16, 32, and 36 in every township of the proposed state of Utah, mineral lands passed to the state of Utah. We think, however, the case at bar is clearly distinguishable from that case. Section 6 granted specific lands without qualification or exception, and we were of the opinion that to hold that mineral lands were excepted therefrom would be to interpolate into the section by interpretation language that Congress did not choose to use. In the present case, however, the lands are not specified in the statute, but so many thousand acres are granted to the proposed state, to be selected as stated in this opinion, and we conclude that the certification of these lands by the Secretary of the Interior did not carry mineral lands in direct opposition to section 2318, and the general policy of the United States. It was decided in Mullan v. United States, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170, that section 2318, above mentioned, included coal lands. Congress did not know when sections 8 and 12, supra, were enacted, what lands the state would select, and therefore could not have had any particular lands in view. When the Secretary of the Interior came to approve the selections made by the state, he was prohibited by section 2318 from approving the selection of mineral or coal lands. It appears from the record that all the agreements to purchase involved in this action were assigned to the Carbon County Land Company, of the stock of which Stanley B. Milner is the owner of 99,950 shares of a total of 100,000 shares capital stock. We find that the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of these lands from the United States.

Decree affirmed.

BOSTON & M. R. R. v. RAFALKO.

(Circuit Court of Appeals, First Circuit. December 27, 1916.)

No. 1069.

1. RAILROADS ⟸313—CROSSING ACCIDENTS—LIABILITY—TRESPASSERS.

St. Mass. 1906, c. 463, pt. 2, § 245, provides that if a person is injured by collision with an engine or cars at a railroad crossing, and if it appears that the railroad corporation neglected to give statutory signals, and that such neglect contributed to the injury, the corporation shall be liable for damages, unless it is shown that, in addition to a mere want of ordinary care, the person injured was at the time of the collision guilty of gross or willful negligence, or acting in violation of law, and that such gross or willful negligence or unlawful act contributed to the injury. *Held* that, while gates lowered across a street at a crossing might have been a warning of danger, and while a pedestrian who disregarded such warning may not have been on the crossing by the railroad company's invitation or with its consent, the mere absence of such invitation or consent did not make her a trespasser and deprive her of the protection of the statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1002; Dec. Dig. ⟸313.]

2. RAILROADS ⟸313—CROSSING ACCIDENTS—ACTIONS—INSTRUCTIONS—TRESPASSER.

If such pedestrian was a trespasser in any sense, she was not one in the ordinary sense, and in an action for injuries the refusal to rule that she was a trespasser on the railroad was not error.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1002; Dec. Dig. ⟸313.]

3. RAILROADS ⟸313—CROSSING ACCIDENTS—DISREGARDING LOWERED GATES.

A highway traveler, going on a railroad crossing while the crossing gates are lowered, does not do so at her own risk, if any warning required from approaching trains is omitted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1002; Dec. Dig. ⟸313.]

4. RAILROADS ⟸312—CROSSING ACCIDENTS—NECESSITY OF SIGNALS.

Under St. Mass. 1906, c. 463, pt. 2, § 147, requiring a bell to be placed on each railroad engine and rung when approaching or crossing highways, such signals must be given, whether a crossing is protected by gates or not.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 998–1001, 1003–1005; Dec. Dig. ⟸312.]

5. RAILROADS ⟸347—CROSSING ACCIDENTS—ACTIONS—EVIDENCE.

In an action for injuries to a person who started across a railroad while the crossing gates were down, behind a train which had been standing at the crossing discharging passengers and was starting to pull out, the fireman of an inbound train, by which she was struck, testified that people were always crossing the tracks at that place when there was a train in the depot, that it was the custom for his train to slow down or hold up, and not cross the crossing until the other train had gone by, that he could not say that they were not supposed to go upon the crossing, but that they were not supposed to go into the depot until the other train got off the crossing. *Held*, that such evidence was competent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124–1137; Dec. Dig. ⟸347.]

6. RAILROADS ⟸350—CROSSING ACCIDENTS—ACTIONS—INSTRUCTIONS.
In view of such evidence, a requested instruction that there was no evidence that plaintiff was inside the crossing gates by invitation of the railroad company was properly refused.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. ⟸350.]

7. RAILROADS ⟸350—CROSSING ACCIDENTS—DISREGARDING LOWERED GATES.
While the attempt of a traveler to cross a railroad in disregard of the warning of danger afforded by lowered gates may well go far to prove the gross or willful negligence contributing to the injury, which will defeat a recovery for a failure to give crossing signals under St. Mass. 1906, c. 463, pt. 2, § 245, it does not as a matter of law prevent a recovery for an injury to which the failure to give the crossing signals has contributed.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. ⟸350.]

8. RAILROADS ⟸350—CROSSING ACCIDENTS—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.
As a pedestrian on a highway approached a railroad crossing, the gates were down, and an outbound train, the engine of which stood on the crossing, was discharging passengers. As it moved by, she started to cross behind it and was struck by an inbound train. While crossing the track she was at all times within the limits of the street. There was evidence that there were always people crossing the tracks when trains were discharging passengers, and that the inbound train had been accustomed to slow down or stop before crossing the street until the outbound train had gone by; that plaintiff was familiar with the crossing and had seen all this happen, and never expected a train from the direction from which the inbound train approached; that she listened for other trains, but heard nothing, and did not see the inbound train until the outbound train had passed her; that she then saw its light, but thought it had stopped, and started to move more quickly; and that the engine of the inbound train was emitting a very thick, stifling cloud of smoke, and did not give the required crossing signals. *Held* that, in an action for injuries under St. Mass. 1906, c. 463, pt. 2, § 245, the case was properly submitted to the jury, as the jury might have found plaintiff excusable for believing that the gates were down only because of the outbound train, and in attempting to cross as she had seen others do, and in believing that she could cross safely, and that the light she saw came from a train which had stopped, and, even though they found her negligent, they would not have been bound to find her negligence gross or willful.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. ⟸350.]

9. RAILROADS ⟸348—CROSSING ACCIDENTS—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.
To justify a ruling in an action for injuries sustained at a railroad crossing that the railroad company has sustained the burden of proving gross or willful negligence of the person injured, it is not sufficient that the evidence would warrant a finding that such negligence contributed to the injury, but the evidence must be such as to leave no other reasonable explanation of the accident possible.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138–1150; Dec. Dig. ⟸348.]

10. TRIAL ⟸253—INSTRUCTIONS—SINGLING OUT TESTIMONY.
In an action for injuries sustained at a crossing, for which it was claimed the statutory signals were not given, defendant requested no ruling that there was no evidence of neglect to give the required signal, and the question whether defendant's negligence had contributed to the injuries was submitted to the jury under proper instructions. Defend-

ant requested a ruling that, if the train was running at a rate of 20 to 25 miles an hour, this was not evidence of negligence as between plaintiff and defendant. It appeared that plaintiff started to cross the track while the crossing gates were down. *Held*, that the refusal of the requested ruling was not error, as the ruling related only to one feature of the evidence which the jury were to consider.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. ⊂=253.]

Putnam, Circuit Judge, dissenting.

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

Action by Eva Rafalko against the Boston & Maine Railroad. Judgment for plaintiff, and defendant brings error. Affirmed.

Archibald R. Tisdale, of Boston, Mass., for plaintiff in error.

George L. Mayberry, of Boston, Mass. (Arthur F. Whalen and Mansfield & Whalen, all of Boston, Mass., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The defendant in error (hereinafter called plaintiff) recovered judgment against the plaintiff in error (hereinafter called defendant), under chapter 463, § 245, of the Massachusetts Acts of 1906, for personal injuries sustained on January 1, 1913, at the crossing by the defendant's tracks over Wyoming avenue, in Melrose. The defendant seeks here to reverse the judgment, because of the refusal of the court at the trial to direct a verdict in its favor or to instruct the jury in accordance with its requests.

The section of the Massachusetts statute under which the plaintiff's suit was brought provides as follows:

"If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing such as is described in section 147, and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision * * * unless it is shown that, in addition to a mere want of ordinary care, the person injured * * * was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury."

The crossing referred to was such as described in section 147, and that section provided for the ringing of a bell at least 35 pounds in weight on each passing engine, at the distance of at least 80 rods from the crossing and continuously thereafter until the engine had passed the crossing. It also provided for the sounding of a steam whistle in addition to the ringing of the bell, but at this crossing the sounding of whistles had been prohibited by the Railroad Commissioners, exercising authority elsewhere reserved to them in the statute, and is not claimed to have been a signal required upon this occasion.

The exceptions set forth the following facts as undisputed:

"The gates were down as the plaintiff approached the crossing, and an outbound train, the engine of which stood on the crossing, was at rest on the nearer of the two tracks, discharging passengers at a long platform on her left. She passed from the sidewalk onto the platform, and stood at a point

near the train and at the left of the balance projecting from the gate arm, until the train moved by. She then started across the track behind the train, and was struck by the engine of a train on the inbound track, just as she had cleared the second rail."

As the exceptions further show, it also appeared without dispute that the plaintiff lived on the west side of the tracks, and when she came to the crossing was walking along the sidewalk on Wyoming avenue from the eastward of the tracks, on her way home; that while on the platform as above, waiting for the outbound train to move by, she was on the railroad's property, but that coincidently with the movement of the train she walked along inside the gate, between it and the train, until she reached the crossing planking, before starting across the track as above; that both gates were still down when she was struck by the engine as above; and that they remained down from the time she went within them, as above, until the inbound train by which she was struck had passed the crossing. She was thus at all times after leaving the platform within the limits of Wyoming avenue, though between the gates thereon.

It also appeared from the evidence on the plaintiff's behalf, that the bell on the engine which struck her was not rung as it approached the crossing; that the inbound train was going at the rate of 20 or 25 miles an hour, the engine emitting a very thick, stifling cloud of smoke; and the defendant concedes that these facts may be assumed as true for the purposes of the case.

If, as the defendant contends, the facts that the plaintiff had thus deliberately gone within the gates while they were down, and undertaken to cross the tracks while the gates still remained down, made her a trespasser, or deprived her of the status or rights of a traveler on the highway at the time of the accident, including the right to invoke the provisions of the above statute—the defendant's only duty was to refrain from reckless or willful misconduct as regarded her, and she was not entitled to recover, because there was not sufficient evidence of such reckless or willful misconduct on the defendant's part. If, however, the plaintiff had not lost her status or rights as a highway traveler by reason of the facts above referred to, she was entitled to recover for an injury to which neglect to give the required signals contributed, unless the defendant proved that her own gross or willful negligence contributed to such injury. Whether or not gross or willful negligence contributing to her injury on her part had been so proved, would in that case be a question for the jury, unless the evidence was such that reasonable men could reach no other conclusion.

[1] 1. Wyoming avenue is admitted to be a public highway, wherein the defendant, so far as appears, had no other rights than the right to run trains across it, interfering only so far as necessary for the safe passage of such trains with the public right of travel along the avenue and across the defendant's tracks therein laid.

The defendant's gates, when lowered across the avenue, may have been an indication of the presence of trains and of danger in crossing the tracks within the avenue, if its practice had been such as to make

them so. Baltimore, etc., R. R. Co. v. Landrigan, 191 U. S. 461, 475, 24 Sup. Ct. 137, 48 L. Ed. 262. As will appear, however, there was evidence tending to show that, under the circumstances existing at the time, the lowered gates did not necessarily indicate present danger from any train other than the outbound train then stopped at the crossing.

Her disregard of such warning as the lowered gates afforded may have prevented the plaintiff from claiming that she was on the highway between them, or the tracks therein, by the defendant's invitation or with its consent. But we are unable to regard the absence of such invitation or consent as in itself sufficient to make a lawful traveler on the highway a mere trespasser, so far as the railroad is concerned, without rights other than would belong to such a trespasser, and therefore outside the protection of this statute.

Granger v. Boston & Albany R. R. Co., 146 Mass. 276, 15 N. E. 619, relied on by the defendant, was not based upon failure to comply with the statutory requirement calling for continuous sounding of the bell while nearing a crossing, and the statutory provision that contributing negligence on the part of the person injured must have been gross or willful was not available to the railroad as a defense. Although it is said in the opinion that:

> "Railroads, from the necessity of the case, have the right to the exclusive use of grade crossings when their trains are passing, and it is their duty to give suitable warning of such passing trains to travelers upon the highway. If they do this, and the traveler disregards the warning, and without sufficient excuse insists upon crossing, he does so at his own risk"

—and although the persons injured in that case had knowingly gone upon the tracks while the gates were down, it was held only that their own negligence had been the cause of their injuries, not that they were trespassers.

[2] The ruling requested on this point in the present case was, that "on all the evidence the plaintiff was a trespasser on the railroad at the time of the accident." If she could properly be called "a trespasser" in any sense, she was not one in the ordinary sense, and we cannot hold that the refusal to rule in the above terms was error.

[3, 4] Before it can be said that a highway traveler has insisted on passing over the tracks of a railroad at a grade crossing without sufficient excuse, and therefore at his own risk, we think it must at least appear that no warning required from trains approaching the crossing has been omitted. Otherwise "suitable warning" is not shown to have been given. The bell signals required by the statute here in question must be given while a train is approaching any crossing to which the statute applies, whether it is protected by gates or not. The first enactment of these provisions (St. 1871, c. 352) was entitled: "An act for the better protection of travelers at railroad crossings." In Commonwealth v. Boston & Me. R. R. Co., 133 Mass. 389, the particular act of neglect to give such signals is said to have been "singled out" and "deemed to be of such significance as to call for special legislation concerning it," and further to "stamp

the omission of this duty as sufficient to fix the responsibility of the corporation without any inquiry into the circumstances under which such omission occurred." We do not think that a traveler on the highway can be held to have forfeited the additional protection of an enactment of this kind merely because she is on the tracks between lowered gates, and in that sense is there without the railroad's consent or invitation.

[5, 6] That the lowered gates afforded warning that it was necessarily dangerous to attempt to cross at the particular time when the plaintiff went within them cannot be said to have been entirely clear upon the evidence. The fireman on the inbound train, called as a witness by the defendant, testified upon cross-examination:

"There are always people crossing the tracks there when there is a train in the depot. It was the custom for my train to slow down or hold up, and not cross that crossing until the other train had got by. I could not say that we were not supposed to go onto the crossing, but we were not supposed to go into the depot until the other train got off the crossing."

The fact that the gates were down was thus not the only fact to be considered upon the question of the extent of the warning which they afforded, or upon the question whether the plaintiff could be said to have gone within them without the defendant's invitation or consent. So far as consideration of these questions by the jury was important, the presumption is that they were properly instructed regarding them. It is true that the evidence above quoted, so far as it related to the custom described, was admitted against objection, that a motion to strike it out was denied by the court, and this denial assigned as error. But this assignment of error (the eleventh) is nowhere referred to in the defendant's brief, and we regard the evidence as competent. See La Fond v. Boston & Me. R. R., 208 Mass. 451, 457, 94 N. E. 693.

The refusal of a requested instruction that there was no evidence that the plaintiff was inside the crossing gates by invitation of the defendant is complained of in the seventh assignment of error, which, for the reasons above stated, we are also unable to sustain.

[7] Every person injured at such a crossing as this, by negligence such as the statute describes, is within its language, and proof establishing one or both the defenses expressly specified is the only method provided by its terms in which recovery for such injuries can be prevented. It is true that, notwithstanding the absence of any express limitation, the statute has been held inapplicable to persons on such a highway crossing for purposes other than travel, and therefore inapplicable to persons using the highway unlawfully by riding in an unregistered automobile. Chase v. N. Y. Central, etc., 208 Mass. 137, 157, 94 N. E. 377. But this plaintiff is not claimed to have violated any law, and for the proposition that the statute is inapplicable to a traveler on the highway not shown to have been there unlawfully we find no authority in Massachusetts or elsewhere. The attempt on such a traveler's part to cross tracks in disregard of the warning which lowered gates afford may well go far to prove that gross or willful negligence contributing to the injury of which the statute speaks; and

perhaps in most cases would be sufficient proof thereof. We are unable to hold it, however, enough to require a ruling by the court that no recovery can be had in any such case, even for an injury to which admitted failure on the railroad's part to give the special further warning required from the engine approaching the crossing has contributed.

2. The court refused a requested instruction that:

"On all the evidence the plaintiff assumed the risk of the consequences of her action as disclosed by the testimony."

If her rights were, as we have held, not merely those of a trespasser on the railroad, nor those of an unlawful user of the highway, we do not think she can be said to have assumed the risk of any injury whereof neglect to give the required signals was a contributing cause; and we cannot hold the refusal of this instruction erroneous. It may well be doubted whether the doctrine of "assumption of risk" could in any event afford a defense to a statutory action of this kind.

[8] 3. The court refused to direct a verdict in the defendant's favor, and refused to instruct, at its request, that on all the evidence the plaintiff could not recover. The court, in order to grant these requests, would have had to rule that the evidence showed the plaintiff guilty, as matter of law, of the gross and willful negligence which the statute makes a defense.

The evidence that the plaintiff did not undertake to cross the tracks, except on the highway and immediately behind the outbound train, has been above referred to, as has also the evidence that, when trains were discharging passengers at the station where the outbound train had just discharged, there were always people crossing the tracks between the gates, and that the inbound train had been accustomed to slow down or stop before crossing Wyoming avenue until the outbound train had gone by. The plaintiff's testimony was that she was very familiar with the crossing; that she had seen all this happen, and that, while crossing, she never expected a train from the direction from which the inbound train which struck her approached in the manner above described; and that, while waiting for the outbound train to pass, she had listened for the sound of other trains, but heard nothing, either then or at any time before her accident.

She further testified that until the outbound train had passed her she could see nothing of the inbound train; first knew of its presence while she was right between the outbound and inbound tracks on her way across; that she then looked in its direction, immediately saw the light on its engine, thought the engine was stopped, started then to move more quickly, and ran, instead of walking, as she had been doing, across the inbound track. The train, instead of being stopped, was in fact moving, and at the rate of 20 or 25 miles an hour (this is conceded for the purposes of the case, as has been stated), so that she failed to get clear of the inbound track in time to avoid it.

Upon such evidence, neglect to give the required signal might have been found to have contributed to the plaintiff's injury. And the jury might also have found the plaintiff excusable for believing that the gates were down only because of the outbound train; excusable in attempting to cross the tracks while the gates were down because she

had seen others do the same thing under circumstances similar, so far as she could tell; excusable for believing she could get across the tracks in safety when no engine bell had warned her that any other train was approaching the crossing; and excusable, in view, among other things, of the thick smoke from the engine, for thinking that the light she saw came from a train which was stopped. Even if they found the plaintiff negligent in her attempt to cross, notwithstanding the warning afforded by the lowered gates, or negligent in persisting in that attempt after seeing the light on the engine, we cannot say that they would have been bound to find her negligence gross or willful. That she had recklessly disregarded the probable consequences of a known and impending danger does not seem to us the necessary inference from the evidence before them.

In two Massachusetts cases under this statute the defense of gross or willful negligence on the plaintiff's part has been held by the court established by the evidence at the trial, so as to justify refusal to submit the question to the jury. Debbins v. Old Colony R. R., 154 Mass. 402, 28 N. E. 274 (1891); Emery v. Boston & Me. R. R., 173 Mass. 136, 53 N. E. 278 (1899). As pointed out in Kelsall v. New York, etc., R. R., 196 Mass. 554, 556, 82 N. E. 674, the first of these two decisions was by a divided court, and in both cases there were conceded facts constituting in substance the plaintiff's whole case.

In the subsequent Massachusetts cases, wherein the sufficiency of evidence at the trial to establish this defense has been involved, it was held that the question was for the jury. See Brusseau v. New York, etc., R. R., 187 Mass. 84, 72 N. E. 348; Kenny v. Boston & Me. R. R., 188 Mass. 127, 74 N. E. 309; Kelsall v. New York, etc., R. R., 196 Mass. 554, 82 N. E. 674; Slattery v. New York, etc., R. R., 203 Mass. 453, 459, 89 N. E. 622, 133 Am. St. Rep. 311; La Fond v. Boston & Me. R. R., 208 Mass. 451, 94 N. E. 693.

[9] It is seldom, according to the above decisions, that the court can declare the burden of affirmative proof sustained which rests upon a defendant relying in such a case as this on gross or willful negligence of the person injured; and it is not enough to justify such a ruling that the evidence relied on would warrant a finding that such gross or willful negligence had contributed to the injury. The question is still one for the jury, unless the evidence has left possible no other reasonable explanation of the accident, which, in our opinion, cannot be said of the evidence here under consideration. We therefore find no error in the above refusals to direct a verdict or to instruct as requested.

[10] 4. The court refused a request to rule that, even if the inbound train was going at the rate of 20 to 25 miles an hour, that fact was not evidence of negligence as between the plaintiff and defendant. There was no request to rule that there was no evidence of neglect to give the required signal on the defendant's part. Whether such negligence was proved or not was submitted to the jury under proper instructions, as must be assumed. The ruling requested related only to one feature of the evidence they were to consider, and there was no error in refusing to give it.

What has been said disposes of all the assignments of error upon which the defendant has insisted. We find no error in any of the refusals complained of.

The judgment of the District Court is affirmed, with interest, and the defendant in error recovers its costs of appeal.

PUTNAM, Circuit Judge, dissents.

UNITED STATES FIDELITY & GUARANTY CO. v. UNION BANK & TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit, December 7, 1915.)

No. 2640.

1. BANKS AND BANKING ⟸130—DEPOSITS—TRUST FUNDS—LIABILITY OF BANK FOR MISAPPROPRIATION.

Where trust funds are deposited in a bank, which has knowledge of their character, if it obtains payment of a debt from the depositor personally to itself from the deposit, or affirmatively and intentionally aids him in wrongfully appropriating any part of the fund to his own use, it becomes liable in equity therefor to the beneficiaries of the trust.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319–325, 327; Dec. Dig. ⟸130.]

2. BANKS AND BANKING ⟸130—DEPOSITS—TRUST FUNDS—LIABILITY OF BANK FOR MISAPPROPRIATION.

The bank is not relieved from such liability on account of money received on its own debt by the fact that the depositor had funds of his own mingled in the deposit, but accepts the payment at its peril of having to refund if the trust deposit is thereby depleted.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319–325, 327; Dec. Dig. ⟸130.]

3. BANKS AND BANKING ⟸130—DEPOSITS—TRUST FUNDS—LIABILITY OF BANK FOR MISAPPROPRIATION.

Nor is the bank protected from liability by the fact that the money of numerous beneficiaries is mingled in the deposit, which is added to from many sources and drawn against for many purposes until the identity of each owner's part is lost. In such case the amount wrongfully taken from the fund must stand to them in the same relation as the remainder does, and the liability is to them as a class, and where there is no right of preference between them, and in the absence of clear proof that the money of any particular owner remains, they are entitled to share pro rata in the fund remaining, and in such money as may be recovered.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319–325, 327; Dec. Dig. ⟸130.]

4. SUBROGATION ⟸7—SURETY OF OFFICER—SUBROGATION TO RIGHTS OF BENEFICIARIES OF TRUST FUNDS.

Where in such case the depositor was a public officer and the beneficiaries, instead of pursuing their remedy against the bank, recover their loss from the surety on his official bond, the right to bring the action passes to the surety under the general principles of subrogation, and by what amounts to an equitable assignment, but subject to any disability which affected the beneficiaries whose claims were paid.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21–29, 58, 77, 83, 92; Dec. Dig. ⟸7.]

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5. LIMITATION OF ACTIONS ⊂=66—ACCRUAL OF RIGHT OF ACTION—ACTION TO RECOVER BANK DEPOSIT.

Limitation begins to run in favor of a bank against the claim of beneficiaries of a trust fund deposit on demand and refusal of payment, or when the claimants have notice that the bank will not pay, and where the depositor was a public officer, an official report of a committee, which was a matter of public record, that he had drawn out practically all of the fund is equivalent to such notice.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 353-375; Dec. Dig. ⊂=66.]

6. SUBROGATION ⊂=32—EXEMPTION IN FAVOR OF STATE—SUBROGATION OF SURETY PAYING CLAIM.

Where the claim of a state against a public officer for taxes collected was not subject to limitation, the exemption inures to the benefit of a surety who pays the claim and becomes its assignee by subrogation.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 92-95; Dec. Dig. ⊂=32.]

7. BANKS AND BANKING ⊂=130—DEPOSITS—TRUST FUNDS—SUIT TO RECOVER.

Where by the decision of the Supreme Court of a state the state had a first lien on funds in the hands of a public officer for state taxes collected by him, and his surety was required to pay the state's claim, a suit by the surety as subrogee against a bank in which the officer had deposited his official funds, and from which they were wrongfully withdrawn, is one to restore the fund wrongfully diverted from the office of its principal, and it is not essential to recovery to identify the state's money and trace it in specie into the deposit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319-325, 327; Dec. Dig. ⊂=130.]

8 BANKS AND BANKING ⊂=154—DEPOSITS—TRUST FUNDS—SUIT TO RECOVER.

While the liability of a bank on account of its participation in the misappropriation of a deposit, consisting of trust funds belonging to numerous beneficiaries, is to such beneficiaries as a class, a decision of a state court that the state, as one of such beneficiaries, was entitled to first lien on the funds and priority of payment therefrom so far segregates its claim from the others that a separate suit may be maintained thereon.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. ⊂=154.]

9. SUBROGATION ⊂=28—SURETY—SUBROGATION TO RIGHT OF ACTION OF OBLIGEE—PARTIAL PAYMENT.

The right of a surety on a bond to be subrogated for the obligee in a right of action against one wrongfully causing the liability is founded on payment by the surety to the obligee, and does not come into existence except on full payment of the loss indemnified against, since the cause of action cannot be split.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 51-59; Dec. Dig. ⊂=28.]

Appeal from the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Suit in equity by the United States Fidelity & Guaranty Company against the Union Bank & Trust Company and others. Decree for defendants, and complainant appeals. Reversed.

Rainey was a clerk of the courts at Nashville, and the Fidelity & Guaranty Company (hereafter called the guaranty company) was surety on his official bonds. He kept his official funds on deposit with the Union Bank & Trust

Company (hereafter called the bank), in an account in the name of "Walter S. Rainey, Circuit Court Clerk," and from which withdrawals were commonly made by checks signed "Walter S. Rainey, Clerk." These official funds consisted of judgments collected, delinquent taxes paid, and officers' and trustees' fees and costs paid. He would be entitled to take for himself out of such funds his own costs and commissions. He also deposited in the same account his private funds, and he had no other bank account. In January, 1901, it developed that as clerk he was "short" about $25,000. Because of its liability as surety, the guaranty company was compelled to pay about $18,000 to or for the beneficial owners of the funds which the clerk should have had on hand. This result was brought about by the decree of the Supreme Court of Tennessee finding and holding that, in round numbers, the total shortage was $25,000, of which $3,000 was due the state, $3,300 was due to the county, and $8,700 to the city for taxes received by Rainey, making a total of $15,000 for taxes, and $10,000 was due to individuals for costs, fees, judgments, etc.; that the guaranty company was liable for the full amount of two bonds aggregating $15,000 and interest, or $17,000, and for $1,300 and interest upon another bond. Apparently the $1,300 consisted of items which would be paid in full out of the judgment, leaving $8,700 of the individual claims standing against the $15,000 bonds. The decree directed that the fund of $17,000 be paid into court; that the state had priority and should be paid therefrom its $3,000 and interest in full, but that the county and city had no priority; and that the remainder of the fund, about $13,500, should be prorated among the remaining $21,000 of claims without distinction between the county, city, and individuals, thus indicating payments of about $2,100 for the county, $5,700 for the city, and $5,700 for the individuals. Having made payment as thus ordered, the guaranty company, in May, 1909, stating the necessary diverse citizenship to give jurisdiction, filed its bill in the court below against the bank, alleging that, with knowledge of the trust character of the deposit, the bank had negligently permitted Rainey to use large portions of that deposit for his private purposes, and also had received from him, out of the trust deposit, about $6,700 to be applied upon payment of his personal obligations to the bank. It was the theory of the bill that, upon these facts, a cause of action arose against the bank in favor of the beneficial owners of the fund, and that by the payments made pursuant to its bonds, the guaranty company had become equitably subrogated to these rights. It therefore asked an accounting against the bank, and claimed such an adjustment of the various funds and interests as to entitle it to a decree for about $12,000. The trial court held that there was no such conduct by the bank as would have given rise to an action on account of sums checked out of the fund to Rainey himself or to his private creditors, but that the bank would have been liable for the sums which it received for itself out of this deposit; that all the individual claimants to the trust fund would have been barred by the statute of limitations before this bill was filed, and that so far as the guaranty company claimed by subrogation their rights of action, it, also, was barred; that the state, county, and city, on their claims for tax money in the clerk's hands, would have escaped the bar of the statute; and that the guaranty company, claiming by subrogation to these rights, likewise escaped, but that the tax money was not sufficiently traced into the bank deposit, and, hence, even as to this part of its claim, the guaranty company must fail. From a decree dismissing the bill, the guaranty company appeals, and, by the assignments of error, as limited by the printed brief, raises two questions: (1) That the bank should have been held liable for a certain sum of $2,000 checked out by Rainey for his personal uses; (2) that the presence in the bank deposit of the state, county, and city tax money sufficiently appeared so as to justify a decree in favor of the guaranty company to the extent of the fund diverted to the bank. Obviously, both propositions involve the rightfulness of the above recited steps which lead to the existence of any liability in favor of plaintiff.

C. T. Boyd, of Nashville, Tenn., for appellant.
J. J. Vertrees, of Nashville, Tenn., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. The official funds on deposit were not, as between the clerk and the bank, a trust fund; but as between the clerk and the beneficiaries, the fund was largely or wholly made up of trust moneys; and this case must be approached by way of the proposition that if the bank, out of this fund, either satisfied its debt against the clerk personally, or affirmatively and intentionally aided him in wrongfully appropriating it to his own use, a liability therefor accrued in equity against the bank in favor of the beneficiaries. We think this proposition follows from the decision in Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693. True, in that case, Mr. Justice Matthews called attention to the fact that the court was not dealing with a voluntary application of the fund by the check of the depositor, but with an attempt to enforce a banker's lien; but we do not see a controlling distinction between the two situations, as the former has developed in this case. Once admitting that the fund belongs in equity to the beneficiary and that the bank knows this, it seems clear that the bank can get no better right against the real owner from the fact that the depositor, trustee, colludes with the bank in the wrongful application.

[2] 2. From such a liability, on account of a bank debt paid, the bank could find no protection in the fact that it acted on the mistaken supposition that mingled in the deposit was enough money belonging to the depositor to satisfy his check. When such a joint fund is drawn upon for a payment to the bank to discharge a mere personal debt to it, the bank takes the money at its peril of having to refund, if in fact the trust deposit is thereby depleted. This is the teaching, though not the holding, of the case in 104 U. S. The refund works no injury to the bank; it has no equity equal to that of the real owner.

[3] 3. Where there is a single beneficiary of such a fund, the matter is simple; it becomes more complex when there are many beneficiaries. In such case, while their respective, mutual rights are several, yet the liability in chief must be to them as a class. There may be instances where the money of one person can be traced through the deposit into the diversion, but that must be unusual. The typical case is where, as here, money belonging to numerous persons is mingled in one deposit, which is added to from many sources and drawn against for many purposes until the identity of each owner's part is hopelessly lost; and as between beneficiaries whose rights are of equal rank, this confusion cannot be cleared by any presumption that withdrawals must be charged against one rather than another. This loss of specific identity ought not to be a protection for the wrongful appropriator. It is enough for the bank to know that the deposit, as a mass, is charged with a trust in favor of beneficiaries, as a class. The bank cannot be concerned with their equities as between themselves, as long as it will not be charged twice. An amount wrongfully taken by the bank from such a fund must stand to the beneficiaries in the same relation as the remainder does; and we cannot doubt that those whose money had come into the clerk's office would share pro

rata in whatever official fund in cash or in bank might remain, in the absence of any right to preference or clear proof that the specific and identifiable money of one claimant remained.

[4] 4. If the beneficiaries in such fund, instead of pursuing the right of action we have been discussing, recover their loss from the surety upon the official bond, the right to bring the action against the bank passes to the surety under the general principles of subrogation and by what amounts to an equitable assignment. Travelers' Co. v. Gt. Lakes Co. (C. C. A. 6) 184 Fed. 426, 107 C. C. A. 20, 36 L. R. A. (N. S.) 60, and cases cited; American Co. v. National Bank, 97 Md. 598, 55 Atl. 395, 99 Am. St. Rep. 466.

[5] No matter what the form of the assignment, legal or equitable, the assignee cannot take a better right than the assignor had; and so we come to the defense of the statute of limitations. This defense may be of varying effect as against the beneficiaries of the fund, as between: (1) Individuals; (2) the state; and (3) the city and county. It would be strongest as against the individuals. It is urged that this is, in effect, a suit to recover a deposit, and that such an action does not accrue, and therefore the statute does not begin to run, until the depositor has demanded payment from the bank and the bank has refused. Morse on Banks (4th Ed.) § 322, pp. 587–591. Mr. Morse, however, states that certain acts by the bank will dispense with the necessity of demand and refusal, among which acts are: (1) Notification to the depositor that his claim will not be paid, and (2) rendering by the bank to the depositor an account in which it claims the money as its own. It would seem that the second exception is included within the first, but either the first or the second is fairly satisfied by the facts of this case. As early as January, 1901, by an official report to the chancery court by a committee theretofore appointed, it was made a matter of public record that the clerk had less than $25 in his official bank account in place of the $25,000 which he should have had. This was, in effect, a statement that Rainey had withdrawn from the bank all the sums now in question. In the natural course of events, the substance of this report must have soon become known to all beneficiaries of the fund. It fairly put them on notice that the bank would not pay over the sums the second time and on inquiry whether those who had received the money were liable to pay it back. The statute began to run against all individual beneficiaries, at the latest, on the expiration of reasonable time for this notice to take effect. This suit was not begun until 1909. The Tennessee statute is six years. The federal courts of equity generally enforce the state statutes (Kentucky Co. v. Kentucky Co. [C. C. A. 6] 187 Fed. 945, 948, 110 C. C. A. 93); and we are satisfied that the individual beneficiaries are barred.

It results that if there are beneficiaries not barred, but who may be treated as surviving the statute, the survivors may receive a larger dividend than otherwise would happen. Manifestly this could not be so if the money of each beneficiary could be identified, or if otherwise his right was wholly several; but we see no reason why distribution of such a fund as we are now considering should not be made

to the claimants whose claims exist at the time of distribution and be continued until their claims are satisfied. The wrongful possessor of the fund is not prejudiced by being compelled to yield what he does not own to those who have a good title, and if it appears that there are no other claimants entitled to share. True, a decree for such payment does not bind those who are not parties to the record; but it frequently happens that rights of the parties must be determined as between themselves without an adjudication which will bind others, and in such situations, the question whether all substantial rights involved are held by parties to the record must be determined by the evidence in the case, and not by surmises as to what might be made to appear in some other case.

[6] 5. It is clear enough that, if the state of Tennessee had brought the action to recover on account of the $3,000 of state taxes in the clerk's hands, the statute of limitations would have been no defense; but does this exemption from the statute of limitations, existing for the benefit of the state, inure to the benefit of one who has become subrogated to the state's right of action? We must think that it does; though counsel have not found, nor have we, any decisions directly upon that subject, excepting American Co. v. National Bank, supra, in which, on page 607 of 97 Md., 55 Atl. 395, 99 Am. St. Rep. 466, the Supreme Court of Maryland expressly decided that the assignee by subrogation took the benefit of the state's exemption. The principle is the same as in the leading case of Lambert v. Taylor, 4 B. & C. 138. Here it was held that when the title to a chose in action vested in the sovereign by law upon the owner's suicide and where after a time it was transferred by the Crown to the representative of the deceased, the statute did not run during the Crown's ownership. This case was cited with apparent approval in United States v. Nashville Co., 118 U. S. 120, 126, 6 Sup. Ct. 1006, 30 L. Ed. 81. See, also, Hunter v. United States, 5 Pet. 173, 182, 8 L. Ed. 26, holding that the same right of priority which belongs to the state attaches to the claim in the hands of a surety who has paid the debt to the state; the analogy between a right of priority and a right of exemption seems complete.

We think the conclusion of exemption is required by considerations both of fairness and of public policy. The primary security held by the state, in the form of a right of action or some other form, may be ample to protect, through subrogation, a secondary surety, and the latter may assume the liability relying upon his own right to resort to the primary security, if he is himself compelled to pay, but he can do nothing by way of such resort until he is himself damnified; and it is manifestly unjust that this secondary surety should find the statute of limitations no defense in his favor when he is required to pay, but a successful defense against him when he exercises his right of subrogation. So, too, it must be true that if a surety under such circumstances is unable to take anything effectively through subrogation, he would make payment to the state only when compelled, and the public interests would suffer.

The case of United States v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121, is not persuasive to the contrary. The holding was

that the exemption from the statute of limitations will not be allowed when the state, although plaintiff on the record, is only a nominal party having no actual interest. The real purport of this decision is that the form of the record will not determine whether exemption may be claimed, but that the court will look back to the substantial basis of exemption; and it carries more or less implication that if a suit was brought by an individual for the use and benefit of the state, the exemption could be claimed. The instant case is only one step further away in this direction. Instead of suing for the use and benefit of the state, the plaintiff takes over and pays for the state's claim and then sues. In the Beebe Case, there never had been any real claim by the United States or any right of action in which it had a real interest.

We conclude, therefore, that to the extent of the $3,000 of the tax money and interest thereon which it had paid over for the benefit of the state, the guaranty company was not barred by the statute of limitations and (unless for the matters hereafter mentioned) was entitled to recover from the bank on account of the bank's appropriation of this official fund to the bank's debt.

[7] 6. Considering, now, the character of the demand or right of action in favor of the state, and which constitutes part of the guaranty company's present demand, we must find the basis on which it rests. Does it depend upon the theory that the taxpayer's money deposited with the clerk for transmission to the state is a trust fund which is now to be recovered from the bank by tracing into its hands and by identification in specie or through substitution? If this is the true theory, then we must decide the issue upon which the court below acted. We think the more satisfactory basis is found in the preferential right in the state, as declared by the Supreme Court of Tennessee in the early stages of this controversy. It was decreed that out of the total amount paid by the guaranty company, the state was entitled to preference, and must be paid in full, but that the county and the city had no such right, and must take equal rank with individual claimants. The opinion of that court is reported in Fidelity Co. v. Rainey, 120 Tenn. 357, and on pages 399–405, 113 S. W. 397, it is shown that the priority under the bonds was rested on the sovereign's common-law right of preference against a debtor's assets. The fund recovered from the guaranty company was only a substitute for the fund which should have been in the clerk's office, and, interpreting the Supreme Court opinion as we do, its necessary effect is to say that for this tax money the state had a preference or a first lien upon the fund in the clerk's office. The present action against the bank operates in substance and in effect only to restore to the fund in the clerk's office an amount which should not have been taken away, and the restored fund must be subject to the same priority as the original. It follows that a wrongful diversion of the fund would take full effect as an injury to the rights of the state before it would take effect at all as an injury to the rights of any other beneficiary in the fund—and quite regardless of whether or not the specific state money had come into the fund—assuming, as was true in this case, that there was no proof to show

the money in the fund to have been the identifiable property of any one except the state. Accordingly, we conclude that, even though it should be conceded that the proof fails to trace the state money to the bank, that failure would not defeat the state's right to recover.

[8] 7. The nature of the state's claim must also be determined, as between a claim which is independent and severable and one which is only a fraction of a general and indivisible right of action belonging to beneficiaries as a class. If it is of the former character, it may stand alone and be independently transferred by subrogation or by any other kind of assignment; but if it be only a portion of the unitary action inuring to all beneficiaries, any attempt to transfer it separately must fail, since a cause of action cannot be split. Travelers' Co. v. Great Lakes Co., supra. And see Turk v. R. R. Co. (C. C. A. 6) 218 Fed. 315, 134 C. C. A. 111. Here, again, we must think that the adjudged priority is sufficient to give the state's claim a separate identity. Giving full force to the idea that each beneficiary claims, not independently, but as a member of a class, it is yet true that the claim of the state stands apart. The general fund is at all times charged with a first lien in favor of the state, and an injury to the fund is an injury to that lien. It is true that the injury to the lien comes through the injury to the fund; but the right of the lienholder to redress is so far independent that we cannot think an action brought by him could be defeated because subordinate lienholders or beneficiaries were not joined. A court of equity might well direct them to be joined, but they would not be indispensable parties. It follows that the guaranty company is entitled to recover against the bank the amount which it paid on account of the state tax money.

[9] 8. The claims of the county and city present another question, not made below, but apparent on the record; and, at our request, counsel have filed briefs thereon. The right of a surety on a bond to be subrogated for the obligee in a right of action against one wrongfully causing the liability is founded on payment by the surety to the obligee, and it does not come into existence except upon full payment of the loss indemnified against. This is because subrogation is of an equitable character, and the surety cannot be permitted to take away from the obligee, to the latter's prejudice, securities or rights in which he is still beneficially interested. Sheldon on Subrogation, § 127; Musgrave v. Dickson, 172 Pa. 629, 632, 33 Atl. 705, 51 Am. St. Rep. 765. In this case, the loss of the state was $3,000, and the guaranty company paid it in full, but the loss of the city was $8,700, and the guaranty company has paid on account of it only $5,700 (as above estimated). This leaves the city with an unpaid claim of $3,000 against the clerk and the clerk's fund, and the right of action which the city originally had against the bank it was entitled to enforce and collect and to apply the full sum collected upon its claim. The city thus had, in a very proper sense, two securities to which it might resort and upon both of which it might realize in full until its whole claim was satisfied; these securities being its right of action against the bank and its claim against the guaranty company on the bond. Between these two securities, there was no such relative rank as could permit the guaranty company

to pay the part of the claim for which it was liable and then indemnify itself by demanding the security which the city held for the remainder of the city's claim. The same situation existed as to the county; and, when it is thus stated, it seems to us quite evident that the interests of the city and county in this right of action against the bank did not pass by subrogation to the guaranty company, but that the interest of the state therein did so pass.

It is said that only that creditor a portion of whose debt remains unpaid after the surety has paid all he is bound for can raise the objection that the surety may not be subrogated to the creditor's securities and remedies until the creditor has been paid in full, and cases are cited supposed to be to this effect. These are probably all distinguishable from the general principle above stated, because the creditor had agreed to the substitution (Motley v. Harris, 1 Lea [Tenn.] 577), or because there was a security common to several distinct debts, and the surety, having paid one of these debts, claimed corresponding rights in the security (Nettleton v. Ramsey, 54 Minn. 395, 56 N. W. 128, 40 Am. St. Rep. 342), or because of some other analogous reason. That the city and county have not objected to the subrogation claim of the guaranty company is perhaps explained by the fact that the record shows no notice to them of any such claim. At any rate, the cause of action existing in favor of the city or of the county was a single, indivisible cause of action, even if it existed separately from the rights of individual beneficiaries, and it could not be split up into two actions, with or without the consent of the city or county.

By the foregoing conclusions, it becomes immaterial whether the rights of the city and county were barred by the statute of limitations, or whether any liability originally accrued on account of the $2,000 payment, or whether the amount wrongfully diverted by the bank was somewhat more than $5,000. The guaranty company can recover only the amount of the state tax claim and interest, and to cover such a claim the amount which the bank concedes that it applied to its own debt is large enough.

The decree below is reversed, with costs, and the case is remanded for further proceedings consistent herewith.

CITY OF CHARLOTTE v. ATLANTIC BITULITHIC CO.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1915.)

No. 1372.

1. EVIDENCE ⟸555—FACTS OR CONCLUSIONS—INFERENCES FROM COLLECTIVE FACTS.

A paving contract named the city engineer as the representative and agent of the city charged with the duty of seeing that the contractor lived up to his agreement, and authorized him to reject materials, compel the contractor to take out and replace work, and even order the discharge of employés disregarding his directions or found to be incompetent. The specifications were numerous and complicated, and some of

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

them distinctly technical. In an action on the contract, the engineer testified that he examined and inspected the work after it was completed and accepted it as a compliance with the contract. He was thereupon asked whether in his opinion as an engineer, and from his knowledge of the specifications and contract and his personal observations of the work, it was in compliance with the contract, and was permitted to answer over objection. *Held*, that this was not error, as the question did not, except in a qualified sense, call for expert opinion, but rather for his knowledge and professional judgment respecting the subject of inquiry, and a comparison having been made by him as the work progressed, it was competent for him to state the results of the comparison without confining himself to a detailed recital of what the contractor did and a minute comparison of each item with the specifications.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. ⊂=555.]

2. CONTRACTS ⊂=324, 346—ACTIONS—FORM—ACTION ON QUANTUM MERUIT.
Where a contract has been completed, suit may be brought upon the contract itself and also in assumpsit, though in the latter case a recovery will be limited to the contract price, and hence, where the complaint in an action on a paving contract set up causes of action on the written contract and for work done and accepted of the value alleged, evidence as to the value of the work done was properly admitted.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549–1557, 1714, 1718–1751; Dec. Dig. ⊂=324, 346.]

3. APPEAL AND ERROR ⊂=1053—HARMLESS ERROR—ADMISSION OF EVIDENCE.
Where, in such action, the court submitted as the issue for determination the question as to the amount, if anything, which plaintiff was entitled to recover "under the terms of the contract," and told the jury that the question for them to determine was whether or not the pavement came up to the standard provided and stipulated in the contract, and entirely left out of account the right to recover upon a quantum meruit, the proof of value was immaterial, and its admission was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178–4184; Dec. Dig. ⊂=1053; Damages, Cent. Dig. § 561.]

4. APPEAL AND ERROR ⊂=1056—HARMLESS ERROR—ADMISSION OF EVIDENCE.
In an action on a paving contract, where the city counterclaimed for breach of guaranty for a period of five years, contained in a different paving contract, and the jury found that the city was entitled to recover nothing on its counterclaim, the exclusion of evidence as to the cost to the city of making repairs claimed to be necessary was harmless, as the jury must have found that the contractor fulfilled its obligation to keep the pavement in serviceable condition during the five-year period.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. ⊂=1056.]

5. APPEAL AND ERROR ⊂=1053—HARMLESS ERROR—ADMISSION OF EVIDENCE.
In an action on a paving contract, M., a property owner assessed for the pavement, testified concerning the imperfect quality of the work, and further stated that he had not paid his assessment because in his opinion they got a rotten pavement. In rebuttal, the city engineer was allowed to testify that M. told him he wanted a cheap class of pavement, something to get them out of the mud and not more expensive than necessary to be fairly permanent. *Held*, that while this testimony did not tend to contradict M. on a material issue, and its admission was technically erroneous, it was so inconsequential as not to require a reversal, especially as it was deprived of any possible harm by the court's explicit charge that the fact that the pavement may have been of inferior kind or

class had no status in the case, provided it was of the kind and class contracted for.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178–4184; Dec. Dig. ⊂⊃1053.]

6. APPEAL AND ERROR ⊂⊃273—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS BAD IN PART.

Where a charge excepted to included some correct statements of law, the exception was insufficient to sustain an assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620–1623; Dec. Dig. ⊂⊃273; Trial, Cent. Dig. § 694.]

7. MUNICIPAL CORPORATIONS ⊂⊃358—STREET IMPROVEMENT CONTRACTS—PERFORMANCE—BURDEN OF PROOF.

Where a street paving contract named the city engineer as the city's representative and agent in charge of the work, and provided for payment of any balance due within 30 days after the final completion and acceptance of the work by the engineer and executive board, as evidenced by the final estimate and certificate of completion and acceptance, the action of the city engineer in passing upon and accepting the work made a prima facie case that the specifications and requirements of the contract had been complied with, and the burden was upon the city, by the weight of the testimony, to show that the contractor had failed and to what extent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 890; Dec. Dig. ⊂⊃358.]

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

In an action on a street paving contract, an objection that the complaint did not allege presentation of the claim to the proper municipal authorities as required by statute could not be raised for the first time on appeal, as the failure to comply with a condition precedent to the right to sue must be raised in the trial court, so that plaintiff may have an opportunity to avoid or remove the objection.

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

9. MUNICIPAL CORPORATIONS ⊂⊃374—CONTRACTS—ACTIONS—WAIVER OF DEFENSES.

Where a street paving contract provided for payment of any balance remaining due within 30 days after the final completion and acceptance of the work by the city engineer and executive board, the fact that there had been no acceptance by the executive board was a matter of defense to be set up by plea in abatement in an action on the contract, and was waived by denying liability in any event and trying the case on the merits without a preliminary disposition of the question of acceptance, as matters in abatement must be separately pleaded and tried, and are waived by setting up defenses on the merits and in bar of plaintiff's claim, and especially by going to trial upon such defenses.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. ⊂⊃374.]

In Error to the District Court of the United States for the Western District of North Carolina, at Salisbury; James E. Boyd, Judge.

Action by the Atlantic Bitulithic Company against the City of Charlotte. Judgment for plaintiff, and defendant brings error. Affirmed.

Chase Brenizer and H. L. Taylor, both of Charlotte, N. C. (F. I. Osborne, of Charlotte, N. C., on the brief), for plaintiff in error.

Charles W. Tillett, of Charlotte, N. C. (Thomas C. Guthrie, of Charlotte, N. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. [1] The plaintiff in error, defendant below, seeks reversal of a judgment, entered upon the verdict of a jury, in this suit of the Atlantic Bitulithic Company to recover the balance alleged to be due upon a contract for street paving; and such of the errors assigned as appear to merit discussion will be briefly considered. The first of these is a question of evidence which arises in connection with the following provision of the contract:

"Within thirty days after the final completion and acceptance of the work by the engineer and executive board, as evidenced by the final estimate and certificate of completion and acceptance, any balance remaining due to the contractor will be paid to him in cash."

Firth, the city engineer, a witness for the plaintiff, after stating that he had supervision of the work and saw it almost daily during its progress, further testified:

"I examined and inspected the work after it was completed and accepted it as a compliance with the contract."

He was thereupon allowed, over defendant's objection, to answer this question:

"In that connection, in your opinion as an engineer, from your knowledge of the specifications and contract and your personal observations of this work, was it in compliance with the contract?"

It is insisted that this was an erroneous ruling because it permitted the witness to express an opinion upon the chief matter in dispute without stating the facts upon which that opinion was based, and numerous cases are cited which are claimed to support the contention. The rule invoked is well settled, but we are of opinion that it is not applicable. The witness had stated without objection that he examined the work and accepted it as complying with the contract, and we perceive no reason why it was not competent for him to testify that the work had in fact been done in accordance with the contract. The question he was asked, as the jury must have understood it, did not call for expert opinion, except in a qualified sense, but rather for his knowledge and professional judgment respecting the subject of inquiry. It needs only a glance at the contract to see that the specifications were numerous and complicated, some of them distinctly technical. They related to the kind and quality of materials, their preparation for use, and detailed methods of construction. The witness was the defendant's representative and agent. He was charged with the duty, as repeatedly appears in the specifications, of seeing that the contractor lived up to his agreement in each particular. He could reject materials which did not meet the contract requirements, compel the contractor to take out and replace work which did not conform to the standard of construction, and even order the discharge of employés who disregarded his directions or were found to be incompetent. Under such circumstances, it seems plain to us that he was properly allowed to state as a fact that the work actually done was of the character and quality called for by the contract; and that his testimony was not incompetent, or otherwise in violation of the rule respecting expert opinion, because his answer involved professional judgment as

well as personal knowledge. As it was his duty to supervise the work during its progress and exercise his authority to require compliance with the contract, so was it clearly permissible for him to testify to the fact that the contractor had fulfilled his obligations. In a case like this it would be quite unreasonable to hold that the engineer should be confined to a detailed recital of what the contractor had done and a minute comparison of each item with the specifications of the contract. Such a course would not only be impracticable but tend to confuse rather than enlighten the jury. The comparison had been made by him as the work progressed, and it was competent for him to state the results of that comparison.

And this view accords with the decisions of the courts generally in analogous cases. For example, Schaefer v. Ely, 84 Conn. 501, 80 Atl. 775, Ann. Cas. 1912D, 899, is directly in point. That was an action on a building contract, and the architect who drew the plans and was familiar with the progress of the work was permitted to give his opinion that the work had been done properly and in accordance with the contract, without detailing the manner in which each item of work had been performed. In sustaining this ruling the Supreme Court of the state said:

"The main objection to this evidence was that the opinion of the witness could not be given, that he must state in detail what he saw, and the various defects, and leave the conclusion of compliance with the contract to be drawn by the court between the contract and the work done. This is an erroneous view. The witness who qualifies as an expert and testifies to his familiarity with contract, plans, specifications, and changes therein, and with the work done, may give his conclusions as to the comparison between these, without detailing at length the manner in which each item of the work done has been performed. When the opinion of the witness in a case is evidence otherwise competent, and the subject of the investigation will be made clearer by its introduction, the opinion should be received. When facts sought to be proved are of so voluminous or complicated a character that their introduction would occupy much time, and might be difficult to understand by themselves, and these many facts are to be proved for the purpose of drawing a conclusion from them, the court may permit a witness who is qualified upon the subject of investigation, and has made the investigation, to express an opinion without giving the details on which the opinion rests."

Other cases in which it has been held that a qualified witness may state that the work of construction has been done in accordance with the contract are Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109; Stark Grain Co. v. Harry Bros. Co., 57 Tex. Civ. App. 529, 122 S. W. 947; Tucker v. Williams, 2 Hilt. (N. Y.) 562; Taulbee v. Moore, 106 Ky. 749, 51 S. W. 564; and Johnson v. Griffiths & Co. (Tex. Civ. App.) 135 S. W. 683.

In this connection it may be observed, as the court observed in the Connecticut case, that the defendant had full opportunity by cross-examination of the witness to test the extent of his knowledge and the accuracy of his judgment. Instead of attempting in this way to discredit or weaken the testimony, the defendant apparently preferred to rely upon an exception to its admissibility. We deem it not doubtful that the question was properly allowed.

[2, 3] The admission of testimony to the effect that the work done

was worth the contract price, and as to the cost of similar pavements of superior quality, is the basis of a group of exceptions which may be considered together. We are of opinion that reversible error cannot be predicated upon these rulings of the trial court for two reasons. In the first place, it appears to be settled that where a contract has been completed suit may be brought upon the contract itself and also in assumpsit, although in the latter case recovery would be limited to the contract price. In this suit the complaint sets up two causes of action, one upon the written contract and the other for work done and accepted of the value alleged; and the right to recover upon the second count seems to be fully sustained by Dermott v. Jones, 69 U. S. (2 Wall.) 1, 17 L. Ed. 762, in which the Supreme Court said:

"While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue on the contract, or in indebitatus assumpsit, and rely upon the common counts. In either case the contract will determine the rights of the parties."

Apart from this, however, we are of opinion that the testimony became immaterial and its admission harmless because the trial court excluded it from consideration by submitting the issue to the jury in the form of this question:

"What amount, if anything, is the plaintiff entitled to recover of the defendant under the terms of the contract?"

The effect of this charge was to eliminate the second cause of action and confine the jury to finding whether the contract had been performed in accordance with its provisions. And in a later part of the charge the learned judge again said:

"The question for the jury to determine under this issue is whether or not the pavement put down came up to the standard of that class of pavement put down as provided and stipulated in the contract. You have heard the evidence in this case. Was this done or not?"

Indeed, taking the charge as a whole, it is apparent that the right to recover upon a quantum meruit was left out of account altogether, and that a verdict was rendered for the plaintiff because the jury, under instructions which limited the issue to the first cause of action, found that the work had been done in compliance with the contract. This being so, the proof of value became immaterial, and its admission furnishes no ground for reversing the judgment. Cunningham v. Springer, 204 U. S. 647, 27 Sup. Ct. 301, 51 L. Ed. 662, 9 Ann. Cas. 897.

[4] Several exceptions relate to the counterclaim set up by defendant. It appears that there was a prior contract for paving, made in November, 1907, and completed during the following year, which contained a guaranty that the pavement constructed thereunder would remain in good repair and condition for a period of five years and at the end of that period be in good serviceable condition and free from such defects as would impair its usefulness as a roadway. The evidence of defendant tended to show that the pavement in question had not been kept in the condition required by the guaranty, while the plaintiff's proofs were to the effect that all needful repairs had been

made and that the pavement was then free from any defects which would impair its usefulness as a highway. This issue was submitted to the jury in the following question:

"What amount, if anything, is defendant entitled to recover on its counterclaim?"

The jury answered that the city was not entitled to recover anything on its counterclaim. In view of this finding we are of opinion that the judgment should not be disturbed because the trial court refused to allow a witness for defendant to state what it would have cost the city of Charlotte to make the repairs claimed to be necessary. The jury must have found that the repairs made by the contractor had fulfilled the obligation to keep the pavement in serviceable condition during the five-year period, and what the needful repairs would have cost the city became immaterial. In this connection, much is sought to be made of a letter written by plaintiff's president in March, 1913, relating to the subject of these repairs. Without referring in detail to the contents of this letter, it is sufficient to express the opinion that its meaning and intent were properly construed by the trial court, and that no prejudicial error was committed by refusing to allow defendant's witness to state what it would have cost to make the repairs mentioned in the communication.

[5] A witness for defendant, one McAden, a property owner assessed for the pavement in suit, testified at length to the imperfect quality of the work done by the contractor and the numerous respects in which it failed to conform to the specifications. He further stated that he had not paid his assessment "because in my opinion we got a rotten pavement." In view of this testimony, the trial court allowed the city engineer in rebuttal to state that he had a conversation with McAden in which the latter said that he wanted a cheap class of pavement, something to get them out of the mud and not more expensive than necessary to be fairly permanent. It may be conceded that this ruling was technically erroneous, for the testimony did not tend to contradict the witness on a material issue, but it was so inconsequential, if not trivial, that it cannot be seriously regarded as ground for reversal. Moreover, the answer was deprived of any possible harm to defendant by this explicit charge to the jury:

"The fact, gentlemen, that the pavement may have been of inferior kind or class, has no status in this case, provided it was of the kind and class contracted for, whether that be a good pavement, a bad pavement, or an indifferent pavement."

[6, 7] Exception is taken, in rather wholesale fashion, to that portion of the charge, covering upwards of a page in the printed record, in which is discussed at some length what the defendant calls the burden of proof. It would be enough to say that this exception is not well taken because it embraces all that was said upon a particular subject and fails to point out any specific error. The rule is too familiar to require the support of citation that, where the charge excepted to includes correct statements of the law with others that are incorrect, the exception is insufficient to sustain an assignment of error. But without taking this view of the exception, and assuming

that the question involved is properly raised, we are of opinion that the charge upon this point was not erroneous. The jury were told, among other things, that:

"The action of the agent (or engineer, as he is called here), in passing upon and accepting the work, makes a prima facie case that the specifications and requirements have been complied with, and that, if the defendant denies that conclusion, the burden is upon it, by weight of the testimony, to show that plaintiff failed and to what extent."

These instructions were predicated upon the opinion of this court in Jefferson Hotel Co. v. Brumbaugh, 168 Fed. 867, 94 C. C. A. 279, and the learned judge quoted to the jury the following syllabus from that case:

"Where a building contract constituted the architects the owner's supervising agents, but did not in terms authorize the architects to issue a conclusive final certificate, an architect's final certificate was only prima facie evidence that the work had been performed according to the contract, and placed the burden of proof on the owner to impeach the same for error, mistake, omission, or concealment."

Upon the point here considered we are unable to distinguish the Brumbaugh Case from the case at bar, and it follows, since we adhere to the views then expressed, that the charge in question must be held a correct application of the law to the facts developed at the trial. This is in no wise a variance with what is said in Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905. That case merely holds, in a negligence action, that where the rule of res ipsa loquitur applies it does not have the effect of shifting the burden of proof. Obviously, the doctrine of res ipsa loquitur has no application to the present controversy.

[8] It is argued for the first time in this court that the judgment should be reversed because the complaint does not state a cause of action and because it shows on its face that the trial court was without jurisdiction. This contention is based upon a statute of North Carolina which provides as follows:

"No person shall sue any city, county, town, or other municipal corporation for any debt or demand whatsoever unless the claimant shall have made a demand upon the proper municipal authorities. And every action shall be dismissed unless the complaint shall be verified and contain the following allegations: (1) That the claimant presented his claim to the lawful municipal authorities to be audited and allowed, and that they had neglected to act upon it, or had disallowed it; or (2) that he had presented to the treasurer of said municipal corporation the claim sued on, which had been so allowed and audited, and that such treasurer had notwithstanding neglected to pay it." Revisal, § 1384.

Conceding that the complaint does not contain the allegations required by this statute, the conclusive answer to the contention is that it comes too late. This court is a court of errors only, and will not consider questions not raised in the court below. The objection that there has been a failure to comply with a condition precedent to the right to sue must be raised in the trial court, so that the plaintiff may have opportunity to avoid or remove the objection; it cannot be raised for the first time on appeal. Wetzel & T. Ry. Co. v. Tennis Bros. Co., 145 Fed. 458, 75 C. C. A. 266, 7 Ann. Cas. 426; Wilfong v.

Ontario Land Co., 171 Fed. 51, 96 C. C. A. 293; Carr v. Fife, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508; Brown v. Gurney, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717; Campbell v. United States, 224 U. S. 99, 32 Sup. Ct. 398, 56 L. Ed. 684.

[9] Although the question is not raised in the assignments of error, except it may be in connection with the questions of evidence already discussed, the defendant earnestly contends that the action must fail because the work done was not accepted by the executive board, as provided by the terms of the contract. We are not prepared to say, in view of certain provisions in the city charter, that the acceptance of the engineer and inspectors was not in law an acceptance by the executive board. But without so deciding, we are of opinion, upon the facts here of record, that this was a matter of defense to be set up by plea in abatement, and that the denial of liability in any event and consent to try the case on the merits, without preliminary disposition of the question of acceptance, operated as a waiver of any defense based upon failure to show acceptance by the executive board. So this court held in City of Greensboro v. Southern Paving & Construction Co., 168 Fed. 880, 94 C. C. A. 292, a case which appears to cover the point. The opinion in that case states the principle as follows:

"If it is desired to rely upon these defenses, it was its plain duty to demand such independent ascertainment of them. It did not do so, but it, in effect, sought the advantage of having them, if possible, secure for it a final judgment where it would have been entitled by reason of them to only a restricted one of dismissal without prejudice, and this by allowing them to be tried with other matters in bar by the same jury. Under the plain principles above set forth, it must be held to have waived these defenses in abatement. The court below could have excluded all evidence touching them upon the trial actually had, and it will therefore not be allowed to rely here upon the failure of them in the court below as ground of error."

It is a general rule of common-law pleading that matters in abatement must be separately pleaded and tried, and that by setting up defenses on the merits and in bar of plaintiff's claim, and especially by going to trial upon such defenses, the matters in abatement are deemed to be waived. Bailey v. Dozier, 47 U. S. (6 How.) 23, 12 L. Ed. 328; Sheppard v. Graves, 55 U. S. (14 How.) 504, 14 L. Ed. 518; Railroad Co. v. Harris, 79 U. S. (12 Wall.) 65, 20 L. Ed. 354; 1 Cyc. 136.

It suffices to say, without further comment, that careful study of the record fails to disclose reversible error, and the judgment will therefore be affirmed.

In re VAN SCHAICK & CO.

Appeal of LYON.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 13.

BANKRUPTCY ⊂=188—RIGHTS OF CREDITOR—SUBROGATION TO LIEN.

A transaction by which bankrupts, who were brokers, loaned to another firm of brokers certain stocks, including some purchased for claimant, a customer, receiving as security a deposit of cash, *held* subject to the constitution and rules of the stock exchange of which both firms were members, which became part of the contract and required the borrowers, on the insolvency of bankrupts, to sell the stocks in the exchange, as they did, and gave them a lien on the proceeds of the membership of the insolvents when sold only for the unpaid balance due them, so that, since they realized a sufficient amount from the sale of the stocks to cover their deposit, they never became entitled to any lien on such proceeds to which claimant could be subrogated.

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

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

In the matter of Van Schaick & Co., a copartnership, bankrupts. On appeal by Samuel H. Lyon from an order denying him a lien. Affirmed.

The following is the report of referee as special master:

I, John J. Townsend, referee in charge of this case, have before me as special master to hear and determine and to report upon a claim made by Samuel H. Lyon, who was a customer of the bankrupt stockbroking firm of Van Schaick & Co., to have a lien upon the proceeds of a so-called seat in the New York Stock Exchange owned by the partner John B. Van Schaick which proceeds are now in the possession of the trustee in bankruptcy.

It is impossible for the special master to state more cogently and concisely the contentions of the claimant and the trustee in bankruptcy, than has been done in the briefs filed by the respective counsel.

The controversy arises out of a transaction occurring on the New York Stock Exchange prior to a general assignment for the benefit of creditors made by Van Schaick & Co. on September 11, 1911.

On September 7, 1911, Lyon, having an ample credit balance on the books of Van Schaick & Co., ordered that firm to purchase for him 100 shares of Union Pacific Common Stock which order was executed by the brokers.

The shares so purchased for the account of Lyon, with 100 other shares, through the machinery of the Stock Exchange Clearing House, were delivered and loaned by Van Schaick & Co. to the Stock Exchange firm of Potter, Choate & Prentice; the latter delivering or depositing with Van Schaick & Co. a check for a sum including the then value of Lyon's 100 shares of stock.

Upon the announcement of the suspension of Van Schaick & Co., Potter, Choate & Prentice sold 200 shares of Union Pacific common stock upon the Stock Exchange for the account of Van Schaick & Co. at a trifling higher price than the borrowing price and out of the proceeds retained the amount of money which they had deposited or paid to Van Schaick & Co. as security for the shares borrowed on September 7th and turned over to the assignee of Van Schaick & Co. the surplus proceeds of such sale.

In making such sale on the Stock Exchange, Potter, Choate & Prentice did not sell the identical certificates which had been received by them in borrow-

ing the stock from Messrs. Van Schaick & Co. on September 7th, but sold, out of their own resources, a certificate or certificates for a similar quantity of shares of the same stock, or, in other words, the shares Potter, Choate & Prentice would have been obliged under their contract to return to Van Schaick & Co. had the latter not suspended. I so find as a matter of fact.

It is not disputed that Potter, Choate & Prentice borrowed the shares from Van Schaick & Co. on September 7th, not to retain in their possession the identical certificate or certificates, but to use the certificates as they saw fit, but always under the obligation to return to Van Schaick & Co. other certificates for a similar quantity of the same stock.

This transaction between the two firms of brokers took place under the following articles of the constitution of the New York Stock Exchange, which must be regarded as part of the contract between the two firms of brokers:

Article 15. Transfer of Membership.

Section 1. A transfer of membership may be made upon submission of the name of the candidate to the committee on admissions, and the approval of the transfer by two-thirds of the entire committee. Notice of the proposed transfer shall be posted on the bulletin in the exchange for at least ten days prior to transfer.

Sec. 2. All contracts subject to the rules of the exchange made by a member proposing to transfer his membership, shall mature on the tenth day of the posting of the notice of the proposed transfer; and said member shall not be permitted, thereafter, to make any contracts subject to the rules of the exchange, pending the approval of the proposed transfer by the committee on admissions. This rule shall also apply in cases where a membership is disposed of by the committee on admissions.

Sec. 3. Upon any transfer of membership, whether made by a member voluntarily, or by the governing committee or the committee on admissions in pursuance of the provisions of the constitution, the proceeds thereof shall be applied to the following purposes and in the following order of priority, viz.: First. The payment of all fines, dues, assessments and charges of the exchange, or any department thereof, against a member whose membership is transferred. Second. The payment of creditors, members of the exchange, or firms registered thereon, of all filed claims arising from contracts subject to the rules of the exchange, if, and to the extent that, the same shall be allowed by the committee on admissions. If said proceeds shall be insufficient to pay said claims, as so allowed, in full, the same shall be applied to the payments thereof pro rata. Third. The surplus, if any, of said proceeds shall be paid to the person whose membership is transferred, or to his legal representatives, upon the execution by him or them of a release or releases satisfactory to the committee on admissions. The committee on admissions shall have power, by rule or otherwise, to secure the observance of the provisions of this article.

Sec. 4. All unmatured debts or other obligations of a member, arising out of contracts subject to the rules of the exchange shall become due and payable immediately prior to the transfer of his membership; and all claims filed with the committee on admissions, founded upon contracts subject to the rules of the exchange, shall, if, and to the extent that same are allowed by said committee, be liquidated, and paid, pro rata, out of the proceeds of said membership upon consummation of the transfer.

Sec. 5. A member shall forfeit all right to share in the proceeds of a membership unless he file a statement of his claim with the committee on admissions prior to the transfer of such membership; but such claim, as allowed by the committee on admissions, may be paid out of any surplus remaining after all other claims, allowed by said committee, have been paid in full.

Sec. 6. Claims growing out of transactions between partners, who are members of the exchange, shall not share in the proceeds of the membership of one of such partners, until after all other claims, as allowed by the committee on admissions, have been paid in full.

Sec. 7. When a member dies, his membership may be disposed of by the committee on admissions.

Sec. 8. When a member is expelled, or becomes ineligible for reinstatement, his membership may be disposed of forthwith by the committee on admissions.

Sec. 9. The expulsion or suspension of a member shall not affect the rights of creditors, members of the exchange or of firms registered thereon.

Sec. 10. When a member is in debt to another member, the death of the creditor member or the transfer of his membership, either by himself voluntarily, or by the governing committee, or the committee on admissions, shall not affect the rights of said creditor member, his firm, or estate, to share in the proceeds of the membership of the debtor member under this article, in the same manner and to the same extent as if such creditor member had not died or his membership had not been transferred.

Article 28. Closing Contracts "Under the Rule."

Section 1. When the insolvency of a member or firm is announced to the exchange, members having contracts subject to the rules of the exchange with the member or firm, shall without necessary delay proceed to close the same. If the contracts involved securities admitted to quotation upon the exchange the closing must be in the exchange, either officially by the chairman, or by personal purchase or sale. If the contracts involve securities not dealt in on the exchange, the purchase or sale of such securities must be promptly made in the best available market. Should a contract not be closed, as above provided, the price of settlement shall be fixed by the price current at the time when such contract should have been closed under this rule.

Sec. 2. A contract which has not been fulfilled according to the terms thereof may be officially closed "under the rule" by the chairman, as herein provided. Notice of intention to make such closing of a contract must be delivered, at or before 2:30 o'clock p. m. at the registered office address of the member or firm in default. And the chairman shall not close such contract before 2:35 o'clock p. m.

Sec. 3. Every notice of intention to close a contract "under the rule," because of nondelivery, shall be in writing; and shall state the name of the member or firm by whom the order is given, also for whose account—all of which shall be announced by the chairman before closing the contract. The closing of a contract "under the rule" made in conformity with such notice, shall be also for the account and liability of each succeeding party in interest.

Sec. 4. Notice of intention to close a contract "under the rule" may be given upon the entire amount in default or upon any portion thereof, but in this latter case for not less than one hundred shares of stock or ten thousand dollars of bonds.

Sec. 5. When notice that a contract will be closed "under the rule" is received too late for transmission to other members or firms interested in such contract, within the times stated therefor, the notified member or firm who is unable to so transmit said notice may, immediately after the official closing "under the rule," re-establish such contract by a new purchase or sale in the "regular way"; and any loss arising therefrom shall be a valid claim against the successive party or parties in interest.

Sec. 6. When a member has issued a notice of intention to close a contract "under the rule," for default in delivery, he must receive and pay for securities due upon such contract if tendered at his office within five minutes of the official time for closing; or thereafter, if tendered at the rostrum of the exchange, before the chairman has closed the contract.

Sec. 7. When a contract has been closed "under the rule" the member or firm who gave the order must give prompt notice of such closing to the member of firm in default. Notification to successive parties in interest must be transmitted without delay, and claims for damages, arising therefrom, must be made prior to 3 o'clock p. m. of the business day following the closing of the contract.

Sec. 8. When a contract has been closed "under the rule" the chairman shall indorse upon the order therefor the name of the purchaser or seller, the price and the hour at which such contract is closed, and deliver the order to the secretary of the exchange, who shall ascertain whether the money

difference, if any, has been paid. If such difference shall not be paid within twenty-four hours after the closing of the contract, the secretary shall report such default to the president.

Sec. 9. When a contract is closed "under the rule" any member or firm accepting the bid or offer, as made by the chairman, and not complying promptly therewith, shall be liable for any damages resulting therefrom. The member of firm, for whose account a contract is being closed "under the rule," shall not be permitted to accept the bid or offer made by the chairman.

Sec. 10. When a loan of money is not paid at or before 2:15 o'clock p. m. of the day upon which it becomes due, the borrower shall be considered as in default, and the lender may sell "under the rule" the securities pledged therefor, or so much therefor as may be necessary to liquidate the loan, in the manner prescribed in the foregoing sections of this article.

The referee will also find that the stock purchased by Van Schaick & Co. for Lyon has been identified, on the testimony, as included in the 200 shares delivered by Van Schaick & Co. to Potter, Choate & Prentice. See claimant's supplemental brief, pages 2 and 3.

The referee will also find, for present purposes, but without determining the question as a matter of fact should it hereafter become otherwise material, that, as against Van Schaick & Co. and the creditors of that firm, the claimant Lyon has paid in full for his 100 shares and as against Van Schaick & Co. was at all times entitled to the immediate possession of his securities, because of his abundant credit balance before referred to supra, p. 140.

It is claimed by Lyon that Potter, Choate & Prentice, in possession of his stock on September 7th, had two securities for their claim against Van Schaick & Co. for the moneys deposited with the latter firm on September 7th; (1) the stock in their possession which as between Lyon and Van Schaick & Co. belonged to Lyon, which Van Schaick & Co. had no right to lend to Potter, Choate & Prentice or the stock which the latter were bound to return in kind to Van Schaick & Co. in order to collect the amount of their deposit; and (2) a lien under article 15 of the constitution of the New York Stock Exchange upon the proceeds of the so-called seat or membership in the Stock Exchange owned by Van Schaick & Co. for the amount of their deposit with Van Schaick & Co. even had Potter, Choate & Prentice voluntarily returned the shares to the claimant Lyon as lawful owner, or had he repossessed himself of the same by legal process, if a legal process would lie in his favor against Potter, Choate & Prentice.

In parenthesis I may state that, while it is possible that Potter, Choate & Prentice might have voluntarily and at their own risk delivered the shares to the claimant Lyon on his demand, I cannot see how any legal process to compel such delivery would lie in favor of the claimant Lyon against Potter, Choate & Prentice except on a tender of the amount of money deposited with Van Schaick & Co. nor even then without making Van Schaick & Co. parties to the legal process.

It is the contention or theory of the claimant Lyon that Potter, Choate & Prentice, having the two alleged remedies above described, could or should have returned the stock to the claimant Lyon on demand or to the assignee for Lyon's account and have looked to the proceeds of the seat, under article 15 of the constitution of the New York Stock Exchange, for their claim, against Van Schaick & Co., for the amount of money deposited with the latter.

It is the further contention or theory of the claimant Lyon that, Potter, Choate & Prentice having in order to collect their claim against Van Schaick & Co., resorted to the sale of the shares which were the property of Lyon and his only security for his claim against the insolvent Van Schaick & Co., Lyon in equity is subrogated to the rights which Potter, Choate & Prentice might, he contends, have enforced under article 15 of the constitution of the Stock Exchange against the proceeds of the so-called seat or membership in the Stock Exchange now in the hands of the trustee in bankruptcy, which security was available only to Potter, Choate & Prentice and to which they did not resort for the collection of their claim against Van Schaick & Co. as in equity they were bound to do under the familiar rule that a creditor, hav-

ing two securities or remedies in one of which he alone is interested and in the other of which a second creditor has an interest, is bound to resort first to the security or remedy in which he alone is interested, and that where he fails to do so the second creditor is subrogated to the rights which the first creditor had in the security or remedy to which he has not but should have resorted and in which he alone was interested.

The trustee in bankruptcy does not dispute the rule of law or equity advanced by the claimant Lyon, but takes issue with the proposition that Potter, Choate & Prentice did have two securities or remedies for the collection of their claim against the firm of Van Schaick & Co. for the amount of the deposit.

The controversy is a novel one, and, so far as I am aware, has to be decided by me on impression and not on authority.

My conclusions are as follows:

I regard it as immaterial whether, in the transaction between Potter, Choate & Prentice and Van Schaick & Co., the former were obliged to retain in their possession and to return to Van Schaick & Co., in order to collect their deposit the identical certificate or certificates delivered on September 7th, or whether Potter, Choate & Prentice might use such certificate or certificates and were only obligated to return certificates for a similar quantity of the same stock.

In either alternative, I am of the opinion that Potter, Choate & Prentice had in the transaction only one remedy or security for the collection of their claim against Van Schaick & Co., to wit, the one provided by articles 28 and 15 of the constitution of the New York Stock Exchange.

I have already held that these two articles constituted an integral part of the contract between two firms of brokers.

The claimant Lyon in dealing with Van Schaick & Co. and in trusting them with the possession of his negotiable securities took the risk of their solvency and of any use they might make of his property.

So far as Potter, Choate & Prentice and Van Schaick & Co. are concerned, it was perfectly competent for the two firms to enter into the transaction and to make the contract that they did make, a part of which was article 28 of the constitution of the Stock Exchange.

Potter, Choate & Prentice were bound to liquidate that contract according to its tenor, viz., by selling the certificates, or like certificates, on the floor of the exchange.

Such a sale is meant by the words "close the same" as used in article 28. I do not think that the clause in article 28 beginning, "Should a contract not be closed as above provided," etc., in any way relieves Potter, Choate & Prentice from resort to such a sale or authorized them to surrender the shares to a third person. As far as Potter, Choate & Prentice were concerned, Van Schaick & Co. were the owners of the stock in question, and it would be entirely at the peril of Potter, Choate & Prentice if they recognized any claim by Lyon to ownership in the stock.

Under this view of the contract, I am of the opinion that Potter, Choate & Prentice resorted to the only security or remedy open to them, and that the sale made by them was incumbent upon them under article 28 in order to establish any claim under article 15 upon the proceeds of the seat in case the sale failed to realize the amount of the deposit.

Taking, however, the view maintained by the claimant Lyon that there should or might have been a voluntary or enforced surrender of the stock by Potter, Choate & Prentice to him or to the assignee for his account, and without a tender of the amount of his deposit, I am of the opinion that such surrender imports a negation of any security or remedy of Potter, Choate & Prentice in connection with the stock and would be equivalent to a declaration by all parties, and that the only security or remedy of Potter, Choate & Prentice in the premises against Van Schaick & Co. for the amount of the deposit would be their lien under article 15 of the constitution of the Stock Exchange. Once the title of Lyon to the shares had been asserted and recognized in such surrender the claim of Potter, Choate & Prentice against Van Schaick & Co. ceases to arise under the original contract for the borrowing

of the stock against a deposit of its value, but arises under the implied contract to return money obtained without consideration, viz., in his case obtained on the loan of stock to which Van Schaick & Co. had no title and which had been restored to the lawful owner by Potter, Choate & Prentice.

I repeat, however, that I cannot conceive of such a surrender, voluntary or enforced, without a tender to Potter, Choate & Prentice of the amount of their claim against Van Schaick & Co., and, of course, in the case of such a surrender, with a tender, no such controversy as the present would arise.

Every point of view therefore leads me to my original conclusion that Potter, Choate & Prentice had open to them only one security or remedy, to wit, the one to which they resorted and that a voluntary or enforced surrender by them of the stock to Lyon or to the assignee for his account would have been a negation of any security or remedy in their favor in connection with the stock because such surrender would have been a declaration of an adjudication that they had no right to the stock. In other words, once admitting that Potter, Choate & Prentice had a right to the stock, it follows that they were in duty bound to sell it under their contract with Van Schaick & Co. under article 28 of the constitution of the Stock Exchange before they could assert any claim under article 15 of that constitution.

I report, accordingly, that the trustee in bankruptcy is entitled to a decree adjudging that the claimant Samuel H. Lyon is not entitled to any lien upon the proceeds of the so-called seat or membership in the New York Stock Exchange belonging to the bankrupt John Van Schaick now in the possession of the trustee in bankruptcy.

Solely for the convenience of the court, but in no sense as a part of the record in this proceeding, the special master files in the office of the clerk of this court the briefs referred to by him at the outset of this report.

Joseph M. Gazzam, of New York City, and Semmes, Bowen & Semmes, of Baltimore, Md., for appellant Lyon.

Robert Forsyth Little and B. W. B. Brown, both of New York City, for appellee Robinson.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Order affirmed on opinion of the referee.

BADDERS CLOTHING CO. v. BURNHAM-MUNGER-ROOT DRY GOODS CO. et al. (two cases).*

BADDERS CLOTHING CO. et al. v. SAME.

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

Nos. 4292, 4293, 139.

1. JURY ⟸103—CHALLENGES FOR CAUSE—PERSONAL OPINIONS.

Where a juror on his examination stated that he would act on his own judgment of the value of real property, but in reply to the court said he would take the evidence of the witnesses as to the facts, the overruling of a challenge for cause was not error.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 444, 456, 460–479, 497; Dec. Dig. ⟸103.]

2. BANKRUPTCY ⟸63—CORPORATION—ACTS OF BANKRUPTCY—ACTS ULTRA VIRES.

It is no defense to a proceeding in bankruptcy against a corporation that the act of bankruptcy charged was not within its charter powers.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸63.]

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

*Rehearing denied March 27, 1916.

3. BANKRUPTCY ⊂⊃63—CORPORATIONS—ACTS OF BANKRUPTCY—EVIDENCE.
If a corporation engages in a plan to hinder and defraud its creditors by concealing or transferring its property, the proof is primarily found in the conduct of its officers in authority; and, where a part of the plan is their individual enrichment at the expense of the creditors, the distinction between official and personal acts should not be drawn too nicely, and is not ground for excluding testimony of their acts in bankruptcy proceedings against the corporation.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃63.]

4. CORPORATIONS ⊂⊃397—REPRESENTATION BY OFFICERS—ACTS WITHIN SCOPE OF AUTHORITY.
If an officer of a corporation acts within the authority with which he has been clothed, and others are injured, the same consequences follow as in the case of a natural person.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1585, 1586, 1588, 1589, 1596–1601; Dec. Dig. ⊂⊃397.]

5. BANKRUPTCY ⊂⊃91—PROCEEDINGS AGAINST CORPORATION—EVIDENCE.
A statement of the mercantile indebtedness of a corporation, drawn from its ledger by the witness at the request of its president and submitted to and corrected by him, *held* admissible in evidence in proceedings in bankruptcy against the corporation, although the witness did not make the book entries and the ledger, though in court and used by both parties, was not offered in evidence in its entirety.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137–139; Dec. Dig. ⊂⊃91.]

6. BANKRUPTCY ⊂⊃95—INVOLUNTARY PROCEEDINGS—JURY TRIAL—VERDICT.
Where, on the trial of an involuntary petition in bankruptcy against a corporation, through oversight the question of the solvency of the corporation when the petition was filed was not submitted to the jury in the first instance, it was not error for the court, before they had been discharged, to require them to find a supplemental verdict on that issue.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 132, 140, 145; Dec. Dig. ⊂⊃95.]

7. BANKRUPTCY ⊂⊃114—APPOINTMENT OF RECEIVERS.
In involuntary proceedings, receivers should never be appointed without full compliance with all requirements of the Bankruptcy Act, including a showing that it is absolutely necessary for the preservation of the estate.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164–166; Dec. Dig. ⊂⊃114.]

8. COURTS ⊂⊃356—FEDERAL COURTS—RIGHT OF REVIEW—ASSIGNMENTS AND SPECIFICATIONS OF ERROR.
Except when enlarged in the discretion of the appellate court, the right of review in the federal courts depends, first, upon sufficient assignments of error filed below and shown in the record, and then upon a specification in the briefs of the errors relied on which are necessarily errors which have been assigned, and they should, in some appropriate way, be identified with the assignments in the record, especially when both are numerous.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⊂⊃356.]

In Error to, Appeal from, and Petition to Revise Order of, the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

In the matter of the Badders Clothing Company, bankrupt. To review proceedings resulting in its adjudication on petition of Burnham-

Munger-Root Dry Goods Company and others, the bankrupt brings error; and from certain orders therein, it appeals. A petition to revise in matter of law is also filed. Adjudication affirmed, and petition to revise dismissed.

D. R. Hite, of Kansas City, Kan., and James H. Harkless, of Kansas City, Mo., for plaintiff in error, appellant, and petitioners.

A. L. Quant and Edwin A. Krauthoff, both of Topeka, Kan. (W. S. McClintock, of Topeka, Kan., on the brief), for defendants in error, appellees, and respondents.

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

HOOK, Circuit Judge. No. 4292 is a writ of error to review the proceedings at a trial by jury, resulting in a verdict and an adjudication of bankruptcy against the Badders Clothing Company, a Kansas corporation. No. 4293 is an appeal from certain orders in the bankruptcy proceedings, and No. 139 original is a petition to revise in matter of law.

[1] The rulings of the trial court in allowing amendment of the petition in bankruptcy and in requiring the bankrupt to proceed to trial were within its reasonable discretion. The defect in the verification of the petition, if any, was waived by the answer. Statements in the answer that the petition does not conform to the Bankruptcy Act, and that the facts alleged do not confer jurisdiction nor entitle petitioners to relief, are too general to challenge the verification. Objection is made that the jury was not summoned as required by the laws of Kansas. If there is anything of importance in this, the references to the record do not disclose it. The jury appears to have been secured according to Judicial Code, §§ 279, 280 (Act March 3, 1911, c. 231, 36 Stat. 1165 [Comp. St. 1913, §§ 1256, 1257]). In response to a question by counsel touching his qualifications, Juror Brewer said he would act on his own judgment of the value of real property, instead of upon what others would say. But in reply to a question by the court he said he would take the evidence of the witnesses as to the facts. The court overruled a challenge for cause. This was not error. Pearson v. Rocky Mountain Fuel Co., 219 Fed. 496, 135 C. C. A. 208; Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244.

The petition charged the commission of six acts of bankruptcy. The first five were preferential payments to creditors when insolvent. The sixth was that the bankrupt conveyed, transferred, concealed, and removed, and permitted to be concealed and removed, a large portion of its property with intent to hinder, delay, and defraud its creditors, with averments of details. Since the adjudication may be sustained by a proper charge in the petition and adequate proof at the trial of any one of them, it is enough to say the petition was sufficient as to the sixth, and the proof of it was clear and convincing. By its answer the bankrupt denied insolvency. Solvency when the petition was filed was a complete defense to the sixth charge, but the burden of proving it was on the bankrupt. Bankruptcy Act (Act July 1, 1898,

c. 541, § 3c, 30 Stat. 546 [Comp. St. 1913, § 9587]). The jury also found against it on that issue and we think the evidence sustained the finding.

[2] Counsel contend that under the laws of Kansas where the bankrupt was incorporated and domiciled, and the decisions of the courts, the acts charged against it, if true, were ultra vires and void, were not corporate acts, and therefore would not constitute ground for adjudication in bankruptcy. They say:

"A corporation can do and assent to the doing by its officers of only those things which are within the corporate power, while an individual may do anything he pleases. * * * An individual may divert his property in any manner that he pleases, by giving it away, or by selling it for an unlawful consideration, or by concealing it, or doing anything else with it that he pleases. Not so with a corporation. It can do no act prohibited by the terms of its charter or the general law. If the general law prohibits corporations from diverting their assets or property from a use which by the terms of their charter they are authorized to make of it, any attempt on the part of those in charge of the corporate affairs to divert such assets is ultra vires and absolutely void. Indeed it is not an act of the corporation."

This is a revival of an ancient fiction long since discarded. It is equivalent to saying a corporation can do no wrong. But a corporation may be held for a felony by engaging in a conspiracy (Joplin Mercantile Co. v. United States, 213 Fed. 926, 131 C. C. A. 160); assault and battery with a deadly weapon (Railway v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146); libel (Railroad v. Quigley, 21 How. 202, 16 L. Ed. 73); fraud and deceit, assault and battery, malicious prosecution, nuisance and libel (National Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750); fraud in reports to revenue collector (Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176); fraud and deceit (Butler v. Watkins, 13 Wall. 457, 20 L. Ed. 629); boycotting (Hartnett v. Plumbers' Supply Ass'n, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194); false representation (Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290); false imprisonment (Wachsmuth v. Nat. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278); conspiracy by a bank through its president with a merchant to defraud those selling goods to the latter (Johnston Fife Hat Co. v. National Bank, 4 Okl. 17, 44 Pac. 192). There are many other apposite cases. It would be quite strange to find that a corporation could not commit the wrong involved in the charge before us. The words of the Bankruptcy Act are broad enough to include the corporation here. See sections 1 (19), 3a (1), 4b.

[3, 4] While upon this subject we may refer to complaints of the admission of testimony of acts of George S. Badders claimed to have been for his personal benefit, and therefore not attributable to his corporation. Badders was the president of and dominated the company. He exercised unrestrained control over its affairs. If the power of restraint was elsewhere, it does not appear to have been exercised. Neither the directors nor other stockholders, if there were any with substantial holdings, interfered. He was practically the corporation in the conduct of its business. The evidence shows a plan

and purpose to defraud its creditors which were in course of accomplishment when arrested by the bankruptcy proceedings. Its stock of goods was being sold, in some instances at a sacrifice, and the proceeds taken by Badders and used in such ways as to put them beyond the reach of corporate creditors. If a corporation engages in a plan to hinder and defraud its creditors by concealing or transferring its property, the proof is primarily found in the conduct of its officers in authority, and where part of the plan is their individual enrichment at the expense of the creditors, the distinction between official and personal acts should not be drawn too nicely. The ultimate disposition of the corporate property or its proceeds, however made, may be the very effective act which was intended to hinder or defraud the creditors. Having ventured upon the wrongful course, it may even act through agents who have no official relation to it. We are not now speaking of contracts ultra vires. Nor does it follow that every wrongful act of an officer is the act of his corporation. It may be unauthorized or be a trespass upon the corporate rights. But if the officer acts within the authority with which he has been clothed and others are injured, the same consequences follow as in the case of a natural person. It is worthy of note in this case that the bankrupt joined Badders individually in resisting preliminary efforts in the bankruptcy court to uncover the transactions and disclose corporate assets.

[5] Complaint is made of the admission of a statement of the mercantile indebtedness of the bankrupt drawn from its ledger by witness Coulson. The witness testified that he had been in the employment of the bankrupt as a salesman, and also did some work upon the books; that at the request of Badders, the president, he drew off the statement for use in preparing a trial balance; that he submitted it to Badders, who suggested some minor corrections, which were made. The statement purported to show the total mercantile indebtedness of the bankrupt, though it appeared that some of the amounts were perhaps subject to trade discount. The ledger from which the statement was drawn was not offered in evidence in its entirety, but it was identified, and was in court, where it was used by counsel for both parties. Some of the items on the list showing creditors and amounts owing were verified by reference to pages of the ledger, which were separately offered and received in evidence. Other parts of the ledger, relating to other matters, were offered in evidence by both parties. The witness did not make the ledger entries drawn off by him, and had no personal knowledge of their correctness, but the book was one of the records of the bankrupt's business kept under its direction, and the statement was prepared, submitted to, and corrected at the instance of its president. It needs no discussion or citation of authority to show the evidence was admissible.

[6] Complaint is made regarding the verdicts. The jury first found six separate verdicts, one upon each act of bankruptcy in issue. In each they specifically found that the bankrupt, while insolvent, committed the act of bankruptcy charged. The attention of the court was then called to the omission to find upon the issue of solvency or in-

solvency when the petition was filed. There had been some confusion in selecting the proper forms of verdict to be submitted, which the court said was due to its oversight. Counsel for the bankrupt objected "to any change in the verdict." The courts replied: "We are not changing it. We are getting a further verdict." The court then directed the jury "to retire and find a verdict on another question," which was explained. They returned a verdict, finding the issue in question in favor of the petitioning creditors, specifying that the bankrupt was insolvent at the date of the petition. They also found in addition that prior thereto it committed the several acts of bankrupcy charged. It is sufficient to say, without considering the effect of this last verdict in its entirety and by itself, that the finding of the bankrupt's insolvency when the petition was filed supplemented the prior separate verdict on the sixth charge. The action of the trial court was entirely right. The jury had not been discharged, but were still in service, and when the omission of the issue was discovered, it was proper to have them retire and complete their duty.

[7] Many objections are urged to the proceedings outside the trial, as that the restraining order at the beginning of the proceedings was erroneous because the petition in bankruptcy was defective; that certain questions as to the restraining order and the appointment of a receiver were referred to the referee as special master; that the court did not wait for his report; that a receiver was appointed without sufficient cause; that the bond for the appointment of a receiver was not conditioned as required by the Bankruptcy Act, and was not approved by the court or judge, etc. Such of them as ever had merit have become moot. It should be said, however, that in involuntary proceedings receivers should never be appointed under sections 2(3) and 3e, of the Bankruptcy Act without full compliance with all the requirements, including a showing of cause. It is an extraordinary remedy which should only be granted when, as the statute says, "absolutely necessary" for the preservation of the estate. But in this case the application for the appointment showed such an emergency; and upon a hearing, the bankrupt being represented, the trial court found and recited in its order the absolute necessity.

[8] The printed record with the writ of error and appeal consists of 689 pages. There are 91 assignments of error on the writ of error and 11 on the appeal, consecutively numbered in each case. The briefs for the bankrupt contain 74 specifications of error in the one case and 8 in the other, also consecutively numbered, but with no identifying references to the assignments. The numbers of the assignments and of the specifications upon the same subjects are different in almost every instance. Some of the specifications are made up of parts of widely separated assignments, the language being changed, and in some instances the scope. This confusion, which was not necessary for a topical arrangement of the errors asserted has imposed upon us much unnecessary labor, and is contrary to the intent of rules 11 and 23 of this court. Except when enlarged in the discretion of the court, the right of review depends, first, upon sufficient assignments of error filed below and shown in the record,

and then upon a specification in the briefs of the errors relied on. The errors specified as relied on are necessarily errors which have been assigned. The assignments required by statute and rule of court to be filed with the trial court are not a mere formality, or preclude to enlarged or different specifications in the briefs. The former mark the limits of the latter. No changed or new specifications of error should be made except in connection with an appeal to the discretion of the court to consider them. If a review of a case is to be facilitated, the specifications in the briefs should be identified in some appropriate way with the assignments in the record, especially when both are numerous. Passing this, it should be further said that many matters are discussed in the briefs without references to the pages of the record where they might be found. Rule 24 (224 Fed. xvi) of this court upon this subject is so reasonable, and has been so frequently called to attention, that we feel we should not assume the task of searching the record. Chicago Great Western Ry. Co. v. Egan, 159 Fed. 40, 86 C. C. A. 230. We have also omitted discussion of other matters obviously without merit.

The adjudication in bankruptcy is affirmed; the petition to revise is dismissed.

BARBER v. COLUMBIA CHEMICAL CO.

(Circuit Court of Appeals, Sixth Circuit. January 10, 1916.)

No. 2654.

1. APPEAL AND ERROR ⊜1022—REVIEW—QUESTIONS OF FACT.

The findings of a master in chancery, concurred in by the District Court, are to be taken as presumptively correct, and should not be disturbed on appeal, unless clearly wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. ⊜1022.]

2. ESTOPPEL ⊜93—PERMITTING IMPROVEMENTS—DAMS.

Plaintiff and others organized a syndicate, which became the owner of the whole tract of land on which a city was laid out, as well as surrounding land, and which engaged in promoting such city and in procuring various manufacturing plants to locate there. Defendant, a chemical company, was solicited to locate its plant there, and made a series of experiments during a considerable period of time to determine whether a stream could be depended upon to supply the water necessary for its needs. Plaintiff owned 40 per cent. of the stock of the syndicate, and knew that defendant would require large quantities of water, that members of the syndicate had represented to defendant, as an inducement for it to locate there, that water in abundance could be provided from such stream, and that a dam would be necessary to provide water during the dry season. Defendant did locate its plant there, purchased land for that purpose from the syndicate and others, and erected buildings and made improvements at a cost of several million dollars. Plaintiff attempted to sell defendant certain land at about 1000 per cent. advance over its cost six years previous, and, being unable to do so, sued to compel the removal of the dam, on the ground that it backed up water and prevented the proper drainage of such land. No material damage to plaintiff's land

was shown. *Held*, that plaintiff's conduct and course of dealing with defendant was such that he was not entitled to injunctive relief.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264–275; Dec. Dig. ⟸93.]

3. WATERS AND WATER COURSES ⟸177—INJURY FROM DAM—ENJOINING OBSTRUCTIONS.

A mandatory injunction against the maintenance of a dam could not be granted on the ground that it backed up the water of a stream to such an extent as to prevent the drainage of land by proper underground tiling, where no effort had been made to so drain the land, and it was at most a probability that the dam would prevent such drainage.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 260–262; Dec. Dig. ⟸177.]

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 Ohio C. Barber against the Columbia Chemical Company. From a decree in favor of defendant, plaintiff appeals. Affirmed.

C. E. Smoyer and J. A. Kohler, both of Akron, Ohio, for appellant.

A. E. Clevenger, of Cleveland, Ohio, and F. H. Waters, of Akron, Ohio (Kline, Clevenger, Buss & Holliday, of Cleveland, Ohio, and Allen, Waters, Young & Andress, of Akron, Ohio, of counsel), for appellee.

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

McCALL, District Judge. This is a case in equity. The court below denied the relief sought and dismissed the bill. The plaintiff appealed and assigned error.

Wolf creek (sometimes called a county ditch) flows through the lands of plaintiff and defendant near Barberton, Ohio. The lands of the former lie adjacent to and above that of the latter. It is insisted that a dam, which is maintained across the creek by the defendant at its plant, impedes the flow of water so that it backs up and prevents the proper drainage of plaintiff's lands, to his damage. The suit was brought to require the defendant to remove the dam, to enjoin it from diverting the ditch or water course from the proper line, and restore it to its original and true line, and to its proper and original condition prior to the construction of the dam, so as to allow the water to flow in its proper channel in such a manner as to carry away the sediment, and permit the free drainage of the lands, which drain into the ditch and water course, and, further, that the court ascertain and determine the damage which the plaintiff had sustained, occasioned by the construction of the dam and the consequent injury to his property, and for general relief.

At the time the injunctive relief was denied, the court was of the opinion that the plaintiff had a right to equitable relief, by way of compensation, for such definite damage and injury as he had sustained up to that time, and retained the case as a pending suit. The case was referred to a special master, to "take testimony and report what damage the plaintiff had sustained to his lands, because of the defendant's

said dam." The master was instructed to consider the testimony then on file, as well as such other evidence as either party desired to offer on the question of damages. The master viewed the premises, by agreement of counsel for both parties, accompanied by the plaintiff and his counsel, and, after having carefully considered the evidence, reported:

"I find that complainant has sustained no definite, material, or substantial damage or injury to his lands, described in the bill of complaint, because of the defendant's said dam."

Exceptions were filed to the report of the master, which were disallowed, and the court concurred in the master's findings.

[1] The findings of the master in chancery, concurred in by the court, are to be taken as presumptively correct, and should not be disturbed, unless clearly wrong. Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; Lovewell v. Schoolfield, 217 Fed. 689, 702, 133 C. C. A. 449. In Western Transit Co. v. Davidson, 212 Fed. 701, 129 C. C. A. 232, Judge Denison, speaking for this court, said:

"We think, in the ordinary case of a reference by the equity court to its master 'to take proofs and report his findings of fact and law,' * * * it has never been intended to hold that the finding or report should have any greater force than is implied by the criterion, 'clearly against the weight of the evidence,' or 'unless error clearly appears,' or our own formula, 'a decided preponderance against the judgment.'"

Whether the plaintiff's land had suffered any material damage from the maintenance of the dam by the defendant is essentially a question of fact, and since we discover no serious nor important mistake in the consideration of the evidence, nor find that the evidence decidedly preponderates against the decree, under the ruling of this court in the above-cited cases, we approve, in this respect, the action of the trial court.

[2] The mandatory injunction was denied, as stated in the decree, "because of the conduct and course of dealing of the complainant, and his delay in bringing this suit." There are two grounds, therefore, as a basis of the decree: First, plaintiff's conduct and course of dealing with the defendant; and, second, his delay in bringing the suit.

Subsequent to 1890, the plaintiff, O. C. Barber, and his colleagues organized a syndicate, known as the Barberton Land & Improvement Company, which became the owner of the whole tract of land on which the city of Barberton, Ohio, was laid out, as well as large tracts of land immediately surrounding the town site. Barber acquired 40 per cent. of the stock. The business of the syndicate was principally the promotion of the city of Barberton, and its entire energies were devoted to procuring various manufacturing plants to locate there, to selling lots and land owned by it, and also to selling large tracts of land surrounding the city.

The defendant was solicited by members of the syndicate to locate its plant at Barberton. Yielding to the solicitations, the defendant sent its engineer to examine and report upon the suitability of the site proposed by the plaintiff, especially as to whether water in necessary quantities was at all times obtainable. The defendant was assured by

members of the syndicate that an ample supply of water for its needs could be obtained from Wolf creek and vicinity. A series of experiments on the stream was conducted by the plaintiff and a member or members of the syndicate for a considerable period of time, in order to determine whether the stream during the dry portions of the year could be depended upon to supply the requisite amount of water. It was thus ascertained that by putting a suitable dam across the stream, at the proposed site of defendant's works, a sufficient quantity of water for its manufacturing needs could be obtained.

Was the plaintiff acquainted with these representations and activities by the syndicate? It appears from the record that William A. Johnson was the engineer in the employ of the Barberton Land & Improvement Company, and that he was directed to make some readings of the temperature of Wolf creek and the volume of the flow of water, to ascertain whether there was sufficient water and of proper character for the purposes of the defendant Chemical Company's uses, and he says that:

"Mr. Galt [manager of the defendant company] stated to me, right at the beginning, that water was one of the most important things to be considered in the establishment of that business, and that is why these experiments were conducted over such a long period of time. I discussed the matter with Mr. Barber and my partners, just as I did everything else, and I did not do anything until they were fully informed of everything."

From this and other evidence of like character, we are unable to escape the conclusion that the plaintiff was acquainted with these representations and activities of the syndicate in its effort to induce the defendant to locate its plant at Barberton.

Induced by the representations and the experiments as to water, defendant decided to locate its manufacturing plant at Barberton, and for that purpose purchased in 1899 from the Barberton Land & Improvement Company and others the lands now owned by the company and occupied by it, and erected on the premises many large and expensive buildings, filled them with large quantities of costly machinery, bored numerous wells to a salt formation 2,700 feet beneath the surface of the earth, and made other improvements necessary for its business, amounting now to more than $4,000,000.

For the purpose of conducting a portion of the water into its manufacturing plant, located along the banks of the stream, the defendant widened the stream on its premises, on both sides thereof, from its natural width of about 20 feet to 60 feet, and also deepened the channel, throughout its entire works at a heavy cost. Until about 1904, the defendant maintained in the stream a solid dam, for the purpose of conserving the water for its use. At that time it replaced the solid dam with a lift dam, or series of gates, so constructed that when water was plenty the dam could be entirely removed from the stream, by lifting the various gates and thus allowing the water to flow through the channel unimpeded, with a much greater area for such purposes than formerly existed. In dry times, when water was scarce, all the gates or any of them could be lowered and the water conserved for the use of the defendant, except a small portion, was returned to the stream below the dam.

Thus it appears from the record that the plaintiff knew that the defendant would require large quantities of water; that members of the syndicate represented to the defendant, as an inducement for it to locate at Barberton, that water in abundance from Wolf creek and vicinity could be provided for at the site of the plant, and that it would be necessary in some measure to dam the creek so as to provide a reservoir, to draw upon during the dry season. When we consider the correspondence in the record, that passed between the plaintiff and the defendant in September, 1905, together with circumstances preceding and subsequent thereto, and recall that the court below found that plaintiff had sustained no damage to his land because of defendant's dam, it is difficult to escape the conclusion that the plaintiff's inability to sell to defendant the land under consideration, at about 1,000 per cent. advance over its cost six years previous, was probably the predominant motive that induced plaintiff to bring this suit, rather than because of any real damage he had sustained to his land.

In view of the entire record, we are impressed with the idea that the court below was correct in decreeing that the conduct and course of dealing of the plaintiff with the defendant disentitles the plaintiff to injunctive relief. Mr. Justice Brewer, speaking for the Supreme Court of the United States, said:

"It is a familiar law that injunction will not issue to enforce a right that is doubtful, or to restrain an act the injurious consequences of which are merely trifling." Canal Co. v. Canal Co., 177 U. S. 302, 20 Sup. Ct. 630, 44 L. Ed. 777.

Plaintiff's right to injunctive relief should be made clear, for, if granted, it would very seriously affect, if it did not destroy, defendant's manufacturing business at Barberton. A suit for an injunction is an equitable proceeding, and the interests of the defendant are to be considered, as well as those of the plaintiff. Wilson v. Shaw, 204 U. S. 31, 27 Sup. Ct. 233, 51 L. Ed. 351.

[3] It was insisted at the hearing that, though it may not have been shown that the dam impeded the flow of water so as to back it up and inundate plaintiff's land, the evidence did show that the water backed up to such an extent that it prevented the drainage of the land by proper underground tiling. That conclusion is not at all certain—a probability, at most. No effort has been made to use underground tiling for draining the land, and until this has been done, and the result more clearly ascertained, we think the dam should not be disturbed on that account.

The doctrine of estoppel, the character of the water course, and other questions are raised upon the record; but we deem it unnecessary to discuss them, since, as we think, they are not material to a proper determination of the case.

It results that the decree must be affirmed, with costs, but without prejudice to plaintiff's right to recover of defendant, by proceeding supplemental to this decree, such damages, if any, as plaintiff may hereafter suffer by reason of any change made by defendant, subsequent to the decree appealed from, affecting the flow in the ditch to the injury of plaintiff's land, or in case defendant's present or future

interference with the flow of the ditch shall actually operate to prevent the drainage of plaintiff's land (as held under his presently existing title or easement) into the ditch by means of undertiling, if and when such drainage shall be actually attempted.

THE E. M. PECK.

(Circuit Court of Appeals, Sixth Circuit. December 17, 1915.)

No. 2655.

COLLISION ⊂=71—MOORED VESSEL DRIFTING IN FLOOD—INEVITABLE ACCIDENT.

The steamer Peck, without cargo, was moored for the winter in the river at Lorain, Ohio, in charge of an experienced caretaker. She was made fast by anchor chains at bow and stern; that from the bow, which was upstream, being carried up to a sound white oak pile 15 inches in diameter set in solid ground, the chain being sunk a foot or 18 inches below the ground and shackled. In the latter part of January a thaw, with rain, set in, causing the ice to break up, and creating a situation which was very unusual, if not unprecedented. The harbor master and caretaker, both experienced mariners, ran five additional lines from the Peck; but an ice gorge, which had formed above, broke through a bridge and, coming down against her, first parted her lines, and then the pile to which her bow chain was made fast broke off, and she was swept down, striking and injuring a dredge moored below. Of the 14 vessels moored in the harbor, 9 were swept away or cast ashore, and all but one of the others were damaged. *Held*, that those in charge of the Peck were not negligent, but exercised such care and prudence as the circumstances reasonably required, and that her drifting was the result of inevitable accident.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⊂=71.]

Appeal from the District Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Suit in admiralty by the L. P. & J. A. Smith Company, owner of Dredge No. 8, against the steamer E. M. Peck; the Calumet Transit Company, claimant. Decree for libelant, and claimant appeals. Reversed.

For opinion below, see 201 Fed. 599.

Prior to January, 1904, the steamer Peck, a wooden barge, 250 feet long, and 40 feet beam, without cargo, and owned by the appellant, was moored for the winter on the west bank of Black river, at Lorain, Ohio, in charge of an experienced caretaker. Thirteen other vessels were moored in the river at that point, lying both ahead and astern of the Peck, and also on the opposite shore. The Peck's moorings originally consisted of a regular size 1½-inch anchor chain, 75 to 100 feet long, leading forward from the starboard side to a mooring pile planted in solid ground, 12 to 15 feet back from the edge of the water. This pile was of sound white oak, 14 or 15 inches in diameter, and one of a series of like piles placed along the shore for mooring purposes about two years prior to January, 1904. The chain was sunk a foot to 18 inches below the ground and shackled. A second chain led from the stern of the steamer to the shore and made fast.

About 75 or 100 feet astern of the Peck, somewhat around a bend in the river, Dredge No. 8, owned by the appellee, was moored. She was 90 feet

long, 30 feet wide, and drew 5 feet of water. Her forward end was square; her aft end had something of a fan tail. Upon her forward end a large derrick projected. No criticism is made of her moorings.

The steamer Steinbrenner lay just ahead of the Peck, but somewhat around a bend in the river, thus placing the Peck between Dredge No. 8 and the Steinbrenner, and approximately on a segment of a circle passing through the three vessels. The Nickel Plate railroad bridge is located above where the vessels were moored.

It had been very cold, and the river was frozen over; the ice being from 1 to 2 feet thick. Shortly prior to January 22, 1904, a thaw had set in, with rain. An experienced mariner, who was the acting harbor master, anticipating trouble, went along the river front advising ship keepers to prepare for a possible flood and assisting them to put out additional lines. Two or three additional lines were put out from the dredge and five additional 6-inch lines from the Peck, and made fast to the shore. After the additional lines were put out, the ice above the bridge began to move, carrying with it some scows and dredges. The latter caught upon the bridge; the ice passing under it forming a gorge abreast of the Steinbrenner, and ahead of the Peck. The ice continued to pile up against the scows and dredges that caught against the bridge, until between 8 and 9 o'clock, when they tore away a part of the bridge and passed down the river into the gorge abreast of the Steinbrenner. This gorge soon thereafter began to move down the river, forcing the ice ahead of it and against the bow of the Peck. The additional strain, thus placed on the Peck, came first on her lines, and they parted, thus leaving the strain on the forward chain, which caused the compressor, to which the chain was made fast on the steamer, to slip once or twice, permitting the vessel to surge astern.

At this time the caretaker, who was on the deck of the Peck, adjusting the lines in an effort to equalize the strain, ran below and jumped on the lever, which controlled the compressor and held it fast. With the next pressure of the gorge on the bow of the Peck, the pile to which the forward chain was fastened broke off, and her bow swung out into the river, and she was carried down stream. As she passed the dredge, the after-end of her cabin came in contact with the end of the crane on the dredge, breaking through the Peck's cabin stanchions and throwing a yawl boat resting on a cradle to the deck. The ice gorge, which tore the Peck from her moorings and carried her along, again formed below the bridge at Erie street near the mouth of the river.

When the Peck came in contact with the dredge's crane, the water was not more than 2 feet above normal height; but after the gorge again formed at the mouth of the river, the water above rose rapidly until it was about 6 feet above normal height and upon the embankment above the river. As the water rose, the dredge rose with it. Along the shore, abreast of the dredge, there was a row of old piling, projecting a few feet above the ground, which originally supported a wharf. The water rose above them. When the water began to recede, it was found that the after-end of the starboard side of the dredge was fast upon a pile, throwing her port bow forward into the river, and as the water continued to recede the dredge continued to hang on the pile. There was a hole in the hull of the dredge, and her weight was increased by water which flowed in both through the hole, and also by running over her port bow, until the weight became so great that her lines parted, and she slid into the river and sank. This was between 1 and 2 o'clock in the afternoon, about five hours after the Peck had passed down with the gorge.

Of the 14 or 15 other vessels that were moored in the harbor of Lorain, none escaped damage, except the Steinbrenner. Nine of them were either cast ashore, or torn from their moorings, and carried down the river; all being either destroyed or greatly damaged.

F. S. Laws, of Philadelphia, Pa., and S. A. Hill, of Detroit, Mich., for appellant.

H. D. Goulder and F. S. Masten, both of Cleveland, Ohio, for appellee.

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

McCALL, District Judge (after stating the facts as above). The court below reached the conclusion that the steamer Peck was at fault and decreed accordingly. The Calumet Trust Company, the owner of the Peck, appealed and assigned error.

Judge Day was of the opinion:

"That the Peck broke loose by reason of the compressor slipping and permitting the chain to slack and then tighten, thus breaking or loosening the pile to which the Peck was moored," and that "this was the fault either in the construction of the compressor or more probably in the conduct of the caretaker of the Peck."

If this finding of fact is warranted by the evidence, the appellant was properly adjudged liable for such damages as the appellee sustained, resulting from the Peck's colliding with the dredge, under the rule announced in The Louisiana, 3 Wall. 164, 18 L. Ed. 85, that in a collision caused by a vessel drifting from her moorings she "must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident or a vis major which human skill or precaution and a proper display of nautical skill could not have prevented." This court has adopted the principle announced in The Louisiana, supra, and applied it in The Wm. E. Reis, 152 Fed. 673, 82 C. C. A. 21, and in Bradley v. Sullivan, 209 Fed. 833, 126 C. C. A. 557.

There was no dispute, therefore, as to the law governing this case; but the appellant stoutly insists that the evidence clearly sustains its defense that the damage sustained by the dredge was the result of inevitable accident or a vis major, and that all was done that human skill or foresight could reasonably suggest to properly moor the Peck and hold her fast, and thus it has brought itself within the rule announced in The Louisiana, supra.

An attentive examination of all the evidence leads us to the conclusion that such contention is not without merit. On January 21st, when it was apparent that a thaw had set in and that there would be a breaking up of the ice, and probably a rise in the river to flood tide, the acting harbor master, an experienced mariner, went to the Peck (as he did to the other vessels in the harbor), and assisted her caretaker, who was also an experienced seaman, to put out five additional 6-inch lines. It was their opinion that the Peck was then properly moored, with sufficient lines to hold her against any condition that under the circumstances might be reasonably anticipated. The additional lines parted when the gorge moved down the river, but the anchor chain held fast. Nor did the compressor, to which it was attached on the boat, break or give way. It slipped once or twice, causing the steamer to lurch. Still the chain held fast, but when the pressure of the ice gorge upon the bow of the steamer became so great that something had to give way, the 15-inch white oak pile, to which she was moored, broke off below the surface of the ground, and the vessel was set adrift. The conditions were very unusual, if not unprecedented, in

the harbor at Lorain on January 22, 1904; for, as has been stated, nine other vessels were either torn from their moorings or cast ashore on the occasion under consideration. If the Peck alone had been swept away, we would be more impressed with the contention of the appellee that there was some negligence or want of nautical skill in her mooring.

While the facts in the cases of The Wm. E. Reis and Bradley v. Sullivan, supra, when considered generally, are very similar to the facts in the instant case, yet they differ in material and important particulars. In the case of The Wm. E. Reis, she had aboard a cargo of 4,800 tons of iron ore, no dock timber or pile gave way, but the lines and cables parted, and, although there were 50 or more vessels moored in the harbor at that time, the Reis was the only one that broke loose and went adrift. In Bradley v. Sullivan, the vessel had a cargo of 70,000 bushels of flax seed aboard; and, though the piles to which she was moored broke off, it was not shown that the flood and floating ice were unprecedented. Furthermore, the conditions prevailing at the time the Alva went adrift, as well as a few hours later, "were anticipated and overcome by those in control of other vessels then moored in neighboring portions of the river and equally exposed." The Alva alone went adrift.

The material distinguishing facts are these: Both the Reis and the Alva had on board large cargoes, and therefore required greater skill and care in mooring. They were the only vessels that went adrift on the respective occasions, thus strongly indicating that the fault was either in the manner of their mooring or handling, while in the instant case the Peck was without cargo and 9 of the 14 craft moored in the harbor at Lorain (including the Peck) either were swept away or cast ashore, and of the remaining 5 all were damaged, except the Steinbrenner. What might have been her fate, had the great pressure of the moving ice gorge come against her bow, is problematical.

The court below found that the drifting of the Peck resulted either from a fault in the construction of her compressor, or in the conduct of her caretaker—more probably the latter. Can it be justly said he was at fault, in that he was unable to adjust the lines about the Peck so as to equalize the strain, and thus have prevented them parting? or that he was at fault in going below to hold the lever to the compressor down? In the light of the wholesale havoc wrought in the port of Lorain, we cannot think the caretaker was guilty of actionable negligence or fault in either instance.

What fault was there in the construction of the compressor? The chain slipped on it once or twice. The caretaker says that was the result of "an extraordinary strain on it." There is no direct evidence touching its construction. That it did not give way, but held the cable firmly, after the first extraordinary strain, until the pile broke off, strongly tends to refute the idea of faulty construction.

We conclude that the evidence proves that appellant did that which careful, prudent, and experienced men would have done under like conditions, that those in charge of her exercised such care and prudence in mooring the Peck as the circumstances reasonably required,

and that her drifting was the result of inevitable accident. The C. H. Northam (D. C.) 181 Fed. 986; Sharpsburg Sand Co. v. Coal & Coke Co. (D. C.) 145 Fed. 424; The Mary J. Robbins (D. C.) 100 Fed. 41; The Waterloo and The Glenalvon, 100 Fed. 332, 40 C. C. A. 386; The Mary L. Cushing (D. C.) 60 Fed. 110.

There are other questions raised, but we deem it unnecessary to discuss them.

It results that the case must be reversed and remanded, with costs, and with direction to dismiss the libel.

SPEAR v. UNITED STATES.
PORTER v. SAME.

(Circuit Court of Appeals, Eighth Circuit. September Term, 1915. Rehearing Denied January 24, 1916.)

Nos. 4385, 4386.

1. POST OFFICE ⊂⊃48—CRIMINAL OFFENSES—FRAUDULENT USE OF MAILS—INDICTMENT.

An indictment charged that defendants and their associates, having devised a scheme to defraud, for the purpose of executing it, caused a letter to be deposited in a post office. It described the scheme as involving the use of a pretended pool room, in which the victims were induced to make wagers on races, and having put up checks, instead of cash, were required to leave them for collection as an assurance of good faith, though announced as winners of the wagers. The indictment did not, as part of the description of the scheme to defraud, directly allege an intent to convert the proceeds of the checks to defendants' own use, but instead charged that in carrying out such scheme in manner and form as contemplated by them in devising it they received a check from one of their victims, and for the purpose of having it presented and collected for their use and benefit caused a bank to forward it for collection for the account of one of the defendants. *Held*, that while a general averment that defendants devised a scheme to defraud is not of itself sufficient, without descriptive details showing the character of the scheme, and that it was reasonably calculated to effect the wrongful design, and while the details in descriptive form in the indictment fell short, the direct averment of what defendants and their associates did and intended were fairly ascribable to and explanatory of the scheme to defraud, and the scheme was sufficiently charged and described.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⊂⊃48.]

2. POST OFFICE ⊂⊃35—CRIMINAL OFFENSES—FRAUDULENT USE OF MAILS—ELEMENTS.

Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), provides that whoever, having devised any scheme to defraud, shall for the purpose of executing it, or attempting so to do, place or cause to be placed any letter, etc., in any post office, shall be punished as therein provided. Defendants, having obtained a check from a victim of their scheme to defraud, caused a bank to forward it by mail for collection for them. *Held*, that the fact that the bank which deposited the letter in the mail was an innocent agency and ignorant of the scheme to defraud did not defeat defendant's responsibility.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊂⊃35.]

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3. CRIMINAL LAW ⊜789—INSTRUCTIONS—REASONABLE DOUBT.

On a trial for using the mails for the purpose of executing or attempting to execute a scheme to defraud, the court charged that it was not necessary for the jury to be satisfied beyond a reasonable doubt of the proof of every material allegation in the indictment, but that if, taking all the evidence together upon the whole question, they were satisfied beyond a reasonable doubt that defendant was guilty, their verdict should be guilty. *Held*, that this instruction was misleading, as tending to induce the jury, if impressed by the evil character of some part of the transaction, to overlook a lack of proof of a vital factor of the offense and find guilt in a general sense, since while each averment of descriptive detail, or each evidentiary fact or circumstance, need not be proved beyond a reasonable doubt, the essential, constituent elements of the offense, such as the contriving of a scheme to defraud and the use of the mails, must be so proved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1851, 1880, 1904–1922, 1960, 1967; Dec. Dig. ⊜789.]

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Ed Spear and Jack Porter were convicted of offenses, and they bring error. Reversed and remanded.

Lewis Rhoton, of Little Rock, Ark., John M. Goodwin, of St. Louis, Mo., and George W. Murphy, of Little Rock, Ark. (H. H. Myers and E. L. McHaney, both of Little Rock, Ark., and McShane & Goodwin, of St. Louis, Mo., on the briefs), for plaintiff in error Spear.

Lewis Rhoton, X. O. Pindall, and George W. Murphy, all of Little Rock, Ark. (H. H. Myers, of Little Rock, Ark., on the brief), for plaintiff in error Porter.

W. H. Martin, U. S. Atty., of Hot Springs, Ark. (W. H. Rector, Asst. U. S. Atty., of Little Rock, Ark., on the brief), for the United States.

Before HOOK, Circuit Judge, and ELLIOTT and YOUMANS, District Judges.

HOOK, Circuit Judge. Spear and Porter were indicted in five counts, the first four of which charged fraudulent use of the mails, and the last a conspiracy to commit the offenses set forth in the others, in violation of sections 215 and 37 of the Penal Code (Comp. St. 1913, §§ 10385, 10201). There were convictions and sentences on all the counts, except that Porter was acquitted on the first. They obtained these writs of error.

[1] At the threshold of the cases is the question of the sufficiency of the counts for fraudulent use of the mails. If they fall, that for conspiracy depending on them falls also. In respect of this question the first count is typical of the others. It charged that defendants and their associates, having devised a scheme to defraud certain named persons and others of their money and property by means of false and fraudulent pretenses, representations, and promises, for the purpose of executing it, caused the letter set forth to be deposited in a certain post office of the United States for transmission and delivery. The scheme described was what is commonly called a confidence game,

and involved the use of a pretended pool room at Hot Springs, Ark., upon the boards of which appeared to be inscribed the results of races at Juarez, Mexico, and other distant cities, a capper who pretended to and convinced the victims of his advanced knowledge of the results of the races and the sure success of the wagers he advised, and so forth. In this case the victims were announced as winners, but having put up checks, instead of cash, the worth of the checks was brought in question, and they were required to leave them to the test of collection as an assurance of good faith on their part. Up to this point the description of the scheme is full and complete. The defect in the count as claimed is that no averment follows that defendants or their associates intended to convert to their own use the proceeds of the checks intrusted to them. It is true that the count, instead of continuing the descriptive form of words, breaks off into recitals of what the parties actually did, with some connective references to the preconceived scheme. Thus it is charged that *"in carrying out the said scheme and artifice, and in said manner and form as contemplated,"* by defendants and their associates, *"in devising said scheme and artifice,"* they received a check or draft from one of their victims for $10,000 on a bank in New York City; *"and so having the said check or draft in their possession, * * * for the purpose of having said check or draft presented and collected for the use and benefit of"* themselves, they caused a certain local bank to forward it for collection *"for the account of"* defendant Spear.

It is contended that these averments are not a part of the description of a scheme to defraud, and that without them it does not appear there was any intention wrongfully to convert the check or draft or its proceeds, and therefore there could be no defrauding. Milby v. United States, 48 C. C. A. 574, 109 Fed. 638.

A general averment that defendants devised a scheme to defraud is by itself not sufficient, without descriptive details showing its character and that it was reasonably calculated to effect the wrongful design. Here the details in descriptive form fall short, but we think the direct averments of what defendants and their associates did and intended are fairly ascribable to and explanatory of the scheme to defraud charged in general language. The receipt of the victim's check, the intent that it should be presented and collected for their use and benefit, though it belonged to him, and the causing it to be forwarded for collection for the account of one of the defendants, all were by way of carrying out the scheme in the manner and form as contemplated when the scheme was devised. This conclusion is plainly to be drawn from the words of the indictment. Again, the character of the offenses charged in the first four counts is not conspiracy. In an indictment for conspiracy, the omission of an essential element of the offense cannot be cured by the statement of the acts done to effect it, though it may be looked at to ascertain the sense in which terms are used. Stearns v. United States, 82 C. C. A. 48, 152 Fed. 900. This is so, because the offense is the conspiracy alone, and overt acts are not a part of it, but simply a requirement to show it was not a mere evil conception of the mind, without move to accomplishment

See United States v. Britton, 108 U. S. 199, 204, 2 Sup. Ct. 531, 27 L. Ed. 698. As to most conspiracies the statutes require an overt act; but where none is required, as in a conspiracy to deprive a citizen of a right under the Constitution and laws of the United States (Rev. Stat. § 5508), it is held not necessary to aver one, and that when averments of that character are made they are referable to the conspiracy as describing or particularizing it. Smith v. United States, 85 C. C. A. 353, 157 Fed. 721. So in a case like this there should be at least the same freedom of construction. We think a scheme to defraud was sufficiently charged and described.

[2] The indictment discloses that the bank, which defendants and their associates caused to forward the check for collection and to deposit the letter of transmittal in the mails, was ignorant of the scheme to defraud. An argument was made on this. But responsibility cannot be avoided by the use of an innocent agency intentionally employed to reach and use the mails in effecting a scheme to defraud.

[3] In charging the jury the court said:

"Another thing about the reasonable doubt: I want to say to you it is not necessary that you must be satisfied beyond a reasonable doubt of the truth of every material allegation in the indictment. It means this: That taking all the evidence together, upon the whole question, are you satisfied beyond a reasonable doubt that he is guilty? If you are, then your verdict should be guilty. If you are not, then your verdict should be not guilty."

We think the instruction is misleading. It tends to induce a jury, impressed by the evil character of some part of the transaction, to overlook a lack of proof of a vital factor of the offense, and to find guilt in a general sense. The material allegations in an indictment must comprise all the substantive elements of the offense charged, and manifestly the measure of proof required for each should not be less than upon the ultimate issue of guilt. We do not mean to imply that in a case like this each averment of descriptive detail must be so proved, or that each evidentiary fact or circumstance must be so believed; but the contriving of a scheme to defraud substantially as set forth must be shown beyond a reasonable doubt, and so of the use of the mails.

Counsel for the government endeavor to sustain the instruction by cases holding that the jury are to be governed by "the effect of the evidence as a whole and not of distinct parts"; that an accused has no right to single out each material fact, and to demand a verdict of not guilty if the jury has a reasonable doubt of its existence, but is only entitled to an instruction upon the consequence of a doubt of guilt on the whole evidence in the case; that an instruction on the rule of reasonable doubt should be applied to the general issue, or to all the evidence, and not to each and every fact in proof, nor "to each link in a chain of circumstances," nor "seriatim to each item of the evidence," nor "to any particular fact in the case," as distinguished from the whole of the evidence. When the language of such cases, and there are many of them, is rightly regarded, and perhaps in some instances restrained to the point for decision, it will be seen that they relate to evidence or evidentiary facts, as distinguished

from the structural elements of the offenses charged. The former are within the domain of proof. The latter are matters of substantive law, and, though in a large sense also facts, they are the essential, constituent, ultimate proposition, to the existence or nonexistence of which the evidence or proof is directed. They inhere in the definition of the offense and compose its vital ingredients, as distinguished from the evidence to establish or refute them.

There is generally such a relation between the definitive elements of a public offense, and mutual corroboration in the proofs of them, as to make it improper to single them out for isolated, detached consideration. But in the end, all things considered, the established measure of proof of an offense charged is also the measure of each essential, constituent element. Instructions like the one before us were condemned in State v. Ottley, 147 Iowa, 329, 126 N. W. 334, and State v. Kimes, 145 Iowa, 346, 124 N. W. 164. See, also, Hinshaw v. State, 147 Ind. 334, 47 N. E. 157.

The opinion of this court in Richards v. United States, 99 C. C. A. 401, 175 Fed. 911, is also relied on. It was said:

"By the first of these requests a declaration was sought that, to find a defendant guilty, not only must each juror separately be convinced of his guilt beyond a reasonable doubt, but he must also be convinced beyond a reasonable doubt of the existence of each fact necessary to be proved. This goes farther than the authorities relied on. [Cases cited.] We think the subdivision of the case and the essential elements of the offense into separate matter for the separate determination of each individual juror would have served to confuse, rather than assist in a just and lawful verdict. The unusual emphasis so given would have tended to destroy the interrelation between the important facts of the case and the probative value which comes from the concurrent existence of a number of them, each assisting in the proof of the other—in other words, the rationale of circumstantial evidence."

This is very far from supporting the instruction in question. The other questions discussed by counsel may not arise again.

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

ERIE R. CO. v. VAN BUSKIRK.

(Circuit Court of Appeals, Third Circuit. December 27, 1915.)

No. 1970.

COMMERCE ⊂⊃27—INJURY TO SERVANT—EMPLOYERS' LIABILITY ACT—"INTERSTATE COMMERCE."

Plaintiff's intestate was an engine hostler in railway yards. A machinist was directed to take a yoke from a disused clam shell bucket and ship it to Bergen, and, being unable to remove the yoke in the then position of the bucket, applied for help to the engineer of a hoist used in lifting coal from a coal car and dumping it in the tenders of standing engines. Deceased left an engine, which had come in for hostling, walked some 150 feet to the place where the bucket was being hoisted, and was killed when it suddenly fell. *Held* that, assuming that he was engaged in interstate commerce while acting as hostler, the machinist, in attempting to remove the yoke, was not employed in interstate commerce, the hoist was not, while moving the bucket, an instrumentality

used in such commerce, and deceased, in assisting with the bucket, was not assisting the machinist in interstate commerce, within Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657-8665), making carriers liable for injury or death suffered by employés while employed in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟸27.

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

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

Action by Elmira Van Buskirk, administratrix of William Van Buskirk, deceased, against the Erie Railroad Company, for injuries caused by the sudden falling of a bucket, which was being moved by means of a hoist. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Collins & Corbin and George S. Hobart, all of Jersey City, N. J., for plaintiff in error.

John C. Oldmixon and Frank F. Davis, both of New York City, for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Mrs. Elmira Van Buskirk, a citizen of New Jersey and administratrix of William Van Buskirk, brought suit and recovered a verdict against the Erie Railroad Company, a citizen of New York, for damages caused, it was alleged, by defendant's negligence. On entry of judgment, defendant sued out this writ.

The action was based on a liability created by the federal Employers' Liability Act which provides:

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier." 35 Stat. 65.

The underlying question involved in this case is whether at the time of his death William Van Buskirk was so employed in interstate commerce, for if he was not no liability was created by the act. On the trial the court below submitted to the jury the question whether the deceased was so employed, which action is here assigned for error, and it is further alleged the court's duty was to itself hold that the proofs showed the deceased, in doing the act which resulted in his death, was not employed in interstate commerce.

The testimony on behalf of the plaintiff tended to show the Erie Railroad was engaged in both interstate and intrastate transportation of freight and passengers. In aid of such transportation it used a number of switching engines in a terminal yard to shift cars used indiscriminately in interstate and intrastate commerce. The decedent

was an engine hostler, whose duty was to coal, sand, water, and do the general hostler work engines required before and after service. Assuming, for present purposes, that one engaged in such work was employed in interstate commerce, as contemplated by the act, the fact is that the defendant did not meet his death while doing any act in or about the hostling of an engine. On the contrary, just prior to his death he left engine No. 106, which had come in for hostling and was standing over an ash pit, and walked some 150 feet up the switch track to the place where he was killed. The circumstances were these:

Shortly before, one Krueger, who was a machinist in a nearby machine shop of the railroad, was directed by his foreman to go to the point in question and take a yoke from a disused clam shell bucket and ship it to Bergen. Krueger found the bucket standing against a shanty in such a position that it had to be moved to enable him to remove a pin which held the yoke. Near by stood a Brown hoist or crane. This crane was mounted on a car, which was moved from place to place along the tracks and by means of a clam shell bucket, suspended from a swinging arm, the hoist lifted coal from a coal car and dumped it in the tenders of standing engines. The hoist had steam up at the time, but stood idle on the track about 150 feet from switching engine No. 106. Being unable to move the clam shell from the shanty, Krueger applied to Hancke, the engineer of the hoist, for help. Thereupon Hancke swung round his crane and lowered the clam shell bucket in use on the crane down to the clam shell desired to be moved. Krueger then fastened his clam shell to the hoist's clam shell and directed Hancke to lift it. This Hancke did, but in swinging it around he carried the bucket too far and dropped it on an ash pit track. Thereupon Kreuger had Hancke lift it again, so as to move it from the track. It was while it was being swung around, and while Krueger was steadying it with his hand to prevent it from twisting, decedent came up the track. Krueger testified that, beyond saying "Good morning" to him, and "What are you trying to do there?" he made no remark or request to the decedent, and indeed supposed he had gone into the shanty.

Another hostler, Maloney by name, was also injured at the same time and in the same way as decedent. Maloney's account of their employment and of the accident is as follows:

"X-Q. 238. Van Buskirk was what you call an engine hostler? A. An engine hostler. X-Q. 239. He took engines around the yard from time to time? A. Yes. X-Q. 240. And when he did that, didn't he do that under the orders of the yardmaster? A. Sure, from the yardmaster—got our orders. X-Q. 241. Van Buskirk got his orders from the yardmaster, too, didn't he? A. That's right. X-Q. 242. So that Van Buskirk was under the orders of the yardmaster? A. Under the orders of the yardmaster. * * * X-Q. 246. You and Van Buskirk went to work about what time in the morning? A. Six o'clock in the morning. X-Q. 247. Did you go together? A. Yes, sir. X-Q. 248. And you went to what is called the ash pit, did you not? A. Yes. X-Q. 249. Is that the place where engines are stationed in order to dump the ashes from them? A. Yes, sir. X-Q. 250. Was there an engine on the ash pit when you went there that morning? A. No, sir. X-Q. 251. How long did you stay around the ash pit? A. From 6 o'clock until 20 minutes after 8, up to the time of the accident. X-Q. 252. While you were there did an engine come to the ash pit? A. Yes. X-Q. 253. And stopped there?

A. Yes. X-Q. 254. Who brought that engine to the ash pit? A. Engineer McDonald. X-Q. 255. Did you see McDonald go away after he brought the engine? A. Yes. X-Q. 256. He left the engine on the pit and went away? A. Yes. X-Q. 257. Did Van Buskirk do anything? A. Van Buskirk got up on the engine after the engineer went away—on 106. X-Q. 258. On what part of the ash pit was the engine at that time? A. About the middle pile. X-Q. 259. How far was that from the Brown hoist? A. About 150 feet, I guess. X-Q. 260. Did you go up on that engine? A. No; I did not. X-Q. 261. Was it any part of your work to go on the engine? A. If he wasn't there, I would go and see how much water there was in the boiler. X-Q. 262. But Van Buskirk was there, and you did not go up? A. Yes. X-Q. 263. Was that engine watered while you were there, before the accident? A. No; it was not watered at all. X-Q. 264. Do you know whether the ashes were dumped from it before the accident? A. I couldn't tell you. I know two men were cleaning up. X-Q. 265. Some of the ash men? A. Yes. X-Q. 266. You don't know whether they finished or not? A. No. X-Q. 267. Was that engine coaled before the accident? A. No; she hadn't been started at all. X-Q. 268. Did you see Van Buskirk get down from the engine? A. No; I did not. I seen him come down and go from there; that's the last I saw him; he walked right by me. X-Q. 269. In which direction did he go by you? A. Going east. X-Q. 270. Was the engine still on the ash pit at that time? A. Yes, sir. X-Q. 271. Was there any one else in charge of that engine, outside of Van Buskirk? A. No; nobody but Van Buskirk. X-Q. 272. And as Van Buskirk went east, did he go by the bucket? A. Yes; he went on the other side of the bucket. X-Q. 273. The other side of the bucket? A. Yes. X-Q. 274. That's the time you saw him on one side? A. Yes; while I was on the west side. X-Q. 275. And, when he walked by you, had you yet started to shove the bucket? A. Yes; I started to put my hand against the engine. X-Q. 276. Who told you to shove the bucket? A. Nobody. X-Q. 277. Did you have anything to do with looking after that bucket? A. No, sir; I didn't have nothing to do with it at all. X-Q. 278. Why did you shove it? A. Because, I guess I must have been foolish. X-Q. 279. Was the yardmaster around at that time? A. No, sir. X-Q. 280. Had you ever shoved such a bucket before? A. No, sir; I never shoved the bucket before. X-Q. 281. Had you ever had anything to do with the bucket? A. No; I never had anything to do with the bucket; followed the engine. That was all I had to do. X-Q. 282. Had you seen Van Buskirk working around the yard for some time before he was hurt? * * * A. Yes, I worked with him for four or five years. X-Q. 283. Had you ever seen him have anything to do with the Brown hoist bucket? A. No; I didn't see him. I seen him under it; but he was not hired on that bucket. (Mr. Davis, in behalf of plaintiff, moved that the last part of the answer be stricken from the record, and the court so ordered.) X-Q. 284. When you saw Van Buskirk by the bucket, was that when the engine was being coaled? A. Yes, sir. X-Q. 285. Had you ever seen him have anything to do with running the bucket or operating the machine? A. He done it of his own accord. I see him going up there. X-Q. 286. On the bucket? A. No; but on the machinery that ran it. X-Q. 287. Was that while you were coaling the engine? A. Yes. X-Q. 288. That's while the engineer was up there? A. Yes."

From these facts and proofs it is clear that the bucket from which Krueger was taking the yoke was not in actual or contemplated interstate commerce use, that Krueger in attempting to remove such yoke was not employed in interstate commerce, and that the Brown hoist which he enlisted to help move the bucket was not, while so employed, an instrumentality used in interstate commerce. Such being the case, it follows that Maloney and Van Buskirk were not engaged in assisting Krueger in interstate commerce when the unfortunate accident occurred. It follows, therefore, that all the persons and all the agencies

connected with this accident were so distinctively noninterstate commerce in character that it was the duty of the court below on trial, and of this court now on appeal, to hold, under the undisputed facts, that as a matter of law the decedent was not engaged in interstate commerce when he was killed and that therefore the federal Employers' Liability Act, which imposes "damages to any person suffering injury while he is employed * * * in such commerce," does not apply in this case.

Between the filing of this opinion and its present publication the case of Shanks v. Delaware, Lackawanna & Western Ry. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. —, was decided by the Supreme Court. The conclusion reached by us is supported by that case.

The judgment below must therefore be reversed, and the case remanded for further proceedings.

VIRGINIA-CAROLINA CHEMICAL CO. et al. v. SHELHORSE et al.

(Circuit Court of Appeals, Fourth Circuit. November 10, 1915. Rehearing Denied December 21, 1915.)

No. 1374.

1. BANKRUPTCY ⊂⊃68—INVOLUNTARY PROCEEDINGS—PERSONS WHO MAY BE ADJUDGED BANKRUPTS.

Under Bankruptcy Act (July 1, 1898, c. 541, § 4b, 30 Stat. 547 (Comp. St. 1913, § 9588), providing that any natural person except a wage-earner or a person engaged chiefly in farming or the tillage of the soil may be adjudged an involuntary bankrupt, the question whether an insolvent is exempt depends upon his status as to occupation at the time the acts of bankruptcy were committed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. ⊂⊃68.]

2. BANKRUPTCY ⊂⊃68—PERSONS WHO MAY BE ADJUDGED BANKRUPTS—OCCUPATION OR BUSINESS.

S. was the owner of a gristmill which was formerly a fairly up-to-date mill, but which was never profitable under S.'s management, and the business of which had dwindled to a comparatively small volume. S. was unable to meet his obligations, and was also embarrassed by a suit against him for a large amount which he was charged with converting, and in July, 1914, while such action was pending, he confessed judgment to practically all of his creditors except those subsequently filing an involuntary petition in bankruptcy, and also committed other acts of bankruptcy. On the hearing on the petition he claimed that he was a wage-earner and introduced a written contract of employment showing that the term of service thereunder was to begin August 1, 1914. He testified without corroboration that by verbal agreement he commenced work May 1st on the same terms, but it appeared that he was still proprietor of the mill which was operated in his name by his sons and a "representative," that the mill was running with considerable regularity, grinding such corn as customers brought, supplying S.'s family and making small sales, and the facts also indicated that he must have been more or less occupied with the proceedings in the suit mentioned, and in meeting his financial difficulties. *Held* that, while the burden of proving that he was not a wage-earner was on the petitioning creditors,

the facts sustained this burden and showed that he had not become a bona fide wage-earner when he committed the acts of bankruptcy charged.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. ⟸68.]

3. BANKRUPTCY ⟸68—PERSONS WHO MAY BE ADJUDGED BANKRUPTS—OCCUPATION OR BUSINESS—"WAGE-EARNER."

While under Bankruptcy Act, § 4b, a farmer is exempt from involuntary proceedings whatever his other interests, if farming is his chief occupation, a wage-earner is exempt only when he actually pursues the calling which that term prescribes; and a "wage-earner" is an employé, and this implies service for another which is substantially exclusive.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. ⟸68.

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

Appeal from the District Court of the United States for the Western District of Virginia, at Danville; Henry Clay McDowell, Judge.

Petition in involuntary bankruptcy by the Virginia-Carolina Chemical Company and others, opposed by J. C. Shelhorse, the alleged bankrupt, and others. From a decree denying the petition, the petitioning creditors appeal. Reversed and remanded.

Louis M. Swink, of Winston-Salem, N. C., and J. Turner Clement, of Chatham, Va., for appellants.

R. I. Overbey and George T. Rison, both of Chatham, Va. (B. H. Custer, of Danville, Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The court below held that Shelhorse could not be put into involuntary bankruptcy because he was a wage-earner, and the correctness of that ruling is challenged on this appeal.

[1, 2] We take it to be settled, at least in this circuit, that the question whether an insolvent is exempt, under section 4b of the Bankruptcy Act, depends upon his status as to occupation at the time the acts of bankruptcy were committed. Counts v. Columbus Buggy Co., 210 Fed. 748, 127 C. C. A. 298. It seems indisputable that up to May 1, 1914, if not later, Shelhorse had always been in the nonexempt class; and it was prior to that date that he acquired the property and incurred the debts involved in this proceeding. This property was mainly real estate, consisting of a house and lot in Chatham, Va., worth about $6,500, and a gristmill some three or four miles distant, known as the Eagle Roller Mills, of the estimated value of $8,000, or thereabouts. Shelhorse paid $3,500 for a half interest about eight years ago, when he bought out his partner and became the sole owner. It was then considered a fairly up-to-date mill, for both wheat and corn, though situated on a small stream which furnished operating power only part of the time. It is not now a modern or economical plant. Other mills better equipped and more accessible are serving the same community and absorbing most of the local custom. For these and other reasons the business has dwindled to a comparatively small vol-

ume. It has never been profitable under Shelhorse's management, and of late years the losses have been large for a concern of that kind. In consequence the debts of Shelhorse increased and he became unable to meet his obligations. He was also embarrassed by a suit which the Virginia-Carolina Chemical Company was prosecuting against him for a large sum which he was charged with converting. This case was on trial before a master in the spring of 1914, and it was claimed, about the 1st of May of that year, that the evidence showed a liability approaching $10,000. This exceeded the sum for which the suit was originally brought, and on application for that purpose the court allowed amendment to cover an increased demand. The hearing then continued before the master, who later reported his findings and recommended judgment for upwards of $9,500, besides interest. In the meantime, on the 13th and 14th of July, Shelhorse confessed judgments to practically all his creditors, except the petitioners herein, and these judgments became liens upon his real estate. This confession of judgments, to say nothing of other things done by him about the same time, was undoubtedly an act of bankruptcy, if Shelhorse was then subject to adjudication; that is, if he was not exempt because he was a wage-earner. Within four months thereafter the petition in bankruptcy was filed. The formal allegation that he was not a wage-earner was denied by the answers of Shelhorse and the judgment creditors. The special master, to whom the matter was referred, and who took the testimony on the 19th of December, reported in favor of adjudication; but the District Court sustained exceptions to his report and dismissed the petition.

To support the contention that he was a wage-earner when the acts of bankruptcy were committed, Shelhorse called a member of the firm by which he was then employed, one Walton, who produced a written contract of employment and testified as follows:

"I am one of the proprietors of the Exchange Warehouse. My firm made a contract with J. C. Shelhorse to work for the warehouse on a salary of $1,200 a year. Mr. Shelhorse has no other employment, so far as I know."

But this contract, dated in January, showed on its face that the term of service provided for was to begin on the 1st of August, 1914. Later in the day, and after Walton had left town, as appears from the brief of appellee's counsel, Shelhorse testified that there was a subsequent verbal agreement under which he commenced work the 1st of May on the same terms and continued at work until the written contract took effect. There was no corroboration of his testimony as to this preliminary service, so to speak, and it is rather surprising that it was not mentioned by his employer. What Shelhorse himself says upon this point is confined to a brief and general statement. He did not tell when or with whom the verbal agreement was made, nor did he give any details as to where he had been at work or what he had done for the Exchange Warehouse during these three months. But giving due credence to his testimony in this regard, it must be taken in connection with other facts and circumstances which are undisputed. He was still the proprietor of the mill, however limited its business, and it was operated in his name. Early in May he

insured it as a going concern, though he says this was required by the bank to which the property was mortgaged. It was left in charge of his two sons and a colored man, whom he describes as his "representative." During the three months in question the mill appears to have been running with considerable regularity, grinding such corn as customers brought there for that purpose. It supplied the family of Shelhorse with some amount of mill products, and there were small sales of output from time to time. In short, there was a continuation of the business as previously conducted, though on a very small scale. Its returns had nearly reached the vanishing point, and Shelhorse had undoubtedly become aware that he must obtain a livelihood from some other source. As we see the matter, it was a period of transition from the pursuits of a manufacturer and trader, in which he had long been engaged, to the position of a salaried employé which he afterwards became. Moreover, he must have been occupied more or less during these months with the hearings and proceedings in the suit of the Virginia-Carolina Chemical Company, which he was defending, and in meeting the financial difficulties in which he was involved. It is a reasonable if not necessary inference from the record that the service performed by him for the Exchange Warehouse was not continuous or exclusive until some time after he committed the acts of bankruptcy charged in the petition.

Taking into account the facts to which we have referred, with other related circumstances, we are of opinion that Shelhorse had not acquired the status of a wage-earner, within the meaning of the Bankruptcy Act, when he confessed the judgments and did the other things which, if he was not then exempt, would constitute acts of bankruptcy. It is quite probable, and may be conceded, that his chief means of living after the 1st of May was the salary paid him by the Exchange Warehouse; but in our judgment this is not enough to show that when he confessed judgments to some of his creditors and paid others in full about the middle of July, he had effected a definite and settled change of occupation. To all outward appearance his activities at that time were much the same as they had been before, and those activities do not indicate that he had abandoned his previous pursuits and made himself a member of the wage-earning class. Strictly speaking, the burden of proof was upon the petitioners to show that Shelhorse was not a wage-earner when the acts of bankruptcy were committed; but this burden was sustained, as we think, by the presumptions arising from years of nonexempt occupation, from the apparent continuance of that occupation down to a later period, and from other facts and circumstances tending to identify him as a manufacturer and trader; and the probative force of this evidence was not overcome, in our opinion, by his unsupported testimony respecting his employment prior to the 1st of August. We are therefore constrained to hold that he had not become a bona fide wage-earner, such a wage-earner as is meant by section 4b, when he committed the acts of bankruptcy charged against him.

This conclusion is believed to be in accord with the weight of authority. Indeed, some decisions go to the extent of holding that the

question of exemption depends upon the status of the insolvent at the time his indebtedness to the petitioning creditors was incurred, and this view finds support in the standard text-books. In re Wakefield (D. C.) 182 Fed. 247; Tiffany v. La Plume Condensed Milk Co. (D. C.) 141 Fed. 444; In re Burgin (D. C.) 173 Fed. 726; In re Crenshaw (D. C.) 156 Fed. 638; Loveland on Bankruptcy (4th Ed.) vol. 1, 269, 270; Collier on Bankruptcy (10th Ed.) 128.

[3] The cases cited by the learned District Judge do not appear to be of contrary import. They all turn upon the question whether the insolvent was "engaged chiefly in farming," which seems to us quite a different proposition. A farmer is exempt from involuntary proceedings, whatever his other interests, if farming is his chief occupation; a wage-earner is exempt only when he actually pursues the calling which that term describes. The farmer works for himself; the wage-earner is an employé, and this implies service for another which is substantially exclusive. This characteristic difference between the two classes is clearly recognized in the language of section 4b. We think it decisive of this case, because we are convinced, after careful study of the record, that Shelhorse had not become a bona fide wage-earner when the acts of bankruptcy were committed, and is therefore not entitled to exemption. To sustain his plea, under the facts and circumstances shown in this case, would subvert the policy of the Bankruptcy Act and furnish a precedent for its easy evasion.

On the record here presented we hold that the petition should have been granted and Shelhorse adjudged a bankrupt. The decree appealed from is, accordingly, reversed, and the case remanded for further proceedings in accordance with this opinion.

Reversed.

GENERAL LIGHTERAGE CO. v. HANSEN.

(Circuit Court of Appeals, Second Circuit. November 2, 1915.)

No. 42.

1. MASTER AND SERVANT ⟸101, 102—MASTER'S LIABILITY FOR INJURY TO SERVANT—APPLIANCES.

An employer is required to exercise reasonable care to furnish safe appliances as well as a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192; Dec. Dig. ⟸101, 102.]

2. MASTER AND SERVANT ⟸212, 286—ACTION FOR INJURY TO SERVANT—NEGLIGENCE—ASSUMPTION OF RISK—QUESTION FOR JURY.

Plaintiff was employed on a lighter of defendant which, because it frequently carried packages of acid on deck, liable to leak through the hatch cover and damage cargo below, had been fitted with a drip-pan running on small wheels on angle-irons fastened to the underside of the fore and aft coamings so that it could be run under the hatch-cover when needed and out of the way when not. Sometimes it did not move readily, and it was then the custom for some one to step into it and start it by pushing. On one occasion, the mate being unable to start it, plaintiff was ordered to step in with him, and while both were in the pan it fell and plaintiff was injured. There was evidence that the

wheels rested on the angle-irons less than half an inch on each side. *Held*, that the risk from such construction was not one assumed by plaintiff, and that whether it constituted negligence on the part of defendant was properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 558, 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ⟸212, 286.]

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

Action at law by Charles Hansen against the General Lighterage Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This cause comes here upon appeal from a judgment of the District Court, Southern. District of New York, in favor of defendant in error who was plaintiff below. The action was brought to recover damages for personal injuries; the Employer's Liability Statute is not involved, the action being at common law. The jury brought in a verdict for the plaintiff.

Nadal, Jones & Mowton, of New York City (Edward P. Mowton, of New York City, of counsel), for plaintiff in error.

John C. Robinson, of New York City, for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff was employed on defendant's steam lighter James L. Morgan. On her forward deck was a hatch about ten feet fore and aft by eight feet across, provided with the usual hatch-cover. The vessel was used largely in transporting packages of acids from which there was leakage. When such packages were stowed on the hatch-cover the leakage would sometimes drip into the hold, doing damage to cargo and boat. To remedy this a drip-pan was installed under the hatch. This was moveable, being so arranged as to slide off from under the hatch when it was open and to be drawn back under the hatch when it was closed. To each side of this drip-pan there were attached three iron wheels two inches in diameter, which ran on the horizontal flanges of angle-irons, one angle-iron being underneath each fore and aft hatch coaming. Each angle-iron track was twice the length of the pan so that the latter could slide aft entirely clear of the hatch. When this drip-pan was installed it was supposed that because of the sheer and trim of the vessel it would always, when free, run aft and clear the hatch; therefore the only arrangement for moving the pan was a piece of rope attached to the forward end; the pan was drawn up by this rope until it was under the hatch, whereupon the rope was made fast. After the new device was installed it was discovered that it would not always work as had been anticipated; very frequently when the rope was cast off the pan would not run back by the action of gravity. When this happened one of the men had to stand in the pan and placing his hands against the coamings, or anything else, which would give him a purchase, he pushed the pan with his feet and thus started it out from under the hatch.

On the day in question, it being necessary to run the pan aft to clear the hatch, one of the men went below and cast off the rope. Thereupon the mate jumped into the pan from the deck, put his shoulder against some barrels and tried to start the pan aft by shoving with his feet. The pan did not start, whereupon, as plaintiff testified, the captain ordered him to get into the pan and give a hand to push it back. He did so and while the two men were thus pushing, the pan started to move, when just as it started it slid off the track and fell into the hold, carrying the two men with it. The mate was not injured but the plaintiff sustained a double fracture of the right ankle.

[1] There was much discussion on the argument as to whether the drip-pan was an "appliance" or a "place to work." It is not necessary to decide which it was; the employer is required to exercise reasonable care to furnish a safe appliance as well as a safe place to work. This was not an ordinary appliance, like a shovel or a pick, whose defects are obvious. It was a structural part of the vessel so arranged that whatever defects it might have were not appreciable by plaintiff. He certainly did not assume the risk of any such hidden defects when he stepped into the pan to move it in the way in which it was frequently moved. Since the verdict was for the plaintiff we must assume that as to every point where there is conflict of testimony the jury has found that the narrative of the witnesses upon whom plaintiff relies is the correct one.

[2] The jury were instructed as requested by defendant that they could not find against defendant unless the plaintiff established that the pan or its fastenings were defective and that defendant either had actual knowledge of the defects or that the defects had existed for such length of time that defendant must be presumed to have knowledge of them.

The width of the horizontal part of the angle-iron was about two inches. There was a dispute as to whether it was beveled off at the edge; and defendant's witness Thomas O'Brian admits it "had a round edge." George Thomson says that only half of the tread of the wheels rested on the angle-irons that "about half of the wheel projected outside of the edge of the angle-iron." The witness Thomas O'Brian says that the rolling surface of each wheel was from five-eighths to seven-eighths inches across. If only half of this wheel rested on the angle-iron there would be only five-sixteenths to seven-sixteenths inch on each side to hold the pan up. If this be so and the edge of the angle-iron was rounded, the margin of safety would be extremely slight; there would be only a trifle above a quarter-inch support on each side. Some unfavorable jar or thrust or twist might overcome so slight a support. It seems to us that a jury might fairly find that such a margin of safety was too small for reasonably prudent construction.

Assuming this to be a defect, it was there continuously from the day the pan was installed, and defendant might reasonably be charged in the knowing of its existence.

The defendant contends that the plaintiff and the captain were fellow servants and that if the captain was negligent in ordering Hansen on to the pan the defendant is not answerable for that negligence.

In reply it is sufficient to say that the plaintiff does not rest his right of recovery upon the negligence of the captain. It makes no difference whether he got on the pan under orders of the captain. He got on the pan in the course of his employment and what he did was in the performance of his work. There is nothing in the point raised that plaintiff was permitted to get before the jury evidence of conditions subsequent to the accident in relation to the track on which the pan ran. The only object of the questions and the only effect of such answers as were given was to elicit the fact that the parts of the structure were still in existence and under defendant's control; but the court expressly charged the jury that failure to produce them was not to be taken as a presumption against defendant for any purpose.

Exception was taken to a part of the charge on the ground that it might lead the jury to infer that a corporation defendant is liable for the acts of its agents, when an individual would not be liable for the acts of his agents. If the colloquial charge were susceptible of any such construction, the trial judge abundantly corrected it when his attention was called to it by the exception.

The amount of damages awarded is a matter which this court cannot consider.

Judgment affirmed.

ROBERTSON BANKING CO. v. CHAMBERLAIN.

(Circuit Court of Appeals, Fifth Circuit. January 4, 1916. Rehearing Denied February 7, 1916.)

No. 2739.

1. BANKRUPTCY ⊜461—REVIEW OF PROCEEDINGS—APPEALS—TIME FOR TAKING APPEAL.

Under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (Comp. St. 1913, § 9609), requiring appeals in bankruptcy proceedings to be taken within 10 days after the judgment appealed from is rendered, where the petition for an appeal accompanied by an assignment of errors was filed in the District Court within 10 days from the date of the decree and was promptly presented to a judge having authority to allow the appeal, the allowance of the appeal three days after such presentation and after the expiration of the 10 days related back to the date of the application, and the appeal was taken in time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–923; Dec. Dig. ⊜461.]

2. USURY ⊜60—USURIOUS CONTRACTS AND TRANSACTIONS—STIPULATIONS AS TO PAYMENT OF TAXES.

Code Ala. 1907, § 2082, subd. 7, provides that no mortgage on real or personal property to secure the payment of any debt shall be received for record unless a privilege tax equal to 15 cents on each $100 or portion thereof has been paid upon such instrument before it shall be offered for record, such taxes to be paid by the lender. *Held*, that a provision in a mortgage that such privilege tax shall be paid by the mortgagor does not render the contract usurious, as such an agreement does not enable the mortgagee to get more than legal interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 133; Dec. Dig. ⊜60.]

Appeal from the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Proceeding between the Robertson Banking Company and Marshall E. Chamberlain. From a decree, the Banking Company appeals. Reversed and remanded.

E. W. Pettus, of Selma, Ala. (Pettus, Fuller & Lapsley, of Selma, Ala., on the brief), for appellant.

George Pegram, of Faunsdale, Ala., for appellee.

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

WALKER, Circuit Judge. [1] The appeal is not subject to be dismissed because the order allowing it was made more than 10 days after the making and filing of the decree. The petition for an appeal, accompanied by an assignment of errors, was filed in the District Court within 10 days from the date of the decree, and was promptly presented to a judge having authority to allow the appeal. This was a presentation to the court which made the decree of the application for an appeal within the time allowed by the statute; and the order allowing the appeal, which was made on the third day after such presentation, has relation back to the date of the application therefor. Bankruptcy Act, § 25a; Farrar v. Churchill, 135 U. S. 609, 612, 10 Sup. Ct. 771, 34 L. Ed. 246; Credit Co. v. Arkansas Central Ry. Co., 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448; 3 Foster's Federal Practice (4th Ed.) § 508.

[2] It is apparent that the features of the decree appealed from of which complaint is made were largely due to the conclusion stated by the district judge in the opinion he rendered that the provision in the mortgage to the appellant for the payment by the mortgagors of the privilege tax required by the statute of Alabama (Code of Alabama 1907, § 2082, subd. 7) to be paid before such an instrument is received for record rendered the mortgage contract usurious, with the result of depriving the mortgagee of the benefits which accrue to a bona fide purchaser. That statute provides as follows:

"No mortgage, deed of trust, contract of conditional sales, or other instrument in the nature of a mortgage, which is given to secure the payment of any debt which such mortgage, deed of trust, contract of conditional sale, or other instruments of like character, shall be executed so as to convey real property or any interest in real property or personal property which is situated within this state, shall be received for record unless the following privilege taxes shall have been paid upon such instrument before the same shall be offered for record, to wit: Upon all such instruments which are executed to secure any indebtedness which shall not exceed one hundred dollars, there shall be paid the sum of fifteen cents, and upon all such instruments, which shall be executed to secure an indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one hundred dollars of said indebtedness or portion thereof, which is secured by said mortgage, * * * to be paid for by the lender."

The provision quoted is a revenue measure. Nothing in its terms indicates a purpose to deal with the subjects of interest and usury, which are governed by statutes previously enacted. Code of Alabama

of 1907, §§ 4619–4625. The Alabama decisions establish the proposition that there is nothing in the last-mentioned statutes which has the effect of rendering a mortgage or other contract for the loan or forbearance of money usurious because of the presence in it of a provision requiring the borrower to make outlays required to avoid risks or for services incident to making the mortgage or other instrument evidencing the debt an effective security to the lender for the amount of the loan and no more than legal interest thereon. Dubose v. Parker, 13 Ala. 779; Van Beil v. Fordney, 79 Ala. 76; Harmon v. Lehman, Durr & Co., 85 Ala. 379, 5 South. 197, 2 L. R. A. 589; Rapier v. Gulf City Co., 77 Ala. 126; Smith v. Bank of Enterprise, 148 Ala. 501, 42 South. 552; Kinard v. Hill, 154 Ala. 632, 45 South. 60. In the case of Dubose v. Parker, supra, the question presented was whether a note for the principal amount borrowed, and lawful interest, was rendered usurious by an independent but contemporaneous parol contract that the borrower should pay the state tax on the loan, which was one-fourth of 1 per cent. The court gave a negative answer to the question. In the course of the opinion it was said:

"The law has deemed it wise * * * to permit the lender to realize as profit 8 per cent. per annum for the loan of his funds. By the contract in question, he receives no more. The payment of the tax upon the loan is not very dissimilar from the payment of expenses for conveyances, which are usually borne by the borrower."

This reasoning is applicable to the case at bar. A result of the statute in question is to make the payment of the tax it imposes a prerequisite to the mortgagee having the benefit which results from the recording of his mortgage. A failure to record the mortgage subjects the interest acquired by the mortgagee to loss or impairment resulting from conveyances subsequently executed by the mortgagor or from the enforcement of liens upon the mortgagor's property otherwise subsequently attaching. So far as the mortgagee is concerned, the effect of recording his mortgage is to make it a better security than it would be if this precaution was omitted. It does not enable him to get more than legal interest. The payment of the tax is an incident to making the mortgage accomplish its authorized purpose of securing to the lender the amount of the loan and legal interest thereon. The presence in the statute in question of its concluding words, "to be paid for by the lender," does not make this case materially different from that of Dubose v. Parker. Evidently the state tax on the loan which was under consideration in that case was leviable against the lender, and, in the absence of a contract otherwise providing, was payable by him. The court was of opinion that this was not enough to require giving to the borrower's agreement to pay that tax the effect of making the loan contract a usurious one. The statute now under consideration does not forbid the making of an agreement by a mortgagor to pay the tax required to be paid before the mortgage is offered for record. As above suggested, there is nothing in that statute to indicate that it was any part of its purpose to deal with the subject of usury. We think that we would be withholding from the ruling made in Dubose v. Parker, supra, the weight which should be accorded to it by

us in considering the very similar question arising in this case under another Alabama statute if we failed to hold that the agreement of the mortgagors to pay the tax provided for by that statute did not have the effect of making the mortgage contract usurious.

It is apparent that the decree appealed from would have been materially different from what it is if the district judge had not entertained the view, expressed in the opinion he rendered, that the mortgage to the appellant was infected with usury. The conclusion is that that decree was erroneous.

It is reversed, and the cause is remanded for further proceedings not inconsistent with the conclusion above stated.

HEARD v. UNITED STATES.

DUNN v. SAME.

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

Nos. 4405, 4406.

1. CRIMINAL LAW ⟸789—INSTRUCTIONS—REASONABLE DOUBT.
   On a criminal trial, it was error to charge that it was not necessary for the government to prove every material allegation beyond a reasonable doubt, that it must prove them by evidence satisfactory to the jury, but that upon the whole evidence, before the jury could find defendants guilty, they must be satisfied of their guilt beyond a reasonable doubt.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1851, 1880, 1904–1922, 1960, 1967; Dec. Dig. ⟸789.]

2. CRIMINAL LAW ⟸1059—APPEAL—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS.
   Where the court charged that the government need not prove every material allegation beyond a reasonable doubt, that it must prove them by evidence satisfactory to the jury, but that upon the whole evidence, before the jury could find defendants guilty, they must be satisfied of their guilt beyond a reasonable doubt, an exception to that part of the charge "which dispenses with the proof beyond a reasonable doubt of every material allegation" was a sufficient exception.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. ⟸1059.]

3. CRIMINAL LAW ⟸1086—APPEAL—RECORD—MATTERS PRESENTED FOR REVIEW.
   The record in a criminal case showed in progressive recitals the usual and ordinary course of a trial. Immediately following the charge appeared a colloquy, in which the court inquired about exceptions, and in response counsel for the defense stated that he took an exception to a specified part of the charge. Further along the record recited that "thereupon the jury, after retiring, returned a verdict of guilty." *Held*, that it sufficiently appeared that the exception in question was taken at the trial, and while the jury were still in the box.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2770, 2772, 2794; Dec. Dig. ⟸1086.]

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Homer Heard and William W. Dunn were convicted of offenses, and they bring error. Reversed and remanded.

George W. Murphy, of Little Rock, Ark. (Edward B. Downie, Douglas Heard, E. L. McHaney, Hoeppner & Young, Robert L. Rogers, and John P. Streepey, all of Little Rock, Ark., on the brief), for plaintiffs in error.

W. H. Rector, Asst. U. S. Atty., of Little Rock, Ark. (W. H. Martin, U. S. Atty., of Hot Springs, Ark., on the brief), for the United States.

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

HOOK, Circuit Judge. [1] Heard was convicted of stealing from a railroad car certain packages of money, being interstate shipments by express (Act Feb. 13, 1913, c. 50, 37 Stat. 670 [Comp. St. 1913, §§ 8603, 8604]), Dunn of aiding and abetting him, and both of a conspiracy with the express messenger to commit the thefts (Penal Code [Act March 4, 1909, c. 321] § 37, 35 Stat. 1096 [Comp. St. 1913, § 10201]). At the trial the court pointed out to the jury the material allegations of the indictment and then charged them as follows:

"Now, gentlemen, it is not necessary for the government to prove every one of the material allegations beyond a reasonable doubt. It must prove them by evidence satisfactory to you that they are proven; but upon the whole evidence, before you can find them guilty, you must be satisfied of their guilt beyond a reasonable doubt."

A similar instruction was discussed and held erroneous in Spear and Porter v. United States, decided at this term.

[2] It is urged by the government that a sufficient exception was not taken. The record shows that one of the counsel for defendants said:

"I have no objection to any part of the charge except that, your honor, which dispenses with the proof, beyond a reasonable doubt, of every material allegation. I take an exception to that."

Manifestly the exception is plain and to the point.

[3] It is also contended that it does not appear the exception was taken before the jury retired. The record shows in progressive recitals the usual and ordinary course of a trial. Immediately following the charge of the court appears a colloquy in which the court asked counsel for the government and for defendants whether additional instructions were desired. Upon receiving negative answers, the court then inquired about exceptions to the charge given, and in response the exception in question was taken with others. Further along the record recites that "thereupon the jury, after retiring, returned a verdict of guilty," etc. We think it sufficiently appears that the exception was taken at the trial and while the jury were still in the box. New Orleans & Northeastern R. Co. v. Jopes, 142 U. S. 18, 21, 12 Sup. Ct. 109, 35 L. Ed. 919.

The other assignments do not merit discussion. Because of the error in the charge, the sentences are reversed, and the cause is remanded for a new trial.

JACOBS & DAVIES, Inc., v. ANDERSON, Collector of Internal Revenue.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 43.

INTERNAL REVENUE ⊂=9—EXCISE TAX ON CORPORATIONS—NET INCOME.

Two civil engineers formed a corporation for the prosecution of their business, with which they entered into a contract to devote their services to the business for stated salaries and providing that the net surplus profits should also be divided between them on the basis of their stockholding. *Held*, that the amount so divided could not be considered as compensation for services and as such deducted from the income of the corporation as an expense of the business, but that it constituted net profits of the corporation subject to the excise tax imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, § 6300).

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

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

Action by Jacobs & Davies, Incorporated, against Charles W. Anderson, Collector of Internal Revenue, Second District of New York. Judgment for defendant, and plaintiff brings error. Affirmed.

On writ of error to review a judgment entered March 3, 1915, upon a verdict in favor of the defendant pursuant to the direction of the court.

Guthrie, Bangs & Van Sinderen, of New York City (Howard Van Sinderen and Thomas C. Curtis, Jr., both of New York City, of counsel), for plaintiff in error.

H. Snowden Marshall, U. S. Atty., of New York City (Ben A. Matthews, Asst. U. S. Atty., of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. This action was brought to recover under the corporation tax law of 1909 sums aggregating $3,829.29 paid under the protest of the plaintiff, as taxes for the years 1909 and 1910. The business of the corporation, which was incorporated in April, 1909, is civil engineering, which business had previously been carried on by the parties individually. Prior to the enactment of the Corporation Tax Act of August 5, 1909, the partners entered into an agreement with the corporation to devote their time and energies to the corporation for a salary of $6,000 to be paid to each. The corporation also agreed to pay them on a percentage basis the net surplus profits, as defined in the agreement. The sixth clause of the agreement is as follows:

"In determining the amount of net surplus profits for division and distribution between the parties of the first and second parts under the terms of this agreement, the receipts shall be charged with the expense of conducting the business of the corporation, including said salaries and every share of profits which may be paid as compensation for services, except as hereinabove provided, and ten per centum of the remaining surplus profits shall be carried

to the credit of the dividend account, and declared and paid as a dividend on the capital stock of the corporation. The credit balance which shall then remain will be net surplus profits distributable under the terms of this agreement as above provided."

The amounts paid to the partners as "further compensation" was, during 1909, $73,136, during 1910, $204,810, and during 1911, $114,986.

The trial judge held that the parties by a series of agreements divided everything received as profits among themselves as though it were a case of partnership and not of corporation assets. They called these sums "compensation," but the court held that they must be treated as income of the corporation. To enable the company to deduct these amounts it must appear that they were paid as salaries for services actually rendered. If the payments were based upon the stockholdings of the parties, as we think they were, they cannot be considered as expenses of administration. They were not compensation, because the salaries of both the parties are fully provided for in the agreement of April, 1909. It seems plain that they were profits of the business and as such were subject to the tax. Their payment did not depend on the services rendered. Whether the stock was distributed among a large number of holders or only two, it can hardly be maintained that the amount paid out in dividends should be deducted in order to ascertain the amount of the net income of the corporation. That must be determined by deducting from the gross amount of the income all ordinary and necessary expenses actually paid within the year. The distribution of surplus profits was not an ordinary and necessary expense paid in the maintenance and operation of the business.

The judgment is affirmed.

DELLINGER v. WAITE-THRESHER CO.

In re FLOYD-SCOTT CO. OF BOSTON.

(Circuit Court of Appeals, First Circuit. December 10, 1915.)

No. 1146.

1. BANKRUPTCY ⟸191—RIGHTS OF TRUSTEE—APPLICATION OF STATE LAW.
   The rule applied that the validity of a lien for rent reserved in an unrecorded lease, as against a trustee in bankruptcy, is governed by the local law.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. ⟸191.]

2. BANKRUPTCY ⟸191—LIENS—VALIDITY—REGISTRATION WITHIN FOUR MONTHS BEFORE BANKRUPTCY.
   Under the laws of Rhode Island, a lien for rent reserved in a lease is good as against creditors, though the lease is not registered, and hence, under the provision of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838, invalidating transfers recorded or registered within four months before bankruptcy, if by law recording or registering is required, such a lien is good as against the

trustee in bankruptcy, though the lease is not registered until shortly before bankruptcy.

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

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

In the matter of the Floyd-Scott Company of Boston, bankrupt. From a decree (224 Fed. 987) allowing a claim of lien by the Waite-Thresher Company, Raymond P. Dellinger, trustee, appeals. Affirmed.

Clarence A. Barnes, of Boston, Mass., for appellant.

Charles W. Littlefield, of Providence, R. I., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This case relates to a lease of real estate in the state of Rhode Island, which contained for the lessor a reservation of personal property on the premises, to protect rent which might afterwards become due. The lessee went into bankruptcy, but failed to record the lease containing the stipulations about the personal property referred to until within four months before the filing of the petition in bankruptcy. The trustee claimed that, under the amendatory act in bankruptcy of 1910, he thus became entitled as such trustee to the personal property in question, free from the alleged lien, and after very careful consideration, and, indeed, reconsideration, and a thorough opinion of the learned judge of the District Court, the personal property was awarded to the lessor. Thereupon the trustee in bankruptcy appealed to us.

[1] We need add but very little to what has been said in the opinion of the District Court, which requires no elaboration of authorities to establish the proposition that the case is governed by local law, and the learned judge of the District Court so held.

[2] The amendatory bankruptcy statute in the matter referred to relates only "to the recording or registering of the transfer, if, by law, recording or registering thereof is required." Careful examination of the statutes of Rhode Island, and of Groton Manufacturing Company v. Gardiner, 11 R. I. 626, settles the fact that the statutory laws of Rhode Island, governing this instrument, so far as the alleged rights of the lessor are concerned, do not require any registration. That requisition is limited, so far as personal property is concerned, to mortgages. The other provisions for registration are limited to realty; so that there is nothing in the statutes requiring this lease to be recorded, so far as this lien is concerned. Also Groton Manufacturing Company v. Gardiner establishes the proposition, so familiar to the courts of the United States and to some others, that this contract gave the lessor an efficient equity, good against general creditors or a trustee in bankruptcy, as was held by the learned judge of the District Court in this case. It is true, as stated by the learned counsel for the trustee, that "the lease itself is voidable" for want of registry; and he claims that this renders all the terms of it voidable, although only incidental to leasing. This is an inconceivable proposition in law, because the lack of recording an instrument on an occasion of this

kind imperils only the rights of the purchaser, the lessee, or the mortgagee; so that, even if the recording statute did apply here, the lack of record would be effective only in a reverse direction from that which the trustee insists on.

The decree of the District Court is affirmed, with interest, and the costs of appeal are awarded the appellee.

Supplemental Opinion.

Since this case was announced, substantially the same questions came before the Court of Appeals and the Supreme Court in Bailey v. Baker Ice Machine Company,[1] per opinion announced November 29, 1915, and also in the Court of Appeals in 209 Fed. 603. The circumstances were not altogether the same; but the rules laid down by the Supreme Court were sufficiently broad to cover and approve the results reached by us in every particular. In neither case was there any obligation on the part of the creditor to record the instrument in question, so that in any event the time of recording the instrument was entirely an unimportant matter. Lawyers learn the rules touching these matters in the district of Maine, where, for more than two generations, the arrangements have been known as "Holmes notes"; and there seems to the bar to be no necessity for a long discussion in reference to them.

OWENS v. FARMERS' BANK OF ABBEVILLE.

(Circuit Court of Appeals, Fourth Circuit. December 17, 1915.)

No. 1393.

BANKRUPTCY ⊂=306—APPEAL—REVIEW—QUESTIONS OF FACT.

In an action by a trustee in bankruptcy to set aside an alleged preferential transfer made within four months prior to bankruptcy, whether the transferee had knowledge or reasonable cause to believe that the transferror was insolvent at the time of the transfer was a question of fact, and the finding of the referee and District Judge would not be disturbed, in the absence of a preponderance of opposing proof.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=306.]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston, in Bankruptcy; Henry A. Middleton Smith, Judge.

Action by Robert S. Owens, trustee in bankruptcy of the estate of the Abbeville Lumber Company, against the Farmers' Bank of Abbeville. From a decree for defendant, plaintiff appeals. Affirmed.

J. M. Nickles, of Abbeville, S. C., for appellant.

William P. Greene, of Abbeville, S. C., for appellee.

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

PER CURIAM. The referee found as a conclusion of fact that the appellee bank had no knowledge or reasonable cause to believe that

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

[1] 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. —.

the lumber company was insolvent when, on September 8, 1914, and within four months prior to its bankruptcy, it transferred to the bank a certain $1,000 note to apply upon or as security for a pre-existing debt. Accordingly he reported that the proceeds of the note, which had matured in the meantime and been paid into court, should be turned over to the bank. His report was approved and confirmed by the court below, and the trustee in bankruptcy thereupon brought this appeal.

The question presented is purely one of fact, and we are not persuaded that it has been erroneously decided. It appears to be true, as the appellant contends, that the particular facts testified to by the witnesses are undisputed; but it does not follow, and we cannot agree, that these facts are so convincing or of such probative force as to furnish no support for the inferences drawn by the referee and the learned District Judge. On the contrary, a careful review of the testimony satisfies us that there was at least a fair probability, taking all the circumstances into account, that the bank had no reasonable cause to believe, when the note in question was transferred, that the lumber company was insolvent, or that the transaction would give the bank an unlawful preference over other creditors. Certainly there is no such preponderance of opposing proof as to warrant a reversal by this court on the controlling question of fact.

The decree appealed from must therefore be affirmed.

O'ROURKE ENGINEERING CONST. CO. v. FOUNDATION CO.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 17.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—FOUNDATION CONSTRUCTION.

The O'Rourke patent, No. 678,581, for improvements in subterranean or subaqueous dam or foundation construction, claim 2, which covers "a plurality of caissons having removable and registering doors or wall sections in adjacent walls and having their adjacent walls secured together close to said removable doors or wall sections," was not anticipated, discloses patentable invention, and is entitled to a liberal construction; also, *held* infringed.

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

Suit in equity by the O'Rourke Engineering Construction Company against the Foundation Company. Decree for complainant, and defendant appeals. Affirmed.

On appeal from a decree of the District Court for the Southern District of New York holding valid and infringed claim 2 of Letters Patent No. 678,581 granted July 16, 1901, to John F. O'Rourke for improvements in subterranean or subaqueous dam or foundation construction. Claims 1 and 6 which were in controversy in the District

Court were held invalid, but the complainant has taken no appeal from the ruling of the court as to these claims.

C. C. Linthicum and D. Anthony Usina, both of New York City, for appellant.

William A. Redding and William B. Greeley, both of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The invention relates to the construction, below the surface, of walls, either water resisting simply or adapted as foundations to support the weight of superimposed structures. As these structures, particularly in lower Manhattan, are of steel and stone and are carried to a great height, it is manifest that the foundations, in order to support the immense weight imposed upon them, must be carried to a correspondingly great depth, often as low as sixty or seventy feet below the level of the street, until hardpan is reached. It is often necessary to carry the foundations into the hardpan or to the rock below the water-bearing strata. In order to do this work a pneumatic caisson is used. The working chamber of the caisson is a bottomless box with sides and roof air-tight and when in operation with sufficient air pressure to prevent water and quicksand from entering the interior under the cutting edge. In this way the lives of the workmen in the working chamber are made as safe as so dangerous an occupation will permit. The invention is intended principally for use in the construction of tall buildings and large piers but it is useful whenever it is desired to form, at considerable depth below the surface, a continuous wall or dam for the purpose of retaining earth or excluding the water of water-bearing strata. This is true whether or not it is also desired to support the weight of superimposed structures. The inventor says:

"The work of construction is carried on in suitable caissons, which may be placed one after another, that portion of the dam or foundation which is formed in one caisson being connected through the adjoining ends or walls of the caisson with that portion of the wall which is built in the adjoining caisson in such a manner as to make the two portions substantially integral, so that the whole dam or foundation when completed shall be practically continuous from end to end, no joints being left through which water may find its way from one side to the other."

The claim now in issue is as follows:

"2. A plurality of caissons having removable and registering doors or wall-sections in adjacent walls, and having their adjacent walls secured together close to said removable doors or wall-sections."

We have seldom been confronted with such incomplete, obscure and unsatisfactory drawings and descriptions as those of the patent in suit. Figure 4 of the drawings is the one which is supposed to illustrate the structure described in claim 2. The most important of all the details, namely the bolts which draw and hold the adjacent walls together are not indicated either by letter or figure, and other drawings are equally obscure. We are, however, convinced that the struc-

ture of the claim as explained by counsel and experts shows an improvement over those of the prior art and adds important elements of safety and durability in the construction of buildings requiring deep foundations. The old method of forcing packing between the blocks or piers of concrete or masonry to exclude the presence of water or quicksand was to pack the spaces between a row of piers with clay rammed into the joints or by driving piles between them. These methods were unsatisfactory when the piers were sunk to a great depth. In short, O'Rourke proposed to unite the concrete piers theretofore in use into one continuous wall of concrete so that the water on the outside could not seep through into the deep cellar within. It is unnecessary to attempt a further description of the invention as the diagrams attached to the appellee's brief make the construction of the claim sufficiently plain and are much more satisfactory than anything found in the patent.

What O'Rourke sought to accomplish, so far as claim two is concerned, was the connection of separate piers of concrete into a continuous water-tight wall, the piers being constructed by sinking caissons from the surface and excavating the earth below them. With this connection made and a homogeneous barrier constructed, quicksand and water can be excluded from the foundations and cellars of large buildings and from the piers of bridges.

It seems to be generally accepted by counsel and by the court below that the best reference produced by the appellant is the article in the Engineering Record describing the construction of the foundations of the Commercial Cable building. Does this article disclose beyond a reasonable doubt a plurality of caissons having removable and registering doors in adjacent walls with adjacent walls secured together close to the removable doors? We are compelled to answer this question in the negative. With the claim in issue before us it is easy to see how a skilled engineer could with little difficulty transform the Cable structure into the O'Rourke structure, but it is equally clear that the article in the Engineering Record does not show the continuous homogeneous wall of the patent and we are persuaded that it required something more than the skill of the calling to transform the earlier into the later structure. The argument that the continuous wall or dam of O'Rourke is there shown is based wholly on conjecture. The drawings do not show it, but do in fact show the direct contrary. Figure 23 which is a plan view of the Cable structure, seems to show a space between the piers. What the article in the Record actually does show it is not necessary to discuss in detail after we are fully convinced that it does not show, beyond a reasonable doubt, the structure of the claim in controversy. An inventor, seeing the Cable foundations, would perceive the importance of filling in the spaces between the piers with concrete, a skilled mechanic would not.

We agree with Judge Hand that nothing in the record invalidates the claim in controversy. We think infringement of claim 2 is clearly shown. The claim is entitled to a liberal construction and one which gives the patentee the benefit of his contribution to the art. The claim is in plain language and unless it is distorted from its obvious mean-

ing, when considered in connection with the description and drawings, there can be no doubt that the defendant infringes. Its structures and method of procedure are well illustrated by the drawings at pages 221–225 of the record, which are conveniently arranged in juxtaposition at the end of the appellee's brief. The elements of the claim are:

First: A plurality of caissons having removable and registering doors or wall sections in adjacent walls.

Second: Having their adjacent walls secured together close to said removable doors.

There can be no doubt that the defendant used the first element. It seeks to have the claim limited to "wall sections which are easily detachable without destruction." The difficulty with this construction is that there is nothing in the description to warrant it. The inventor was not required to limit his claim in a manner so unnecessary and there is nothing to indicate that he intended so to do. This is made clear by the opinion of the District Court as follows:

"I cannot think that because the ends were chopped out they were not removable. Agreeing that the parts so chopped were not 'doors,' it seems to me going very far to say that they were not 'wall-sections.' The defendant did not, it is true, go about the construction in the easiest way, but they got all the benefit of the structure, and they indubitably did remove the wall opposite the 'halfmoons.' Since the claim should not be limited in the methods by which the removability is to be accomplished, it would be an easy way to steal away its heart to use it in a somewhat inconvenient way."

It is unnecessary to add further to the opinions of Judge Hand.

We have not discussed claims 1 and 6 for the reason that they are not properly before us on this appeal.

The decree of the District Court is affirmed with costs.

KLAUDER-WELDON DYEING MACH. CO. v. GILES et al.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 135.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—YARN-DYEING MACHINES.

The Weldon patents, No. 659,906, for a yarn-dyeing machine, claim 1, as limited by its language and the prior art, and No. 645,698 for a mercerizing apparatus claims 1 and 2, also relating to dyeing machines, *held* not infringed on the showing made for preliminary injunction.

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

Suit in equity by the Klauder-Weldon Dyeing Machine Company against John H. Giles and another. From an order granting a preliminary injunction, defendants appeal. Reversed.

For opinion below, see 224 Fed. 515.

This cause comes here upon appeal granting preliminary injunction in a suit for the alleged infringement of two letters patent. The pat-

ents are No. 645,698 granted March 20, 1900, to Leonard Weldon for an apparatus for mercerizing, etc.; and No. 659,906, granted October 16, 1900, to the same patentee for a yarn-dyeing machine. The opinion of Judge Ray will be found in 224 Fed. 515.

A. D. Salinger, of New York City (C. J. Heffernan, of Amsterdam, N. Y., of counsel), for appellants.

Duell, Warfield & Duell, of New York City (F. P. Warfield and H. S. Duell, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. This is not a suit for unfair competition and we cannot see that, even if certain charges of unfair conduct which are made against the defendants be sustained by the proofs, there is any sufficient reason shown for holding that a particular device infringes the claims of a patent, when a study of the patent and of the device leads to a different conclusion.

In dyeing yarn, the skeins are immersed in a bath. The violent ebullition of the bath causes the fibers to mat together and greatly decreases the value of the dyed product. Each skein is, therefore, hung over two sticks located a sufficient distance from each other, the skein being stretched between them. Following the sequence of the arguments, the second patent (659,906) will be first considered. It describes two inventions, one of these deals with certain details of the dye tub and steam supply, which are not here involved. The other deals with a method for increasing or diminishing the distance between outer and inner yarn-sticks, whereby the yarn is stretched to a greater or less extent. The prior art effected this (as does the patent and as does the defendant) by fixing the outer sticks between one pair of wheels and the inner sticks between another pair of wheels of smaller diameter and then moving one pair of wheels, or the other pair, or both pairs, till the skein of yarn is sufficiently stretched, and then locking the wheels against further relative movement. The patentee thus describes this part of his invention:

"To provide means for increasing or decreasing the distance between the sticks that carry the skeins to accommodate skeins varying in length or to tighten the skeins after they are placed in position upon the sticks, I place the bearings for the inner circular series of sticks upon rings *E E'* loosely journaled in the arms of the large wheels *C C* or spiders, or on wheels loosely journaled on the spider-shaft, and provide means to move or rotate these rings or wheels, and thus rotate all the bearings at once on each ring toward or from the outer mates or sticks *D*. Said adjustable rings are held loosely in place by small angular pieces *b b*, etc., secured upon the inner faces of the arms of the large wheels. A lever *H* is pivoted upon a bar *h*, extending between two spokes on each large wheel, and is provided with a small slot *l* to receive a pin *L*. Near and upon the outer end of said lever is a spring-bolt *d*, which is adapted to engage a curved rack *e* on a bar *f*, also secured to and connecting the two spokes together. When it is desired to revolve one of the rings in either direction, it is only necessary to raise the bolt *d* and turn the lever *H* on its pivot to one side or the other and release the bolt to engage the rack and to hold the lever and ring in the required position."

The claim reads:

"In a rotary dyeing machine, the combination with the dye-tub, of a pair of wheels mounted on a shaft to turn in bearings on the dye-tub, an outer and inner circular series of sticks to hold the skeins, the inner series of sticks having bearings for their ends in revoluble adjustable parts, a lever connected with each of the parts to revolve the same, a bolt on the lever, and a rack to engage the bolt secured upon each of the wheels, as set forth."

Means for tightening or loosening the stretch by revolution of the wheels relatively to each other and for holding the wheels against further revolution were old. All that the patentee shows is one method of effecting this relative motion between the two pairs of wheels and their subsequent locking. His method is set forth specifically in detail, and his claim is limited by its language to those details of the structure. There is nothing in the record to indicate that the claim should be construed as being broader than he has made it. Down to and including the words "in revoluble adjustable parts" the device of the claim is old. Weldon's contribution to the art is "a lever connected with each of the parts to revolve the same; a bolt on the lever; and a rack to engage the bolt secured upon each of the wheels, as set forth."

In defendant's device there is a short rack on each inner wheel, each rack meshing with a pinion. The two pinions are mounted on a cross-shaft extending across the machine and having bearings in the spider arms of the outer wheels. The rotation of this shaft (through the pinions and short racks) turns the inner wheels relatively to the outer wheels to tighten or loosen the stretch of the yarn between the sticks. The shaft is rotated by a worm-wheel on the shaft, which meshes with a worm on a rod. The rod is mounted on one of the spiders of one of the outer wheels and extends radially outward beyond said outer wheel. It has a squared end and is turned by a removable wrench. When the rod is not being manually turned by the wrench the worm and worm wheel gear remain in position, thus locking the inner wheels against revolution.

The result accomplished is the same as that obtained by the levers, racks and bolts of the patent, but the means are different and not covered by the text of the claims. We are satisfied that the claim is not infringed unless it be given a very broad range of equivalents, to which, upon this record, it is not entitled.

In the other patent No. 645,698 the patentee states that his 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. Elsewhere in the description it is stated that when the large wheels are revolved in a certain direction various engagements of specified parts are brought about, as a result of which the smaller wheels revolve

in the opposite direction or relatively to the revolution of the large wheels.

The claims relied on are:

"1. The combination with the dye-tub, of a shaft, a pair of large wheels on the shaft carrying a series of yarn-sticks, a pair of smaller wheels on the shaft between the large wheels carrying the second series of yarn-sticks, and means for revolving the said small wheels simultaneously in one direction and relatively to the revolution of the large wheels, as set forth."

"2. The combination with the dye-tub, of a shaft, a pair of large wheels on the shaft carrying a series of yarn-sticks, a pair of smaller wheels on the shaft between the large wheels carrying the second series of yarn-sticks, means for revolving the said small wheels simultaneously in one direction while the large wheels are rotated in the opposite direction, and means to arrest the relative movement of the wheels during the continued revolution of said wheels, as set forth."

We do not think it necessary to quote further from the specifications or to elaborate the details of the structure. It seems to us very clear that the description and claims call for a device for changing the length of spacing between outer and inner yarn-sticks, when the machine is in operation; the actual revolution of the large wheels in one direction automatically causing a simultaneous revolution of the smaller wheels in the opposite direction. The structure is complicated and apparently lacks usefulness—it is asserted that in the fifteen years which have elapsed since the patent was issued no such machine has ever been made—but that "change of spacing during operation" was an essential element seems entirely clear. Defendant's device has no such feature, its change of spacing is made when the apparatus is at rest. It does not infringe.

Order reversed with costs.

FOUNDATION CO. v. O'ROURKE ENGINEERING CONST. CO.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 100.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—PNEUMATIC CAISSONS. The Moran patents, No. 759,388, claims 1 and 6, and No. 759,389, claims 2, 4, 7, and 9, both patents being for improvements in pneumatic caissons, *held* valid and infringed. Claim 6 of the latter patent *held* not infringed.

2. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—SHAFTING FOR CAISSONS. The Moran & Doty patents, No. 828,761 and No. 828,861, both for improvements in shafting for caissons, *held* valid and infringed.

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

Suit in equity by the Foundation Company against the O'Rourke Engineering Construction Company. Decree for complainant, and defendant appeals. Affirmed.

On appeal from a decree which held valid and infringed claims 1 and 6 of patent No. 759,388 granted to D. E. Moran, May 10, 1904,

for improvements in pneumatic caissons, and claims 2, 4, 6, 7, and 9 of patent No. 759,389, granted to the same inventor for similar improvements.

The District Court also held valid and infringed claims 1, 2, 4, 5, 6, 7, 10, and 11 of patent No. 828,761, granted August 14, 1906, for improvements in caissons to Moran & Doty, and also claims 1, 4, 5, 7, 9, 17, 18, and 19 of patent No. 828,861 for improvements in shafting for caissons granted to the same inventors.

D. Anthony Usina, of New York City, for appellant.

William A. Redding and William B. Greeley, both of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. [1, 2] Judge Hunt has made a clear statement of the improvements covered by the claims in issue and a careful analysis of the various defenses and alleged anticipations urged by the appellant. We agree with him except as to claim 6 of No. 759,389. This claim as originally inserted was as follows: "A caisson having a cutting edge of masonry." After the trial, but prior to the final submission of the case, the plaintiff filed a disclaimer which limited this claim to concrete, so that it read: "A caisson having a cutting edge of concrete." It is not contended that the alleged infringing structure has a cutting edge of concrete. All that counsel for the plaintiff asserts in this particular is that "the cutting edge of the Walker-Lispenard caissons is backed solidly by concrete and its face half concrete and half iron." In other words, the contention is that a cutting edge half iron and half concrete is a cutting edge of concrete. We are unable to agree with this contention, as the claim is expressly limited to a cutting edge of concrete.

The decree is affirmed, with costs, but with half costs only as to patent No. 759,389.

EQUITABLE TRUST CO. OF NEW YORK v. GREAT SHOSHONE & TWIN FALLS WATER POWER CO. et al.

(District Court, D. Idaho, S. D. November 17, 1915.)

No. 526.

1. CORPORATIONS ⊂⊃482—MORTGAGES—FORECLOSURE—AMOUNT OF INDEBTEDNESS.

The trustee under a corporate deed of trust securing bonds is not entitled to foreclose the deed of trust for the full amount of the bonds certified by it, where all of the bonds have not been put into circulation, as a bond does not become an obligation of a debtor until it is issued.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. ⊂⊃482.]

2. CORPORATIONS ⊂⊃470—BONDS—LIABILITY—"ISSUED."

A corporate bond is "issued," so as to become an obligation of the company, only when a third party acquires some right or interest therein, and, while there need not be an absolute sale, and the bond is issued

when put out as collateral, there must be an alienation of some interest therein, or the creation of some lien thereon.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⊂⊃470.

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

3. CORPORATIONS ⊂⊃482—MORTGAGES—FORECLOSURE—BURDEN OF PROOF.
While a trustee, suing to foreclose a corporate deed of trust securing an issue of bonds, need not show to whom bonds have been issued or by whom they are held, he has the burden of showing how many have been issued and are outstanding.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877-1888; Dec. Dig. ⊂⊃482.]

4. CORPORATIONS ⊂⊃482—MORTGAGES—FORECLOSURE—ISSUE.
While it would seem that, in a suit to foreclose a corporate deed of trust, the question whether bondholders are the absolute owners thereof or hold them as collateral may be raised and litigated prior to the decree of foreclosure and sale, where the corporation was making no defense, and, being insolvent, had no expectation of avoiding a sale or causing a redemption to be made therefrom, this question would be reserved until the distribution of the proceeds of the sale; appropriate qualifications and provisions guarding against injustice and against prejudice to rights which might otherwise be foreclosed being included in the decree.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877-1888; Dec. Dig. ⊂⊃482.]

5. CORPORATIONS ⊂⊃482—MORTGAGES—FORECLOSURE—DISTRIBUTION OF PROCEEDS.
On the distribution of the proceeds of a sale upon the foreclosure of a corporate deed of trust, one holding secured bonds as collateral security cannot demand an amount in excess of the actual indebtedness due him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877-1888; Dec. Dig. ⊂⊃482.]

6. CORPORATIONS ⊂⊃482—MORTGAGES—RIGHT OF GENERAL CREDITORS TO ATTACK MORTGAGE.
While a general creditor without an interest in or a lien upon mortgaged property of a corporation cannot intervene in a foreclosure suit or challenge the sufficiency of the mortgage, where, in a creditor's suit brought long before the institution of the foreclosure suit, a receiver was appointed of the mortgagor's property and the claims of general creditors were offered, allowed, and filed as valid, subsisting claims, such creditors could intervene and challenge the validity of the mortgage, as the appointment of the receiver placed the property in the custody of the law and prevented them from acquiring specific liens by means of attachment or execution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877-1888; Dec. Dig. ⊂⊃482.]

7. CORPORATIONS ⊂⊃477—MORTGAGES—CHATTEL MORTGAGES—STATUTORY PROVISIONS—"PERSONAL PROPERTY."
The property of a public service corporation devoted to the public service, such as the franchises and water rights of a power company, its generators, dynamos, switchboards, and other articles of equipment constituting essential parts of its generating, transmitting, and distributing system, as well as tools, implements, materials, teams, and conveyances necessary for the maintenance, repair, and operation of its system, are not to be regarded as "personal property" within chattel mortgage statutes but as constituting part of a single indissoluble unit; and hence a mortgage covering such property and the real estate of the corporation was not ineffective as to such property because of noncompliance with

Rev. Codes Idaho, § 3408, making mortgages of personal property void unless accompanied by an affidavit of good faith.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1857–1863, 1865–1869; Dec. Dig. ⊂⊃477.

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

8. CORPORATIONS ⊂⊃477 — MORTGAGES — CHATTEL MORTGAGES — STATUTORY PROVISIONS.

Supplies, materials, and tools in excess of the corporation's present needs, bills or accounts receivable, cash on hand or in bank, stocks of merchandise intended for sale to the public in the ordinary course of retail business, the capital stock of another corporation, a public ferry, and such articles of personalty as did not form constituent parts of the system and were not presently necessary to its maintenance and operation, were not within the operation of this rule, and where Rev. Codes Idaho, § 3408, was not complied with the mortgage was ineffective as to such property as against other creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1857–1863, 1865–1869; Dec. Dig. ⊂⊃477.]

In Equity. Suit by the Equitable Trust Company of New York, as trustee under deeds of trust made by the Great Shoshone & Twin Falls Water Power Company, against the Great Shoshone & Twin Falls Water Power Company and others. Decree for complainant in accordance with the opinion.

Murray, Prentice & Howland, of New York City, and Sullivan & Sullivan and Richards & Haga, all of Boise, Idaho, for complainant.

P. B. Carter, of Boise, Idaho, for defendant Great Shoshone & Twin Falls Water Power Co.

James H. Wise, of Twin Falls, Idaho, for defendant Hahn.

S. H. Hays, of Boise, Idaho, for receiver.

Karl Paine, of Boise, Idaho, for defendant Towle.

Martin & Cameron and Alfred A. Fraser, all of Boise, Idaho, for intervening creditors.

DIETRICH, District Judge. [1-5] Two general questions are presented: (1) For what amount is the plaintiff entitled to foreclose? and (2) upon what property? That bonds of the face value of $2,230,000 were duly certified, and later issued for value, and are now outstanding, is admitted. It is further admitted that no part of the principal thereof has been paid, and no interest subsequent to the coupons maturing May 1, 1914. These facts constitute a prima facie showing of an indebtedness of $2,230,000, besides interest thereon at the rate of 5 per cent. from May 1, 1914. Upon the other hand, there is evidence tending to show, and sufficient, I am inclined to think, upon which to base a finding, that nearly all of the bonds were issued, not absolutely, but as collateral only. There being no competent evidence that the collateral character of the holding has changed to absolute ownership, the question presented is whether an unqualified decree should go for the full face value of the bonds. At the oral argument it was urged that it was the right and duty of a trustee to foreclose for the full amount of the bonds which it has certified, regardless of

the question whether or not the debtor has put them into circulation. No authorities have been cited in support of this view, and being unable to appreciate the reasoning upon which it is based I must decline to accept it. A bond does not become an obligation of the debtor until it is issued, and it is issued when, and only when, a third party acquires some right or interest therein. True, there need not be an absolute sale; a bond is issued as well when it is put out as collateral. But to be issued there must be an alienation of some interest therein or the creation of some lien thereon. While the trustee is not bound to show to whom bonds have been issued, or by whom they are presently held, it must assume the burden of showing how many have been issued and are outstanding, for the aggregate of the outstanding bonds is the measure of its maximum recovery.

The real, and as it seems to me the only serious, question upon this branch of the case is whether the capacity in which outstanding bonds are held may be made an issue prior to decree and sale. The trustee says no, and directs my attention to certain cases, which, while tending to support its view, are seemingly far from being conclusive. It is to be noted that it is not a question merely of what presumptions may be indulged, or of the burden of proof, or the weight of evidence. If the trustee's contention is sound, it is incompetent for the debtor to raise such an issue at all, and evidence offered by it to show that bonds were issued only as collateral, and that the amount for which they are held is less than their face, is not receivable. Nor is it a question of the character or amount of the relief to which the collateral holder is entitled. Upon the one hand the trustee concedes that upon the distribution of the proceeds of sale the collateral holder cannot demand an amount in excess of the actual indebtedness due him; and upon the other hand it is doubtless true that up to the amount of such claim, and until it is fully discharged, he is entitled to share ratably with other bondholders upon the basis, not of the amount of his claim, but of the face value of the bonds. But if offered by the debtor can the issue touching the just amount of the collateral claim be ignored? There are logical and practical objections of the most serious character to the trustee's position. It here prays for a judicial determination of the amount of the indebtedness secured by the trust deed and for a sale of the property to pay the same. Admittedly the maximum of the debtor's obligation, where its bonds are held as collateral only, to secure notes which it has executed, is the face of the notes, and not of the bonds. How, then, can the court by its decree declare that the amount due is the full face of the bonds?

It is urged that the matter can be controlled upon the distribution of the proceeds of sale; but, aside from the illogical aspect of such procedure, suppose the debtor desires to avoid a sale, and is able to raise the amount of money it actually owes, but no more, within the period usually granted to it under the practice, before a sale can be made. Is it to be permitted to discharge its just obligation and thus save its property? And, if so, how, in the face of the decree, is the amount of the actual indebtedness to be ascertained? Are the con-

ditions at such a time any more favorable for the determination of the issue than they were before the entry of a decree? The parties before the court are the same. The pertinency of these inquiries is emphasized by portions of complainant's prayer. Referring to the supplemental bill, where the relief sought is more comprehensively and particularly stated, we find that it prays:

"That the court find and adjudge that the principal of the said bonds issued and outstanding as alleged in the bill of complaint herein, in the amount of $2,230,000, is due and payable," etc.

And again:

"That an account be had and taken of the bonds, interest coupons, and interest secured by said deed of trust and supplemental mortgages, and the amount due thereon, with the names of the lawful holders or owners thereof, be ascertained; that an account be taken of all property of every kind conveyed or pledged by said deed of trust and supplemental mortgages or intended so to be, whether acquired before or after the execution and delivery thereof."

And again:

"That the defendant, Great Shoshone & Twin Falls Water Power Company, and William T. Wallace as receiver of its property, may be decreed to pay, within a short time to be fixed by the court, to the holders of the bonds and coupons secured by said deed of trust and supplemental mortgages, or to your orator as trustee for said holders, the principal amount of said bonds and the defaulted interest thereon," etc.

Again, upon what basis is redemption from sale to be made if the property goes to sale? And is there to be a personal judgment over, for the entire difference between the face of the bonds and the proceeds of the sale, pursuant to the usual provision of a foreclosure decree? If so, manifestly the debtor will thus be adjudged to pay in excess of the amount of its actual debt.

While leaning toward the view that the issue may properly be presented and tried at this juncture of the proceeding, I am under the circumstances disposed to yield to the plaintiff's suggestion that it be reserved, with the understanding that the decree shall contain appropriate qualifications and provisions guarding against injustice and against prejudice to rights which might otherwise be foreclosed. The debtor is making no defense, and, being insolvent, it is quite apparent that it has no expectation of either avoiding the sale or causing a redemption to be made therefrom. Hence no serious practical difficulties need be anticipated.

[6] The second question arises out of the fact that the trust deed, which, under the laws of the state, is to be deemed a mortgage, is executed with the formalities only of a real estate mortgage, and is without certain requirements for, and is not recorded as, a chattel mortgage. By intervening creditors and by the receiver it is urged that as to the personal property which the instrument purports to cover, it is void; or perhaps, speaking more accurately, it is to that extent ineffective as against the claims of other creditors. In support of this view reliance is placed upon section 3408 of the Idaho Revised Codes, which declares that:

"A mortgage of personal property is void as against creditors of the mortgagor * * * unless * * * it is accompanied by the affidavit of the mortgagor that it is made in good faith," etc.

Admittedly no such affidavit was attached to or accompanies the trust deed. Against this defense the first point raised by the plaintiff is that neither the intervening creditors nor the receiver is competent to interpose it. The argument is that the receiver stands in the shoes of the debtor, and can assert no defense unavailable to it, and that the instrument, being undoubtedly valid as between the mortgagee and the mortgagor, is valid as between the mortgagee and the receiver, and further that the intervening creditors having no judgment or other lien upon, or interest in, any of the property, are without standing as parties, and cannot be heard to question the validity of the mortgage. It must be conceded that as a rule a general creditor without interest in or a lien upon mortgaged property cannot intervene in a foreclosure suit or challenge the sufficiency of the mortgage. But here, it is to be observed, a creditors' suit was brought long before the institution of the foreclosure suit, and a receiver was appointed therein to take charge of all of the mortgagor's property. In that suit the claims of these creditors were offered, allowed, and filed as valid subsisting claims against the estate. In Chemical National Bank v. Armstrong, 59 Fed. 372, 375, 8 C. C. A. 155, 28 L. R. A. 231, where a receiver had been appointed to take charge of the assets of an insolvent bank, Judge Taft, delivering the opinion of the court, said:

"It is manifest that it would utterly defeat the object of the Banking Act if, after the suspension, the assets remained subject to levy, execution, or attachment, and therefore that the passing of the assets into the hands of the receiver removes all the property of the bank from liability to process to secure satisfaction of judgments. Bank v. Colby, 21 Wall. 609 [22 L. Ed. 687]. The right which a creditor of the bank had before suspension of levying an execution to satisfy his judgment is gone, and for it is substituted a fixed and definite interest in the assets as a security for the payment of his debt, which it is the purpose of the Banking Act to reduce to money, and apply on his debt, with all convenient speed."

Referring to this case, the Supreme Court of the United States, speaking through Mr. Chief Justice Fuller, in Merrill v. Bank, 173 U. S. 131, 136, 19 Sup. Ct. 360, 362 (43 L. Ed. 640), said:

"This was in accordance with the decision of the Circuit Court of Appeals for the Sixth Circuit, in Chemical National Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231; Mr. Justice Brown and Circuit Judges Taft and Lurton, composing the court. The opinion was delivered by Judge Taft, and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolvent debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor, on proof of his claim, acquires a vested interest in the trust fund."

Recognizing the same principle, the Supreme Court of California, in Ruggles v. Cannedy, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371, gave it specific application to conditions analogous to those here presented. It is there said:

"In this case the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time

he was adjudged an insolvent. After that judgment, by force of the insolvency act itself, they were prevented from resorting to any proceeding in law or equity for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and when those claims were allowed and approved the questions involved in them became res adjudicata. The presentation, allowance, and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. Roan v. Winn, 93 Mo. 503 [4 S. W. 736]."

Only by giving effect to such principle can great injustice be avoided, for otherwise, at the suggestion and with the encouragement of the trustee, a general creditor could bring such a suit as was here brought, and secure the appointment of a receiver, and the property having thus been placed in custodia legis, other general creditors would be prevented from acquiring specific liens thereon through the levy of attachment or execution process, with the result that they would be disabled from attacking an invalid mortgage, while the trustee, taking advantage of their disability, could rest secure until, upon the maturity of its right to foreclose, it could appropriate the entire property to the discharge of its claim, notwithstanding the defect in its mortgage. It will therefore be held that the creditors were properly permitted to intervene, and that they have an interest which entitles them to challenge the mortgage.

[7, 8] The further contention is made by the trustee that the provisions of the chattel mortgage statutes of the state are not applicable to property such as is here involved, for the reason that while some of it, considered separately, falls within the definition of personal property, it is all to be deemed a single indissoluble unit, because of its necessary relation to the public purpose to which it is devoted. Within certain limits the view finds support in Hammock v. Farmers' Loan & Trust Co., 105 U. S. 77, 26 L. Ed. 1111, and Farmers' Loan & Trust Co. v. Detroit, etc., R. R. Co. (C. C.) 71 Fed. 29. See, also, Jones on Corporate Bonds and Mortgages (3d Ed.) § 137 et seq. While this is not a railroad property, it is devoted to the public service, and I am inclined to think is subject to the same considerations which were regarded as controlling in these cases; in the absence of a decision of the Supreme Court of the state to the contrary, I shall therefore apply the principle which they establish to the determination of the issue here. It may be added that the decisions of the state courts, where there are no controlling statutes, are wanting in harmony, with the weight probably against the view here adopted.

Complying with the suggestion made at the hearing, counsel for the interveners have incorporated in their brief a schedule in which specifically or generally they have inventoried what they deem to be personal property. By section 3054 of the Idaho Revised Codes real property or real estate is defined as embracing lands, mining claims, possessory rights to lands, ditch and water rights, and everything affixed or appurtenant to lands. Under this definition it is not apparent how the several water rights included in the list can be held to be personal property. But, however that may be, they clearly fall

within the principle of the Hammock Case. So also do franchises, and such items as generators, dynamos, switchboards, and other articles of equipment constituting essential parts of the mortgagor's generating, transmitting, and distributing system; also tools, implements, and materials, teams and conveyances, presently necessary for the maintenance, repair, and operation of the system.

The principle, however, does not extend to supplies, materials, and tools in excess of present needs; to bills or accounts receivable; to cash on hand or bank balances; to stocks of merchandise which are intended for sale to the public in the ordinary course of retail business; and apparently not to the capital stock of the Jerome Waterworks Company, or to the public ferry at Shoshone Falls; nor, generally speaking, to such articles of personalty as do not form constituent parts of the system, or are not presently necessary to its maintenance and operation—as to all of which the claims of the interveners will be recognized as being superior to the lien of the mortgage. The other property will be sold as a single parcel, but these items upon which it is held the creditors have a superior lien will be sold separately. Either party may, upon notice, introduce further evidence, at a date to be stated in the notice, prior to December 10, 1915, for the purpose of more completely identifying the property embraced in this latter class.

HOWARD et al. v. LINNHAVEN ORCHARD CO. et al.

(District Court, D. Oregon. December 13, 1913.)

No. 6882.

1. VENDOR AND PURCHASER ⟸337—REMEDIES OF PURCHASER—LIEN FOR PURCHASE MONEY.

A vendee under a contract for the purchase of real property has a lien on such property for the amount of the purchase price paid by him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 985–990; Dec. Dig. ⟸337.]

2. VENDOR AND PURCHASER ⟸337—ACTIONS BY PURCHASER—CONSTRUCTION OF COMPLAINT.

A complaint alleged that each of the complainants had contracted with one of the defendants, a corporation, for the purchase of a tract of land constituting part of a larger tract; that the corporation agreed to plant the tracts to trees for orchard purposes, and cultivate them for five years, and at the end of that time convey the tracts free from incumbrances; that it had virtually abandoned the project and was unable to carry out its obligations and would be unable to convey an unincumbered title; that each of the complainants had paid sums therein specified on their contracts; that the corporation was permitting unfounded and extravagant claims to be asserted against it and judgment liens to be secured to the irreparable injury of complainants; that it owed unsecured indebtedness to a considerable amount inferior in right to the claims of complainants; that, on account of the failure of consideration and the corporation's inability to convey a good title, the purchasers had each been damaged in the amount of their payments; that, on account of the facts, the complainants had refused to make further

payments and had rescinded their contracts, and on account of such refusal the corporation had attempted to declare the contracts and the payments thereon forfeited; that complainants had equitable liens on the tracts for the amounts paid. It sought a recovery of the amounts paid and a decree impressing a lien therefor on the land. *Held*, that the purpose of the complaint was to recover back the purchase money as for a breach of contract, and to impress the property with a lien, and not, as claimed, to rescind the contracts; there being no prayer for a rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 985-990; Dec. Dig. ⟸337.]

3. VENDOR AND PURCHASER ⟸123—ACTIONS BY PURCHASER—NATURE OF ACTIONS.

If the suit was one to rescind the contract, the cause was nevertheless equitable, and complainants would not be relegated to an action at law, though not entitled to a lien for the money paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 221-227; Dec. Dig. ⟸123.]

4. COURTS ⟸328—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

A corporation owning a large body of land, pursuant to a common scheme or project, contracted to sell small tracts to various purchasers by contracts similar and largely identical, under which it was to plant and cultivate the tracts for five years. It became unable to carry out its obligations and was permitting judgments to be obtained and would be unable to convey a good title, whereupon the purchasers sued to recover payments on the purchase price, to impress the land with a lien therefor, to have a receiver appointed, and to wind up the corporation's affairs. The corporation had given mortgages covering some of the tracts, some of which were covered by more than one mortgage. The amount sought to be recovered by each complainant was less than $3,000. *Held* that, where the only ground for invoking federal cognizance was diversity of citizenship, a federal court had no jurisdiction, as the contracts with the various purchasers were completely severable and wholly independent, and the amounts involved could not be aggregated to confer jurisdiction on a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. ⟸328.]

In Equity. Suit by W. I. Howard and others against the Linnhaven Orchard Company and others. On order to show cause why receiver should not be appointed and on motion to dismiss the complaint. Motion to dismiss allowed, and show cause ordered vacated.

The complainants, 25 in number, sue to impress a vendee's lien, each upon a separate tract or parcel of land for the amount advanced thereon, under separate contracts for purchase; it being alleged that the vendor has failed to comply with the terms of each contract on its part, and hence that the purchaser has the legal right to recover from it the amount of money advanced upon such purchase, and to have the amount impressed as a lien upon the land described in the contract.

The controversy grows out of a project entered upon by the Linnhaven Orchard Company, whereby the company, representing that it was the owner of about 2,500 acres of land, entered into separate and several contracts of sale with divers persons, whereby it agreed for a money consideration, payable in installments, to sell to the purchasers specified smaller tracts of its holdings, to plant the same to trees for orchard purposes, and to cultivate and keep the trees in growing condition for the period of five years, and at the end of that time to make conveyance, free from all incumbrances. According to the complaint, the company has failed in its venture, and is

unable to carry out its obligations imposed by its contracts of sale, and is in such a condition that it is, and will be at the end of the five-year period, unable to convey a fee-simple unincumbered title. The complaining purchasers have paid sums running from $300 to $2,400 upon their contracts, and it is for the amounts so paid that they seek a recovery and a decree impressing the land contracted for with the amount of the recovery.

It is alleged in the complaint, among other things, that each of the complainants entered into a contract with the Linnhaven Orchard Company for the purchase of a tract of land within said Linnhaven tracts, as thereinafter mentioned. Then follows a list of purchasers, giving the name of the purchaser, the tract contracted for, the date of the contract, the purchase price, and the amount paid. It is then further alleged:

"That defendant Linnhaven Orchard Company has virtually abandoned its orchard project and has ceased to exert any effort to protect or preserve its assets and properties, and is permitting unfounded and extravagant claims to be asserted against it and judgment liens to be secured against its properties, without objection or defense, to the irreparable injury of complainants; that complainants are informed and believe that the defendant Linnhaven Orchard Company owes unsecured indebtedness to a considerable amount, but complainants allege that such unsecured indebtedness is largely subsequent and inferior in right to the claims of the complainants; that said Linnhaven Orchard Company has no assets in addition to said land, except bills receivable upon which there could be realized not to exceed five thousand dollars ($5,000)."

After setting forth the particulars in which the orchard company has failed to perform the stipulations of the contracts on its part, the complaint continues:

"On account of the failure of said consideration, and on account of the inability of said defendant to convey a good unincumbered title to the respective purchasers for the land described in their respective contracts, each of said purchasers has been damaged in the amount of their payments upon said tracts, as above set forth and alleged. That on account of the failure of said Linnhaven Orchard Company to comply with the terms of said contracts with the said purchasers as aforesaid, and on account of its inability to convey a good title as aforesaid, each of said complainants has refused to make further payments upon his or her said contract and has rescinded the same; and on account of the refusal of said complainants to make said payments upon said contracts, said defendant Linnhaven Orchard Company has wrongfully attempted to declare said contracts and the moneys paid thereon forfeited. That by reason of the premises, said complainants have equitable liens upon said tracts for the amounts paid by said complainants upon the same pursuant to said contracts."

And finally the necessity for winding up the affairs of the orchard company and the appointment of a receiver is averred.

A number of mortgage-lien claimants are made parties defendant. Some, but not all, of the mortgages cover some of the tracts involved, and some tracts are covered by more than one of the mortgages.

The defendants having been directed to show cause why a receiver should not be appointed, the cause came on for hearing upon such order, and upon a motion to dismiss the complaint.

Veazie, McCourt & Veazie, of Portland, Or., and S. M. Endicott and W. C. Winslow, both of Salem, Or., for complainants.

Hewitt & Sox, Dan Johnston, Weatherford & Weatherford, and Hill & Marks, all of Albany, Or., and Roscoe P. Hurst, of Portland, Or., for defendants.

WOLVERTON, District Judge (after stating the facts as above). It was submitted that plaintiffs' right of action, whatever they had, was legal and not equitable. This upon the hypothesis that the true theory

of the complaint is that the plaintiffs have rescinded their contracts, and that, having rescinded, they could only have their actions at law to recover back what they had paid on their contract price.

[1] According to the great weight of authority, a vendee is vested with a lien for the amount of the purchase price paid upon a contract for the purchase of real property. By an equitable conversion, the purchaser becomes the owner of the land contracted for (equitable though his title may be), while the vendor retains the legal title, but in trust for the purchaser. Every advancement of purchase money increases the vendee's interest in the realty purchased, and there is no just reason why the vendee's right to a lien is not just as strong as that of the vendor. The principle upon which such a lien is founded is the same in either case. Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937, 127 Am. St. Rep. 862, 15 Ann. Cas. 819.

[2] While it is averred by the complaint that each of the purchasers has been damaged, and each has rescinded his or her contract, the complainants nevertheless claim an equitable lien, and pray that it be foreclosed and the property sold to satisfy their respective demands. There is no effort to have the court rescind the contracts. If such a purpose were in the mind of the pleader, he would certainly have asked for it in his prayer. This he has not done. Looking through the entire complaint, I am impressed that its true purpose and intendment is to recover back the purchase money for a breach of the contract and to impress the property with a lien for the amount of the recovery.

In this view the case of Davis v. Rosenzweig Realty Operating Co., 192 N. Y. 128, 84 N. E. 943, 20 L. R. A. (N. S.) 175, 127 Am. St. Rep. 890, is without application.

[3] But if the case at bar is one for rescinding the contract, the cause is equitable nevertheless, and plaintiffs would not be relegated to an action at law, although they might not be entitled to a lien for the money paid. See case last cited.

[4] The cause, however, must be dismissed for want of jurisdiction in a federal court to entertain it. The demand of no single one of the complainants equals $3,000, and, as the ground for invoking federal cognizance is diversity of citizenship, the amount in controversy becomes jurisdictional. The contracts of purchase entered into by complainants with the Linnhaven Orchard Company are several and distinct, and wholly independent one from the other. That is to say, each purchaser has contracted for a distinct tract or parcel of land, in which no other purchaser has an interest, and the terms of his contract relate to himself wholly, and are not interdependent in any particular upon any conditions of the contract of purchase of any other purchaser, so that each contract may be wholly performed and wholly executed by the parties to it without in any way affecting any other contract or any conditions imposed upon any other purchaser. True it is that the orchard company is the common vendor, and has contracted to sell by a common scheme or project, to dispose of a large body of land, and the form of contracts is similar, and we may say largely identical; but this does not detract from the complete severa-

bility and wholly independent character of the contracts. The land contracted to be sold comprises all the interest the purchaser obtained or was to obtain in the larger tract, and the sale of other tracts from the larger tract was in no way made dependent upon the interest acquired by the individual purchasers under their contracts. So that, from any viewpoint, the severability of the individual contracts one from the other is complete and independent, not in the least nor in any way interdependent.

Nor does the fact that some of these tracts have been mortgaged by the company, and some more than once, and that lands of the orchard company not contracted to be sold have also been mortgaged, with the mortgages in some instances overlapping some of the tracts under contract for sale, change or modify the severable character of the contracts themselves. Nor do such facts afford ground for uniting the causes of action in the sense that the amounts involved may be aggregated for conferring jurisdiction on a federal court. It may be convenient to unite all the causes of action for the purpose of marshaling the assets. But this does not signify, as each individual suing singly and separately may bring in necessary and proper parties for properly and adequately marshaling all the assets essential to determining the rights and interests pertaining to their individual purchases and the priorities relating thereto, or they might intervene in suits instituted for the foreclosure of these mortgages, for the purpose of setting forth their interests and having appropriate assets marshaled accordingly. The general rule applicable is stated by Mr. Hughes (Hughes, Fed. Procedure, 233) thus:

"Where there is more than one plaintiff, if the interests of the plaintiffs are joint, and not several, the entire amount will be taken into consideration in determining the jurisdiction; but if their interests are several, and they have merely joined for convenience in bringing the suit, then the amounts due to the different plaintiffs cannot be joined for the purpose of conferring jurisdiction."

It is so stated by Mr. Justice Bradley in Clay v. Field, 138 U. S. 464, 479, 11 Sup. Ct. 419, 425 [34 L. Ed. 1044]. After alluding to several cases from the Supreme Court, he says:

"The general principle observed in all is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

This was a case where the question of jurisdiction arose on appeal, but the rule is the same where jurisdiction is sought in a federal court of original cognizance. Thus it was said in Walter v. Northeastern Railroad Co., 147 U. S. 370, 373, 13 Sup. Ct. 348, 349 [37 L. Ed. 206]:

"It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in

this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff."

See, also, Wheless v. St. Louis et al., 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583.

The Walter Case was a suit by the railroad company to enjoin distinct assessments in several counties, and the Wheless Case a suit by lot owners to enjoin street assessments against distinct lots severally owned by the plaintiffs; and it was held in each instance that the several demands could not be aggregated for the purpose of giving the court jurisdiction. If such be the rule (and it is so adjudged) as it relates to a class "whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered," how much more cogent would be its application where, as in the present case, the rights not only arose out of entirely separate and distinct transactions, but have no relation whatever to any common fund or mass of property to be administered.

The motion to dismiss must be allowed, and likewise the show cause order will be vacated.

CONSOLIDATED INTERSTATE CALLAHAN MINING CO. v. CALLAHAN MINING CO. et al.

(District Court, D. Idaho, N. D. October 9, 1915.)

No. 628.

1. CORPORATIONS ⟸398—WHO MAY REPRESENT—DISPUTED ELECTION OF DIRECTORS.

Directors of a corporation, whose election was duly certified and who are in actual control of its affairs, although the validity of their election is disputed, must, until the question has been adjudicated by a competent tribunal, be recognized as its directors for the purposes of a removal of a suit brought against it in a state court.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1592–1594; Dec. Dig. ⟸398.]

2. REMOVAL OF CAUSES ⟸42—ACTIONS REMOVABLE—LOCAL SUITS.

A suit in a state court by stockholders against a foreign mining corporation, whose property is situated within the state and federal district, in which plaintiffs allege the invalidity of the election of the acting directors and seek to take the property out of their control through the appointing of a receiver, and which is in effect one to determine rights between rival groups of stockholders, is a suit to enforce a claim to property, of which the federal court is given jurisdiction by Judicial Code (Act March 3, 1911, c. 231) § 57, 36 Stat. 1102 (Comp. St. 1913, § 1039), where the other jurisdictional facts are present, and is removable by the defendant corporation.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 85; Dec. Dig. ⟸42.]

Ancillary proceeding for an injunction by the Consolidated Interstate Callahan Mining Company against the Callahan Mining Company and others. Petition granted.

John H. Wourms, of Boise, Idaho, Joseph McCarthy, of Spokane, Wash., Cotton, Neukom & Colton, of Duluth, Minn., and Graves, Kizer & Graves, of Spokane, Wash., for plaintiff.

M. A. Folsom, of Spokane, Wash., John P. Gray, of Cœur d'Alene, Idaho, and James E. Gyde, of Wallace, Idaho, for defendants.

DIETRICH, District Judge. This is an ancillary proceeding, brought by the petitioner, hereinafter called the Mining Company, to restrain the defendants from further prosecuting a suit in the state court against the petitioner, upon the ground that the court has lost jurisdiction of the cause by reason of its removal to this court. The petition for removal was filed by the Mining Company, named as the defendant in that suit, together with numerous individuals constituting two rival groups of stockholders, each claiming to be the regularly elected board of directors. In Traction Company v. Mining Company, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462, and Donovan v. Wells Fargo & Co., 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250, may be found a statement of the general principles under which the issue is to be adjudged. They are so well settled that it is unnecessary to discuss them here.

In the principal suit, which was brought by two stockholders of the Mining Company, it is shown that there is a question whether certain of the individual defendants therein named were elected directors of the company at an election held in Duluth, Minn., on the 16th day of August, 1915, or whether the other individual defendants were so elected. The election of one group was certified by the inspectors of election, and it is this group which is in control of the machinery and property of the corporation, and has possession of its records and seal. The plaintiffs, espousing the cause of the other group, set forth that those in control are either interested in, or are unduly friendly with, another corporation, the Metals Company; that they secured their election by unlawful means, and that, because of the election controversy and the impending struggle for possession and control, the corporate business, which involves the operation of a large and profitable zinc mine, will suffer irreparable injury, unless the court takes possession through a receiver. The prayer is that a receiver be appointed to take over and manage the entire business until the result of the election can be determined by a competent tribunal, and that thereupon the property and records be turned over to those who shall be held to have been duly elected. There is also a prayer that the result of the election be determined by the court in which the action was brought.

The Mining Company was organized under, and exists by virtue of, the laws of the state of Arizona. The election in question was, as already stated, held in Minnesota. None of the directors certified by the inspectors reside in Idaho, and no one of them has been served with process or has appeared in the suit. The other group, assuming to act upon behalf of the Mining Company, procured counsel to enter its appearance and to co-operate with the plaintiffs in securing the appointment of a receiver, and forthwith a receiver was appointed, without notice to the remaining individual defendants. Thereupon the di-

rectors, whose election had been certified, and who are in fact in control of the corporate business, caused the Mining Company to petition for the removal of the suit to this court, upon the ground that the complaint presents a separable controversy between it and the plaintiffs. Upon that assumption there doubtless exist the requisite diversity of citizenship and jurisdictional amount in dispute. Only one of the plaintiffs, however, is a resident of this district, and, as we have already seen, the Mining Company is a nonresident, and therefore, under the rule of Smith v. Lyon, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, it is conceded that the cause is not removable to this court over the objection of the nonresident plaintiff, unless it falls within one of the provisions of section 57 of the Judicial Code; that is, unless it is a suit "to enforce * * * claim to * * * real or personal property within" this district. And counsel apparently agree that this is the principal, if not the only real, question for discussion.

[1] True, it is suggested in the brief for the respondents that the Mining Company, having appeared, as we have already explained, and joined in the petition for a receiver, thus submitted itself to the jurisdiction of the state court, and therefore its petition for removal came too late. The point was not seriously pressed at the argument, and it may be summarily disposed of. For present purposes the allegations of the petition for removal must, under familiar principles, be deemed to be true, and upon the showing therein made the appearance was unauthorized. Until otherwise determined by a competent tribunal, the directors whose election was certified in due form, and who are in the actual control of the company's affairs, must be recognized as its directors. Their election may be voidable, but it was not void, and the question cannot be adjudicated upon a petition for removal. Hence for the time being the presumption of the regularity of the certificate of election must be deemed to be conclusive. Beard v. Beard, 66 Or. 512, 133 Pac. 797, 134 Pac. 1196.

[2] Turning now to the real question, does the issue between the plaintiff and the defendant company involve a "claim" to real or personal property, within the meaning of the statutory provision quoted? It will be borne in mind that the primary purpose of the statute was to enable federal courts to acquire jurisdiction of the persons of nonresident parties whose presence might be necessary to an adjudication of local actions touching the status of property within the district, in cases depending for federal jurisdiction upon diversity of citizenship. By implication it has been held to create an exception to the statutory rule, applicable to this general class of cases, requiring that they be brought in the district of the residence of one of the parties. Now, when we consider its primary purpose and the comprehensive terms in which it is couched, I am inclined to think it should receive a liberal construction, with a view to giving effect to the legislative intent. Otherwise, a party having a local cause of action clearly falling within federal jurisdiction could not prosecute it in a federal court, for

the reason that he could not bring his adversary into the only court having jurisdiction of the subject-matter. Logically it follows that, in considering its secondary purpose it must have the same construction. It is as broad for one purpose as it is for the other. In every case where it authorizes the constructive service of process it necessarily operates to create an exception to the general rule of the venue of actions. If, therefore, the issue between the plaintiffs and the defendant affects real or personal property within this district, and involves the status thereof in such a manner that, if the defendant could not be found in the district, it could be proceeded against upon constructive service, then the objection to the venue is without merit.

A search of the books has discovered no decided case which impresses me as being controlling, or even highly persuasive. With a measure of confidence the petitioner cites Schultz v. Diehl, 217 U. S. 594, 30 Sup. Ct. 694, 54 L. Ed. 896, Schultz v. Gold Mines Co. (C. C.) 158 Fed. 337, East Tennessee Co. v. Atlanta Co. (C. C.) 49 Fed. 608, 15 L. R. A. 109, State National Bank v. Syndicate Co. (C. C.) 178 Fed. 360, Brown v. Pegram (C. C.) 143 Fed. 701, Texas Co. v. Oil Co., 194 Fed. 1, 114 C. C. A. 21, and Jewett v. Trust Co. (C. C.) 45 Fed. 801. And the respondents cite Ladew v. Tennessee Copper Co., 218 U. S. 357, 31 Sup. Ct. 81, 54 L. Ed. 1069, Jones v. Gould (C. C.) 149 Fed. 153, and Central Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98. But, as I read these cases, they are all easily distinguishable in their facts.

If we now pass to an analysis of the complaint in the state court, what do we find? The Mining Company holds the legal title to, and has possession, and presumptively is entitled to continue in the possession and control, of a valuable mine in this district, which, it may be added, constitutes substantially all of the corporate assets. This property it holds for the use and benefit of its creditors and stockholders, but, subject to the obligations of this trust, it is vested with full proprietary power; neither creditors nor stockholders have the right to infringe upon its exclusive possession. The plaintiffs, as stockholders, have an equitable interest in, or claim to, the property, which, by this suit, they seek to protect against what they conceive to be an impending danger arising out of the alleged inability or incompetency of the corporation to discharge the duties of its trust. They do not sue upon behalf of the corporation or all other stockholders, but they bring the action in their own right, and thereby seek to change the status of the property. They would wrest it from its present possession and control, where the majority of the stockholders have chosen to put it, and place the management thereof in other hands. It is as if the beneficial ownership of real estate, the title to which, and the right to its management and control, were vested in a trustee for certain purposes, came into court alleging the incompetency of the trustee and prayed for his discharge and the appointment of another in his place.

The interests of the corporation are adverse to those of the plaintiffs. The issue between them involves the status of property within this district. The corporation claims the right to remain in the possession and control, and this claim the plaintiffs directly challenge.

To be sure, the source and nature of the plaintiffs' interests in the property are probably not in issue; but that fact is not controlling. Upon the basis of their conceded interest they predicate a claim which is *not* conceded, namely, the claim that they have a right to take the property out of the defendant's hands. And that is a claim to property in the district, which by the suit they are attempting to enforce. The effect which the granting of the relief prayed for would have upon the defendant's relation to the property cannot be ignored. The plaintiffs would take the property from the corporation as now organized for an indefinite length of time, place it in the hands of a receiver, and ultimately turn it over to the corporation differently organized. The remedies of mandamus, replevin, and ejectment could not effect a more complete change of possession than that here sought. It is true the plaintiffs' theory of the nature of the action is not entirely clear, and in a possible view which may be taken the receivership can be regarded as furnishing only a provisional remedy. But it is conceded to be doubtful whether the state court has the power to inquire into or determine the controversy between the contending groups of directors, and therefore one branch of the prayer is that the property be kept in the custody of a receiver until that issue can be adjudicated by *some competent* tribunal. Having regard only for that branch of the relief sought, the ultimate, and indeed the sole, purpose of the suit would be to oust the defendant of possession. Change of possession through the receivership would not be merely a provisional remedy, for such change would be the ultimate, as well as the intermediate, purpose and effect of the suit; and in considering the jurisdictional aspect of a suit the maximum relief prayed for, and not the minimum, is to be taken as the criterion.

But if we take the most favorable view to the plaintiffs which they have suggested, we have only the proposition that a court of equity having jurisdiction upon some other ground may *incidentally* determine the validity or result of an election. In that view it would follow that this proceeding can be maintained in the state court only because it affects the status of property situate within the territorial jurisdiction of that court. In other words, proceeding upon its ordinary jurisdiction to protect and safeguard trust property in the state, or in the district, the state court or this court may incidentally pass upon the validity of a corporate election. I do not understand that counsel for the respondents contend that either court can exercise primary jurisdiction over the election controversy. There must be some other issue of equitable cognizance to which this is a mere incident. The Mining Company was not organized in this state, but is a foreign corporation; the election was not had here, and no meetings are held or records kept here. Few, if any, of the directors or other officers reside here. Now, if we were to add to these conditions the further one that the corporation holds no property here, would any one assert that the courts of or in the state would have jurisdiction in an independent suit in equity to determine a controversy between contending groups of persons, each claiming to be the duly elected board of directors? If under such conditions such an action could not be maintained, then,

whether the receivership be the ultimate, or only a temporary, object of the suit, jurisdiction either in the state court or in this court rests primarily upon the fact that the status of property located within the territorial jurisdiction of the court is involved, and that the action exhibits a controversy over, or a claim to, such property.

Notwithstanding my first impression to the contrary, and a natural reluctance to adopt a view out of harmony with that of the state court, upon reflection the conviction has grown upon me that the issue between the plaintiffs and the defendant company involves a claim to property in the district, and that therefore the objection to the venue is not well taken, and a restraining order should issue as prayed for. The question is not free from great perplexity, and if there are considerations which, to the respondents, may seem to have been overlooked by me, they may be urged upon a motion to remand.

I have not the benefit of counsel's views touching the amount of the bond which should reasonably be required. I therefore fix it at $10,000, reserving the right upon a showing, either formal or informal, to increase it at any time.

Perhaps it should be added that I have not been able to see the pertinency of those portions of the complaint in which it is charged that the Metals Company has exercised an undue influence over the directors of the Mining Company. It is alleged that certain contracts entered into were, from the standpoint of the Mining Company, improvident, if not fraudulent, but no relief is sought upon this head. The Metals Company is not made a party, and besides the plaintiffs pray that the receiver to be appointed be directed to abide by and perform the company's contracts.

In re BROWN.

(District Court, W. D. Kentucky. November 18, 1915.)

1. COURTS ⟸347—FEDERAL COURTS—PLEADING—DEMURRERS.
   Demurrers in equity cases are abolished by the new equity rules, and moreover are inappropriate to the various steps in bankruptcy proceedings.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⟸347.]

2. BANKRUPTCY ⟸400—EXEMPTIONS—SETTING APART.
   The setting apart of exempt property to the bankrupt, and the sale of real estate in which a homestead is claimed, if indivisible, should always be promptly attended to by the trustee, and the referee should see that this is done.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670–675; Dec. Dig. ⟸400.]

3. BANKRUPTCY ⟸342—ALLOWANCE OF CLAIMS—PETITIONS FOR RECONSIDERATION—WITHDRAWAL.
   The claim of a mortgagee was allowed by a referee in bankruptcy as a secured debt, and the trustee filed a petition for a reconsideration and disallowance of such claim. The matter was brought to trial, such testimony as was offered was heard, and after argument the referee announc-

ed his judgment and conclusions, and thereafter entered a decree denying the trustee's petition. Before the decree was entered, but after his announcement of his decision, the trustee moved to dismiss his petition without prejudice. *Held*, that it was within the discretion of the referee at this stage of the proceeding to refuse to permit such dismissal, especially as the trustee desired such dismissal in order that he might litigate with the bankrupt questions concerning the bankrupt's claim of homestead in property covered by the mortgage, a matter with which he had no concern.

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

4. COURTS ⊂⊃335—UNITED STATES COURTS—CONFORMITY TO STATE PRACTICE.
While the state practice governs largely in common-law cases, it does not govern or control in equity cases.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 902–907½; Dec. Dig. ⊂⊃335.]

5. BANKRUPTCY ⊂⊃400—EXEMPTIONS—SETTING APART.
The bankruptcy court can do nothing more than set apart to the bankrupt property exempted by the state law, and whether any creditor has a superior right in or to the exempt property is a question to be litigated in the state courts, and not in the bankruptcy courts, though a bankrupt's discharge may be delayed for a reasonable time to enable the state court to settle such questions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670–675; Dec. Dig. ⊂⊃400.]

6. BANKRUPTCY ⊂⊃400—EXEMPT PROPERTY—RIGHTS OF TRUSTEE.
A trustee in bankruptcy has nothing to do with exempt property, and, while creditors may litigate in the state courts the question of their superior right in such property, the trustee cannot do so.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670–675; Dec. Dig. ⊂⊃400.]

7. BANKRUPTCY ⊂⊃184—RECORDING—NECESSITY AS AGAINST CREDITORS.
Under the Kentucky recording statute, a mortgage executed by a bankrupt, though unrecorded, has priority over creditors who have not in the meantime attached the land.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. ⊂⊃184.]

In Bankruptcy. In the matter of James Henry Brown, bankrupt. On trustee's petition for a review of an order of the referee. Petition dismissed, and order approved and affirmed.

J. C. Erwin, of Murray, Ky., and Arthur Y. Martin, of Paducah, Ky., for petitioning creditors.

J. P. Holt, of Murray, Ky., for bankrupt.

EVANS, District Judge. S. O. Miller, a creditor of the bankrupt, filed his proof of debt upon a note dated April 21, 1909, for $425, due April 21, 1910, with interest from date until paid, subject to a credit of $136. Payment of the note was secured by a mortgage executed simultaneously with the note upon certain real estate. The mortgage was not recorded until March 1, 1915, only a short time before the adjudication in bankruptcy on April 20, 1915. The referee allowed the claim as a secured debt.

The trustee filed a petition before the referee, praying that the claim be reconsidered, and that it be "disallowed in so far as it is sought to

have a lien adjudged on said land, or the proceeds thereof, until after the payment of the general indebtedness of said bankrupt, or such debts as were created without notice of the lien herein claimed." Subsequently the trustee filed an amendment to his petition, wherein he prayed "that said claim, if allowed herein, be allowed only as against the interest of the bankrupt in said proceeds, and so as not to prejudice the rights of the general creditors of said estate, and he further prays as in his original petition."

[1] We ignore certain demurrers to these petitions, because by the new equity rules demurrers were abolished in equity cases, and besides we had previously held them inappropriate to the various steps taken in bankruptcy proceedings.

[2] It appears that the real estate embraced in the mortgage to Miller was estimated by him in his schedules to be worth $1,300. He therein claimed a homestead, and showed himself to be a housekeeper with a family, consisting of a wife and several children, and stated that he, with his family, had previously occupied, and did then occupy, the premises as a homestead. The right to have this property to the extent of $1,000 exempt from the payment of his debts inures to the bankrupt under the provision of section 1702 of the Kentucky Statutes. Whether any steps have been taken by the trustee to set apart the homestead to the bankrupt is not shown by the papers sent up with the petition for a review now under consideration, although one of the first concerns of the trustee should always be promptly to set aside to the bankrupt any exempt property. If the real estate in which the homestead is claimed be indivisible, steps should be taken to have it sold. These things should always be promptly attended to by a trustee, and the referee should see that it is done. Here it appears that the trustee has rather been inclined to litigate with the bankrupt as to his rights in the homestead, and to claim for the trustee and creditors some rights either in the whole homestead or in such parts of it as might remain after the satisfaction of Miller's debt.

[3] The petition of the trustee for a re-examination of the claim of Miller was filed June 2d, and the amendment to it on August 6th. Efforts were made to have the matter disposed of, during which, on June 12th, certain facts were agreed to by stipulation in writing in these terms, to wit:

"It is stipulated as an agreed statement of facts, for the purpose of the trial and determination of the trustee's petition for the reconsideration and rejection of the mortgage claim of S. O. Miller, on the real estate of the bankrupt, in so far as the same is a lien as against the creditors herein: That the said mortgage debt was made in good faith, and for a present valuable consideration, to wit, money loaned, and that the mortgagee failed to record his mortgage until March 1, 1915, by neglect, and did not purposely secrete the same, nor have any agreement with the mortgagor, or other persons, to withhold the same from record, or to defraud the creditors herein, or other persons, by doing so; that the creditors of the bankrupt herein had no knowledge or information of the existence of said mortgage, until after their debts against the bankrupt had been created, and extended credit to the bankrupt without knowledge or information of the said mortgage lien existing against his said real estate. The creditors knew, at the time they extended this credit, the bankrupt owned this real estate, but did not know of the existence of

this mortgage, and extended credit in part because of their knowledge of his ownership of this real estate, and not knowing of the existence of this mortgage."

It is nowhere claimed that any of the bankrupt's debts were created before the purchase of the land or the erection of the improvements thereon (section 1702), nor is it claimed that any creditor had sued out any attachment against the property or caused it to be levied thereon.

At last the matter was brought to trial on October 21st. The referee then heard such testimony as was offered, and, after argument, announced his judgment and conclusions thereon, but said that he would dictate his order and enter it the following day. On October 22d, before the decree was in fact entered by him, the trustee moved to dismiss without prejudice his petition for a re-examination of Miller's claim and its disallowance, the referee overruled the latter motion of the trustee, and entered the decree denying the petition to reconsider and disallow Miller's claim pursuant to the decision announced on the 21st, but which he took time to draw up in form. He embraced in the decree a clause overruling the trustee's motion to dismiss his petition without prejudice.

The trustee then filed this petition to have reviewed by the court so much of the order of the referee entered on October 22, 1915, as refused to allow him to withdraw his petition for a reconsideration and disallowance of Miller's claim, or else to dismiss the same without prejudice. The other portions of the referee's order of the date last named are not complained of or directly sought to be disturbed by the petition for a review. The trustee manifests his purpose to pitch the controversy here upon the question of his right to dismiss his petitions filed June 2d and August 6th without prejudice.

We think it was well within the discretion of the referee, under the facts stated, to refuse, at that stage, to permit the trustee to frustrate the whole purpose of the trial by dismissing his petition, after speculating upon the chances of obtaining the referee's favorable decision upon the case he had brought, and which the referee had already decided against him, although there had been no formal entry of an order upon the decision he had announced. Ordinarily a plaintiff may dismiss his suit, but in cases where it has gone as far as in this instance, and where great injustice might be done, the trial court has a discretion which may be exercised. See the opinion of the Circuit Court of Appeals, delivered by Judge Taft, in City of Detroit v. Detroit City R. R. Co. (C. C.) 55 Fed. 569, 572, and Pullman Car Co. v. Transportation Co., 171 U. S. 138, 146, 18 Sup. Ct. 808, 43 L. Ed. 108.

[4] We think the referee was well within his discretion when, under all the circumstances, he concluded that the attitude and position of this case were such as called for the defeat of the attempt of the trustee to get out of court after the announcement of the decision against him whereby he found that there was no chance to obtain the relief he sought. It will be remembered that the rule in such cases prescribed by the Kentucky Code of Practice, while we believe it does

not vary from what we have stated, cannot be applied, as such, in equity cases in the courts of the United States. The Code of Practice governs us largely in common-law cases, but it does not govern nor control us in equity cases.

[5, 6] It may strengthen our conclusion to recall that the bankrupt court can do nothing more than cause to be set apart to the bankrupt the property which the state law exempts from his debts. Whether any creditor has, under certain conditions, a superior right in or to the exempt property, is a question to be litigated in the state courts, and not in the bankruptcy courts, though the latter is authorized to delay the bankrupt's discharge for a reasonable time to enable the state court to settle such questions. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. Otherwise the trustee has nothing to do with exempt property, and his attempt to obtain an opportunity in this instance to litigate questions with which he, as trustee, can have no legitimate concern, by dismissing his petition for a reconsideration of Miller's claim presents a situation which might well have influenced the discretion of the referee. Creditors may litigate such matters in the state courts, but the trustee cannot, for the reason that he, as trustee, has no concern with them.

[7] Again, further justification of the referee's exercise of discretion is found in the opinion of the Supreme Court in Holt, Trustee, v. Crucible Steel Co., 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756, which has conclusively established for this court the proposition that Miller's mortgage has priority over any of the bankrupt's creditors, although not recorded, because no one of them, in the meantime, had attached the land. The recording statute of Kentucky was held in that case to be ineffective unless an attachment had been sued out by the creditor claiming its benefits. So that under that case the trustee, who acts only for the general creditors, can have no rights here. Those creditors have no rights in the exempt property which can be enforced here, even in their own names, and the trustee has no rights at all in such property. 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061.

It appears that the bankrupt and his wife joined in the mortgage to Miller, and that they therein waived the benefit of the homestead exemption. But his waiver was solely for the benefit of Miller and for the security of his debt alone. To hold that Miller should be confined to the homestead, so as to give other creditors the right to the entire surplus, would be to hold that the bankrupt and his wife waived the homestead exemption for the benefit of all the creditors, instead of for Miller alone. The statute (section 1706) hardly permits a construction so latitudinous, but in the absence of controlling interpretation to the contrary by the Court of Appeals it might most plausibly be held that, in order that any particular creditor may have the benefit of a waiver of the homestead exemption, there must be a direct waiver in favor of his particular debt.

A waiver of homestead rights in favor of all creditors cannot be worked out through a waiver made to one creditor only, nor can the latter form of waiver entitle all creditors to a right to marshal securi-

ties or funds. These propositions are not now decided, but a statement of them shows how very suggestive they become, in view of the general and well-settled rule that exemption statutes should be liberally construed in favor of the exemptions given.

Without pursuing the subject further, we conclude that the referee did not abuse his discretion. The petition for a review of his order should be dismissed, and the order sought to be reviewed should be, and it is, approved and affirmed.

In re SAFADY BROS.

In re SAFADY BROS. & SARTELL.

(District Court, W. D. Wisconsin. December 27, 1915.)

1. STATUTES ⟸184—CONSTRUCTION—EFFECTUATING GENERAL PURPOSE.

If, on applying the Uniform Partnership Act to the varying rules found in different states, obscurity in language appears, the meaning of doubtful parts should, if possible, be gathered from its general purpose, as shown by its language; and when this general purpose is found, and is plain and unmistakable, particular words may be ignored, if out of harmony with the general purpose, unless they were used by way of proviso or exception, or indicate a positive intent inconsistent with the general spirit.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. ⟸184.]

2. EXEMPTIONS ⟸61—PERSONS ENTITLED—MEMBERS OF PARTNERSHIP—"ATTACH"—"ATTACHMENT PROCEEDINGS"—"PARTNER'S INTEREST IN THE PARTNERSHIP."

Uniform Partnership Act (Laws Wis. 1915, c. 358) § 1724m21, provides that the property rights of a partner are his rights in specific partnership property, his interest in the partnership, and his right to participate in the management; that the partners are co-owners of specific partnership property, holding as tenants in partnership; that a partner has an equal right with his partners to possess such property for partnership purposes, but not for other purposes; that his right in such property is not assignable, or subject to attachment or execution, except on a claim against the partnership; that, when partnership property is "attached" for a partnership debt, the partners cannot claim any right under homestead or exemption laws; that a surviving partner has no right to possess the partnership property for any but a partnership purpose; and that a partner's right therein is not subject to dower, etc. Section 1724m24, dealing with the claims of individual creditors, provides that nothing therein shall deprive a partner of his right under exemption laws as regards his interest in the partnership; and section 1724m22 defines a "partner's interest in the partnership" as his share of the profits and surplus. *Held*, that a partner no longer has the right to an exemption out of the partnership's stock in trade in case of its seizure on execution or attachment, or any other mesne or final process, as prior to that act, since, while "attachment proceedings" indicate a seizure on mesne process, the verb "attach" has a broad meaning, and indicates any seizure of property for the purpose of bringing it within the custody of the court, and there is nothing in the act requiring the word to be taken in the restricted meaning of seizure on mesne process.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 83–87; Dec. Dig. ⟸61.

For other definitions, see Words and Phrases, First and Second Series, Attach; Attachment; Partner's Interest.]

In Bankruptcy. In the matter of Safady Bros. and Safady Bros. & Sartell, bankrupts. On review of orders of the referee. Findings and orders of the referee affirmed.

W. H. Dougherty and John Cunningham, both of Janesville, Wis., for bankrupts.

L. A. Avery and M. P. Richardson, both of Janesville, Wis., for trustees and creditors.

SANBORN, District Judge. The question of exemptions in these cases has been referred to the court by the referee. Both firms petitioned for voluntary bankruptcy July 23, 1915, each partner claiming $200 exemptions in each firm. Shortly before a partnership execution had been levied against Safady Bros. & Sartell. It was found on the hearing of the matter that the two stores carried on by the two partnerships constituted the same business, so far as the Safadys were concerned, and they are therefore only entitled, at the most, to one exemption each, and Sartell to one also. The important question concerns the effect to be given to the Uniform Partnership Act, adopted by the Wisconsin Legislature July 8, 1915, as chapter 358, Laws of 1915.

By the Wisconsin law in force before the latter date each merchant or trader belonging to a partnership, in case of a seizure of the property on execution or attachment, or any other mesne or final process, was entitled to a $200 exemption out of the partnership stock in trade. Section 2982, Wisconsin Statutes; O'Gorman v. Fink, 57 Wis. 649, 15 N. W. 771, 46 Am. Rep. 58. Under this statute it was the duty of the trustee to set off the exemption to each partner. In re Friederick (D. C.) 95 Fed. 282; In re Friedrich, 100 Fed. 284, 40 C. C. A. 378. Whether this exemption has been taken away by the Uniform Partnership Act is now the question to be decided. From the words used it is argued that the Legislature intended to take away the individual partners' exemptions only where the firm property was seized on attachment, a comparatively infrequent occurrence, leaving the earlier statute to govern all other situations, including execution, supplementary proceedings, creditors' suits, bankruptcy, and assignments for creditors. An examination of the provisions of the act is therefore necessary, in order to determine what construction should be given it, as a whole. The particular section (1724m21) referring to exemptions provides that, where partnership property is *attached* for a partnership debt, the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

The Uniform Partnership Act was under consideration by the Conference of Commissioners on Uniform State Laws from 1902 to 1912 or 1913, and the first state to adopt it was Pennsylvania, in 1914. A number of explanatory articles have recently appeared in the law magazines, including a criticism by Judson A. Crane, of the Harvard Law School, 28 Harvard Law Review, 762, and Mr. Lewis' answer, in current numbers of the same publication. It was drawn by William Draper Lewis for the Conference, based on the incomplete work

of the late James Barr Ames, Dean of the Harvard Law School, and on the English Partnership Act, drawn by Sir Frederick Pollock. It is an attempt to codify the existing common law on the subject, rather than to change that system; but where the rules are conflicting it chooses the one supposed to be the better.

[1] Since the Bankruptcy Act (Act July 1, 1898, c. 541, § 6, 30 Stat. 548 [Comp. St. 1913, § 9590]) adopts the state laws on the subject of exemptions, and as the recent act has not yet been construed by the Wisconsin court, the courts of bankruptcy must apply it for themselves. It was drawn to secure as far as possible uniformity among the states as to the substantive law of partnership, how formed, how changed during its existence, and how dissolved, the precise legal relation between partner and partner, partner and firm, firm and creditor, partner and creditors (firm and individual), marshaling assets between creditors and between partners, legal relation of outgoing and incoming members and the rights and liabilities of the estates of deceased or bankrupt members. All such relations are most carefully worked out, and described in terse, clear language, without repetition or amplification. It is evident from the text, as well as the history of the subject, that the bill was drawn with the utmost care and pains, not only to reach an important general result, but with fit details strictly combined, so as to present a harmonious and consistent whole. Construction should not be overcritical. If, on applying the act to the varying rules found in different states, obscurity in language should appear, as will undoubtedly be the case, the meaning of doubtful parts should, if possible, be gathered from its general purposes. Upton v. United States, 19 Ct. Cl. 49. The general purpose of the act must be gathered from its language; when this is found, and is plain and unmistakable, particular words may be ignored, if out of harmony with the general purpose, unless they were used by way of proviso or exception, or indicate a positive intent inconsistent with the general spirit. Gardner v. Collins, 2 Pet. 92, 7 L. Ed. 347.

[2] By the former Wisconsin law a partner had no exemption in the firm property as such, because there could not be an exemption in an undivided interest or tenancy in common. West v. Ward, 26 Wis. 579. On seizure by attachment, execution, or insolvency, each partner was permitted to sever his interest and claim $200 exemption in the partnership stock. O'Gorman v. Fink, supra. The right to make such severance or division was the foundation of the exemption right. This right of severance is taken away by section 21 (original section 25) of the Uniform Partnership Act, here copied in full. It reads:

"1. The property rights of a partner are his rights in specific partnership property, his interest in the partnership, and his right to participate in the management.

"2. A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

"3. The incidents of this tenancy are such that:

"(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

"(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

"(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

"(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

"(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin."

Section 1724m21.

The partner's interest in inalienable, and is not subject to dower or family rights. Even a surviving partner could not have any exemption, because he is not allowed "to possess the partnership property for any but a partnership purpose."

Section 24 (original 28) deals with the claims of individual judgment creditors against the individual partners, and subdivision 3 says:

"Nothing in this chapter shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership"

—which is defined in section 22 (28) as "his share of the profits and surplus." Thus the partner's separate interest is subject to exemption on separate debts.

It seems perfectly clear that the former right of severance in Wisconsin for the purpose of exemption cannot possibly exist under the cited provisions. Nor does subdivision "c" change this conclusion. It says that the tenancy in partnership is subject to attachment and execution on partnership claims, but when "attached" shall not be exempt. It is argued that this word means to restrict the creditor's right, and allow the exemption in cases of execution, supplementary proceedings, creditors' suits, insolvency, and bankruptcy, but this construction is out of harmony with the other parts of the statute. Nor should the language itself be given any such restricted meaning. "Attachment proceedings" indicate a seizure on mesne process. This, however, is the narrow meaning. As a verb the word "attach" has a broad, recognized meaning, and indicates any seizure of property for the purpose of bringing it within the custody of the court. This is well brought out in the case of Wilder v. Inter Island Steam Navigation Company, 211 U. S. 239, 29 Sup. Ct. 58, 53 L. Ed. 164, 15 Ann. Cas. 127, where the word was construed to extend to seizure in proceedings supplementary to execution. In using the word "attach," therefore, the drafter has not employed a word which must be given an unusual or strained meaning to carry out the intention of the act. When a word has a narrow and a broad meaning, it should be taken in the sense in which the general purpose of the act requires it to be taken. There is nothing which can fairly be said to require the word to be taken in the restricted meaning of seizure on mesne process; in

fact, to thus restrict the word is to do violence to the intention of the framers, which I think fairly appears when one takes the entire act into consideration. To give the word the narrow meaning would make the right of the partnership creditors to have the partnership property free from exemption claims depend upon the mere accident of whether such property was seized on mesne process. It can hardly be said that the Legislature intended to preserve the partnership property from exemption claims only when it was seized on preliminary process, and not when seized or attached in any other way.

Section 21 discloses the express legislative design to bring about a uniform principle and practice with respect to exemptions, and if found inconsistent with the former interpretation of exemption laws must be held amendatory. An attachment on mesne process is merely to hold the property for the later writ of execution, so, if this clause is to be construed as contended, this absurd result would follow: That there could be no exemption against provisional process, but against final process (which was to be aided and made effective by the other) the exemption claim would be good.

In view of the plan of the draftsman to use the fewest possible words, and the whole purpose and spirit of the law, the word "attach" was advisedly used to indicate the same kind of a seizure meant by "attachment or execution" in the same subdivision.

The findings and orders of the referee, disallowing all the exemptions except the homestead, should be affirmed.

HOWLAND v. METROPOLITAN BANK.

(District Court, S. D. New York. May 12, 1915.)

1. CORPORATIONS ⟸544—PREFERENTIAL TRANSFERS—STATUTORY PROVISIONS.

Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 66, provides that no corporation, which shall have refused to pay any of its notes or other obligations when due, shall transfer any of its property to any officer, director, or stockholder; that no conveyance or transfer of any property of any such corporation, nor any payment made by it when the corporation is insolvent, or its insolvency is imminent, with the intent of giving a preference to any particular creditor, shall be valid; and that every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. *Held* that, in determining whether the payment of a note before maturity was with intent to give a preference, the transfer must be viewed in the light of the situation as it existed at the time of the transaction, and the transaction could not be regarded as invalid because discredited by after events.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2162–2169; Dec. Dig. ⟸544.]

2. CORPORATIONS ⟸544—PREFERENTIAL TRANSFERS—SUFFICIENCY OF EVIDENCE.

In an action by the receiver of a corporation against a bank, evidence *held* to show that when the corporation, before maturity and shortly before the appointment of a receiver, took up a note, held by the bank and indorsed by individuals in control of the corporation, and gave a new

note for a smaller amount, paying the difference, there was no intent to give a preference.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2162–2169; Dec. Dig. ⊂⊃544.]

3. CORPORATIONS ⊂⊃543—PREFERENTIAL TRANSFERS—BONA FIDE TRANSFEREES.

Stock Corporation Law N. Y. § 66, prohibits preferential transfers by corporations while insolvent, or when insolvency is imminent, and provides that no such transfer shall be void in the hands of a purchaser for a valuable consideration without notice. A corporation before the maturity of a note indorsed by individuals in control of the corporation took up the note, paid part of the indebtedness, and gave a new note for the balance with the same indorsers. *Held*, that the holder of the note gave a valuable consideration for the part payment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2161; Dec. Dig. ⊂⊃543.]

At Law. Action without a jury by Silas Howland, as receiver of the Improved Property Holding Company of New York, against the Metropolitan Bank. Judgment for defendant.

William M. Chadbourne and Minturn De S. Verdi, both of New York City, for plaintiff.

Woodford, Bovee & Butcher, of New York City (Frederick C. Tanner and James N. Luttrell, both of New York City, of counsel), for defendant.

MAYER, District Judge. Plaintiff, a receiver in an equity conservation suit, has brought this action to recover $50,000 because of an alleged preferential payment to defendant by the Improved Property Holding Company of New York (hereinafter called "Company"), the corporation of which plaintiff is receiver. To succeed the plaintiff must show that the payment came within the condemnation of section 66 of the New York Stock Corporation Law, which is as follows:

"Sec. 66. *Prohibited Transfers to Officers or Stockholders.*—No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law shall make any assignment in contemplation of insolvency. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void. No conveyance, assignment or transfer of any property of a cor-

poration formed under or subject to the banking law, exceeding in value one thousand dollars, shall be made by such corporation, or by any officer or director thereof, unless authorized by previous resolution of its board of directors, except promissory notes or other evidences of debt issued or received by the officers of the corporation in the transaction of its ordinary business, and except payments in specie or other current money or in bank bills made by such officers. No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice. Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

[1] At the outset, it will be noted that plaintiff must show, among other things, that the Company or its officers intended to give a preference to defendant. In a case of this kind we must carry our minds back to the situation as it was at the time of the transaction under consideration. Such is the mental approach which enables courts to award redress for frauds, even though dealings seem innocent on their face, and, per contra, to refrain from stigmatizing as offensive to statutes, such as this, transactions honestly and fairly engaged in, merely because after events and a later point of view tend to discredit what, at the time, was beyond question.

[2] So far as the evidence in this case discloses, Henry Corn, Alwyn Ball, Jr., and Joseph J. O'Donohue were the active and controlling men in the affairs of the Company. The Company had been a borrower from the defendant, the business between the two being conducted for the Company by Corn and for the defendant by Ollesheimer, its president. On three occasions, viz., September 7, 1911, November 28, 1911, and February 14, 1912, the Company had paid its notes prior to maturity. As related to the payments on the two first-named dates, the loans were increased in the ordinary and orderly course of business. On February 14, 1912, the payment of a note for $12,500 due April 8, 1912, was anticipated, the Company then having in hand some $220,000 additional cash realized from what are referred to in the case as the Assets Realization Guardian and Empire Trust Companies' loans.

When, therefore, on May 13, 1912, the transaction complained of took place, Ollesheimer naturally had no reason to suppose that as between his bank and the Company a different situation existed than had theretofore obtained. On that day, two notes due June 4 and July 5, 1912, respectively, and aggregating $50,000, were paid. On these notes Corn, Ball, and O'Donohue were indorsers, as they had been on previous notes. The Company had $8,603.38 on deposit, and added thereto $23,000. The bank rebated $283.33 interest, and then discounted the Company's note for $25,000 due September 13, 1912, with the same three men as indorsers. The net result was that the Company and the indorsers reduced their liability to the bank from $50,000 to $25,000, and thus the $25,000 then paid off is the amount really in controversy.

It is conceded, and, in any event, the evidence is uncontradicted, that Ollesheimer had no knowledge whatever of the embarrassments

of the Company and not the slightest reason to suppose that the payment was preferential or intended so to be. What, then, was the intent of the Company? That, of course, must be determined from all the existing facts and surrounding circumstances, as well as from what, according to their testimony, was in the minds of Corn, Ball, and O'Donohue. That their testimony was truthful I do not doubt for a moment. And why not? There is not in this case a suggestion of unloading, as not infrequently appears when an enterprise is in difficulties. On the contrary, these men were straining every means to save what they believed was a plus from becoming a minus, as of necessity so often occurs when receiverships arrive on the scene.

The Company owned or operated leaseholds as follows, covered by the so-called A mortgage:

84–90 Fifth avenue,
110 Fifth avenue,
315 Fifth avenue,
320 Fifth avenue,
341–347 Fifth avenue,
894–900 Broadway,
1161–1175 Broadway,
43–47 West Thirty-Third street,
Forty-Second street and Sixth avenue.

Under the B mortgage, so called, were the following:

Brunswick Building,
2–4–6 East Thirty-Fourth street,
505 Fifth avenue—

and the following fees:

303 Fifth avenue,
395 Broadway.

Undoubtedly, at the time when these various properties were acquired and thereafter they certainly looked promising. Where is the man so wise who could have foreseen the calamities that have befallen real estate in various sections, and more especially in certain parts of Broadway and Fifth avenue? One need but walk north from the courthouse by any route to note the sad and mute witnesses to the fallibility of human judgment in investing in or dealing with realty in this ever-changing metropolis.

There is no need of an elaborate analysis of the figures argued from and about by these litigants. The Company was and had been hard up for cash, but it owned or controlled what its directors were justified in believing (even if their judgment was mistaken) were assets over liabilities. There came a time when it was desirable to obtain, if possible, a mortgage to cover the whole situation and retire mortgages A and B, and this it was hoped could be accomplished by placing in France the bonds of a mortgage called M. There is nothing strange about such an effort or its good faith. There is no reason to doubt O'Donohue's statement that he "had every reason to believe, by letters and cables that I saw, that they would absolutely go through with De Luze & Co of Paris." It was not until May 17, 1912, that hope was abandoned and an equity receivership was reluctantly resorted to.

When we consider the size of this Company's property, the fact that Corn, Ball, and O'Donohue could easily have relieved themselves of all liability to the defendant, instead of indorsing the $25,000 note due September 13, 1912, the comparatively trifling proportion which $25,000 bore to the whole situation, the earnest and emphatic statements under oath of these three men, the utter lack of knowledge of the defendant, and absence of any secret or collusive arrangement, it is flying in the face of experience to conclude that the Company had any intent to prefer.

I see no occasion for further discussion, although much more could be said; but, having seen the witnesses and carefully followed the figures, I find as a fact, upon all the evidence, that there was not any intent to prefer. This renders it unnecessary for me to consider the question of insolvency, as to which plaintiff relies largely on inability to pay current debts.

I may remark in passing, however, that notwithstanding the undoubtedly conscientious testimony of Stevens as to the value of the Fifth avenue and Thirty-First street property, I would rather, in a case of this kind, take the judgment of a rough diamond like Smith. There is a sense of smell, as it were, about values, which is more likely to be right than all the automatic rules of experts, and I have seen men in the auction room in Vesey street who could hardly write their names, who knew more about the right price at which to buy and sell than some of the students who had the historic price of the neighborhood per front foot at their finger's ends.

[3] Finally, the statute provides:

"No such conveyance, assignment or transfer shall be void in the hands of the purchaser for a valuable consideration without notice."

That defendant did not have notice is conceded, as stated supra. That there was a valuable consideration has been disposed of by Perry v. Van Norden Trust Co., 192 N. Y. 189, 84 N. E. 804; for the view of the highest court of New York must be followed. I see no distinction in principle between the Perry Case and the case at bar.

The argument of plaintiff is that, because the indorsers would be benefited, therefore the defendant bank could now recover. But in the light of the Perry Case how could the defendant bank recover against the indorsers, especially in the absence of fraud? If a judgment were to go against the defendant, about all that would be left to the defendant would be a lawsuit against the indorsers, with no reasonable prospect of recovery at the end. We would thus have the spectacle of a court penalizing a bank innocent of guilty knowledge or wrongdoing for a transaction consonant with the usual and orderly course of a banking business. I am of opinion that the Legislature of New York never intended that section 66 should be tortured to accomplish such a result.

Judgment for defendant.

Ex parte KRAUSE.

(District Court, W. D. Washington, N. D. November 23, 1915.)

No. 3166.

1. CRIMINAL LAW ⟸242—REMOVAL OF ACCUSED TO ANOTHER DISTRICT FOR TRIAL—"OFFENSE AGAINST THE UNITED STATES."

Rev. St. § 1014 (Comp. St. 1913, § 1674), provides that for any crime or offense against the United States the offender may be arrested and imprisoned for trial, and that, where an offender is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where he is imprisoned to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had. Comp. Laws Alaska 1913, § 2099, adopts the common law of England, as adopted and understood in the United States, except as modified thereby, and section 2502 makes provision for extraditing persons charged with felony in the district of Alaska and fleeing from justice. Comp. Laws Alaska 1913, § 410 (Act Cong. Aug. 24, 1912, c. 387, § 3, 37 Stat. 512), provides that all laws of the United States establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by act of Congress, and that except as therein provided all laws in force in Alaska shall continue in force until altered, amended, or repealed by Congress or the territorial Legislature, provided that the authority of the Legislature to alter, amend, and repeal laws shall not extend to the customs, internal revenue, postal, or other general laws of the United States. *Held*, that the crime of kidnapping, denounced by Comp. Laws Alaska 1913, § 1907, is not an "offense against the United States," and, though such offense is triable before the United States District Court for Alaska, the offender may not be removed from another district to Alaska under Rev. St. § 1014, especially as the Compiled Laws indicate that Congress distinguished between local laws affecting the territory of Alaska and laws affecting generally all of the states and territories.

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

For other definitions, see Words and Phrases, Second Series, Offense Against the United States.]

2. EXTRADITION ⟸25—AUTHORITY AND DUTY TO DEMAND FUGITIVES—TERRITORIAL GOVERNORS.

Under Rev. St. § 5278 (Comp. St. 1913, § 10126), providing that, whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment or affidavit, etc., it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and delivered to the agent of the executive authority making the demand, the executive of a territory has the same rights and bears the same duties as the Governor of a state.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 29; Dec. Dig. ⟸25.]

3. STATUTES ⟸54—TERRITORIAL LEGISLATION—LEGISLATIVE POWER OF CONGRESS—OPERATION AND EFFECT OF STATUTES.

Congress, in adopting the Alaska Code, exercised its power as a local Legislature, rather than its power as a general government of the United States, and the Compiled Laws of Alaska have no greater force than a law enacted by a territorial Legislature subject to congressional approval.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 52; Dec. Dig. ⟸54.]

Application by Edward Krause for a writ of habeas corpus. Petitioner discharged.

J. Grattan O'Bryan and Kazis Krauczunas, both of Seattle, Wash., for petitioner.

Clay Allen, U. S. Atty., and Winter S. Martin, Asst. U. S. Atty., both of Seattle, Wash., for respondent.

NETERER, District Judge. The petitioner alleges that he is restrained of his liberty by the United States marshal, who holds him under an order of removal to the United States District Court for the territory of Alaska; that he was arrested upon a warrant issued by Robert W. McClelland, United States commissioner for the Western district of Washington, Northern division, upon complaint filed by the United States district attorney charging the petitioner with the commission of a crime within the territory of Alaska, in violation of section 1907 of the Compiled Laws of the territory of Alaska, codified and arranged by act of Congress of August 24, 1912; that a preliminary hearing was had and petitioner bound over by the commissioner to the grand jury at Juneau, Alaska; and further alleges that, if a crime was committed, it was not an offense against the laws of the United States, but an offense against the laws of the territory of Alaska. On presentation of the petition an order was issued, and the United States marshal thereby directed to produce the petitioner before the court for such disposition as may be directed. Obedient to this order, the petitioner is produced in court.

[1] The issue presented is whether the petitioner shall be removed to the District Court of Alaska pursuant to the provisions of section 1014 of the Revised Statutes (Comp. St. 1913, § 1674). Much was said upon the argument on both sides as to the application of the provisions of this section to the offense charged, and several citations given by the respective parties claiming support for the positions assumed. An examination of the complaint upon which the warrant was issued and the several provisions of the laws of the territory of Alaska, together with the general extradition laws enacted by Congress, and expression of the courts upon similar issues, I think clarifies the situation.

It is urged that Judge Hanford held a fugitive from Alaska to be removable under the provision of this section. This holding it was alleged was in the case of Tiberg v. Warren, which was appealed to the Circuit Court of Appeals and is reported in 192 Fed. 458, 112 C. C. A. 596; but an examination of the case shows that this question was not an issue. The emphasis upon the suggestion is placed upon the argument in the brief of the United States district attorney before the Circuit Court of Appeals, in which reference was made to the application of this section. The issue in that case was the right to extradite under the provisions of section 5278, Revised Statutes (Comp. St. 1913, § 10126). If Judge Hanford in that case said that an offender under the Alaska Criminal Code, being present in this district, could be removed under section 1014, supra, it was purely obiter dictum.

It is fundamental that the United States courts, as such, can only entertain jurisdiction of offenses against the United States. If the offense charged is not an offense against the United States, this court would not have jurisdiction to try the petitioner if it had been committed within this district, and that, I think, is the criterion by which this issue must be determined. The question is not, Has the District Court of Alaska jurisdiction? for that court acts in a dual capacity, one in administering the laws of the United States, and the other in administering the local laws of the territory. The Supreme Court of the United States, in the Case of Coquitlam, 163 U. S. 346, 16 Sup. Ct. 1117, 41 L. Ed. 184, held that the District Court of Alaska is to be regarded as the Supreme Court of the territory, within the meaning of section 15 of the act of March 3, 1891 (26 Stat. 830, c. 517), and because of such status and order of the Supreme Court, a decree of that court was subject to review by the Circuit Court of Appeals of the Ninth Circuit. Justice Harlan, in McAllister v. United States, 141 U. S. 174, 179, 11 Sup. Ct. 949, 951 (35 L. Ed. 693) said:

"It is clear that the District Court for Alaska was invested with the powers of a District Court and a Circuit Court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon"

—which, by section 7 of the act of May 17, 1884 (23 Stat. 24, c. 53), was declared to be the law of Alaska so far as they were applicable and not in conflict with the provisions of that act or of the laws of the United States, and held that a judge of the District Court of Alaska is not a judge of a court of the United States within the generally accepted meaning of that term.

The cases cited by the government do not appear to me to be to the issue. In Benson v. Henkel, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 919, the Supreme Court of the District of Columbia is held to be a court of the United States within the meaning of section 1014, supra, authorizing the removal of a person charged with an offense against the United States. Much emphasis was placed by the government upon United States v. Haskins, Fed. Cas. No. 15,322. In that case Judge Hillyer, at page 215 of 26 Fed. Cas., says:

"The act of Congress, respecting fugitives from justice (1 Stat. 302), in pursuance of article 4, section 2, Const. U. S., provides a mode by which offenders against state and territorial laws, who have fled from justice, may be delivered up to the * * * state or territory demanding them, but makes no provision for the case of those persons who have committed offenses against the United States in one district and have fled to another."

These cases do not, it seems to me, help the complainant. They are all predicated upon an offense against the United States, which is the express requirement of section 1014, supra. If the offense here charged were an offense against the United States, there would be no question as to the duty of this court to order the removal. By act of Congress the territory of Alaska, under the Constitution and laws of the United States, became an inchoate state, not yet admitted, but organized, with separate Legislature, under a territorial Governor and other officers appointed by the President by consent of the Senate. The legislative power extended to all rightful subjects pertaining to local

self-government not inconsistent with the laws and Constitution of the United States. That Congress had in mind the different relation of the local laws of the territory and national laws with relation to extradition or removal, I think is made manifest by the provisions of the Alaska Criminal Code and the general provisions of Congress.

[2] Section 5278 of Revised Statutes, relating to fugitives from justice of a state or territory, makes provision for extraditing offenders. The executive of a territory, under this section, has the same rights and bears the same duties as the Governor of a state. In re Morgan (D. C.) 20 Fed. 298; Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250. Section 2502, page 771, of the Laws of Alaska, makes special provision for extraditing a person charged with a felony, thereby recognizing local application of the local laws of Alaska. Section 410, Comp. Laws Alaska 1913 (Act August 24, 1912, c. 387, § 3, 37 Stat. 512), provides that all laws of the United States heretofore passed, establishing the executive and judicial departments in Alaska, shall continue in full force and effect until amended or repealed by act of Congress; that, except as therein provided, all laws in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the territorial Legislature; that the authority granted to the Legislature to alter, amend, modify, or repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States.

There is, by this provision, clearly a line of demarcation placed by Congress between the local laws affecting the territory and laws affecting generally all of the states and territories. Section 2099 of the Laws of Alaska, supra, provide:

> That "the common law of England as adopted and understood in the United States shall be in force in said district, except as modified by this act."

This expression, I think, further emphasizes the line of demarcation suggested, as it is fundamental that federal courts have no jurisdiction of common-law offenses, but are limited to acts made criminal by Congress, and Congress is charged with knowledge of this fact. The common-law offenses by this provision are placed in the came category and relation as the offenses defined by the Criminal Code, and it would hardly be contended that this court would have jurisdiction to direct the removal of an offender against the common law of the territory.

[3] The offense charged, kidnapping, is not an offense under any law of the United States to which my attention has been directed, or one cognizable by the United States courts as such, unless the adoption of the Alaska Code by Congress makes this an offense against the United States. Congress, in passing this law, exercised its power as a local Legislature rather than its power as a general government of the United States, Allen v. Myers, 1 Alaska, 114. The intention of Congress undoubtedly was to constitute the "Alaska Criminal Code," taken largely from the Oregon Criminal Code, which was extended to Alaska in 1884, a territorial act, as distinguished from the laws of the United States. Jackson v. United States, 102 Fed. 478, 42 C. C. A. 452; United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631.

The Compiled Laws of Alaska have no greater force than a law enacted by a territorial Legislature, subject to congressional approval, and as such its provisions are not laws of the United States, and do not come within the cognizance of the United States courts. Maxwell v. Federal Gold & Copper Co., 155 Fed. 111, 83 C. C. A. 570; In re Moran, 203 U. S. 96, 27 Sup. Ct. 25, 51 L. Ed. 105; United States v. Jones, Adms., 236 U. S. 106, 35 Sup. Ct. 261, 59 L. Ed. 488. Chief Justice Marshall, in United States v. Burr (No. 14,694) 25 Fed. Cas. 188, says: "No man can be condemned * * * in the federal courts on a state law." Nor does it seem to me that the provisions of section 1014, supra, can be extended to territorial affairs as such.

The authorities of Alaska are not without remedy; full and complete provision being made by the extradition laws, which are open to all the states and territories.

I think that the court has not the power to order the petitioner removed to the District Court of Alaska.

BROACH v. MULLIS, Sheriff, et al.

(District Court, S. D. Georgia. December 27, 1915.)

1. BANKRUPTCY ⟸217—LIENS—RESTRAINING PROCEEDINGS IN STATE COURTS.
Where a mortgage and a judgment of a state court foreclosing it were more than four months old before the mortgagor filed his petition in bankruptcy, and the sheriff of the state court had already seized the mortgaged property under the mortgage fi. fa. before the petition was filed, the United States District Court would not enjoin a sale under such fi. fa., though it would have jurisdiction to do so, if necessary.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. ⟸217.]

2. USURY ⟸129—RIGHTS AND REMEDIES OF TRUSTEE IN BANKRUPTCY.
Under Code Ga. 1910, § 3428, providing that the plea of usury is personal, but that a creditor has no right to collect usurious interest from an insolvent debtor to the prejudice of other creditors, and section 3304, authorizing any creditor of a mortgagor, after the issuance of a mortgage fi. fa., to contest the validity or fairness of the mortgage lien or debt, the trustee in bankruptcy can set up usury in a mortgage executed by the bankrupt, though reduced to judgment; but this does not invalidate the mortgage, but would only reduce the amount collectible on the fi. fa.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 384, 385; Dec. Dig. ⟸129.]

3. BANKRUPTCY ⟸217—LIENS—RESTRAINING PROCEEDINGS IN STATE COURTS.
As, under the statutes of Georgia, a trustee in bankruptcy can, by applying to the state court rendering a judgment foreclosing a mortgage, set up usury in the mortgage and contest the amount due thereon, the fact that the mortgage debt is infected with usury is not sufficient ground for enjoining a sale under process of the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 328–330, 340; Dec. Dig. ⟸217.]

In Equity. Bill by James F. Broach, trustee of B. L. Harrell, bankrupt, against C. N. Mullis, Sheriff, and another, to enjoin a sale of real

estate of the bankrupt, levied under state court process. Injunction denied.

Warren Grice and Chas. J. Block, both of Macon, Ga., C. W. Griffin, of Eastman, Ga., and Oliver & Oliver, of Savannah, Ga., for complainant.

W. M. Clements, of Eastman, Ga., for respondents.

LAMBDIN, District Judge. The question here made is quite an important one to the business world. It appears that on the 18th day of January, 1912, the bankrupt, B. L. Harrell, made a mortgage on his real estate in Dodge county to the Citizens' Banking Company, of Eastman, Ga., in order to secure an indebtedness of something like $3,900, principal; that the mortgage was duly recorded, as provided by the laws of Georgia, and was regularly foreclosed by final judgment in the superior court of Dodge county, Ga., in November, 1914, and that a mortgage fi. fa. was issued a few days thereafter on said judgment for principal, interest, and attorney's fees; that B. L. Harrell filed his voluntary petition in bankruptcy in this court on October 30, 1915, and an order of adjudication was promptly entered, but that about one month before the filing of said petition in bankruptcy the sheriff of Dodge county had levied upon said real estate in order to satisfy said mortgage fi. fa., and is now advertising the property for sale. The trustee brings this bill to enjoin the sheriff from selling the real estate of the bankrupt so levied on as aforesaid.

[1] 1. The bankruptcy law is not intended to interfere with valid and existing liens which are more than four months old at the time of the filing of the petition in bankruptcy. The lien in this case is not derived from the judgment of foreclosure, which itself, however, was rendered nearly a year before the filing of said bankruptcy petition, but is derived from the original mortgage, which was given in 1912. It is essential to the stability and integrity of business and commercial transactions that those who lend money shall be secure in their loans, and also shall not be unduly delayed in realizing upon the securities which they hold, and courts of bankruptcy should be slow to needlessly interpose their jurisdiction in such matters. In the leading case of Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, the Supreme Court of the United States said:

> "Where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized."

The Circuit Court of Appeals of the Fifth Circuit, to which this court owes obedience, has decided the very point here involved in the case of Sample v. Beasley, 20 Am. Bankr. Rep. 164, 158 Fed. 607, 85 C. C. A. 429. In that case a similar effort was made to stay the sale of real estate of a bankrupt which had been levied upon on a judgment rendered in an action to foreclose certain mortgages made four months before the filing of the petition in bankruptcy—the levy having been made before the petition was filed. It was contended by the complainant in that case, as it is contended here, that the property would

probably bring more if sold under the supervision of the court of bankruptcy, that there was an equity for the creditors in the property over the amount due on the mortgage, that the interest of the creditors would be best conserved by the bankruptcy court taking charge of the property and selling it, rather than by allowing the sheriff to sell it under the state court process, and that under the circumstances it was within the discretion of the court to stop the sale advertised by the sheriff and allow the trustee in bankruptcy to handle the property. The District Court in that case sustained these contentions, but the Circuit Court of Appeals, upon a petition to superintend and revise, reversed the court below, and held that the sheriff should be allowed to proceed with the sale of the property. The headnote in that case is in the following language:

"A bankruptcy court has not jurisdiction to stay the sale of real estate duly seized under a judgment rendered in an action to foreclose a mortgage, rendered long prior to the four months preceding the petition and adjudication of the mortgagor."

It is probable that this headnote was not formulated by the Court of Appeals, and the court is of the opinion that the statement therein to the effect that the District Court of the United States had no jurisdiction is rather too broad, and that a better statement of the principle involved should have been that the District Court, under the facts in the case, should not enjoin the sheriff from selling the property under the state court process. In other words, I think that this court would have jurisdiction to stop the sale where absolutely necessary under the facts of the particular case in order to protect the rights of the creditors or the trustee, which would otherwise be lost or impaired. It is not a question of jurisdiction, but of discretion and policy in each case under its peculiar facts. See also the case of In re Rohrer, 177 Fed. 381, 100 C. C. A. 613, decided by the Circuit Court of Appeals of the Sixth Circuit, where the subject is fully discussed and many authorities cited; also Neill, Trustee, v. Barbaree, Sheriff, 135 Ga. 771, 70 S. E. 638, Carter v. People's National Bank, 109 Ga. 573, 35 S. E. 61, and Parks, Trustee, v. Baldwin et al., 123 Ga. 869, 51 S. E. 722.

Under the foregoing decisions, inasmuch as the mortgage and the judgment foreclosing same were more than four months old before the bankrupt filed his petition in bankruptcy, and inasmuch as the sheriff of the state court had already seized the property before the petition was filed, this court does not think it should enjoin the sale.

[2] 2. Counsel for the trustee also urge, as an additional reason why this court should enjoin the sale of the property in question and administer same in this court, that the mortgage debt is infected with usury. It is clear that, under the laws of Georgia and the decisions of the Supreme Court of the state, the trustee can set up usury in the mortgage although it has been reduced to judgment; but this would not have the effect of invalidating the mortgage, but would only reduce the amount that can be collected by the plaintiff in the mortgage fi. fa. The trustee cannot set aside the mortgage, but can purge the mortgage debt of usury. Code of Georgia of 1910, § 3428, is in the following language:

"The plea of usury is personal; but a creditor has no right to collect usurious interest from an insolvent debtor to the prejudice of other creditors."

The case of Parker v. Barnesville Savings Bank et al., reported in 107 Ga. 651, 34 S. E. 365, is also in point. The second headnote in that case is as follows:

"If, however, such mortgage debt be infected with usury, and the mortgagor is insolvent, it is the equitable right of the wife, as a creditor of her husband, to compel the mortgagee to purge his claim of the usury charged against their common debtor. To this end the wife may, even after a foreclosure of the mortgage, avail herself of the statutory remedy provided for by section 2769 (now section 3304) of the Civil Code, whereby a creditor is permitted, upon specified terms, 'to contest the validity or fairness of a mortgage lien or debt' prejudicially affecting his interests as such."

[3] The same question is also very fully discussed in the case of Stone v. Georgia Loan & Trust Co., 107 Ga. 524, 33 S. E. 861. The trustee, however, may assert and enforce all his rights in the premises by applying to the state court and filing a rule or other appropriate proceedings therein. If by going into the state court the trustee would have no remedy in the matter, and could not set up the usury which he claims, and thus contest the amount due on the mortgage, this court would not hesitate to enjoin the sale and administer the property. However, it is clear that the trustee can assert all the rights he has in the matter in the state court, and inasmuch as the sheriff of that court has already seized the property, the rule of comity prevailing between the courts, as well as the principles set forth above in this opinion, constrain this court to deny the injunction prayed for. The trustee, however, will be directed to apply to the state court, so that he may receive any surplus derived from the sale of the mortgaged property, and may there also set up any claim of usury which he may think exists.

An order will be entered accordingly.

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO. et al.

(District Court, D. Idaho, N. D. September 18, 1915.)

ALIENS ⇐50—ALIEN CONTRACT LABOR LAW—VIOLATION.

A section foreman of defendant railroad company was indebted to an alien, who had formerly worked under him, but had later returned to his own country, and gone from there to Canada. Being unable to pay the debt when requested, the foreman sent his creditor sufficient of his own money to pay traveling expenses and offered to re-employ him if he would return to this country, which offer was accepted. The foreman was authorized by defendant to employ men when needed on his section, if they applied or could be obtained in the immediate vicinity, but not otherwise. *Held* that, under such facts, defendant was not chargeable with violation of Alien Contract Labor Law (Act Feb. 20, 1907, c. 1134) § 4, 34 Stat. 900 (Comp. St. 1913, § 4248); it not appearing that any officer or other agent knew of the transaction.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 108–110; Dec. Dig. ⇐50.]

Action by the United States against the Chicago, Milwaukee & St. Paul Railway Company and W. D. Tuttle. Judgment for defendants.

J. L. McClear, U. S. Atty., and J. R. Smead, Asst. U. S. Atty., both of Boise, Idaho.

Geo. W. Korte, of Seattle, Wash., and Robt. H. Elder, of Cœur d'Alene, Idaho, for defendants.

DIETRICH, District Judge. This is an action brought by the government to recover from the defendants the prescribed penalty of $1,000 for the alleged violation of section 4 of the Alien Immigration Act of February 20, 1907 (34 Stat. 898). The case is submitted upon the deposition of John Spiros, the alien involved, and certain additional probative facts set forth in a written stipulation signed by counsel for the respective parties. If the defendant corporation is liable at all, such liability grows out of, and is a result of, the acts of its co-defendant, W. D. Tuttle, while in its employ. Upon motion of the district attorney, the cause has been dismissed as to the defendant Tuttle.

It seems that Spiros first came to this country from Greece in 1909. While here he was engaged for about two years as a section laborer for the defendant company, under the direction of the defendant Tuttle as section boss. Thereafter he returned to Greece, where he remained for 14 months, and then again came back to America, taking employment at Fraser Mills, British Columbia. It further appears that before he left this country he had loaned to Tuttle $500, and the larger part of this was still due him upon his return from Greece. Of date August 24, 1914, he wrote to Tuttle from Fraser Mills, advising him that he had recently returned, and also informing him that he was without work and without money, and requested that he send him funds by telegraph. Tuttle replied from Plummer, Idaho, stating that he had been unfortunate, and suggesting that if he (Spiros) would come to him, he would try to get him a job and would gradually pay the debt. At that time Tuttle was working for the defendant corporation as a common laborer, and was without any authority to act as its agent in any capacity. A short time afterwards he again secured a position as section foreman, and thereupon, on September 29, 1914, he wrote to Spiros, inclosing $25 of his own money for the payment of traveling expenses, and requested him to come to Plummer and take a job under him upon the section. Spiros came and was put to work as section laborer. So far as appears, no officer or agent of the defendant company, other than Tuttle, knew that Spiros was an alien, or knew any of the circumstances of his coming to Plummer.

Section 5 of the Alien Immigration Act provides that any person or corporation violating the provisions thereof "by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of $1,000." Comp. St. 1913, § 4250. The act has been construed in United States v. Regan, 232 U. S. 37, 34 Sup. Ct. 213, 58 L. Ed. 494, Grant Bros. v. United States, 232 U. S. 647,

34 Sup. Ct. 452, 58 L. Ed. 776, and United States v. Great Northern Ry. Co., 214 Fed. 46, 130 C. C. A. 486.

The primary question is of the extent of Tuttle's agency for the defendant corporation. Notice will be taken of the fact that ordinarily a section foreman exercises a very limited authority. Here it is expressly stipulated that at the time he wrote the last letter referred to, and sent the money to Spiros, Tuttle was section foreman at the station of Pedee; that he had been similarly employed for a period of several years, at a time shortly prior to that date; that generally his duties were to care for the track and supervise the work of the men in his gang; and that he—

"was authorized to employ such men as might be necessary to work upon the said section of railroad, if such men should ask for employment in person at said Tuttle's headquarters at a time when they were needed on said section, or if they could be obtained in the immediate neighborhood of said section; that said Tuttle was not authorized to make any contract of employment which would be binding upon the said railway company uhder circumstances other than the foregoing; and that if he needed men to work upon said section, and such men could not be obtained at his said headquarters or in the immediate neighborhood thereof, he was authorized to requisition such men from either the roadmaster of the defendant company or the division superintendent."

With this definition of the character and extent of his agency, I think it must be held that in arranging with Spiros or encouraging him to come Tuttle was not acting in the line of his duty or within the scope of his authority. Spiros was at the time hundreds of miles away from Pedee, and not only without the boundaries of the state, but in a foreign country. Moreover, the evidence leaves no doubt in my mind that, in engaging Spiros, Tuttle was not acting primarily for his employer, but upon his own behalf and in his own interest. It is also clear that, had the relation of debtor and creditor not existed between him and Spiros, the latter would not have come to the United States at all. Tuttle was unable to pay his debt, and was endeavoring to secure forbearance from his creditor by bringing him to Idaho, and the latter hoped to hasten the collection of the debt by coming. The first suggestion from Tuttle was, not that Spiros should go into the service of the railroad company, but into some other line of work.

It is further clear that the moving consideration which induced Spiros to come was not the promise of employment, but the hope of being able to collect his money. He appears to have testified frankly and fairly, and his positive statement is that he had satisfactory employment where he was, and by reason of the fact that his brother was near him he did not desire to come back to the United States. I entertain no doubt that, had Tuttle paid him in full upon his arrival, he would have immediately returned to Canada. To be sure, without the promise of employment, he would not have come to the United States; but it still remains true that he did not come to get employment. He came for his money. He was a poor man, and could not afford to give up his job in Canada and stay here in idleness until Tuttle could raise what was due him. But the job was not what he came for, and, as already suggested, he did not stay for that purpose.

Employment was the condition of his staying, rather than the object of his coming, or the inducement which brought him. Work he had in Canada, and there he preferred to stay, for the reasons just explained.

Now, to hold that in such a case, where a subordinate employé of a corporation, with limited agency, has exceeded his authority, for the purpose of furthering his own private interests, the corporation becomes chargeable with the commission of a crime and subject to the payment of a heavy penalty, would in my judgment be to place a most unreasonable construction upon the law, and to extend its operation beyond the limits of what is reasonably necessary to effectuate its manifest purpose and intent. I am unwilling to put upon it such a strain. The case is clearly an isolated one. There has been, and, under the stipuation, there could be, no suggestion that such or similar practices were or are common, or are resorted to for the purpose of evading the provisions of the statute. Responsibility might be imposed upon the company by a knowledge of, and acquiescence in, the unauthorized acts of an employé; but there are no facts here warranting the application of such a principle. Upon the whole, the transaction was for Tuttle's benefit alone; Spiros was not in need of employment, and the railroad company was not in need of his services. So far as appears, section men could have been procured near at hand. Tuttle was without authority to go into a foreign land to secure laborers.

The government conceded that the railroad company had limited his authority to the immediate vicinity of his section, and presumably this limitation was imposed for some purpose. May not this purpose have been the prevention of that which here took place? But, however that may be, the company had the right to impose the limitation, and it cannot be held liable for an act which it did not authorize or ratify. The suggestion is made that the limitation is wanting in certainty, and that inasmuch as Tuttle, acting in good faith, assumed that he had the right to engage the services of Spiros, the company is therefore bound. But while the phrase "immediate neighborhood," or "immediate vicinity," may be somewhat elastic and indefinite, under no reasonable construction could it be extended to reach out and include a foreign locality, hundreds of miles away from the point where Tuttle was employed.

Accordingly judgment will be entered dismissing the action.

THE ATHANASIOS.

(District Court, S. D. New York. November 15, 1915.)

1. ADMIRALTY ⊂⊃47—SUIT IN PERSONAM—PROCESS WITH FOREIGN ATTACHMENT CLAUSE.

Process in personam against the nonresident owner of a foreign vessel, with clause of foreign attachment, will not be issued, where the respondent offers to enter appearance and does so before allowance of process.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 396–403; Dec. Dig. ⊂⊃47.]

2. SHIPPING ⊂⊃51—RELEASE OF VESSEL FROM CHARTER—"RESTRAINT OF PRINCES."

A Greek vessel, chartered in a port of the United States by a charter party containing the usual exemption from liability for "loss or damage occasioned by * * * arrest and restraint of princes, rulers, or people," is released from the obligations of her charter where, before proceeding to her loading dock, she was requisitioned by the kingdom of Greece for government service by orders transmitted through its legation in Washington and consul general.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 203–210; Dec. Dig. ⊂⊃51.]

3. ADMIRALTY ⊂⊃1—DISCRETIONARY JURISDICTION—SUIT IN REM AGAINST FOREIGN VESSEL REQUISITIONED BY HOME GOVERNMENT.

Semble, that a court of admiralty of the United States should for political reasons refuse to entertain a suit by a Canadian corporation against a Greek vessel requisitioned for use by the Greek government.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1–17; Dec. Dig. ⊂⊃1.]

In Admiralty. Suits by James Carruthers & Co., Limited, against the steamship Athanasios, N. D. Lykiardopulo, claimant, and Bowring & Co., and against N. D. Lykiardopulo, as owner of said steamship, in personam. Libels dismissed.

On October 16, 1915, at New York, the Greek steamship Athanasios was chartered to James Carruthers & Co., a Canadian corporation, to carry a cargo of grain from a port in the United States to a port in Europe. The charter recited that it was between H. Clarkson & Co., agents for owners, and was signed by Bowring & Co., "as agents by cable authority of H. Clarkson & Co., London." Subsequently the words "H. Clarkson & Co., agents for" were deleted from the body of the charter, and the owner's name, N. D. Lykiardopulo, substituted. The words "H. Clarkson & Co., London," were also deleted after the signature of Bowring & Co., and the word "owners" substituted.

A printed clause was pasted on the charter providing: "The ship, in addition to any liberties expressed or implied herein, shall have the liberty to comply with any orders or directions as to departure, arrivals, routes, ports of call, stoppages or otherwise, howsoever given by his majesty's government or any department thereof, or by any committee or person having, under the terms of the war risks insurance on the ship, the right to give such orders or directions, and nothing done or not done by reason of such orders or directions shall be deemed a deviation." It was also provided in the body of the charter: "It is also mutually agreed that this contract shall be completed and be superseded by the signing of bills of lading on the same form as in use by regular line steamers from loading port to port of destination; or, if port of destination be one to which there is no regular line of steamers from loading port, this contract shall be superseded by the signing of bills of lading in the form customary for such voyages for grain cargoes, which bills

of lading shall, however, contain the following clauses: (1) 'It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by * * * arrest and restraint of princes, rulers or people. * * *'"

The vessel arrived at the port of New York on October 29th. While the steamer was at New York, off the Statue of Liberty, the master was advised by the Greek consul general that the vessel had been requisitioned by the Greek government under orders received from the Greek legation at Washington. In consequence of these orders the vessel did not load for the charterers. The charterer filed a libel against the steamer and against Bowring & Co., as agents for an unknown owner, and the vessel was seized by the marshal under process in rem.

The first of the actions above named was begun by filing the libel on November 1, 1915. Process in rem issued against the Athanasios, which was seized within the jurisdiction of the court, and is still in custody, with security demanded in the sum of $75,000. Bowring & Co. appeared on November 9th, and on November 10th the answer of "Bowring & Co. and of N. D. Lykiardopulo, claimant of the S. S. Athanasios," was filed. On November 10th the trial of the action was begun; motion to that effect having been made and granted on the ground that the ship was in custody and her claimant unable to give the security demanded.

At or shortly after the beginning of this trial counsel for libelant stated in open court his intention of filing a libel in personam for the same cause of action against the owner of the Athanasios, whose name had been revealed by the answer in action in rem. It was thereupon stipulated between counsel that all testimony taken under the pleadings in the first suit should be considered as taken also in the second suit. The trial continued to November 11th, when the libel in the second suit was filed in open court, and a motion made by libelant for process with a clause of foreign attachment. Counsel for N. D. Lykiardopulo immediately offered to appear, and on November 12th an answer in the second suit was filed and the trial and argument of both cases concluded.

Travis & Spence, of New York City, for libelant.

Charles R. Hickox and Kirlin, Woolsey & Hickox, all of New York City, for Bowring & Co., N. D. Lykiardopulo, and steamship Athanasios. Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, amici curiæ, representing the charge d'affaires of Greece in the United States of America and the consul general of Greece in the city of New York.

HOUGH, District Judge (after stating the facts as above). [1] The motion for process with clause of foreign attachment is denied. The practice is correctly outlined in Benedict's Admiralty, § 353 et seq., which is little more than a statement of the traditional law as contained in the briefs of counsel in Atkins v. Fibre & Co., 18 Wall. 292, 21 L. Ed. 841. For an instance in this court of how far this form of process depends on known possibilities of procuring appearance, see Shewan v. Hallenbeck (D. C.) 150 Fed. 231.

[2] The question whether Bowring & Co. are personally responsible, because in signing the charter party no principal was disclosed, and whether an action in rem will lie in any event, because the ship had not at time of breach of charter taken aboard any cargo nor gone to a loading berth, need not be considered, because I am of opinion that performance of contract has been prevented, and the charter party relieved, by "restraint of princes."

This Greek steamer cannot fulfill her charter without lawfully clearing from this port; she cannot clear without her papers; the Greek

consul has them, under orders from his government to see to it that the vessel loads for governmental purposes, and he has authority to put on her a captain who will obey these orders, if the present master does not. In the phrase now current, the sovereign of the ship's home and owner has "commandeered" or requisitioned the steamer for government account.

There is certainly no power in any court of the United States to prevent or undo this act of the Greek king and his consul. It is of no moment whether the Greek municipal law is being correctly interpreted by the various Grecian officials concerned—the restraint is actual and is governmental. Restraint need not be by physical force. Olivera v. Union Ins. Co., 3 Wheat. 183, 4 L. Ed. 365. Many of the cases on restraint are cited in The Styria, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027, all the British decisions and the American rule as to quarantine, in Carver on Carriage by Sea (5th Ed.) § 82, and Scrutton on Charter Parties (6th Ed.) art. 82.

It is unnecessary to parade the opinions; the essential holding is that restraint which fulfills the exception must be actual, not potential or probable, and must emanate from recognized authority, not, e. g., the brute power of a pirate. I am quite unable to conceive any more actual restraint than is here present. The Athanasios has been in effect seized by the Greek consul, evidently much against the will of her owner and master. For this reason, both libels must be dismissed.

[3] Having reached a decision, going into the merits of the controversy, by interpreting the contract made by the parties thereto, anything further is obiter. Considering, however, the probability of other cases more or less similar arising during the present world war, attention is called to the fact that this libelant is a Canadian corporation asserting a right against a res presently used by the government of Greece. In my opinion there is no compulsion upon a court of admiralty to entertain such a suit, and it is advisable to decline jurisdiction for political reasons.

It may also be noted that, under existing treaties and what has hitherto been considered accepted international usage, it would be the duty certainly of the executive, and probably of the judicial, branch of the United States government to assist the consul general of Greece in carrying out the orders of his king in respect of the Athanasios, inasmuch as such orders in no wise interfere with the peace, order, or dignity, of the United States, however destructive they may be to a private contract between subjects of Greece and Great Britain.

This consideration would (even if the charter party had not contained the usual exemptions) result in denying process, either in rem or by attachment, against the steamship.

Vessel released, and libels dismissed, with one bill of costs.[1]

[1] NOTE.—Since filing the above Sanday & Co. v. British, etc., Ins., Limited, 113 Law Times Rep. 407, has appeared. "Restraint of princes" is there fully treated in a case not unlike this.

UNITED STATES v. OREGON SHORT LINE R. CO.

(District Court, D. Idaho, E. D. October 23, 1915.)

1. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—VIOLATIONS—"PERMIT."
Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1913, § 8678) makes a carrier liable for a penalty if it requires or permits telegraph operators to remain on duty more than 9 hours. Section 3 provides that the carrier is deemed to have had knowledge of all acts of all its officers and agents. *Held*, that a carrier was liable where a telegraph operator remained on duty more than 9 hours, though he did so in violation of the company's rules, and without the knowledge of any of its officers or agents other than himself, as the statute enlarges or extends the application of the general rule under which a corporation is chargeable with the knowledge of only certain classes of officers and agents, and the knowledge which comes to it through an inferior agent is of the same quality as that coming through one having general authority, and to construe "permit" as requiring, not only knowledge, but permission in fact, and to hold that such permission in fact cannot be predicated upon imputed knowledge would render section 3 ineffective (citing Words and Phrases, Permit).

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

2. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—VIOLATIONS—"CONTINUOUSLY OPERATED OFFICE."
On April 19th a railway company issued an order that, commencing with the 20th, a telegraph office at which V. had been the sole operator, and which had been kept open only part of the day, should be continuously operated. An additional operator arranged for failed to appear, and the order was suspended until the evening of the 20th. V. on the 20th was on duty for the number of hours he had been accustomed to work; but, the services of an additional operator having been secured, the office was in fact kept open continuously on that day. *Held*, that the office was not, at the time of V.'s service, a "continuously operated office," within the Hours of Service Act, limiting the hours of service at such offices to 9, but permitting 13 hours of service at offices not continuously operated.

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

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

Action for penalties by the United States against the Oregon Short Line Railroad Company. On motion for judgment on the pleadings. Motion granted as to four of the counts, and denied and complaint dismissed as to the fifth count.

John R. Smead, Asst. U. S. Dist. Atty., of Boise City, Idaho.

George H. Smith, of Salt Lake City, Utah, and H. B. Thompson, of Pocatello, Idaho, for defendant.

DIETRICH, District Judge. This is an action to recover from the defendant penalties for five different alleged violations of what is commonly known as the "Hours of Service Act" (34 Stat. 1415). Upon the coming in of the defendant's answer to the complaint, the plaintiff moved for judgment on the pleadings, and by agreement between counsel the cause has been finally submitted upon the questions of

law thus raised. There are five counts in the complaint, the first four of which are in legal aspect identical; a distinct question is presented by the answer to the fifth.

[1] As to each of the first four counts the defendant admits that its employé, A. R. Weston, a telegraph operator in its station at Shelley, Idaho, remained on duty 9 hours in the 24 as operator, and thereafter 3 additional hours performing clerical work. It also concedes that the fact that the overtime was given to clerical work is not controlling, but it further alleges that this extra service was in violation of the defendant's general rules, and was without the knowledge of any of its officers or agents other than Weston himself; and this want of actual knowledge is the defense, and the only defense, relied upon.

A carrier is liable if, in the language of the act, it "requires or permits" an employé to remain on duty more than 9 hours; and under section 3 it is "deemed to have had knowledge of all acts of all its officers and agents." The precise point urged by the defendant is that, not having actual knowledge that Weston was working overtime, it cannot be held to have "permitted" the unlawful act, for the term "permit" necessarily implies both knowledge and consent. Gregory v. United States, 10 Fed. Cas. 1195, 1197; In re Wilmington (D. C.) 120 Fed. 180, 184; Wilson v. State, 19 Ind. App. 389, 46 N. E. 1050, 1051; People v. Conness, 150 Cal. 114, 88 Pac. 821, 824; Words and Phrases, vol. 6, p. 5317. The difficulty with the argument is that if it is given place, section 3 of the act is rendered wholly ineffective, for if the knowledge thus imputed cannot, when considered in connection with inaction on the part of the carrier, be made the basis for an inference of permission or consent, it can serve no useful purpose at all. If not only knowledge, but permission in fact, must be proved, and if, as contended, permission in fact cannot be predicated upon the imputed knowledge, it necessarily follows that actual knowledge must always be affirmatively established as any other material fact. In the argument the knowledge referred to in section 3 was assumed to be constructive only, but it is to be noted that it is not so designated in the act. The declaration is that the carrier shall be "deemed to have had knowledge"—not constructive knowledge. A corporation can, of course, acquire knowledge only through its officers and agents. Under the rules of general law it is chargeable with the knowledge, not of all of its officers and agents, but of only certain classes thereof. But, within the scope of the rule, actual notice to the officer or agent is deemed to be actual notice to the corporation.

It is thought that the statute here simply operates to enlarge the application of the general rule beyond those certain classes to which it is now confined by extending it to all officers and agents, and therefore the knowledge which comes to the corporation through an inferior agent is of the same quality as that which comes through one having general authority; in both cases the notice is deemed to be actual and not merely constructive. I am unable to yield to the suggestion that the only effect of section 3 is to cast upon the carrier the burden of showing that it was without knowledge. The language is inapt to express such a purpose. The declaration is absolute and unqualified:

"In all prosecutions * * * the common carrier shall be deemed to have had knowledge," etc.

The statute identifies the carrier with all of its agents, inferior as well as superior, and to it is imputed the knowledge of any one of them. It once appearing that some officer or agent had knowledge, it becomes quite immaterial to show that other officers or agents were without such knowledge. It is doubtless true that, so interpreted, the act is rigorous, and may now and then operate harshly upon the carrier; but, upon the other hand, it is apparent that under the view urged by the defendant it would be a much less efficient means for accomplishing the manifest purpose for which it was designed. From the discussion it follows that the answer states no defense to the first four causes of action, and as to them the motion for judgment must be allowed. It should be added that, while the reasoning may in some respects be distinct, the conclusion is fully supported by O. W. R. & N. Ry. Co. v. United States (D. C.) 213 Fed. 688, and is, to say the least, not out of harmony with the views expressed by the Circuit Court of Appeals in its opinion of affirmance in that case. 223 Fed. 596, —— C. C. A. ——.

[2] The controlling question touching the fifth cause of action is whether or not the defendant's telegraph office or station at Dayton, Idaho, was, during the whole of the 20th day of April, 1915, "continuously operated," as contemplated by the provisions of the act. The operator, Vissing, was on duty more than 9, but less than 13, hours, and, if it was not a "continuously operated" office, no wrong was done. It appears that prior to April 20th Vissing had been the sole operator, and the office was kept open only part of the time; but on April 19th the defendant issued an order that, commencing with the 20th, the office should be continuously operated, and arranged for an additional operator. But upon the morning of the 19th the new operator having failed to appear, the order of the preceding day was suspended until the evening of the 20th, when the services of an additional operator were secured. Vissing was on duty for the number of hours he had been accustomed to work, and as a matter of fact the office was kept open continuously on the 20th. But I am inclined to think that what was done was obnoxious to neither the letter nor the spirit of the act. Suppose that, the other facts being the same, the company had not decided to change to a "continuously operated" office until the hour of 7:40 p. m., on April 20th, the time when the additional operator appeared. We would have a case where the office was in fact operated continuously on April 20th, but in law it did not become such until 7:40 p. m., and surely the decision at that hour to change the character of the office could not be given the retroactive effect of making unlawful the service of Vissing, which at the time it was rendered was entirely within the terms of the statute. In principle and legal aspect the supposed case is indistinguishable from that made by the answer.

Accordingly, as to the fifth count, the motion will be denied, and the complaint dismissed.

In re HANSLEY & ADAMS.

(District Court, S. D. California, S. D. January 3, 1916.)

No. 1560.

1. BANKRUPTCY ⇐100—ADJUDICATION—CONSTRUCTION.
An order of the bankruptcy court, providing that, the petition of a copartnership having been heard and duly considered, it was thereby declared and adjudged a bankrupt, was not an adjudication that the members of the partnership were bankrupts.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. ⇐100.]

2. BANKRUPTCY ⇐69—ADJUDICATION AGAINST PARTNERSHIP—NECESSITY OF ADJUDGING PARTNERS BANKRUPTS.
While a partnership cannot be adjudged a bankrupt without a finding that the members of the partnership are insolvent, it may be declared bankrupt without at the same time declaring the partners to be bankrupt, as bankruptcy and insolvency are different things under the statute (Act July 1, 1898, c. 541, § 5, 30 Stat. 547 [Comp. St. 1913, § 9589]), and the statute provides that a partnership may be declared a bankrupt and contains no limitation in this regard.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 51–53, 56; Dec. Dig. ⇐69.]

3. BANKRUPTCY ⇐42—VOLUNTARY PROCEEDINGS—PARTNERSHIP.
One partner may petition to have the partnership declared a voluntary bankrupt.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 39; Dec. Dig. ⇐42.]

4. BANKRUPTCY ⇐42—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF PETITION.
Under a petition by one member of a partnership to have the partnership and its members adjudged bankrupts, a nonpetitioning member of the partnership cannot be adjudged a bankrupt, and the only method of instituting an involuntary proceeding is by a petition of creditors.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 39; Dec. Dig. ⇐42.]

5. BANKRUPTCY ⇐149—ADMINISTRATION OF ESTATE OF PARTNERSHIP AND MEMBERS.
Where a partnership is adjudicated a bankrupt and one of its members is not declared a bankrupt, the partnership trustee may be authorized to take possession of the assets of such member and administer them; they being subject to the payment of partnership debts.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. ⇐149.]

In the matter of Hansley & Adams, a copartnership, bankrupt. On motion to vacate the adjudication and counter motion to adjudicate the members of the partnership bankrupt nunc pro tunc. Motion to vacate denied, and adjudication made nunc pro tunc as to Adams.

Frank C. Hill and Lynden Bowring, both of Los Angeles, Cal., for H. A. Hansley.

Cass & Shelton, of Los Angeles, Cal., for J. E. Adams.

W. T. Craig, of Los Angeles, Cal., and Swaffield & Swaffield, of Long Beach, Cal., for trustee.

TRIPPET, District Judge. [1] Hansley and Adams were partners. J. E. Adams, one of the partners, filed a petition to have the partnership and himself declared bankrupts, alleging the proper jurisdictional facts. The petition also alleged that H. A. Hansley resided in the district and was insolvent. The prayer of the petition is that the partnership, and the members thereof, be declared bankrupts. Hansley opposed the proceedings. Upon the findings of a special master, an order was made in the matter, in the words and figures following:

"At Los Angeles, in said district, on the 7th day of June, A. D. 1915, before the Honorable Benjamin F. Bledsoe, judge of said court in bankruptcy, the petition of Hansley & Adams, a copartnership, that it be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Hansley & Adams, a copartnership, is hereby declared and adjudged a bankrupt accordingly."

This is not an adjudication that the members of the partnership are bankrupt.

Hansley now moves the court to vacate the adjudication on the ground that there has been no order adjudicating H. A. Hansley and J. E. Adams bankrupts. The contention is made that the partnership cannot be adjudged bankrupt without, at the same time, adjudging the individual members of the partnership bankrupts.

[2, 3] The statute provides that a partnership may be declared bankrupt. A partnership is an entity to that extent. The statute does not impose the condition that the partners shall be declared bankrupt at the same time as the partnership. It is plain that the partnership may be declared a voluntary or involuntary bankrupt. There is no limitation in the statute in this regard. It is well settled that one partner may petition to have the partnership declared a voluntary bankrupt. It is undoubtedly necessary, except in certain cases, that the court should determine that the members of the partnership are insolvent; otherwise the partnership would not be bankrupt. Bankruptcy and insolvency are different things under the statute. There are many instances that could be stated that would defeat the statute authorizing a partnership to be declared bankrupt, if it were necessary before doing so to adjudicate the members thereof bankrupts. The language of the statute does not justify an inference that Congress meant that a partnership could not be declared bankrupt without adjudication of the partners to be bankrupt. The motion aforesaid will be denied for the reasons stated.

There is a counter motion in the cause that an adjudication of the members of the partnership be now made and that the adjudication be entered nunc pro tunc. As to J. E. Adams, the petitioner, an adjudication will be made declaring him to be a bankrupt, and ordering that such adjudication be entered nunc pro tunc, as of the 7th day of June, 1915. The better practice is to file a separate petition, i. e., one for the partnership and one for each partner who desires to go through bankruptcy, but the practice adopted here has been approved. In re Meyer, 98 Fed. 979, 39 C. C. A. 368; In re Farley (D. C.) 115 Fed. 359.

[4, 5] There are authorities to the effect that a proceeding like this might be regarded as an involuntary proceeding as to the nonconsenting partner. There is only one method in the statute for the institution of an involuntary bankruptcy proceeding, namely, by the petition of a creditor or creditors, stating certain jurisdictional facts. No such petition has been filed herein, and from the master's report it does not appear that Hansley is indebted to the amount of $1,000, and therefore he could not be declared an involuntary bankrupt. The individual assets of Hansley are assets that are subject to the payment of the partnership debts, and an order will be made that the trustee elected by the creditors of the partnership take possession of said assets and administer them, unless, upon proper procedure, Hansley is declared a bankrupt, and his creditors elect a trustee. The opinion in Re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986, to the effect that the trustee elected by the partnership creditors cannot administer the estates of the members, has been disapproved by the Supreme Court, and section 5 clearly contemplates this procedure. General Order No. 8 (89 Fed. vi, 32 C. C. A. vi) provides for this course.

Before arriving at the foregoing conclusions, I examined the following authorities: Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029; Still's Sons v. American National Bank, 209 Fed. 749, 126 C. C. A. 473; In re Samuels, 215 Fed. 845, 132 C. C. A. 187; In re Forbes (D. C.) 128 Fed. 137; Vaccaro v. Security Bank of Memphis, 103 Fed. 436, 43 C. C. A. 279; In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986; In re Meyer, 98 Fed. 979, 39 C. C. A. 368; and many others.

In re MALONE'S ESTATE.

(District Court, D. Idaho, E. D. October 23, 1915.)

BANKRUPTCY ⊂=207—HOMESTEAD—PRESERVATION OF ATTACHMENT LIEN—POWER OF COURT.

Where an attachment was levied on real estate in Idaho occupied by the debtor as a homestead, but prior to his filing a declaration of homestead, which was necessary under the state law to protect it from the levy, on his subsequent bankruptcy within four months, the referee had power under Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (Comp. St. 1913, § 9651), to order the lien of the attachment preserved for the benefit of the estate as against the homestead claim.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=207.]

In Bankruptcy. In the matter of Mike Malone, bankrupt. On petition to review an order of the referee denying bankrupt's petition for allowance of homestead. Modified and confirmed.

T. L. Glenn, of Montpelier, Idaho, and P. L. Williams, of Salt Lake City, Utah, for bankrupt.

De Meade Austin, of Salt Lake City, Utah, for trustee.

Gough & Kunz, of Montpelier, Idaho, for creditor.

DIETRICH, District Judge. The bankrupt seeks the reversal of an order, or perhaps, more accurately speaking, two orders, of the referee, which in effect deny exemption from administration as a part of the bankrupt estate of a lot in Montpelier, occupied by him as a home. There is no dispute about the facts, and as found by the referee they are in substance as follows:

On June 24, 1914, the bankrupt was residing with his family upon the lot in question, and was entitled under the laws of Idaho to file a declaration of homestead thereon, and thereby render it exempt from attachment and execution. He had, however, made no declaration, and the property being therefore subject to attachment, the Bank of Montpelier, holding two notes against him, aggregating $3,300, besides interest, brought suit thereon against him and caused a writ of attachment to be issued and duly levied upon the lot. Details may be dispensed with, for, generally speaking, it is to be said that no question is now raised touching the validity of the attachment; it being conceded that the bank thus acquired a lien for the full amount of its claim. Three days later, namely, upon June 27, 1914, the bankrupt filed his declaration of homestead as provided by law. It is conceded by the trustee and creditor that this declaration operated to exempt the property from subsequent levies, but it is also conceded by the bankrupt that it in no wise affected the levy already made. Two days thereafter this bankruptcy proceeding was initiated by the filing of a voluntary petition, and upon the following day the adjudication was made.

Upon the authority of Chicago, B. & I. R. R. Co. v. Hall, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306, it is admitted that under section 67f of the Bankruptcy Act the adjudication operated to discharge the attachment lien unless the same was preserved for the benefit of the estate by proceedings taken in pursuance of that clause of the section which provides that such liens are continued in force in case "the court shall, on due notice, order that the right under such levy * * * shall be preserved for the benefit of the estate." In that respect the referee expressly finds and reports that upon August 18, 1914, upon motion of the trustee, and after due notice to the bankrupt, an order was entered preserving the lien for the designated purpose, and apparently this order was not opposed by the bankrupt, and certain it is that no proceedings were ever taken to have it annulled. The real question therefore is of the validity of this order, and in a collateral proceeding, such as this must be deemed to be, it is limited to an inquiry touching the jurisdiction of the referee in point of subject-matter. In other words, if it is within the power of a referee under any circumstances to preserve such a lien upon property which, either subject thereto or free therefrom, the bankrupt may claim as exempt, then full faith and credit must be given to this order, for there was jurisdiction of the person of the bankrupt.

We cannot in a collateral proceeding inquire into the circumstances under which the referee acted, or question the propriety or wisdom of his actions. The validity of this order, I say, is the only real question, for while, as suggested at the hearing, I am inclined to think

that in any view the order now under consideration was technically erroneous, in that, granting the present validity of the lien, the property should, subject to the lien, be set apart as exempt, still it is stated by counsel for the trustee, and not controverted by opposing counsel, that the amount of the lien greatly exceeds the value of the property, and therefore an adjudication of exemption subject to the lien would be of no substantial value to the bankrupt, especially since he is in possession and has the present use of the property.

Upon this principal question no adjudicated case has been called to my attention, and I find none in the books. Nor do I find substantial assistance in an elaborate analysis of the Bankruptcy Act or in a consideration of the general objects which it was intended to accomplish. There is nothing in the act or the policy which it embodies requiring that we put a strained construction upon, or read an unexpressed exception into, the language of the section under review, and, giving to it the meaning which its language naturally imports, there can be but one answer to the question, namely, that the court has the power, within its sound discretion, to preserve such a lien for the benefit of all the creditors. The question of what a bankrupt may or may not claim as exempt is, of course, to be referred exclusively to the state law. At the time the debtor here filed his petition in bankruptcy this property was, under the state law, subject to this lien; the debtor was powerless to escape from it, unless possibly by resort to bankruptcy proceedings. He might have prevented the lien by an earlier declaration of homestead; but this, for some reason not disclosed in the record, he failed to make. He sought the protection of the Bankruptcy Act, and particularly of section 67; but the protection thus afforded is by the terms of the section conditional and contingent. The very provision, and the only provision, upon which he could rely for a dissolution of the lien, confers upon the court the power within its discretion to keep it alive.

The operation of the clause conferring this authority is apparently limited to no class of liens and excludes none; it appears to be quite as comprehensive as the general provision upon which the petitioner relies. Nor can it be said that in this view the Bankruptcy Law operates to work a hardship upon the debtor, for, as we have seen, were it not for the act, there would be no possible escape for the debtor in a case of this character; under the state law he was without hope. The Bankruptcy Act provides the opportunity for a debtor to appeal to the discretion of the court; but here, though having notice of the trustee's application for the preservation of the lien, he seems not to have availed himself of such opportunity, and, as already stated, it is no longer possible to call into question the propriety of the referee's action.

In harmony with the views expressed, an order will be entered, modifying the orders under review in such manner that the exempt character of the property will be recognized, subject, however, to the lien, reserving in the bankruptcy court the power to sell the property for the satisfaction of the lien, the surplus, if any, to be turned over to the bankrupt. Counsel for the trustee is directed to prepare the

order, with the assistance of counsel for the creditors, if he so desires, and submit the same to counsel for the bankrupt for approval as to form.

In re CLOUTIER BROS.

(District Court, D. Maine. December 28, 1915.)

No. 10754.

1. BANKRUPTCY ⟸407—DISCHARGE—MAKING FALSE STATEMENT TO OBTAIN CREDIT.

A statement made by a partnership to a mercantile agency concerning its financial condition was the statement of the partnership within Bankr. Act July 1, 1898, c. 541, § 14 (3), 30 Stat. 550, as amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (Comp. St. 1913, § 9598), relative to denying a discharge where money or property is obtained on credit upon a materially false statement made for the purpose of obtaining credit, though the statement was made by the firm's bookkeeper and not on the personal investigation of either copartner.

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

2. BANKRUPTCY ⟸407—DISCHARGE—MAKING "FALSE STATEMENT TO OBTAIN CREDIT."

Bankr. Act, § 14 (3), as amended by Act June 25, 1910, § 6, provides for the denial of a discharge if the bankrupt has obtained money or property on credit upon a materially false statement in writing made by him to any person or representative for the purpose of obtaining credit from such person. *Held*, that a false statement made to a mercantile agency by a debtor seeking credit with intent that the statement shall go to some one who will extend credit bars a discharge, as the agency is to be regarded as the representative of the debtor and his agent for the purpose of obtaining credit by means of exhibiting the false statement.

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

3. BANKRUPTCY ⟸407—DISCHARGE—MAKING FALSE STATEMENT TO OBTAIN CREDIT.

To bar a discharge under Bankr. Act, § 14 (3), as amended by Act June 25, 1910, § 6, a statement made to obtain credit must not only be untrue, but must be willful or intentionally misleading.

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

4. BANKRUPTCY ⟸407—DISCHARGE—MAKING FALSE STATEMENT TO OBTAIN CREDIT.

A firm which subsequently became bankrupt made a financial statement to a mercantile agency in which it was stated that the open accounts for merchandise at the date of the statement amounted to $10,839.89. The unpaid open accounts for merchandise at that time in fact exceeded $14,000. A creditor's credit manager obtained this statement from the agency, and, relying thereon and believing it to be true, the creditor sold merchandise to the bankrupt. *Held*, that the bankrupt obtained property on credit upon a materially false statement in writing made for the purpose of obtaining credit; and a discharge will be denied under Bankr. Act, § 14 (3), as amended by Act June 25, 1910, § 6.

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

In Bankruptcy. In the matter of Cloutier Bros., bankrupts. On exceptions by the trustee to the report of a Special Master on an ap-

plication for a discharge. Exceptions sustained, and report overruled in part, and discharge refused.

Maurice E. Rosen, of Portland, Me., for trustee in bankruptcy.
Fred W. Clair, of Waterville, Me., for bankrupt.

HALE, District Judge. [1] This case comes before me upon exceptions by the trustee to the report of the special master, in matter of the discharge of the bankrupts. The trustee urges that the proofs show the bankrupts to have made a materially false statement in writing to a mercantile agency, for the purpose of obtaining credit; and that thereby credit was actually obtained from Clapp & Tilton, of Boston. The proofs show that on April 10, 1914, Edmond A. Cloutier, one of the bankrupts, in behalf of the firm of Cloutier Bros., made a statement to Bradstreet's Mercantile Agency with reference to the financial and credit standing of Cloutier Bros., in order that those from whom Cloutier Bros. should buy, and those to whom they should sell, would be able to get information regarding the financial and credit standing of Cloutier Bros. The statement was made by the bookkeeper. Edmond A. Cloutier, however, refers to it in his testimony as his statement; and it must be taken as the statement of the bankrupt firm, even though it was not made on the personal investigation of either copartner. The statement shows open accounts for merchandise $10,839.89 at the date of the statement, April 10, 1914. It appears in testimony that the total unpaid invoices, namely, the unpaid open accounts for merchandise at that time were $14,243.43, figuring only from March 1, 1914, namely, for only the six weeks before that time.

[2, 3] Since the amendment of 1910 (Act June 25, 1910, c. 412, § 6, 36 Stat. 839 [Comp. St. 1913, § 9598]), section 14 of the Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 550, provides that the judge shall discharge the applicant, unless he has (3) "obtained money or property on credit upon a materially false statement in writing, made by him to any person or representative for the purpose of obtaining credit from such person." It is the duty of courts to hold merchants to a strict accountability for statements made in the course of business to a mercantile agency for the purpose of obtaining credit. A false statement made to such agency by a debtor seeking credit, and intending that the statement shall go to some one who will extend him credit, must be held to be a bar to a discharge. The mercantile agency is to be regarded as the representative of the debtor, and his agent for the purpose of obtaining credit by means of exhibiting a false statement. To bar a discharge, the credit statement must not only be untrue; it must be false; it must be willful or intentionally misleading. Since the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797), and before the amendment of 1910, it has been held that the statement made to the commercial agency was the same in effect as if made direct to the parties who relied upon it. In re Kyte (D. C.) 174 Fed. 867, 870, 871; Tindle v. Birkett, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822. There is, of course, much more reason for holding this since the amendment of 1910, which inserted the words "or representative."

[4] In the case at bar, a careful examination of the testimony leads me to the conclusion that the statement made by Edmond A. Cloutier in behalf of the bankrupts was intentionally misleading. The explanation given by Edmond A. Cloutier for the credit statement is not satisfactory. Arthur W. Coolidge testifies that he obtained from the Bradstreet Agency a report of the credit statement made April 10, 1914; and that, relying upon this statement, and believing it to be true, Clapp & Tilton, for whom he is credit manager, sold merchandise to Cloutier Bros. Upon this testimony I am constrained to hold that the bankrupt did obtain property on credit upon a materially false statement in writing made by the bankrupts to the Bradstreet Mercantile Agency for the purpose of obtaining credit. In view of my conclusion, it is unnecessary to consider the other questions presented.

To the extent indicated, the exceptions to the report of the special master are sustained; and to that extent the report of the special master is overruled. In consequence, a discharge to the bankrupts will be refused.

In re ATLANTIC CONST. CO.

Ex parte ATLANTIC CONST. CO.

(District Court, S. D. New York. December 30, 1915.)

BANKRUPTCY ⊂⊃378—COMPOSITIONS—AMOUNT OF DEPOSIT.

Bankruptcy Act July 1, 1898, c. 541, § 12b, 30 Stat. 549 (Comp. St. 1913, § 9596), provides that an application for the confirmation of a composition may be filed after acceptance in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and after the consideration to be paid creditors and the money necessary to pay all debts having priority and the cost of the proceedings have been deposited in such place as shall be designated by the judge. Section 57n (Comp. St. 1913, § 9641) provides that claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication with certain immaterial exceptions. *Held*, that section 57n does not apply to compositions, and, where an offer of a composition was made within one year after the adjudication, all scheduled creditors were included in the offer, though they failed to prove their claims within the year, and the deposit must be sufficient to cover the agreed dividend to such creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 601; Dec. Dig. ⊂⊃378.]

In the matter of the Atlantic Construction Company, bankrupt. On motion by the bankrupt to confirm a composition. Referee's ruling denying the motion affirmed.

Motion to confirm a composition. The adjudication was on October 1, 1914; the offer of 75 cents in composition was filed with the referee on August 20, 1915; the petition for confirmation of the composition, which had been accepted under section 12b, was filed on December 15, 1915. The question is whether the bankrupt's deposit must include those claims proved after October 1, 1915, or only those filed before; the referee has declined a certificate until the deposit covers all claims scheduled.

Anderson, Iselin & Anderson, of New York City, for bankrupts.
Krauthoff, Harmon & Mathewson, of New York City, for trustee.

LEARNED HAND, District Judge. A composition arises from the acceptance of an offer to the creditors to purchase the estate. In this case the offer was made before the year was up, and it can only be interpreted as made at that time to all those who are shown on the schedules. The bankrupt could not tell who would prove before October 1, 1915. It could not have been within his purpose, therefore, to exclude A., B., or C., who might fail to do so. There is no administrative reason why failure to prove should work a forfeiture of the offer so made. When the estate is to be administered it is necessary to put a period to the proving of claims, because the rate of dividend depends upon what claims are proved. Not so in a composition (Re Fox, 6 Am. Bankr. Rep. 525), because the dividend is necessarily fixed by the bankrupt upon the schedules alone. To include claims not proved within the year would undoubtedly create a bad situation, if such claims might vote upon the composition, since those alone should vote who have an option to administer or to accept the offer; but section 12b provides against that by putting the acceptance into the hands of those only who have proved before the application to confirm. Thus, while the offer is made to all, the right to accept is given only to those who have any option. It does not, however, follow that in accepting they do not accept to the full extent of the offer, and do not include those who may not prove till after the year is past. Certainly, their acceptance covers all those mentioned in the schedules who have not proved but who shall before the year is up. Why should it not cover the rest mentioned in the schedules? Section 57n seems to me to have no application whatever to the situation; it concerns only proving claims against the bankrupt estate, and that is quite irrelevant to an offer to the bankrupt's creditors.

If the offer were made after the year expired, so that the bankrupt knew the only creditors who could in any event administer his estate, the result might well be different. That question I leave till it arises, but obviously one of the rights of the creditors might be to have as large as possible an offer from the bankrupt to weigh against their own administration of the estate. Obviously the bankrupt cannot make as large an offer if he must include scheduled creditors who have not proved. Such considerations do not apply when the bankrupt makes his offer before the year is up, because at that time he must take the chance in any event that all who are scheduled may prove.

There is no case which deals with the subject but Re Brown (D. C.) 123 Fed. 336, in which a creditor was not allowed to take his dividend though the composition had been confirmed before the year was up. Why he should have been compelled to prove against an estate which had been redelivered to the bankrupt is not apparent to me. Re French (D. C.) 181 Fed. 583, does not touch the case at bar, because the offer was made after the year had expired; it falls within the proviso suggested above and may well have been correct. Re Lane (D. C.) 125 Fed. 772, turns upon whether a dilatory creditor may take

the dividend of one who did not claim the dividend. It does not appear whether the offer was made before or after the year was out, but in any event the composition had been confirmed upon a deposit appropriated only to creditors who had filed. Re Rider (D. C.) 96 Fed. 808, and Re Harvey (D. C.) 144 Fed. 901, were each cases where the confirmation was asked before the year was up—a situation which does not present the question here. Re Fox, 6 Am. Bankr. Rep. 525, a decision by Mr. Remington while referee, and of most respectable authority, does not state the facts in the report, and I cannot say what it decides. Some of the language goes further, if taken most broadly, than it is necessary to go in this case.

The ruling of the referee is affirmed, and the composition will not be confirmed unless the bankrupt deposit a sum sufficient to pay the dividends of all creditors scheduled.

In re IRISH.

(District Court, E. D. Pennsylvania. December 28, 1915.)

No. 5611.

BANKRUPTCY ⇐84—INVOLUNTARY PETITIONS—AMENDMENT—"ACT OF BANKRUPTCY."

Bankr. Act July 1, 1898, c. 541, § 3a, 30 Stat. 546 (Comp. St. 1913, § 9587), provides that acts of bankruptcy by a person shall consist of his having (1) conveyed, etc., property with intent to hinder, delay, or defraud creditors; or (2) transferred while insolvent any portion of his property to creditors with intent to prefer them; or (3) suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference. A petition to have a person adjudicated a bankrupt on the ground that he confessed judgment to his wife in an amount equal to the value of his real estate, his only disclosed asset, alleged this to be an act of bankruptcy under clause 3, and the petitioning creditors asked leave to amend to allege acts of bankruptcy under clauses 1 and 2. *Held*, that leave to file an amended petition alleging any act of bankruptcy within the general scope of the facts set forth in the original petition would be granted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. ⇐84.

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

In Bankruptcy. In the matter of Ned Irish, an alleged bankrupt. On motion to dismiss the petition. Motion denied conditionally.

G. Herbert Jenkins, of Philadelphia, Pa., for alleged bankrupt.
Montgomery Evans, of Norristown, Pa., for petitioning creditors.

DICKINSON, District Judge. This case has taken on a very practical phase and is disposed of with this in view. The real question involved is whether an insolvent, whose sole disclosed asset is real estate, may confess a judgment to his wife in an amount fully equal to the value of the real estate, and through the lien thus acquired ab-

sorb all the assets, and by merely withholding execution escape bankruptcy proceedings against him. The petition of creditors as filed avers what was done to have been the act of bankruptcy set forth in clause (3) of section 3a. It has been authoritatively ruled by the courts of this district that the things charged to have been done by the bankrupt do not constitute the act of bankruptcy set forth in this clause. This has been since settled for us as the law in Citizens' Banking Co. v. Ravenna Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352.

We have in consequence the admission of counsel for petitioning creditors that the petition is not self-supporting. This situation is met by a request to amend, so that the petition may aver the acts of bankruptcy defined in clauses (1) and (2) of the same section. It is argued for petitioners that the cause may proceed to an adjudication on these grounds, if unchallenged by an answer. Apparently counsel for the bankrupt feel embarrassed in meeting this argument, because the facts upon which the judgment of the court must proceed do not get upon the record until the amended petition has been filed. They, in consequence, adhere to the position that the present petition discloses no basis for an adjudication, and the proceedings, because of this, should be dismissed. To meet this situation we allow an amendment of the petition to be filed averring any act of bankruptcy which the petitioners may feel justified in alleging, provided the amended petition is kept within the general scope of the facts set forth in the original petition. Such amended proceedings will be subject to any motion which the bankrupt may make, or the bankrupt may make answer thereto, as if said amended petition had been originally filed.

If such amended petition be not filed in 10 days, an order dismissing the proceedings may be entered.

In re GRABOYES.

(District Court, E. D. Pennsylvania. December 28, 1915.)

No. 5340.

BANKRUPTCY ⊂=455—REFEREES—REVIEW OF PROCEEDINGS—PROCEEDINGS REVIEWABLE.

A petition for an order requiring a bankrupt to pay over certain moneys contained specific averments of facts regarding his acquisition and payments of money. The bankrupt's answer ignored the averments of the petition beyond those purely formal, and set up other statements of fact. The referee thereupon ordered him to answer the petition. *Held*, that this order would not be reviewed, as the court is not called upon to regulate the minutest details of the practice before referees through petitions for review, and the proceedings could not be made the subject of piecemeal appellate action, but should be reviewed after final judgment.

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

In Bankruptcy. In the matter of Abraham Graboyes, bankrupt. On petition for review or order of referee. Petition dismissed, and cause remitted to the referee.

William F. Berkowitz and Samuel W. Salus, both of Philadelphia, Pa., for bankrupt.

Alfred T. Steinmetz, of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. The order of the referee asked to be reviewed is of the merest interlocutory character. A petition was filed, asking for an order on the bankrupt to pay over certain moneys averred to be in his possession. An order in the nature of a rule to show cause issued. The bankrupt assumed to answer the petition on which the rule was allowed. Instead of answering it, he sets up statements of fact from which it is supposed he wishes the referee to find that he has nothing in his possession belonging to the bankrupt estate. In doing this he ignores the averments of the petition beyond those which are purely formal, and what is filed as an answer is no answer at all. He is thereupon ordered by the referee to answer. From this order he now appeals.

The practice of taking appeals from interlocutory orders is one not to be encouraged. It is the exceptional case where good to any one results from the practice. The evil consequences are to bring about conditions of interminable delays, which are insufferable. There is no call upon the court through petitions for review to attempt to regulate the minutest details of the practice before referees. There is no need for the court to interfere in this instance. The petition for a review is without legal merit. There is also, so far as is shown, an absence of merit in fact. If the bankrupt answers at all, his answer should be a real answer, and responsive. The petition consists in the main of a number of specific, clear-cut averments. They are consecutively numbered. Those from 1 to 3, inclusive, are more or less formal. The others begin with the assertion as a fact of the statement that on July 1, 1914, the bankrupt had on hand stock to the value of at least $9,500. This is followed by equally specific statements that he added to this stock by purchases to a named sum, and that he received moneys from the collection of accounts and from the proceeds of loans and other specifically named sources to a given amount. The aggregate sum which thus came to the bankrupt is set forth. The admission is then made of disbursements out of these moneys by the bankrupt to a stated amount, and certain sums of money or other property otherwise gone out of the possession of the bankrupt, leaving in his hands only a named balance of the moneys received.

The bankrupt answered the averments 1, 2, and 3. Each of the other averments could have been as categorically answered. None of them are. We do not feel called upon to express an ex parte opinion upon the practice followed in this case. The bankrupt must decide for himself in the first instance the course he will pursue. He may, of course, refuse to answer at all. When the consequences of such a refusal reach the stage of the final judgment, which is the proper subject of appellate review, the whole proceedings are brought before the court. He may file an evasive answer. Certain consequences may follow this, and when they have ripened into final judgment an appeal brings them

before the court. The proceedings, however, should not be made the subject of piecemeal appellate action.

The petition for review is therefore dismissed, and the cause remitted to the referee, to be proceeded with to final order.

In re AMER et al.

(District Court, E. D. Pennsylvania. October 11, 1915.)

Nos. 3464, 3467, 3470–3472.

BANKRUPTCY ⊂=473—HEARING ON OBJECTIONS TO DISCHARGE—COSTS.

The filing of objections to a bankrupt's discharge is the beginning of a distinct and separate dispute, and the hearing thereon is in effect a trial in equity in which the equity rules as to taxation of costs may properly be applied. The fact that the same creditor files similar objections in a number of different cases does not relieve him from payment of costs in each case on an adverse decision.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 873–877; Dec. Dig. ⊂=473.]

In the matter of William M. Amer, Thomas W. Barnes, Adam B. Long, Jacob H. Bomberger, and Tobias R. Kreider, bankrupts. On exceptions of the Bendersville National Bank to report of referee as special master recommending discharge of bankrupts. Reargument on question of taxation of costs. Ruling adhered to.

B. F. Davis, of Lancaster, Pa., for exceptant.

John A. Nauman, of Lancaster, Pa., for bankrupts.

THOMPSON, District Judge. Upon the reference of the specifications of objection to the bankrupts' discharge to the referee, the filing of his report recommending the dismissal of the specifications of objection and the discharge of each of the five bankrupts, the matter came before the court upon the exceptions of the Bendersville National Bank to the referee's report, and, after hearing, the exceptions were dismissed.

Costs were taxed in each of the five cases under Supreme Court Equity Rule 67 (198 Fed. xxxvii, 115 C. C. A. xxxvii) in the amount of $5 upon each exception dismissed. The referee having no jurisdiction to act upon an application for discharge, it is within the power of the court, under General Order in Bankruptcy No. 12 (89 Fed. vii, 32 C. C. A. vii), to specially refer it to the same or another referee for report and recommendation to the court. Objections to a bankrupt's discharge are the beginning of a distinct and separate dispute, and the hearing thereon is in effect a trial in equity. In re Guilbert, 18 Am. Bankr. Rep. 830, 154 Fed. 676; In re Broadway Trust Co., 18 Am. Bankr. Rep. 254, 152 Fed. 152, 81 C. C. A. 58.

The equity rules as to taxation of costs may therefore be properly applied, and the fact that the same objecting creditor filed similar exceptions in five separate cases does not relieve it from payment of costs to each of the bankrupts.

I perceive no reason to alter the decision heretofore rendered upon exceptions to the taxation of the bills of costs, and the present petition is therefore dismissed.

NATIONAL SURETY CO. v. UNITED STATES, for Use of PITTSBURGH & BUFFALO CO. et al.

(Circuit Court of Appeals, Sixth Circuit. January 14, 1916.)

No. 2651.

1. COURTS ⟸424—UNITED STATES COURTS—FORM OF ACTIONS—LAW OR EQUITY.

Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), requires contractors with the United States to give a bond, with the additional obligation that the contractor shall promptly pay all persons supplying labor and materials in the prosecution of the work, and provides that any person, etc., furnishing labor or materials "used in the construction or repair of any public building or public work," may intervene in an action instituted by the United States on such bond; that, if no suit shall be brought by the United States, any person supplying labor and materials may sue thereon in the name of the United States; that, where suit is instituted by any such creditor, only one action shall be brought, and any other creditor may file his claim therein and be made a party thereto; and that, if the recovery on the bond is inadequate to pay the amounts found due, judgment shall be given to each creditor pro rata. *Held*, that while there is force in the argument that a court of equity is the appropriate tribunal when such action is brought by a creditor, the District Court had jurisdiction of such an action, though brought on the law side of the court, especially as Judicial Code, § 274a, as added by Act March 3, 1915, c. 90, 38 Stat. 956, provides that when a suit at law should have been brought in equity, or a suit in equity at law, the court shall order any amendments to the pleadings necessary to conform them to the proper practice, and that any party may at any stage of the cause amend his pleadings, so as to obviate the objection that the suit was not brought on the right side of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1119, 1125–1129; Dec. Dig. ⟸424.]

2. UNITED STATES ⟸67—CONTRACTORS' BONDS—CLAIMS SECURED.

In determining what claims are secured by the bond of a contractor with the United States, given pursuant to Act Aug. 13, 1894, as amended by Act Feb. 24, 1905, the provision of the statute authorizing only the one furnishing labor and materials "used in the construction or repair" of any public building or public work to intervene in any suit on the bond by the United States must be given due force.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⟸67.]

3. UNITED STATES ⟸67—CONTRACTORS' BONDS—CLAIMS SECURED—"LABOR FURNISHED OR MATERIALS USED IN CONSTRUCTION OF THE WORK."

Groceries and provisions, furnished to a boarding house of a contractor with the United States, and consumed by his laborers, did not constitute "labor furnished or materials used in construction of the work," and payment therefor was not secured by the contractor's bond, given pursuant to Act Aug. 13, 1894, as amended by Act Feb. 24, 1905, and it was immaterial that the character of the country where the work was done made it necessary for the contractor to board its men on the job.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⟸67.

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

4. UNITED STATES ⊂=67—CONTRACTORS' BONDS—CLAIMS SECURED.
The bond of a contractor with the United States did not secure payment for machinery and appliances intended to be used in one location after another until worn out, though because of the length of the job they were so much or so badly used upon the particular contract as to become worn out.
[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⊂=67.]

5. UNITED STATES ⊂=67—CONTRACTORS' BONDS—CLAIMS SECURED—"CONSTRUCTION OF THE WORK."
Supplies furnished a contractor with the United States, which were specifically intended for current consumption directly on the work, such as drills and material for drills used in drilling machines, and made to be used up currently, and in fact used up in direct and immediate contact with rock removed as part of the contract, were covered by the contractor's bond; the removal of such rock being a part of the "construction of the work."
[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⊂=67.
For other definitions, see Words and Phrases, First and Second Series, Construction.]

6. UNITED STATES ⊂=67—CONTRACTORS' BONDS—CLAIMS SECURED.
The bond of a public contractor engaged in deepening the channel of a river did not secure payment for ordinary and current repairs on the contractor's machinery, and miscellaneous articles used in the operation of the boats and dredges, constituting additions to the contractor's working outfit, or intended to maintain the existing outfit in as good order as possible against wear and depreciation.
[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⊂=67.]

7. APPEAL AND ERROR ⊂=1172—DISPOSITION OF CAUSE—REVERSAL IN PART.
In a creditor's action on a contractor's bond given pursuant to Act Aug. 13, 1894, as amended by Act Feb. 24, 1905, where the judgment in favor of a number of claimants was in the form of a single entry, there was no insuperable difficulty in allowing part to stand, though the judgment was reversed as to other claims, as the judgment could be treated as separate judgments in favor of each of the successful claimants.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4555–4561; Dec. Dig. ⊂=1172.]

In Error to the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Action by the United States, for the use of the Pittsburgh & Buffalo Company and others, against the National Surety Company. Judgment in favor of claimants, and defendant brings error. Affirmed in part, and reversed in part.

The Standard Contracting Company received an award from the United States for deepening the channel in a portion of St. Mary's river, and entered into a contract to do the work pursuant to the award. It gave to the United States the bond required by the act of August 13, 1894, as amended February 24, 1905, with the National Surety Company as surety, and in the sum of $25,000. Before completing the work, the contractor failed, and the job was finished by its receiver. In the court below, sitting as a court of law, suit was commenced by summons by the Pittsburgh & Buffalo Company, as plaintiff, but in the name of the United States, against the contractor and the surety, as defendants. The suit was based upon the bond, and was to

recover an unpaid balance of $4,200 owing for coal furnished by the Pittsburgh & Buffalo Company to the contractor company for its necessary use in the dredging and other work required by the contract. Subsequently there were ten intervening claims: By Hanna & Co., for coal, $4,200; by the Pluto Powder Company for dynamite and electric exploders, $6,180; by the Pattison Supply Company for iron, machinery, hardware, and general supplies, $3,500; by George Kemp for coal, $3,000; by the Soo Hardware Company for supplies for dredges, tugs, and drill boat, which supplies consisted of oil, paint, nails, rope, valves, round iron, etc., $500; by the George Worthington Company for hardware, and supplies, $1,900, which hardware and supplies consisted of nuts, bolts, valves, packing, files, iron pipe, square iron, etc.; by the Upson-Walton Company for cordage, tackle, ship supplies, and ship chandlery articles, $900; by the Cleveland Steel Casting Company for miscellaneous castings as ordered, $200; by J. P. Brogan for groceries and supplies for the company boarding house, $4,600; by David Helman for oak timbers, $600. The surety appeared and pleaded to the merits to the original claim and separately upon each intervention. The summons was served by publication against the contractor, but the record does not show either its appearance or its default for not appearing. Such omission in the record is not relied upon by any party, and so will not be further noticed.

A jury was waived, and the court made findings of fact to the effect that there were unpaid claims as above recited, and findings of law to the effect that supplies consumed or used up by the contractor in the progress of the work were within the security contemplated by the bond; but that materials which became a part of the permanent equipment of the contractor and survived the completion of the work were not secured. Under this classification, the claims of plaintiff and eight interveners were allowed, in amounts aggregating about $28,000; and since the penalty of the bond was only 90 per cent. of the liability, each claimant was given a judgment for 90 per cent. of his allowed claim. This judgment took the form of a single entry, giving the name of each successful claimant, and reciting the 90 per cent. allowed to him, forming a total of $25,000, and adjudging that the United States, for the use and benefit of the claimants whose claims had been allowed, recover from the contractor and Surety Company $25,000 for its damages, and also recover the costs of each intervener. To review this judgment, the Surety Company brought this writ of error, alleging as errors that a court of law had no jurisdiction, because the statutory proceeding could be only in equity, and that the conclusion of law as to the liability to each successful claimant was erroneous. The sufficiency of the assignments will be further mentioned.

J. M. Garfield and Tolles, Hogsett, Ginn & Morley, all of Cleveland, Ohio, for plaintiff in error.

J. A. Cline, of Cleveland, Ohio, E. S. B. Sutton, of Sault Ste. Marie, Mich., B. H. Davis, Smith, Taft, Arter & Smith and Thompson, Hine & Flory, all of Cleveland, Ohio, and John W. Shine, of Sault Ste. Marie, Mich., for defendants in error.

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

DENISON, Circuit Judge (after stating the facts as above). [1] We pass by, without deciding, certain considerations affecting the right of the Surety Company to insist that a court of equity had exclusive jurisdiction, and assume that it had—and has—the full right to be heard on that question. Its contention is fully supported by the opinion of the Circuit Court of Appeals of the Second Circuit in Illinois Surety Co. v. United States, 212 Fed. 136, 129 C. C. A. 584, filed since the hearing of this case below. The contrary result has been

reached in the Seventh Circuit. Illinois Surety Co. v. United States, 226 Fed. 653, 664, — C. C. A. —. In the present case the bond is not sufficient to pay all the claims, and if, upon a writ of error attacking only certain claims, they are set aside, whereby the fund becomes sufficient to pay all, the other claimants who have not assigned error can get no benefit, according to the common-law rule affecting several judgments. In such a case the defendant surety might go free of part of its liability; and so there is direct force in the argument that a court of equity is the appropriate tribunal, and that therefore it will be presumed that Congress intended to put the jurisdiction there; yet, even since the amendment of the statute, so many courts—and the Supreme Court so many times[1]—have assumed that there was jurisdiction in the law court that we are reluctant to consider all these decisions inadvertent. It is enough to turn the scale when we observe, as was done in the Seventh Circuit, that, by the enactment of June, 1915, section 274a of the Judicial Code—and which enactment applies to pending cases—the only effect of holding in this case that the true jurisdiction was in equity, would be to send the case back to be transferred to the equity side and heard over again by the same judge upon probably the same proofs. Upon the whole we are better satisfied to say that the court below had jurisdiction.

[2] The statute involved has been many times considered, but the Supreme Court has never had occasion to declare broadly the meaning of "labor and materials." The standard lien statutes with reference to buildings, in force, probably, in every state, contemplate materials and labor which directly enter into the structure itself. We are not aware of any decisions extending these state statutes so as to reach and create liens for labor or materials which contribute to the construction so indirectly as do the supplies consumed by the contractor in operating his plant. Of course, where the statute, by its words or by judicial interpretation, gives a lien for labor or materials furnished to subcontractors, it carries us one step away from the structure itself; but this does not necessarily mean more than that the rule of direct contribution is to be applied to the work of the subcontractors.

The language of the present federal statute does not seem to be materially different from the typical state lien statute. There is a distinction between the original and the amended act. The act of 1894 directed that the bond given to the United States to secure the completion of the contract should have "the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials in the prosecution of the work," and further specified that suit might be brought and recovery had upon this bond by any person who had supplied "labor or materials for the prosecution of such work." When the statute was amended in 1905, there was no change in the language fixing the condition of the bond, but it was specified that recovery thereon could be

[1] Mankin v. Ludowici Co., 215 U. S. 533, 30 Sup. Ct. 174, 54 L. Ed. 315; United States v. Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163; Texas Co. v. McCord, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893.

had by the person who had "furnished labor or materials used in the construction or repair" of the work. The substitution of this language, which adopted the usual phraseology of the lien statutes, in the place of the former more general reference to "materials for the prosecution of the work," is not to be overlooked, and at least has a tendency to bring this statute into harmony with the lien statutes of the states. Some of the decisions, even since the amendment to the statute, speak as if it contained only the provisions fixing the form of the bond, and reached all persons "supplying the contractor with labor and materials in the prosecution of the work," regardless of whether these things were "used in the construction"; but it is obvious that the two clauses must be read together, and that the provision which gives a right to an intervener only in case he has furnished labor and materials "used in the construction or repair" must receive its due force in interpreting the statute as a whole.

The Supreme Court has repeatedly declared that the bond provided for by this statute is a substitute for the lien of the mechanic's lien laws (Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 425, 24 Sup. Ct. 142, 48 L. Ed. 242; Hill v. Surety Co., 200 U. S. 197, 203, 26 Sup. Ct. 168, 50 L. Ed. 437; United States v. Ansonia Co., 218 U. S. 452, 471, 31 Sup. Ct. 49, 54 L. Ed. 1107; Title Co. v. Crane Co., 219 U. S. 24, 32, 31 Sup. Ct. 140, 55 L. Ed. 72; Equitable Co. v. United States, 234 U. S. 448, 455, 34 Sup. Ct. 803, 58 L. Ed. 1394); and this declaration of purpose at least suggests that the scope as well as the purpose may be discerned from comparison with the state statutes. The Supreme Court in the Pressed Brick Company Case extended the protection of the statute to subcontractors, in the Hill Case to materials furnished to a subcontractor, and in the Equitable Company Case, to a contract which had been somewhat changed after the surety's undertaking was made. In each of these cases there is a statement or intimation that the statute is to be construed liberally to accomplish its purpose, rather than strictly; but in each case the labor or material involved was of the class which entered directly into the work, and no one of these cases decides whether or not this liberality of construction will avail to reach classes of materials not commonly thought within state statutes.[2]

The subject of what specific materials are included we find touched upon by that court in only two cases, Title Co. v. Crane, supra, and United States, etc., Co. v. Bartlett, 231 U. S. 237, 34 Sup. Ct. 88, 58 L. Ed. 200. In the former case, certain claims for cartage and towage are approved as leading to liability under the bond. Page 34 of 219 U. S., page 140 of 31 Sup. Ct., 55 L. Ed. 72. The contract related to building a boat; the towage and cartage claims were, apparently, for hauling some materials. The facts show that they could not have been for

[2] The present force of Judge Putnam's comment in American Co. v. Lawrenceville Co. (C. C.) 110 Fed. 717, 719, to the effect that this statute should not be limited, like the lien statutes, to materials added to the value of the structure, may be somewhat lessened because it had reference to the original act, and because it was written before the Supreme Court had so often declared that the bond was a substitute for the liens.

labor, and so they must have been for materials. If we seek to apply the word "furnished" found in the statute, it would seem that the materials delivered at the work, through hauling or towing done by a carrier, were furnished jointly by the vendor and the carrier, and that the value of the transportation entered into and became a part of the value of the delivered material.[3] The case is, therefore, not necessarily inconsistent with the idea that the "materials" contemplated by the statute are those commonly so considered under the lien statutes. The case also allows a claim for patterns furnished to his molding department for the contractor who was building the marine engine which was a part of the boat. This pattern claim seems to be for labor rather than for materials. The engine builder, normally, makes patterns, makes molds, pours the castings, and machines them. All these things are done by the labor of his employés. If he gets some one else to make the patterns for him, their price is none the less part of the labor cost of producing the engine. The value of the raw material in patterns is negligible; and so it could not be assumed that they had any value for preservation to be used again, in the sense that they would become or might become a part of the contractor's outfit for other use. That this claim was regarded by the Supreme Court as for labor is apparent by the analogy stated between those who make patterns and those who erect scaffolding.

In the other case (United States, etc., Co. v. Bartlett) the contractors were to build a breakwater. They owned a quarry, and, to perform their contracts must open their quarry, get out the stone, transport it, and dump it in the water. There could have been here no question of furnishing materials to the contractors, for they owned the materials from the beginning. The question involved was the labor cost of quarrying and hauling the materials. The court held the whole of this was labor performed on the contract. It did not appear that the quarry, so far as stripped, remained of any value for future operation; and it is a proper inference that the work of stripping was performed on this contract just as much as the work of quarrying. The case seems clearly to show an instance of labor furnished directly in the construction of the work.

The decisions of courts other than the Supreme Court, and which are chiefly relied upon to extend the benefit of the bond to the "materials" now involved, are the so-called powder cases and coal cases (e. g., Powder Co. v. Greenwich Co., 183 N. Y. 306, 76 N. E. 153, 2 L. R. A. [N. S.] 288, 111 Am. St. Rep. 751, 5 Ann. Cas. 443; City Trust Co. v. United States [C. C. A. 2d Cir.] 147 Fed. 155, 77 C. C. A. 397). In the former, blasting powder, used in making excavations, has been held to give a liability under the bond. These powder cases stand on

[3] "Ordinarily the contractor for the material delivers the same, and includes the expense of the hauling in the price of the material. No objection, so far as we are aware, has ever been made to thus including the expense of the hauling and the price of the material. If it may be so included, and lien made to cover the same, why may not the cartman make a separate contract for hauling, and acquire a valid lien therefor?" Kehoe v. Hansen, 8 S. D. 198, 200, 65 N. W. 1075, 1076, 59 Am. St. Rep. 759.

reasoning peculiar to themselves. The powder, or similar explosive, is a direct substitute for manual labor, and it is expended or used directly and immediately on the construction work. This statute, like the lien statutes, must extend to excavating as well as to erecting, and unless powder may be considered materials used in that work, there would often be nothing to which the name "materials" could be applied.

The coal cases are one step further away. The powder directly shatters the rock. The coal serves to carry away the broken rock, but does so indirectly, through the intervention of the boiler, which makes the steam, which operates the engine, which lifts the dredge bucket. The powder is material used in the work; the coal is material the use of which contributes to the work.[4] However, it is not necessary to determine whether the coal cases are rightly decided. Some of the claims here allowed were for coal, and error was assigned on such allowance; but the briefs show that the intention was to raise only subordinate questions, and the general rightfulness of the allowance for coal is not questioned. We refer to these cases only because we must know whether they rest upon principles which require allowances of the supplies involved in this case; and since this case may be well distinguished from them, their correctness need not be determined.

The questions saved for this review, interpreting the assignments by the brief, pertain to claims which may be divided into three classes: (1) Those for groceries and provisions for the men; (2) those for machines or appliances of such a character as to become a part of the contractor's quasi permanent outfit, and as not to be used up or worn out on this job, unless they happened to be; and (3) those for machine or miscellaneous repairs or supplies of a more temporary character.

[3] The Brogan claim was for groceries furnished to the contractor's boarding house. We cannot attach any importance to the fact that the character of the country where this work was done made it necessary for the contractor to board its men on the job—in other words, compelled it to give them their board as a part of their pay for their work. Even if there may be distinctions between one who furnishes food consumed by the men in their contractor's boarding house and food consumed by the same men in an outside boarding house, it is not seen how it can be of any importance whether the men agree to board at the contractor's place, because it is the only one, or do so for some other reason; nor can there one rule in a city and another in a wilderness. The provisions, in one case as in the other, either are or are not "labor" or "materials" used in the construction of the work.

Counsel agree that in no case under this statute has the liability been extended to provisions, and that in the cases decided under the state lien statutes such liability has been denied (Perrault v. Shaw,

[4] The leading federal coal case, City Trust Co. v. United States, supra, arose under the act of 1894, unamended; and even under the original act the Court of Appeals of the District of Columbia reached the opposite conclusion regarding coal. United States v. City Trust Co., 23 App. D. C. 153.

69 N. H. 180, 38 Atl. 724, 76 Am. St. Rep. 160; Carson v. Shelton, 128 Ky. 248, 107 S. W. 793, 15 L. R. A. [N. S.] 509; Luttrell v. Knoxville Co., 119 Tenn. 492, 519, 105 S. W. 565, 123 Am. St. Rep. 737;[5] Dudley v. Toledo Co., 65 Mich. 655, 32 N. W. 884; Pennsylvania Co. v. Mehaffy, 75 Ohio St. 432, 80 N. E. 177, 116 Am. St. Rep. 746, 9 Ann. Cas. 305); but it is said they stand on the same basis as the coal for the engine, as they provide the energy which makes the machine—in this case, the human machine—do the work. The District Court, while regarding the question as very close, thought this final step in the reasoning could not be avoided. We find a sufficient distinction in the difference between labor and materials. Coal has been allowed as a material; it is expended as a material; it never is and never can be transformed and merged into that labor which is the "labor performed," as distinguished from the "material furnished," for each of which the statute gives a right of recovery. The logic of the coal cases—regardless of its persuasiveness—is that the word "materials" in the statute should be thought to include coal, because the latent energy of the coal was developed into a mere substitute for that human labor which is expressly included in the law, and unless this energy thus put into the work is protected in this way it is not protected at all. On the other hand, the food for the men never contributes to the work, except after it is transmuted into the form of that labor which, as labor, is protected. It is not to be thought that the statute gives twice a claim for the one thing.

In this case the entire labor right has been satisfied. The contractor paid the men their wages and furnished them their board, and they have no claim. Money that he may have borrowed to pay part of their wages is, on this principle (though not in responsiveness to the name "materials") difficult to distinguish from the food he borrowed—bought on credit—to pay the balance of their wages; but such money loans are not lienable. 47 Cyc. 44. Nor, if a claim were to be allowed for food for the men, could we well refuse one for rent of their quarters, special clothing, free tobacco, or anything else which the contractor might have agreed to provide as part of their pay. Indeed, among the items allowed on this claim, we find soap and towels, bedding, matches, kitchen and table furniture, etc. These last-named items only illustrate that if, by vague equities, or by the supposed liberal policy of the statute, we are led away from the field of direct and immediate use in the construction, we find no place to stop short of what the Supreme Court of New Hampshire called "interminable litigation and confusion." Perrault v. Shaw, supra. We cannot believe that these provisions sold by Brogan constitute "labor furnished or materials used in the construction of the work," save in a sense so indirect and remote as not to be within the fair contemplation of the statute.

While the cases above cited from the state courts denying a lien to board or provision claims are not under the statute now involved, we do not see controlling distinctions, either in the state statutes cited

[5] This case reviews many decisions and carefully classifies many articles now involved. See 119 Tenn. 512–520, 105 S. W. 565 (123 Am. St. Rep. 737).

in these cases or in the reasoning of the decisions. In the federal courts the point has not been directly decided, but it has been twice argumentatively pointed out that board or provisions are not materials for construction work. In Giant Powder Co. v. Oregon Co. (C. C.) 42 Fed. 470, 475, 8 L. R. A. 700, Judge Deady says:

"The food furnished a contractor for his men may be said to be 'used' and 'consumed' in the construction of the road on which they work, but this only in a remote or consequential way or sense. The food does not enter directly into the structure and is not so used."

He then distinguishes between this remote use, for which there will be no lien, and the more direct use of powder in blasting, or of water in making mortar, or of lumber used in scaffolding, no one of which remains in the final structure, but each of which is so directly used as to support a lien.

In United States v. Kimpland (C. C.) 93 Fed. 403, Judge Thomas was considering this statute in its 1894 form, and he said (page 406):

"Is the board, which the contractors have agreed conditionally to pay out of the men's wages, labor or materials supplied in the prosecution of the work? * * * It is considered that the word 'labor,' as used in the statute, does not admit of such remote and indirect equivalents, but requires the sureties to insure the payment for the visible material that was furnished for direct use and incorporation in the work. * * * Thereby the sureties had a clear conception of the limits of their liability. They were not concerned to see to it * * * that persons who furnished stores or food or lodging to the workmen, under an agreement by the contractor to pay for the same out of the wages due those benefited, should be paid. The contractor was under no such primary duty to the United States. His duty as a contractor, and as regards the sureties, was to pay the laborers their wages, and allow them to buy their board and clothing where they would."

United States, etc., Co. v. Bartlett, supra, is clearly a case where a claim was allowed for labor upon the theory that the unpaid wages of the laborers had been assigned to the claimant (see Justice Day's comment on page 243 of 231 U. S., 34 Sup. Ct. 88, 58 L. Ed. 200); and so, although the original claim was for board, the claim allowed was for labor, and the case has no application here. Lybrandt v. Eberly, 36 Pa. 347, and Bangs v. Berg, 82 Iowa, 350, 48 N. W. 90, are instances where liens were allowed for that agreed price of labor or materials and board which had been made a part of the contract price. In Kollock v. Parcher, 52 Wis. 393, 9 N. W. 67, the statute was express.

[4] The second class of items here involved may be typified by the "Rand drills." As a matter of common knowledge, such drilling machines are portable engines operated by suitable power, and intended to be used in one location after another until they are worn out. Their life depends upon the care given to them. It was found as a fact as to these machines that, because they had been either so much used or so badly used upon this work or because the business was to be liquidated, the receiver considered them not worth moving and they were abandoned. If the bond is to extend at all to machines, tools, and appliances used upon the work, their inclusion must be determined by their inherent character, and not by the length of time for which or the manner in which they happen to be used. Such drilling

machines become a part of the permanent outfit of the contractor. True, they might wear out sooner than a dredge, or a crane, or a hoisting engine; but they might outlive any of these things. In our judgment, they cannot be regarded as materials used in the construction of the work. Of the same class are many other things found among items allowed. Rope in large quantities, wire cable, anchor chains, etc., are clearly normally a part of the permanent or quasi permanent outfit of the contractor. They obviously would outlast any short piece of work; and the proper name to give them must be fixed by the nature of the materials, and not by the length of the job. If, in fact, any of these things, like rope, was intended for current consumption in the direct doing of the work, it does not so appear upon this record. Things of this class are not normally intended for specific use and exhaustion upon the work where they are first sent. They are not materials used in the work; they are facilities for doing that work and any other work to which they may be applied.

[5, 6] The third class consists of miscellaneous supplies and repairs for the contractor's plant. This plant consisted of a dredge and its machinery, a drill boat and its machinery, two tender tugs, and the boarding house. So far as these supplies may have been specifically intended for current consumption directly on the work, they are allowable, like the blasting powder, and like the lumber actually consumed in scaffolding or in concrete forms. Of this character would be the drills used in the drilling machines, or the material therefor. The record does not show certainly the amount of these articles, but steel generally described may have been for this purpose. These drills are made to be used up currently. Their life is a matter of days, if not of hours. The contractor buys only his current needs on the particular job. The drills are used up in direct and immediate contact with the rock, the removal of which is the "construction of the work," and we are satisfied, by analogy to the powder cases, to regard such drills as materials under the statute.

The great part, however, of the items allowed as supplies and repairs, were for the ordinary and current repairs on the machinery and for miscellaneous articles used in the maintenance and operation of the boats and dredges. The articles for outfitting the boarding house (the soap, etc., above mentioned) really belong in the same class. These supply items are of infinite variety, as would be expected when we see that they are not for use directly on the work, but are for the maintenance of buildings, boats, and machinery in suitable condition for living in the buildings or on the boats, navigating and operating the boats, and operating the machinery. As a class we think they are beyond the statute. We may specify bolts and nuts, valves, cylinder heads, electric wire, lanterns, wrenches, files, electric light globes, divers' overalls, waste, oakum, packing, grindstones, kerosene, paints, etc. We even find among the items to which specific attention apparently was not called, but which were allowed against the general objection, two typewriter ribbons, five lengths of stovepipe, and three rat traps. It cannot be denied that even these last items may be necessary supplies for the proper keeping of the boats or buildings in

habitable condition, but we cannot think they are "materials used" in the deepening of St. Mary's river; and this not because they are extreme and striking instances, but because they typify things which are either additions to the contractor's working outfit or are intended to maintain the existing outfit in as good order as possible against the wear and depreciation which would otherwise accrue. We approve generally and apply the rules of separation of items as stated by Judge Webb in United States v. Morgan (C. C.) 111 Fed. 474, 488.

It results that the judgments in favor of the Pattison Supply Company, the Soo Hardware Company, the George Worthington Company, the Upson-Walton Company, and J. P. Brogan must be reversed. As to the Brogan claim, no new trial will be awarded, since, upon the undisputed facts, there can be no recovery. In each of the other claims just named, the claimant may be able to furnish proof which, under our view of the statute, will show a liability as to some of the items. As to each of these claims there will be a new trial—unless counsel, before the mandate goes down, file a stipulation fixing the amounts recoverable under the rules we have indicated. In that event the mandate will direct judgments accordingly, and our action will then be final and subject to immediate review. See In re Martin (C. C. A. 6th Cir.) 201 Fed. 31, 38, 119 C. C. A. 363.

[7] We see no practical way of considering the judgment below as one at law and still subject to partial review, except to treat it as 11 separate judgments in favor of or against 11 separate claims, which for convenience were united in one group proceeding, one hearing, and one judgment, with the same force and effect as if they were consolidated actions. Diggs v. Railroad (C. C. A. 6th Cir.) 156 Fed. 564, 84 C. C. A. 330, 14 L. R. A. (N. S.) 1029. No one of the powder or coal claimants complained of the cutting down of its claim to 90 per cent. but each accepted its judgment for that amount; and we affirm the judgments so rendered. There seems to be no insuperable difficulty in allowing part of the judgments, to stand, although they are united in one entry with the judgments which are reversed.

The plaintiff in error will recover its costs against the five defendants in error whose judgments are reversed. The four defendants in error whose judgments are affirmed will collectively recover costs against plaintiff in error.

KILPATRICK v. UNITED STATES FIDELITY & GUARANTY CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 4, 1916.)

No. 2818.

1. BANKRUPTCY ⇐316—PROVABLE CLAIMS—CLAIMS OF SURETIES.

Bankr. Act July 1, 1898, c. 541, § 16, 30 Stat. 550 (Comp. St. 1913, § 9600), provides that the liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt, shall not be altered by the discharge of such bankrupt. Section 571 provides that whenever a creditor, whose claim is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's

name, and if he discharge such undertaking, in whole or in part, he shall be subrogated to that extent to the rights of the creditor. When a petition in bankruptcy was filed, an action was pending against the bankrupt, in which a surety bond had been given to dissolve garnishments, and judgment was subsequently recovered thereon against the bankrupt and the surety on such bond, and was paid by the surety. *Held*, that the surety had an allowable claim, as the liability of the bankrupt to it took effect from the date the surety executed the bond, and the rendition of the judgment against it and the bankrupt did not alter the relation between them established prior to the institution of the suit, nor affect the inchoate rights of the surety.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1778–1783, 2299; Dec. Dig. ⊂⊃316.]

2. BANKRUPTCY ⊂⊃312—CLAIMS—RELEASE—EFFECT ON RIGHTS OF SURETY.

When a petition in bankruptcy was filed, an action by K. against the bankrupt was pending, in which a surety bond had been given to dissolve garnishments. K. filed his proof of claim, but subsequently was permitted to withdraw such claim. On the day of filing his claim he petitioned for leave to proceed with the pending action, and was allowed to do so, and recovered a judgment which was paid by the surety. The bankrupt filed an offer of composition, which was accepted by creditors; K. filing a release of his claim and waiver of all right to participate in dividends in consideration of the trustee's release of any rights he might have as to the judgment recovered by K. The surety subsequent to the composition filed its claim for the amount paid by it, claiming to be subrogated to the rights of K. *Held* that, while K.'s release estopped him from participating in the distribution of assets, it did not defeat the surety's right to prove its claim, as the rights of the surety attached at the time of the execution of its obligation, which existed at the time of the adjudication, and it was a creditor of the bankrupt with a provable debt, which K. was powerless to waive without consideration passing to the surety and without its consent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496–500; Dec. Dig. ⊂⊃312.]

3. BANKRUPTCY ⊂⊃312—PROVABLE CLAIMS—CLAIMS OF SURETIES.

While K. did file his claim, the withdrawal thereof and the waiver of participation in dividends was such a refusal or failure to prove his claim as authorized the surety to prove such claim under Bankr. Act, § 57i.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496–500; Dec. Dig. ⊂⊃312.]

4. BANKRUPTCY ⊂⊃340—PROOF OF CLAIMS—FORM.

General Order in Bankruptcy No. 21, § 3 (89 Fed. ix, 32 C. C. A. ix), provides that claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or, if secured, the security, as is required in proving secured claims; that upon the filing of satisfactory proof of the assignment of a claim, proved and entered on the docket, the referee shall give notice to the original claimant, and, if no objection be entered, make an order subrogating the assignee to the original claimant; and that, if objection be made, he shall proceed to hear and determine the matter. The surety on a bond executed by the bankrupt, against whom judgment was recovered subsequent to bankruptcy, filed its proof of claim in the form of a petition for the establishment of its subrogated rights, elaborately setting forth a history of the entire transaction. *Held*, that this substantially met the requirements of the statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⊂⊃340.]

Appeal from the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

In the matter of S. E. Wilbourne, bankrupt. From a decree confirming an order of the referee and allowing the claim of the United States Fidelity & Guaranty Company, J. M. Kilpatrick, trustee, appeals. Affirmed.

The report of Referee Alex C. Birch, mentioned in the opinion, was as follows:

In January, 1913, E. C. Kinney filed a suit in the circuit court of Cullman county, Ala., against S. E. Wilbourne, which suit was based on a promissory note in the sum of approximately $8,000, executed by Wilbourne in favor of Kinney. Prior to the institution of the suit Wilbourne had been engaged in the general merchandise business, with stores at Cullman and Marion, and his storehouse at Cullman, containing a stock of goods of the approximate value of $30,000, had been destroyed by fire. At the instance of Kinney, several garnishments were issued against various insurance companies and banks at Cullman in aid of his pending suit. Availing himself of the provisions of section 4313 of the Code of Alabama, Wilbourne, the defendant, executed, on February 22, 1913, a bond in a sum exceeding $17,000, with the United States Fidelity & Guaranty Company, as a surety thereon, and procured the dissolution of these several garnishments. The condition of the bond, which tracked the statute, was as follows: "If the said defendant should pay the plaintiff such judgment as may be rendered as ascertained to exist in favor of the plaintiff and against the defendant in the case, and costs of suit, then this obligation to be null and void; otherwise, to remain in full force and effect."

On October 1, 1913, more than four months after the execution of the dissolution bond, Wilbourne filed his voluntary petition in bankruptcy, in the District Court of the United States for the Northern District of Alabama, and such proceedings were had thereon that he was duly adjudged a bankrupt by this court, on said date. On October 7, 1913, E. C. Kinney filed his proof of claim, which was allowed in the sum of $8,358.46. On October 18th Kinney filed his petition asking permission to withdraw such claim, and on the same day an order was entered allowing the withdrawal of the claim from the files.

On October 7, 1913, being the same day on which Kinney filed his claim for allowance, at which time the garnishment suit of Kinney against Wilbourne was pending in the state court undetermined, Kinney filed his petition with the referee seeking permission to proceed in the state court against the bankrupt, for the purpose of holding the surety on the garnishment bond, and to obtain a judgment against the surety under the terms of the bond and against the bankrupt, with a stay of execution as to the bankrupt. This petition sought to fasten liability on the surety, and at the same time secure to the bankrupt any rights which grew out of his adjudication. A decree was entered on this petition, allowing Kinney to prosecute his suit in the state court to a judgment, with stay of execution against the bankrupt; and on October 30, 1913, judgment was rendered in the state court in favor of the plaintiff against Wilbourne, the bankrupt, in the sum of $9,117.27, with costs amounting to $1,295.30, with stay of execution, and likewise, in accordance with the provision of the Code and the condition of the bond, a judgment in like amount was rendered against the United States Fidelity & Guaranty Company.

On December 8, 1913, the bankrupt filed an offer of composition, under the terms of which he was to deposit the sum of $11,000 in court, and the creditors to receive such dividends as could be declared after the payment of the costs of administration. An order was entered calling a meeting of the creditors on December 18, 1913, to consider such offer, and at such meeting a waiver of Elizabeth Wilbourne, the wife of the bankrupt, Lola M. Pollard, his sister-in-law, whose alleged claims approximated $12,000, and waiver of E. C. Kinney in participation of any dividends had been filed. Such offer of composition was considered by the creditors' meeting and accepted, and on

December 19th the composition was confirmed by the District Court. The agreement between Kinney and Kilpatrick, the trustee, under which Kinney waived rights to participate in the distribution of the funds under the composition agreement, was as follows:

"In consideration of the undersigned, J. M. Kilpatrick, as trustee in bankruptcy of the estate of S. E. Wilbourne, releasing and assigning to the undersigned, E. C. Kinney, all of his rights, equities, and claims in and to a certain judgment rendered in the circuit court of Cullman county, Ala., against the bankrupt and the United States Fidelity & Guaranty Company, of Baltimore, Md., on the 30th day of October, 1913, together with any right of appeal in the trustee in bankruptcy to appeal from said judgment to the Supreme Court of Alabama, the undersigned hereby expressly agree to accept the liability of said United States Fidelity & Guaranty Company, of Baltimore, Md., and to look to the said Fidelity & Guaranty Company, of Baltimore, Md., for the full satisfaction of his said claim under his said judgment, and hereby releases the said trustee in bankruptcy from any liability to the undersigned as a creditor of said bankrupt estate, and takes such judgment and the rights growing out of said judgment in satisfaction of the preferred or lien claim heretofore filed against said estate, releasing all rights which he has or may have to participate against the estate of said bankrupt or the funds thereof: Provided, however, that the said E. C. Kinney shall not release or waive any of his rights to proceed against the aforesaid bond company under said judgment; and provided, further, that nothing herein contained shall be construed as being in conflict with the orders heretofore made by this court with reference to said judgment. The sole consideration for this agreement passing to the said E. C. Kinney being a release by the trustee to said E. C. Kinney of any right the trustee may have in and to said judgment or his right of appeal therefrom; and the consideration passing to the trustee being a release of the trustee of the said Kinney's right to participate in the distribution of the funds of said estate, the said Kinney looking to said judgment for the satisfaction of his said claim. Dated this the 18th day of December, 1913.

"[Signed] E. C. Kinney,
"By Brown & Griffith, Attys.
"J. M. Kilpatrick, Trustee."

After the confirmation of the composition, and before distribution to the creditors, the attorney for the United States Fidelity & Guaranty Company notified the referee that his client claimed to be subrogated to the rights of Kinney, payee of the bond on which it was surety, and that it proposed to file a claim against the funds when it discharged the judgment rendered against it in the state court. Thereupon the referee delayed the distribution of the fund until the rights of the bond company could be determined. The bond company on April 9, 1914, at which time there was accumulated interest on the judgment of $334.30, paid and satisfied the judgment rendered against it in the state court as surety on the bond of Wilbourne, the bankrupt. Thereupon Kinney acknowledged receipt from the bond company, as a surety, of the payment of the judgment, costs, and interest, and executed an assignment to the bond company of any interest that he had in the judgment, and agreed to file any claim he might have growing out of such judgment against the bankruptcy estate of S. E. Wilbourne.

On April 20, 1914, E. C. Kinney filed his claim in the sum of $8,641, and on the same day United States Fidelity & Guaranty Company filed its proof in the sum of $10,746.87, claiming to be subrogated to the rights of Kinney. On April 28, 1914, the trustee filed objections to the allowance of both the Kinney claim and the United States Fidelity & Guaranty Company claim; the gist of such objections being that neither claimant had provable claims in bankruptcy, and that Kinney had waived his rights to participate in the distribution of the funds of the estate, and that the United States Fidelity & Guaranty Company, as surety claiming to be subrogated to his right, was bound by such waiver.

On June 29, 1914, a decree was entered by the referee allowing the claim of the United States Fidelity & Guaranty Company in the sum of $9,409.46, this being the amount of the indebtedness with interest and costs incurred, at the

time of the adjudication in bankruptcy, plus an attorney's fee of $250, which the referee fixed as earned before the time of the adjudication; that part of the claim of the United States Fidelity & Guaranty Company which was disallowed was made up of court costs and interest which accrued after the filing of the petition in bankruptcy, and that part of the $1,000 attorney fee allowed on the note by the state court, which was earned in the trial of the cause, which was bitterly contested.

On the hearing of the contest instituted by the trustee on the allowance of the claim of the bond company, the cause was submitted on the verified claim and the exceptions of the trustee thereto, the transcript of the record of the Cullman circuit court, and by agreement, on all papers or pleadings heretofore filed in the bankruptcy proceedings of S. E. Wilbourne, which might be considered pertinent to the issue. The facts of the case on this review are undisputed and have been detailed in this statement, and it is therefore unnecessary for the referee to make any specific finding of facts, as only a question of law is involved.

Discussion of Legal Principle Involved.

On the hearing of the case before the referee it was contended by counsel for the bonding company that the execution of the agreement between Kinney and the trustee did not operate as a discharge of the surety, and counsel for the trustee, one of whom had represented Kinney in the procurement of the judgment against the surety after bankruptcy, concurred in this contention. It can therefore be taken as a premise that the agreement between Kinney and the trustee did not relieve the surety, and that such surety after bankruptcy and after the execution of such agreement discharge the debt of his principal. It appears to the referee that the sole question of law to be determined is whether or not a creditor, whose claim is secured by the undertaking of another, can waive the rights of his surety in a bankruptcy proceeding.

[1] Pretermitting for the present the power of Kinney to waive any rights of the bonding company existing at the time of the adjudication, ample authority is found in the provisions of the bankruptcy statute for the allowance of claims of sureties on the subrogation theory. Section 16 of the bankruptcy statute is to this effect: "The liability of a person who is a codebtor with or guarantor, or in any manner a surety for a bankrupt, shall not be altered by the discharge of such bankrupt." It can be read from this provision of the act as an inevitable deduction that, if the codebtor or surety of the bankrupt should fail to prove his claim, then in the event of the discharge of the bankrupt all rights of the surety against the bankrupt would be cut off. It follows, therefore, that in order to protect any rights it might have against Wilbourne, the debt having been discharged subsequent to the confirmation of the composition offered by Wilbourne, it was incumbent on the bonding company to offer its claim against the estate. It is by no means clear that the bonding company has any valid claim against the bankrupt; yet any claim it might have must be protected by an offer on the part of the bonding company to participate in the estate.

In ordinary instances, no question of waiver of rights intervening, subsection "i" of section 57 is conclusive of the authority of a surety to prove the claim of the creditor whose debt he paid; said subsection reading as follows: "Whenever a creditor, whose claim against the bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." It would seem that section 57, construed in connection with section 63, which latter section defines the character of claims which may be proven, and the instant claim falling within the purview of the latter section, that there can be small question as to the provability of the claim of the bonding company, if the question of the waiver of participation be put behind us.

It is a fundamental principle of the law of suretyship, recognized alike under the decision of the Alabama courts and the federal courts, that the indebtedness of a bankrupt principal to his surety, who subsequently discharges

the obligation in whole or in part, takes effect from the date the surety executed the instrument which binds him, and that in the event the surety discharges the debt of the principal, after the principal's adjudication as a bankrupt, the surety is indemnified, in that he has a provable and likewise a dischargeable debt, which had its origin prior to the adjudication. In re Stout, 6 Am. Bankr. Rep. 508 (D. C.) 109 Fed. 794; Livingston v. Heineman, 10 Am. Bankr. Rep. 39, 120 Fed. 786, 57 C. C. A. 154; 1 Remington on Bankruptcy, §§ 611 and 644; 1 Loveland on Bankruptcy, §§ 304, 329, and 330; Kyle v. Bostick, 10 Ala. 589; In re O'Donnell, 12 Am. Bankr. Rep. 641 (D. C.) 131 Fed. 150.

The rendition of a judgment against a principal and surety does not alter the relation which was established prior to the institution of the suit, and the rights of the principal and the surety in the event the judgment is rendered, either separately or jointly, are not affected. Therefore the relation of principal and surety, brought into being by the execution of the dissolution bond by the bankrupt and the bond company, was not affected by the rendition of the judgment procured subsequent to the adjudication. If the surety company had inchoate rights immediately after it signed the bond, such rights were not affected by the ripening of the claim against it in favor of Kinney to a judgment in his favor. Carpenter v. Devon, 6 Ala. 718; Knighton v. Curry, 62 Ala. 410; Habil v. U. S. F. & G. Co., 142 Ala. 363, 39 South. 54; 1 Brant on Suretyship, 409; 22 Cyc. p. 88.

[2] The case at bar, as has been stated, in the judgment of the referee, rests upon the question of the power of Kinney to waive any rights which may have existed in favor of the bond company at the time of the execution of the waiver by him. It is true that Kinney estopped himself from claiming participation in the distribution of assets, and that any claim offered by him necessarily would have been stricken. However, it does not follow that the legal effect of his waiver was to in any wise jeopardize the rights of the surety; the burning question is, When did the rights of the surety attach? If such rights came into being at the time of the execution of the bond, and existed at the time of the adjudication in bankruptcy, it does not seem that Kinney could take any arbitrary action, the effect of which would militate against such rights. If the rights of the surety did not come into being until the bankruptcy, the rendition of the judgment being subsequent to the adjudication, then it would only be subrogated to the rights of Kinney at the time of the discharge of the debt. In that case, Kinney having waived his right to any dividends, the surety, being subrogated only to the powers and privileges of his principal, would be cut off.

It is the opinion of the referee that the bond company, with inchoate rights, was a creditor at the time of the adjudication of the bankrupt. The bonding company at that time had the right to insist on the liquidation of any claim which Kinney had against the bankruptcy estate, and to discharge its liability on its undertaking, which secured the unliquidated claim, and thereupon unquestionably under the decisions it would be subrogated to the rights of Kinney to prove the debt against the estate. Manifestly it would be unfair and harsh to allow a creditor with a claim secured by an indorsement or a bond to prove his claim against a bankrupt estate, feeling assured that he could collect his debt in full by proceeding against a surety, and then waive participation in the distribution of the estate and cut off the rights of the surety to in a measure recoup his loss by receiving a dividend as partial payment on an outlay made to pay the undetermined debt of the third party.

If the obligee could arbitrarily cut off the rights of his surety by waiving his own rights, the doctrine of subrogation would be undermined, and the surety would be entirely helpless and powerless in the hands of the person whose debt he secured. The theory of subrogation is to enable one who has discharged the obligation of another to recoup loss by an inheritance of any rights, which the obligee who has been paid might have held against the debtor. Any ruling which would allow the obligee to violate the rights of his surety by waiving for the surety a potential right to participate pro rata in the distribution of a bankruptcy estate would fly in the face of this doctrine.

The case of Swarts v. Siegel, 8 Am. Bankr. Rep. 694, 117 Fed. 13, 54 C. C. A. 399, is on all fours with the case at bar. A very elaborate opinion was rendered by Judge Sanborn of the Circuit Court of Appeals, and the especial attention of the District Judge is called to this case. It is expressly held that a surety is a creditor with a provable debt at the time of the adjudication of the bankrupt. It may be that the debt was not discharged or liquidated until after an adjudication, yet, if the surety was bound for the payment of the claim at the time of the adjudication, in that event he became a creditor with all of the rights guaranteed to a creditor under the bankruptcy statute. If the bonding company was a creditor at the time of Wilbourne's adjudication, then Kinney perforce was powerless to waive, without consideration passing to the bonding company and without its consent, any rights it might have had at that time.

The attention of the District Judge is likewise called to the case of Moody v. Huntley (D. C.) 149 Fed. 797, in which case it is held that the equity of subrogation has received a liberal and broad construction by all courts of the land.

In the argument of the case before the referee, counsel for the trustee contended that any rights of the bonding company must grow out of either section 57i of bankruptcy act or from section 5385 of the Code of Alabama, and that under neither of these provisions could the bonding company be subrogated to greater rights than those rights possessed by Kinney; in other words, that the stream could not rise higher than its source. While it is true that a surety who endeavors to avail himself of the equity of subrogation takes the claim of the person whose debt he has paid, subject to all defenses, limitations, and infirmities, yet counsel for the trustee in this cause mistakes the time when the rights of the surety attached. Counsel contend that the bond company had no rights until it paid the judgment, and that at the time the judgment was discharged Kinney had no rights in the bankruptcy case, because he had expressly waived such rights. The referee, however, is of the opinion that the rights of the surety attached at the time of the execution of its obligation, which existed at the time of the adjudication, at which time they were fixed and preserved.

[3] Counsel for the trustee made the ingenious point that the claim of the bond company did not come within the influence of section 57i, in that Kinney did not fail to prove his claim. Counsel quoted from 1 Loveland on Bankruptcy at page 677: "A person who is secondarily liable for a debt of a bankrupt, as indorser or surety, may prove provided the principal creditor fails to prove his debt."

Counsel maintained that, inasmuch as Kinney proved his debt against the bankruptcy estate within five or six days of the adjudication and subsequently withdrew the proof, it could not be said that he failed to prove his claim. While in a sense it cannot be said that Kinney failed to prove his claim, yet in a legal sense, and in so far as the rights of the surety are concerned, he must be construed to have failed to prove his claim if he neglected or refused so to do on demand. It would indeed be a harsh rule which would allow an obligee to prove a claim and then immediately withdraw such proof, and thereby cut off the rights of his surety. Clearly it was the purpose of section 57i to give to the surety a right to indemnify himself in so far as possible, by allowing him to participate in the stead of the person to whom he paid the debt in the distribution of bankruptcy estates. It cannot be read into the provisions of this statute that the power lies in the obligee to collect his debt in full and then arbitrarily inhibit the surety from securing a dividend by filing his claim, and then withdrawing the same. The beneficent and equitable purpose of the section cannot be subserved if such a narrow and restricted construction is placed upon its provisions. It was the manifest intent of the lawmakers in Congress to secure to sureties, who have discharged the obligation of their principal, the benefits of the equitable doctrine of subrogation; and if such intention can be carried out by placing a liberal construction on the section under discussion, whereas a strict construction would defeat not only the ends sought by the statute, but likewise the ends of justice, it is clearly the duty of the court to give the provision a liberal construction.

The withdrawal of the claim filed by Kinney operated as a refusal or failure to prove the claim in so far as the rights of the surety are concerned. When Kinney withdrew his claim and signed a waiver of participation in dividends, he thereby put the surety on notice that he would look to the surety for the discharge of his debt in full, and that the surety must protect any rights it might have in the bankruptcy court. In legal effect the withdrawal of the claim must be construed as a refusal to prove. It might be that the objection urged by the trustee is met by the fact that Kinney filed a proof of claim at the same time the bond company offered its proof. However, it is difficult to determine how Kinney at that time could have a claim allowed, when he had expressly waived in so far as he personally was concerned any rights to further appear in the bankruptcy proceeding.

[4] Counsel for the trustee attacked the form of the proof offered by the bond company, and insists that it has not complied strictly with the provision of General Order 21, § 3 (89 Fed. ix, 32 C. C. A. ix). An examination of the proof of claim offered by the bond company, which is in the form of a petition for the establishment of its subrogated rights, discloses the fact that it very elaborately sets forth a history of the entire transaction, and measures substantially to the requirements of the bankruptcy statute.

The contention of the trustee that the claim is excessive, in that items therein contained are for counsel fees and costs of court, which have accrued subsequent to adjudication, was sustained in the decree of the referee, and the claim was reduced by striking out such charges.

For the information of the District Judge, all papers, petitions, proofs of claim, and pleadings pertinent to this issue are transmitted as a part of the record of this review.

R. Du Pont Thompson, of Birmingham, Ala., and John D. Bibb, of Anniston, Ala., for appellant.

Phares Coleman, of Birmingham, Ala., for appellees.

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

PER CURIAM. We find none of the assignments of error in this case well taken. For reasons sufficiently stated in the report of the referee, the appellee was entitled to the relief granted by the decree entered October 10, 1914, and the same is affirmed.

KEYSER et al. v. MILTON.

(Circuit Court of Appeals, Fifth Circuit. January 19, 1916.)

No. 2821.

1. HUSBAND AND WIFE ⊂=98—NATIONAL BANKS—LIABILITIES OF STOCKHOLDERS.

Notwithstanding the disabilities of married women under the laws of Florida, a married woman, acquiring stock in a national bank by gift from her husband and collecting the dividends thereon, became, like other stockholders, liable for the debts of the bank which it failed to pay to the extent of her holdings, under Rev. St. § 5151, making the shareholders of national banking associations individually responsible equally and ratably, and not one for another, for all debts of the association to the extent of the amount of their stock in addition to the amount invested in such shares.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 128½; Dec. Dig. ⊂=98.]

2. HUSBAND AND WIFE ⇐242—LIABILITY OF MARRIED WOMEN—EXECUTION AGAINST SEPARATE PROPERTY.

Const. Fla. art. 11, § 1, provides that all property of a wife, owned by her before marriage or lawfully acquired afterwards by gift, devise, bequest, descent, or purchase, shall be her separate property, and shall not be liable for the debts of her husband without her consent, given by some instrument in writing executed according to the law respecting conveyances by married women. Section 2 provides that a married woman's separate real or personal property may be charged in equity and sold, or the rents and profits sequestrated, for the purchase money thereof, for money or thing due upon any agreement by her in writing for the benefit of her separate property, or for the price of any property purchased by her, or labor and material used with her knowledge or assent in the construction of buildings, or repairs or improvements upon her property, or for agricultural or other labor thereon with her knowledge and consent. Section 3 provides that the Legislature shall enact such laws as shall be necessary to carry that article into effect. Gen. St. Fla. 1906, § 1600, makes judgments a lien upon the real estate of the defendant in the county where rendered; and section 1618 provides that lands, etc., shall be subject to levy and sale under execution. *Held*, that article 11, § 2, merely provides for the enforcement of certain obligations in a court of equity, and does not prohibit the enforcement of other obligations, and where a valid judgment is recovered against a married woman in a common-law action, such as a judgment on her statutory liability as a stockholder in a national bank, the judgment is enforceable by execution upon her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 505; Dec. Dig. ⇐242.]

Appeal from the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Suit by Mary C. Keyser and husband against W. H. Milton, as receiver of the First National Bank of Pensacola, Fla. From a judgment dismissing the bill, plaintiffs appeal. Affirmed.

Francis B. Carter, of Pensacola, Fla., for appellants.

William H. Watson and Samuel Pasco, Jr., both of Pensacola, Fla., for appellee.

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

NEWMAN, District Judge. This case comes before the court here on an appeal from the decision of the District Court for the Northern District of Florida, dismissing a bill brought by the appellants against the appellee.

The purpose of the bill was to enjoin Milton, as receiver, from advertising or selling, or attempting to advertise or sell, certain property described in the bill, or any of the property of Mary C. Keyser, under an execution issued upon a judgment rendered against her on an assessment made by the Comptroller of the Currency, following the suspension of the First National Bank of Pensacola; the said Mary C. Keyser, being, at the time of the suspension of said bank, the owner of four fully paid shares, of the par value of $100 each, of the capital stock of the bank, the shares having been purchased in her name by

her husband, subsequent to the year 1907, which stock she accepted, and on which she collected divers dividends.

The receiver, in seeking to collect this assessment, had brought suit against Mrs. Keyser and her husband in the District Court for the Northern District of Florida, and obtained judgment in that court against Mrs. Keyser for the sum of $406.40, being the principal and interest of said assessment.

Mrs. Mary C. Keyser was the owner in fee simple of certain real estate in Escambia county, Fla., and the bill alleges that the receiver has caused the marshal for said district, under an execution issued upon this judgment, to levy on the property described, and has directed the marshal to advertise and sell the property for the satisfaction of the judgment, and that the marshal will proceed to do so immediately unless restrained by the court; that the liability of Mary C. Keyser is a statutory liability for the debts of the bank, and none other, said liability arising under the banking laws of the United States of America, and was not for the purchase money of any property purchased by the said Mary C. Keyser, nor was it due upon any agreement made by her in writing for the benefit of her separate property, nor was it for labor or material used in the construction of buildings, repairs, or improvements upon any property of the said Mary C. Keyser, nor for agricultural or other labor bestowed thereon, nor was it for purchase money of the property upon which the levy of said execution has been had, or any other property now owned or ever owned by the said Mary C. Keyser.

The only question made in this case is whether or not the separate statutory property of a married woman in Florida is subject to levy and sale under execution in a common-law suit. No question is made here, and none could be made, as to the right of the receiver to have had the judgment he obtained against Mrs. Keyser. That question was fully settled in the case of Christopher et al. v. Norvell, 134 Fed. 842, 67 C. C. A. 438, in this court, which judgment was affirmed by the Supreme Court in Christopher v. Norvell, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740; the Supreme Court following a decision it had formerly made in the case of Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531. The headnotes in the case of Christopher v. Norvell, supra, in the Supreme Court, will show, we think, what was decided there. Those headnotes are as follows:

"Although in a limited sense there is an element of contract in becoming a shareholder of a national bank, the liability for debts of the institution is not contractual, but is based on the provisions to that effect in the national banking law. The government creating the bank has prescribed the terms upon which ownership of its shares can be acquired, and only those are exempted from liability who are specially described in the statute; nor can any shareholders be exempted from such liability by a state statute.

"Under section 5151, Rev. Stat., a married woman residing in Florida, who has inherited stock in a national bank, which has been transferred to her and on which she has received and accepted dividends, is subject to a personal judgment for an assessment of the Comptroller, notwithstanding that under the laws of Florida a married woman cannot enter into a contract.

"Nothing in the law of Florida incapacitates a married woman in that state from becoming the owner, by bequest or otherwise, of stock in a national bank.

How and from what property such a judgment shall be satisfied not involved or decided in this action."

In each of these cases, however, the opinion is concluded with the statement that the court expresses no opinion as to what property may be reached in the enforcement of the judgment.

[1] It will be seen that it was held in the decisions referred to above that there is nothing to prevent a married woman from becoming a shareholder in a national bank, and that, while "in a limited sense there is an element of contract in becoming a shareholder of a national bank, the liability for the debts of the institution is not contractual, but is based on the provisions to that effect in the National Banking Law." This was not, therefore, a contractual obligation, strictly speaking, on the part of Mrs. Keyser. Her husband gave her the shares of stock in the bank, and she received the stock and collected dividends thereon, and became, therefore, like any other shareholder, liable under the statute for the debts of the bank which it failed to pay, to the extent of her holdings.

Her liability to a judgment being, therefore, unquestionable, the only question here is the right to subject property of hers, standing in her name in fee simple, in Florida, to the judgment.

[2] The main contention of counsel for Mrs. Keyser, as we understand it, is based on article 11 of the Constitution of Florida, which is as follows:

"Section 1. All property, real and personal, of a wife owned by her before marriage, or lawfully acquired afterwards by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women.

"Sec. 2. A married woman's separate real or personal property may be charged in equity and sold, or the uses, rents and profits thereof sequestrated for the purchase money thereof; or for money or thing due upon any agreement made by her in writing for the benefit of her separate property; or for the price of any property purchased by her, or for labor and material used with her knowledge or assent in the construction of buildings, or repairs, or improvements upon her property, or for agricultural or other labor bestowed thereon, with her knowledge and consent.

"Sec. 3. The Legislature shall enact such laws as shall be necessary to carry into effect this article."

The purpose of the first section of this article undoubtedly was to make of the property of a wife her separate property, and to prevent it being subject to the debts of the husband, or used by him except with her consent in writing, as therein provided. The main contention, however, is that the second section of this article, in stating with what a married woman's separate real and personal property may be charged in equity and sold for, excludes its being charged and sold other than in a court of equity and charged and sold for any liability other than those named therein.

In the opinion of the Supreme Court, by Mr. Justice Harlan, in Christopher v. Norvell, supra, after referring to this constitutional provision and quoting it, this is said:

"Recurring to the provisions in the statute and Constitution of Florida, it is clear that they do not incapacitate a married woman in that state from becoming the owner by bequest or otherwise of stock in a national banking association. On the contrary, it seems that all property, real and personal, owned by a married woman before marriage, or lawfully acquired afterward by gift, devise, bequest, descent, or purchase, is her separate property. Nevertheless, it is said, by the settled course of decisions in that state a married woman cannot bind herself personally by contract at law or in equity, or by becoming a partner, or by making a promissory note. Dollner v. Snow, 16 Fla. 86; Hodges v. Price, 18 Fla. 342; Goss v. Furman, 21 Fla. 406; De Graum v. Jones, 23 Fla. 83 [6 South. 925]; Randall v. Bourgardez, 23 Fla. 264 [2 South. 310, 11 Am. St. Rep. 379]. But those cases are not in point here; for, in each of them, the personal liability attempted to be imposed upon the married woman arose *entirely* out of contract, express or implied, on her part, and not by force of any statute. The argument made in this case in behalf of Mrs. Christopher assumes that the liability sought to be fastened upon her arises wholly out of contract; that is, out of an implied obligation, at the time her name was placed on the registry of shares and she received dividends, to contribute to the extent of the value of such shares to the payment of the debts of the bank. But that implied obligation, although contractual in its nature, could not, standing alone, be made the basis of this action. Without the statute she could not be made liable individually for the debts of the bank at all. No implied obligation to contribute to the payment of such debts could arise from the single fact that she became and was a shareholder."

There is nothing in the laws of the United States on the subject of the enforcement of liabilities of shareholders in national banks to prevent subjecting the property in question here to the execution in favor of the receiver. Rev. St. U. S. § 5151.

Coming to whether there is anything in the laws of Florida to prevent the levying and enforcement of this execution against land held by her in fee simple, as stated in the bill, we think, first, that under the decisions of the Supreme Court of Florida there is nothing whatever in article 11 of the Constitution to prevent levy upon and sale of the property in question.

The General Statutes of Florida of 1906, § 1600, provides:

"Every judgment at law (and decree in equity) which shall be entered in any of the circuit courts of this state shall create a lien and be binding upon the real estate of the defendant in the county where rendered."

Section 1618 provides that:

"Lands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations, shall be subject to levy and sale under execution."

There is no provision in the statutes of Florida, so far as we know, or that has been called to our attention, which prohibits the sale of the separate property of a married woman under an execution based upon a judgment regularly entered against her.

A number of decisions of the Supreme Court of Florida are brought to our attention. One of them is the case of Micou v. McDonald, 55 Fla. 776, 46 South. 291. In this nothing whatever was decided, except that the case there made by a bill in equity was not such as to charge a married woman's separate property under section 2 of article 11 of the Constitution of Florida, and the bill was dismissed for this reason.

Another case cited is King v. Hooton, 56 Fla. 805, 47 South. 394. This was similar to the Micou Case, supra, and was a suit by a broker for commissions.

In the case of Graham v. Tucker, 56 Fla. 307, 47 South. 563, 19 L. R. A. (N. S.) 531, 131 Am. St. Rep. 124, also cited, the question was the liability of a married woman for a tort. The headnote of the case sufficiently expresses what was decided. The headnote is as follows:

"A married woman, the owner of statutory separate real estate, upon which is located a swimming pool and bathhouses, conducted by the husband and wife as a public resort, is sued jointly with her husband for damages in tort by a party who was injured while lawfully using said premises, by his feet slipping and falling on his left leg upon the projecting points of planks alleged to have been negligently left uneven. *Held*, that under the Constitution and laws of Florida, under the circumstances stated, the married woman is not liable in an action of tort."

In the case of Lerch et al. v. Barnes, 61 Fla. 672, 54 South. 763, the question is mainly upon the rights and powers of a married woman, created a free dealer under the statutes of Florida, and is a discussion of the provisions of article 11 of the Constitution of Florida referred to. In the opinion in that case, however, it is said:

"Article 11 of the Constitution of 1885 relates to married woman's property. By the first section it is provided that 'all property, real and personal, of a wife,' etc. [quoting the section as given above]. This section radically changes her common-law relation to her property."

The second section is then quoted, and it then proceeds:

"The third section provides that the Legislature shall enact such laws as shall be necessary to carry into effect this article. These are the only provisions of the Constitution relating to the subject.

"It will be observed that the first section contains no limitations upon the power which might be conferred on her by the Legislature of disposing of her separate property, except that it is exempt from liability for the debts of her husband, without her consent given in some instrument in writing, executed according to the respective conveyances by married women. The second section gives to the court of equity exclusive jurisdiction of certain kinds of obligations which she may have when there is an attempt to enforce their payment from her separate property. Jurisdiction of these, therefore, cannot be conferred by the Legislature on a court of law. Micou v. McDonald, 55 Fla. 776, text 780, 46 South. 291. Otherwise than as thus indicated the Constitution contains no limitations upon the legislative power in the making of laws dealing with the contractual rights which it may confer upon married women, and with their control and disposition of separate property. These matters are left by the Constitution to legislative action and control. A married woman is authorized to dispose of her property by will (section 2270, Gen. Stats. of 1906), to make sales and conveyances of her property, her husband joining her (sections 2590 and 2460, Id.), to bring suits on actions for or concerning her real estate without joining her husband or next friend (section 2592, Id.), and she is allowed her own earnings (section 2593, Id.). These, and perhaps others, are all radical statutory departures from the common law, removing her common-law disabilities to the extent that they go, and permitting voluntary action and liability on her part as to her separate property. It has never been held that these statutes are unconstitutional."

Under this decision it is clear that section 2 of article 11 of the Constitution does not have the broad effect claimed for it by counsel for Mrs. Keyser; that is, that it controls absolutely and entirely as

to the liability of married women enforceable against her separate statutory property. We think this answers the contention that section 2 of this article 11 is a limitation on the power of the Legislature, and prohibits what is not therein expressed, or, in other words, that the instances mentioned in this section are the only ones in which her separate property may be subjected in any way, and that must be in a court of equity.

In Florida Citrus Exchange v. Grisham, 65 Fla. 46, 61 South. 123, attention is called in the opinion to the language of this statutory provision, article 11, in this way:

"The Constitution has thus vested her with the 'property' in her separate estate, instead of the mere *title* thereto, which only she enjoyed prior to the Constitution of 1868, of which our present Constitution is an amendment. May the Legislature against the will of the wife say to her that the husband shall have absolute dominion over her 'property'? To so hold, it seems to us, would cut down the larger word 'property' to the narrow word 'title,' and say to the makers of the Constitution, 'You were ignorant of the meanings of the two words; the change you made was a thoughtless one, and we shall again enthrall the wife, however skillful and competent she may be in matters financial, under the yoke of the husband, however incompetent in such matters, or controlled by his appetite for strong drink, or gambling or other dissipations.'"

We mention this to show to what extent, in the opinion of the Supreme Court of Florida, this article of the Constitution went in conferring rights on married women.

The last Florida case to which our attention has been called (Drake v. March, 66 Fla. 598, 64 South. 268) simply holds that:

"A personal decree or judgment against a married woman for her husband's debts cannot * * * be enforced against her separate property, * * * without her consent duly given as the Constitution requires."

Other cases cited by counsel for appellant, while interesting, we consider not controlling here, in view of the construction which we think has been placed upon the article of the Constitution of Florida relied upon in argument by counsel for the appellants. So far as we can ascertain by an examination of the statutes of Florida and the decisions of the highest court of the state, there is nothing to help the appellants if we give the article of the Constitution in question the construction that it should have, and the construction which we think has been given it by the Supreme Court of Florida, namely, that it does not deal otherwise with the rights of a married woman than to provide that certain obligations may be enforced against her in a court of equity, and that, outside of that, there is nothing to prevent legislative action. If this article of the Constitution is not conclusive as to what may be enforced against a married woman's separate property, if it does not prohibit anything being enforced against it except such as therein expressed, then there is no reason why the execution in this case should not be enforced against the appellants' property.

The judgment here is, as has been stated, a perfectly valid and legal judgment. This has not been questioned, and certainly cannot be in view of the decisions referred to herein. The sole question is: Can this judgment be enforced by execution duly issued and levied upon

Mrs. Keyser's separate statutory property, property which she holds in fee simple in her own name? We believe that it can, and are therefore of opinion that the bill seeking to enjoin the enforcement of this execution was properly dismissed in the District Court.

The judgment of the District Court is affirmed.

POSTAL TELEGRAPH-CABLE CO. v. CITIZENS' NAT. BANK.

(Circuit Court of Appeals, Third Circuit. January 11, 1916.)

No. 2028.

1. BILLS AND NOTES ⊂=149—NEGOTIABLE INSTRUMENTS—NATURE AND FORM—"COMMERCIAL PAPER."

A telegraph company which transmitted money by telegraph, for its convenience, would issue to the sendee of money so transmitted a draft drawn on its money transfer department, and directing payment to the order of such sendee of the sum therein named, reciting that this was the sum placed to his credit by the sender, and that the receipt thereof on the conditions under which it had been transmitted was acknowledged by indorsement thereon. The drafts directed that the amount be charged to the account of money transfers, and bore a statement that it would be cashed by a named bank. *Held*, that these drafts were "commercial paper" within the Negotiable Instruments Act of New Jersey (P. L. 1902, p. 583), and were governed by the rules applicable to that class of instruments.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 296, 373; Dec. Dig. ⊂=149.

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

2. BILLS AND NOTES ⊂=345—BONA FIDE HOLDERS—"NOTICE."

Negotiable Instruments Act N. J. (P. L. 1902, p. 593) § 56, provides that to constitute notice of an infirmity in an instrument or a defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. A clerk in the money transfer department of a telegraph company obtained blank forms of drafts issued by its agents to the sendees of money transferred by telegraph, forged the signature of an agent thereto, and the indorsement thereon of the apparent payee, and deposited them in a bank in the small town of N., where he lived. He had resided there for some years, was only 20 years old, of slender means, and living on his salary, and N. was not the place where the drafts were drawn or were to be paid, or where the payee resided. The bank knew some of these facts, but it further appeared that its teller asked such clerk what he was doing with the money, and was told that he was acting as paymaster and forwarding the money to meet the pay roll of a man who was extending the line, that the teller suggested calling up the company, and the clerk acquiesced, but that this inquiry was not made, and that though the forgeries extended over several months, the drafts were paid by the company without objection. *Held*, that under section 56 the mere fact that the circumstances were suspicious did not put the bank upon "notice" and charge it with the duty of inquiry; the jury having found that it did not act in bad faith.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 849–852; Dec. Dig. ⊂=345.

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

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3. BILLS AND NOTES ⊂=377—RIGHTS OF BONA FIDE HOLDERS.
Where a bank took title to forged drafts in good faith and they were subsequently paid by the drawee, it had a right to retain the proceeds.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 952; Dec. Dig. ⊂=377.]

4. APPEAL AND ERROR ⊂=690—RESERVATION OF GROUNDS OF REVIEW—EXCLUSION OF EVIDENCE.
In an action against a bank, the exclusion of a question as to what the bank's cashier told the witness about a matter in controversy would not be reviewed, where there was no statement of what the witness was expected to prove, and it did not appear what the answer would have been, or whether it would have been favorable to the party asking the question.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897–2899, 2902–2904, 2906, 2908; Dec. Dig. ⊂=690.]

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

Action by the Postal Telegraph-Cable Company against the Citizens' National Bank. Judgment for defendant, and plaintiff brings error. Affirmed.

Vredenburgh, Wall & Carey, of Jersey City, N. J. (John A. Hartpence, of Jersey City, N. J., of counsel), for plaintiff in error.

Harrison P. Lindabury, of Newark, N. J., and Elmer King, of Morristown, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. During the first nine months of 1910 a trusted clerk in the New York office of the Postal Telegraph Company defrauded it of $3,722 in 17 installments differing in amount. He lived in Netcong, N. J., and deposited the money obtained by the fraud in the Citizens' National Bank of that village, checking it out from time to time and applying it to his own use. The bank was sued on the theory that the circumstances of the various transactions unmistakably indicated their fraudulent character, and called for diligent inquiry into the genuineness of certain forged drafts by which the unlawful scheme was carried out. The case was submitted to the jury, and a verdict was found in favor of the bank. In order that the principal questions presented to us may be properly understood, the facts should be stated in somewhat fuller detail.

Among the local offices of the company throughout the United States, there are more than 300 from and to which the public may send money by telegraph. During the period in question the following method of transmission was followed: The sender, say, at Pittsburgh, Pa., signed a written application, requesting the company to pay a specified sum of money to a designated person at, say, Petersburg, Va., and deposited the money with the Pittsburgh agent. Thereupon the Pittsburgh agent, using a private code, telegraphed these facts to the Petersburg agent, and the latter notified the person designated as payee. When the payee appeared, the Petersburg agent gave him a draft on New York City for the sum named, signing the draft and making it payable to the

order of the payee. The draft was drawn on the company's money transfer department at 253 Broadway, and would be cashed by any bank in Petersburg or elsewhere, after the usual identification of the holder. The cashing bank forwarded the draft for collection to its correspondent in New York, who received payment on presentation to the money transfer department, payment being made by the company's check on the American Exchange National Bank; the correspondent of course reimbursing the local bank by whom the draft had been forwarded. The money to meet the draft was sent to New York by the Pittsburgh agent, accompanied by a remittance slip, stating the amount, the names of the sender and the payee, the day when the money was deposited, and the names of the sending and the receiving offices. If (as often happened) the money did not reach New York before the draft, the company paid the draft nevertheless out of a fund maintained in bank for this purpose.

During the period in question and for a good while before, the clerk in question was employed in the money transfer department, and was familiar with the system referred to. Evidence was offered to prove—and there is no reason to doubt—that he obtained some of the blank drafts on the money transfer department, and forged 17 of them, aggregating $3,722 so as to simulate genuine drafts from Petersburg, signing the name of V. H. Borst, the company's agent at that place, making the drafts payable to one James Gouvas, and forging his name also as indorser thereon, and thereupon presenting them to the bank at Netcong for deposit to his own credit. His duties in the office at New York were of such a nature that he was able to make misleading entries and do other acts that covered up his thefts until they were brought to light by accident.

The form of the drafts is as follows:

3237

(Office) (Date)

..... 190:. $.....

Pay to the order of ..... dollars .....

being the sum placed to his credit by .....

..... at .....

receipt of which, on the conditions under which the same has been transmitted, is acknowledged by indorsement hereon and charge same to account of money transfers.

To the Gen'l Agent Money Transfer Dep't,
Postal Telegraph-Cable Co.,
253 Broadway, New York.

No. ..... Time paid .....

.....
Money Transfer Agent
D 759

Form 106—Special
This draft will be cashed by

..... Bank

at .....
Upon Identification of the Payee.

Identified by

.....

When filled out, each draft purported to recite the transfer of money from Pittsburgh to James Gouvas at Petersburg, and each purported

to be drawn on the money transfer department in New York by Borst, the agent at Petersburg, to the order of Gouvas, and to be indorsed by Gouvas, and also by the clerk in question. On each draft the company's name was prominently printed, and the money transfer department was directed to charge the amount thereof to the account of money transfers. Accepting spurious drafts of the character described, the company paid the following sums on the days mentioned:

March	7th, 1910		$112.00
"	23d, "		250.00
"	" "		258.00
"	24th, "		125.00
"	" "		212.00
"	29th, "		100.00
May	21st, "		150.00
June	14th, "		175.00
July	2d, "		280.00
"	26th, "		250.00
"	27th, "		210.00
July	30th, "		475.00
Aug.	1st, "		350.00
Aug.	5th, "		150.00
"	12th, "		250.00
"	27th, "		250.00
Sept.	6th, "		125.00
			$3,722.00

These drafts were credited to the clerk by the Netcong bank, and were then forwarded for collection to the Chase National Bank of New York City to whom they were paid by the company's checks.

The company contends that on the dates specified the Netcong bank knew, or should have known, numerous facts about the clerk—his youth (about 20 years); his financial resources; mode of living; environment, habits, and character; that he had resided for years in Netcong (a small town of perhaps 2,000 inhabitants); that he was, and for a long time had been, employed by the Postal Company; that he was a young man of slender means, living on his salary; and that Netcong was not the place where the drafts were drawn, or were to be paid, or the place where the payee resided, and therefore was not the natural place for cashing such drafts. In a word, the argument is that the surrounding circumstances clearly suggested that the clerk had fraudulently issued the drafts, and was using them fraudulently, and that he had forged the signatures of Borst and of Gouvas, thus putting the bank on notice, and charging it with the duty of diligent and careful inquiry and effort to ascertain whether the drafts and the signatures thereon were in fact genuine, and whether the clerk was in reality entitled to receive the money. Denying the exercise of such care and diligence, the company charges the bank with having cashed the drafts and credited the clerk with the proceeds, wrongfully and not in good faith or in due course of business, but carelessly, and recklessly, the circumstances being such as to visit the bank with notice that the drafts were fraudulent.

[1] 1. The company takes the position—but does not maintain it with much earnestness—that the drafts in question are not commercial paper, and should not be governed by the rules applicable to that class

of instruments. No reason was offered to support the position, except that the drafts were drawn for the company's convenience, and this does not seem to need any other reply than a mere reference to the early sections of the New Jersey Negotiable Instruments Act (Laws of 1902, page 583), which clearly include such instruments as these in their description of commercial paper.

[2, 3] 2. Being commercial paper, therefore, section 56 of the act furnishes the rule by which the conduct of the bank is primarily to be judged:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The bank did not have actual knowledge of the defect in the clerk's title, but there was evidence in the case to justify the inference that it knew some (but not all) of the facts contended for by the company. Qualifying these, however, there was evidence that in May or June the teller asked the clerk what he was doing with the money, and was told that he was acting as paymaster, and was forwarding the money to meet the pay roll of a man in West Virginia, who was extending the line. When the teller suggested calling up the company to inquire if everything was right, the clerk acquiesced; but it does not appear that any inquiry was made. And it was also proved that the company made no objection to any of the drafts until the fraud was discovered early in October. Now, whether or not it was proper to permit the jury to draw an inference of the bank's bad faith from the whole of this evidence, the fact remains that the question of bad faith *was* submitted to the jury, and has been found against the company. The objection made on this writ of error is, in effect, that the jury should have been told that if the circumstances were suspicious, the bank was put upon notice and was charged with the duty of inquiry. It is scarcely necessary to say that this is not the prevailing rule. Section 56 distinctly provides to the contrary, and this is in harmony with the modern view. Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; King v. Doane, 139 U. S. 173, 11 Sup. Ct. 465, 35 L. Ed. 84; Swift v. Smith, 102 U. S. 444, 26 L. Ed. 193; Mee v. Carlson, 22 S. D. 365, 117 N. W. 1033, 29 L. R. A. (N. S.) 388; 7 Cyc. 943, VII, b, et seq. Moreover, the question was also submitted whether the company took the proper precautions to ascertain whether the signatures purporting to be the signatures of its agents had been forged, the jury being instructed that the company had a reasonable time to discover the forgery and to repudiate it. Naturally the company does not assign these instructions for error, and we refer to them to show (what indeed the charge expressly states) that the trial judge had in mind the unusual situation—a drawee accepting and paying a forged draft to a bona fide holder—and correctly applied the rules laid down in the leading case of Bank of U. S. v. Bank of Georgia, 10 Wheat. 333, 6 L. Ed. 334, and other decisions. Under the doctrine of that case, if the Netcong bank took title to the drafts in good faith, it had a right to retain the proceeds.

[4] 3. The next question raised is the correctness of a ruling on evidence. The company's vice president being on the stand, and having testified that in December, 1910, he talked with the cashier in Netcong about these drafts, was asked by the company's counsel what the cashier then said to him with regard to what had taken place when the drafts went through the bank. Upon objection, the court refused to permit the witness to answer, and this refusal is assigned for error. As we do not know what the answer would have been, we see nothing to review. The answer might, or might not, have been favorable to the company. Suppose the witness had answered that he did not remember, or that the cashier said nothing on the subject; manifestly the answer would not have helped the company, and its exclusion would be unimportant. And, as there was no statement of what the witness was expected to prove, we are in no position to judge whether the conversation was properly excluded, or ought to have been heard. The assignment has been argued on the theory that the answer (if competent) would have helped the company; but there is nothing on the record to support the position, and we shall not base a ruling on a guess.

The case was well tried, and the judgment is now affirmed.

LOUISVILLE WOOLEN MILLS v. JOHNSON.

In re TAPP CLOTHING CO.

(Circuit Court of Appeals, Sixth Circuit. January 4, 1916.)

No. 2791.

1. BANKRUPTCY ⟸350—CLAIMS—PRIORITIES UNDER STATE LAWS.

Ky. St. § 2487, formerly provided that when the property of any public improvement company, or owner or operator of any manufacturing establishment, should be assigned for the benefit of creditors, come into the hands of any receiver, trustee, or assignee for creditors, or in any wise come to be distributed among creditors, employés and persons furnishing materials, or supplies for the carrying on of the business, should have a lien on property involved in the business. Section 2488 provides that such lien shall be superior to the lien of any mortgage or other incumbrance thereafter created, and section 2490 provides that when any such company, owner, or operator shall sell or transfer such business, or when the property engaged in such business shall be taken in attachment or execution, the lien shall attach as fully as is provided in section 2487, and may be enforced by proceedings in equity. In 1914, section 2487 was amended, without any saving clause, by eliminating the provision as to persons furnishing materials or supplies. *Held*, that in a bankruptcy proceeding a party furnishing materials to the bankrupt prior to the amendment was entitled to a preference in distribution, since a retrospective operation will not be given a statute which interferes with antecedent rights, unless such be the unequivocal and inflexible effect of its terms and the manifest intention of the Legislature, and the statute did not create a mere right of priority on distribution, but a right between the equitable consequences of which and of a full technical lien no very solid distinction can be drawn.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⟸350.]

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2. BANKRUPTCY ⊂⊃350—CLAIMS—PRIORITIES UNDER STATE LAWS.
The rule that where a statute creates merely an additional remedy for the enforcement of a debt, leaving unimpaired all ordinary remedies, a repeal of the statute without a saving clause prevents the enforcement of the additional remedy did not apply, at least where the property was being distributed in bankruptcy, as by the construction placed upon the statute prior to its amendment by the federal courts, the lien had become and was a part of the bankruptcy law, and this priority was therefore given by the same law which provided for a discharge of the indebtedness and so destroyed all ordinary remedies.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⊂⊃350.]

3. BANKRUPTCY ⊂⊃350—CLAIMS—PRIORITIES UNDER STATE LAWS.
No preference or lien existed for goods shipped after the amendment, though earlier contracted for, as the vendor at the time of the amendment had nothing but a right to get in the future an inchoate lien if in the future it should ship the goods.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⊂⊃350.]

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

In the matter of the Tapp Clothing Company, bankrupt. From an order denying a claim of preference of the Louisville Woolen Mills, opposed by C. W. Johnson, trustee, the claimant appeals. Reversed and remanded.

W. S. Mendel, of Louisville, Ky., for appellant.

D. A. Sachs, Jr., of Louisville, Ky., for appellee.

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

DENISON, Circuit Judge. Section 2487 of the Kentucky Statutes provides that when the property of any manufacturing establishment should be assigned for the benefit of creditors, come into the hands of any executor, administrator, commissioner, receiver, trustee, or assignee for the benefit of creditors, or in any wise come to be distributed among creditors, the employés of such establishment "and the persons who should have furnished materials or supplies for the carrying on of such business" shall have a lien upon the property and effects involved in such business. Section 2488 says that this lien shall be superior to the lien of any mortgage or other incumbrance; and section 2490 directs that when such business is sold or transferred, or when the property is taken on attachment or execution, so that the business shall be suspended, "the said liens shall attach as fully as provided in section [2487] and in such case may be enforced by proceedings in equity."

The nature of the interest or right inuring under this statute to the persons who furnish materials has been twice considered by this court. In Ohio Falls Co. v. Central Trust Co., 71 Fed. 916, 18 C. C. A. 386, it was thought to be the clear meaning of the statute that the so-called lien did not mature or develop into a technical lien until the happening of one of the events upon which the statute conditioned its enforce-

ment; and in Re Bennett, 153 Fed. 673, 82 C. C. A. 531, it was held that, whatever the real nature of the interest contemplated by statute to be given to or retained by the vendor, it gave such a right of priority upon the distribution of the insolvent estate as must be recognized by the bankruptcy law.

The Kentucky Court of Appeals, in Winter v. Howell's Assignee, 109 Ky. 163, 58 S. W. 591, had said that the right to the lien would be controlled by the law in existence when the assignment for creditors there involved was made. This proposition, within the limits of the facts there considered, is perhaps not questioned by any one; but the statement was obviously a dictum, because, in that case, there had been, between the accruing of the claim and the assignment for creditors, no statutory change which could be thought to affect the case.

[1] In this condition of the law, as indicated by the decisions, the Woolen Mills contracted to sell materials to the bankrupt. The contract was made and some of the goods were shipped and delivered before June 17, 1914. The remainder of the goods so contracted for were delivered after that date. On June 17th, the Kentucky Legislature re-enacted section 2487, omitting the words above given in quotation marks, whereby it resulted, at least, that the Woolen Mills Company could have no lien for any goods contracted for after the date of the new law.

In the course of the bankruptcy proceedings, the Woolen Mills Company filed its claim, and asked a preference or lien: First, for the goods contracted and shipped before the repeal of the law; and, second, for the goods contracted before, but shipped after, that day. The referee and the district judge held, in effect, that the statute was merely one giving priority upon the distribution of an insolvent estate, and that, as was thought to be held in Winter v. Howell's Assignee, supra, no effect could be given to a law not in force at the time of the distribution. Accordingly, the claim to preference was rejected; and the claimant appeals.

Since the Kentucky court has not, in any case where the issue was involved, determined the construction of the statute in this respect, we think the effect of the amendment must be controlled by the well-settled rule that:

> "A retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature.'" Union Pac. R. Co. v. Laramie, 231 U. S. 190, 199, 34 Sup. Ct. 101, 102 (58 L. Ed. 179).

In Holt v. Henley, 232 U. S. 637, 639, 34 Sup. Ct. 459, 460, 58 L. Ed. 767, there had been an amendment of the Bankruptcy Act which the courts below had thought took full effect as of its date, even as against existing rights of a character seemingly analogous to the "inchoate lien" here involved; but the Supreme Court reached the contrary conclusion, and found it unnecessary to decide the claim, made there as here, that the existing rights were sufficiently fixed and vested to be protected by the Fourteenth Amendment, but held those rights to be sufficiently protected by the rule that:

"The reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed. * * * The opposite construction * * * would impute to the act of Congress an intent to take away rights lawfully retained and unimpeachable at the moment when they took their start."

Whether we do give to this repeal a retrospective effect if we permit it to cut off the vendor's claim to priority or to lien existing at the date of the repeal depends upon the precise nature and character of the claimant's right. If it was and continued to be of a purely inchoate character, it would be destroyed by a repeal of the statute under which it was claimed (Endlich, Int. Stat. § 280; In re Scott, Bradford, D. J. [D. C.] 126 Fed. 981); and this destruction would not here be called "retrospective," because there would be nothing substantial in the past to be affected; its only direct effect would be in the future. We may, concede, without deciding, that if only section 2487 were involved (and as applied outside of bankruptcy), the subject-matter would be simply a rule of priority or distribution, and would be controlled solely by the law then in force; but sections 2488 and 2490 additionally characterize the vendor's right. They show that even where there is no insolvency or other distribution of any kind, the vendor eventually has a perfect and superior technical lien. As distinguished from and as beyond the mere right of priority on distribution, this right fully justifies the comment made by Justice Lurton (then a judge of this court) in Re Bennett, supra, that:

"It is impossible to draw any very solid distinction between the equitable consequences of such a right and those of a full technical lien."

Of course, the repeal of a law creating "a full technical lien" would not be lightly permitted to have retrospective effect; and we cannot think that we should assume an intent to give equivalent effect to the repeal of a law creating rights so closely analogous to such a lien. It must follow that claimant is entitled to a preference for the goods delivered before June 17th.

[2] We do not overlook the rule that where a statute creates merely an additional remedy for the enforcement of a debt, leaving unimpaired all ordinary remedies, a repeal of the statute without a saving clause prevents the enforcement of that additional remedy. This rule has been applied to mechanics' liens, although there is here a conflict of opinion. 27 Cyc. 23, 24. If it might be regarded as otherwise applicable to the situation before us, it would be distinguished by considering the relation of the Kentucky act to the bankruptcy act. By the effect of the decision in the Bennett Case, it had become and was a part of the bankruptcy law when these goods were shipped that the vendor should have priority over other creditors, if the vendee became bankrupt. This priority was thus given by the same law which provided for a discharge of the indebtedness, and so destroyed all ordinary remedies. Whether such a priority so given and coupled with such an alternative becomes, upon the shipment of the goods, such a vested right as to be beyond legislative control, we do not consider; it at least is above and beyond that mere additional remedy which necessarily falls with the repeal of its creative statute.

[3] What we think to be a consistent application of the same considerations leads us to conclude that the preference or lien does not exist for goods later shipped, even though earlier contracted for. The whole question is as to the intent of the Legislature. This lien statute having been repealed without any saving clause, we cannot well impute an intent that the repealed law should continue in force as to instances where there was not then even an inchoate lien. For goods not shipped before June 17th, the vendor did not have a right of such a fixed and unavoidable character that it could not be substantially distinguished from a true lien; it had only the right to get in the future an inchoate lien, if, in the future, it should ship the goods; and to say that to destroy this expectant right to acquire an inchoate lien is to give the statute a retrospective effect is going a step further than we can approve. The Legislature not improbably thought that if, at the moment of the repeal, any vendor had contracted to sell goods not yet delivered, and if he regarded his right to preserve an effective lien as essential, he would be able to protect himself sufficiently in some other manner.

A question of the application of payments is suggested, but it was not considered below, and the record is not full enough to justify decision here.

The order is reversed, and the case will be remanded for further proceedings in accordance herewith.

GROSMAN et al. v. UNION TRUST CO.*

(Circuit Court of Appeals, Fifth Circuit. January 4, 1916. Rehearing Denied February 1, 1916.)

No. 2831.

1. CONTRACTS ⟸101—ACTIONS—LAW GOVERNING—PUBLIC POLICY.
A contract, though valid under the law of the place where it was made, will not be enforced in a jurisdiction where to so enforce it would involve a disregard of the established public policy of that jurisdiction.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 455–460; Dec. Dig. ⟸101.]

2. HUSBAND AND WIFE ⟸87—LIABILITY OF MARRIED WOMEN ON CONTRACTS —CONTRACTS OF SURETYSHIP—"ANOTHER."
Rev. St. Tex. 1911, art. 4621, as amended by Act March 21, 1913 (Acts 33d Leg. c. 32), provides that neither the separate property of the wife, nor the rents from her real estate, nor the interest on bonds and notes belonging to her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband. Article 4624, as amended by the same act, after providing that the separate property of the husband and certain community property shall not be subject to the payment of debts contracted by the wife, except for necessaries, contains a proviso that the wife shall never be the joint maker of a note, or a surety on any bond or obligation of another, without the joinder of her husband with her in making such contract. *Held*, that a contract made by the wife alone, by which she undertakes to become a surety on a bond or obligation on which her husband is a principal, is forbidden by the statute, as the word "another" cannot reasonably be given such a meaning as

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Application for certiorari granted by the Supreme Court March 20, 1916.

would prevent the husband from being regarded as "another" than his wife, and the wife may not become a surety on bonds and obligations in which the husband cannot join.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 346–353, 798; Dec. Dig. ⊂⊃87.

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

3. CONTRACTS ⊂⊃101—LAW GOVERNING—PUBLIC POLICY.

Act Tex. March 21, 1913 (Acts 33d Leg. c. 32), amending Rev. St. 1911, arts. 4621, 4622, 4624, governing a married woman's liability on contracts, evidences the establishment, or the continuance, with the modifications thereby made, of a well-defined public policy of preventing the diminution of the estates of married women by unauthorized transfers or conveyances, or by subjecting them to the payment of forbidden obligations; and a contract made in Illinois by a married woman residing in Texas, whereby she became a surety for her husband, being contrary to this public policy, cannot be enforced in the courts of Texas, or in courts administering the laws of Texas.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 455–460; Dec. Dig. ⊂⊃101.]

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by the Union Trust Company against Minnie Kahn Grosman and others. Judgment for plaintiff, and defendants appeal. Reversed as against the defendant named.

F. M. Etheridge, Joseph M. McCormick, and H. L. Bromberg, all of Dallas, Tex., for appellants.

Wm. H. Atwell, of Dallas, Tex., for appellee.

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

WALKER, Circuit Judge. On May 23, 1914, the appellant Mrs. Minnie Kahn Grosman, who has been a resident of Texas since her birth, while on a visit to Chicago, accompanied by her husband, Hiram Grosman, also a resident citizen of Texas, executed a guaranty or suretyship contract, signed by her alone, by the terms of which she made herself a surety for a debt of her husband's firm, Hiram Grosman & Co., evidenced by its note, signed in the firm name by her husband. Some months after Mrs. Grosman's return to her home in Texas, and after the maturity of the obligation of Hiram Grosman & Co. which was referred to in the suretyship contract, this suit was brought against her, against her husband's firm, and against the individuals composing it. The objects of the suit were a recovery against the defendants other than Mrs. Grosman on the obligation for which she signed as surety or guarantor, and also on other obligations, the foreclosure of an asserted lien on personal property by which those obligations were secured, and a recovery against Mrs. Grosman on her contract above mentioned. At the time of the institution of the suit a writ of attachment was issued, which was levied on real estate in the city of Dallas which belonged to Mrs. Grosman and was her separate property. Mrs. Grosman duly pleaded her coverture and raised the

question of the right of the plaintiff to have enforced by the court in which the suit was brought the liability which was asserted against her. By the decree appealed from the court adjudged in favor of the plaintiff and against Mrs. Grosman the amount called for by her guaranty or suretyship contract, less a credit allowed on account of the application upon the demand of the plaintiff of the proceeds of the sale of personal property upon which a lien in its favor was decreed, and for the amount decreed against Mrs. Grosman ordered the foreclosure of the lien of the writ of attachment levied on her separate property and the sale of that property.

[1] Evidence was adduced to the effect that under the law of Illinois, the state in which Mrs. Grosman signed the instrument sought to be enforced against her, her act had the effect of creating a valid and enforceable contract. It is contended in behalf of Mrs. Grosman that, notwithstanding the validity of the contract where it was made, the decree appealed from was unwarranted, because the effect of it was to contravene a public policy of Texas, established by express legislative enactment. The doctrine which this contention invokes is a well-settled one. A statement and application of it are found in the opinion in the case of The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190. That case involved the question of the enforceability in the courts of the United States of a provision of a contract of a carrier made in Belgium; the provision being valid there, and the contract expressly providing that "all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made." It was insisted that the law of Belgium should be applied, though the provision in question contravened a public policy applied by the courts of the United States. With reference to this position the court said:

"The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the lex loci governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught." The Kensington, supra, 183 U. S. 269, 22 Sup. Ct. 104, 46 L. Ed. 190.

The result was that the court, concluding that the provision in question was one which contravened a rule of public policy applied in the forum in which the provision came into question, decided that it was not there enforceable. In a much earlier case in the same court the ruling was to the effect that the enforcement of a contract, no matter where made or where to be executed, if that contract is in violation of the law or contravenes the public policy of the government in a forum of which its enforcement is sought, cannot be compelled in that forum. Kennett et al. v. Chambers, 14 How. 38, 52, 14 L. Ed. 316. For other statements and applications of the same rule, see Emery v. Burbank, 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57, 47 Am. St. Rep. 456; 5

Ruling Case Law, 944, and notes. In an action to enforce any kind of liability, the law of the forum is material in so far as it sets a limit of policy beyond which such obligations as the one asserted will not be enforced there. Cuba R. R. Co. v. Crosby, 222 U. S. 473, 478, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40. We do not understand that there is a controversy in this case as to the proposition that a court charged with the administration of the laws of Texas is not required to enforce a contract made in another jurisdiction, and valid there, when to do so involves a disregard of an established public policy of Texas. But it is contended by the counsel for the appellee that the statute law of Texas, which is invoked by the counsel for the appellant, does not evidence the existence of a public policy of that state which would be contravened by the enforcement of the contract in question by a court which administers the laws of that state.

[2] This brings us to a consideration of the statute laws of Texas, to which our attention is directed. Before the taking effect of an act of the Legislature of Texas which was approved March 21, 1913 (Acts 33d Leg. c. 32), article 4621 of the Revised Statutes of Texas of 1911 defined the separate property of the husband and of the wife; article 4622 defined the community property of the husband and wife; and article 4624 specified what contracts could be made by the wife. Under the law as it existed while the three articles mentioned were in force, a married woman could only bind herself by a contract entered into for necessaries of herself or children or for the benefit of her separate estate. Cruger v. McCracken, 87 Tex. 584, 30 S. W. 537; Noel v. Clark, 25 Tex. Civ. App. 136, 60 S. W. 356; Stroter v. Brackenridge, 102 Tex. 386, 118 S. W. 634. In immediate connection with the provisions above mentioned is found the following, being article 4625 of the same compilation:

"*Judgment and Execution in Such Cases.*—Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff."

The act of March 21, 1913, amended articles 4621, 4622, and 4624. It did not mention article 4625. That article remains in force to some extent, at least, unless it has been deprived of all operative effect as a result of the incompatibility of any of its provisions with those of the later enactment of March 21, 1913. Article 4621, as it was amended by that act, defines the separate properties of the husband and of the wife, provides, subject to qualifications in the case of the wife, for each having the sole management, disposition, and control of his or her separate property, specifies how named separate property of the wife may be conveyed or transferred, and contains the provision that:

"Neither the separate property of the wife, nor the rents from the wife's real estate, nor the interest on bonds and notes belonging to her, nor her personal earnings shall be subject to the payment of debts contracted by the husband."

Article 4622, as amended, specifies what shall be deemed the common property of the husband and wife—commonly called the community property—and designates the part of it which shall be under the control, management, and disposition of the wife alone, "subject to the provisions of article 4621, as hereinabove written." Article 4624, as amended, reads as follows:

"Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property shall be subject to the payments of debts contracted by the wife, except those contracted for necessaries furnished her or her children: Provided, the wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

Whatever enlargement of a married woman's right to bind herself by contract can be regarded as having been effected by the act above referred to is subject to the qualification or exception stated in the proviso found in amended article 4624, which has just been quoted. So far as that proviso affects the right of a married woman to become a surety, its explicit prohibition is that:

"The wife shall never be * * * a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

We think the language of this provision forbids a married woman becoming surety for another, unless her husband joins her in the suretyship contract. The word "another," used as it is in that proviso in describing any bond or obligation of any one besides the wife, cannot reasonably be given such a meaning as would prevent the husband being regarded as another than his wife within the purpose of the proviso. Giving to the proviso the meaning its words express, for the bond or obligation of another to be one as to which a married woman may become a surety, it must be one with reference to which her husband may join her in a contract of suretyship. This excludes a bond or obligation upon which the husband is a principal, as he cannot be his own surety. The result is that the wife is forbidden to become a surety when, from the nature of the case, her husband cannot join her as a cosurety. At any rate, the husband, in becoming a principal on a bond or obligation, cannot well be regarded as joining his wife in the separate contract by which she undertakes to bind herself as a surety. The two obligations are separate and distinct in their natures and consequences, though one of them is collateral to the other.

Whatever doubts as to the correctness of these conclusions might exist, if the proviso in question stood by itself, we think are removed when it is considered in connection with the above-quoted provision of article 4621 as amended. The embodying of the two provisions in the same statute we think clearly manifests a legislative purpose to forbid a married woman becoming a surety for an obligation on which her husband is a principal. It cannot be supposed that it was in the legislative contemplation that the quoted provision of amended article 4621, prohibiting the subjecting to the payment of debts contracted by the husband of the wife's separate property and specified parts of the

community property, was to be effective only in the case of the wife failing to become a surety for her husband's debts. If it was so supposed, the will of the Legislature would not control, unless it happened to coincide with that of the wife. The conclusion is that a contract made by the wife alone, by which she undertakes to become a surety on a bond or obligation on which her husband is a principal, is one which a married woman is forbidden by the statute law of Texas to make, and the enforcement of which against her separate property or against specified parts of the common property of herself and husband is prohibited by the same law.

[3] When the act of March 21, 1913, is considered in connection with the previously existing statute law which it amended, we think it clearly discloses a legislative purpose to enlarge the capacity of the married women of Texas to bind themselves by contract and to extend their powers over property, both their separate property and specified parts of the community property; but we think, also, that with equal clearness it manifests a purpose to provide, for the protection of the property interests of Texas married women, safeguards which are put beyond their power to remove or dispense with. The act evidences the establishment, or rather the continuance with modifications it makes, of a well-defined public policy of preventing the diminution of the estates of the married women of Texas by unauthorized transfers or conveyances, or by subjecting them to the payment of forbidden obligations. A notable feature of that policy is disclosed by the prohibition found in the provision of article 4621, as it was amended, that:

"Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings shall be subject to the payment of debts contracted by the husband."

An effect of this provision is to forbid courts which administer the laws of Texas to afford a remedy for the enforcement against the mentioned property interests of the wife of debts contracted by the husband. The denial of such a remedy is general in its terms. It is not confined to Texas contracts of the kind mentioned, but is broad enough in its terms to apply to such contracts wherever made, though they may be valid and enforceable where they were made. It well may happen that an attempt to enforce an obligation, recognized as valid where it was entered into, will fail where the remedy sought is one which is forbidden by the law of the forum. Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; and see notes to Union National Bank v. Chapman, 57 L. R. A. 513, 522, and to International Harvester Co. v. McAdam, 26 L. R. A. (N. S.) 774. Certainly it would be overtaxing the comity, which reasonably may be expected to influence the forum resorted to, to call for the enforcement by it of such a remedy, when the obvious purpose of the law of the forum in forbidding the remedy is to prevent the setting at naught of a public policy established by the same law.

The conclusions are that it is a part of the public policy of Texas, established by statute, to prevent the separate property of its married women being subjected to the payment of such a demand as the one

asserted against Mrs. Grosman in this case, and that the decree appealed from is erroneous, in that it subjected her separate property to the payment of that demand.

It follows that the decree against Mrs. Grosman should be reversed; and it is so ordered.

MONTGOMERY v. CHICAGO, B. & Q. R. CO.

(Circuit Court of Appeals, Eighth Circuit. November 16, 1915.)

No. 4488.

1. CARRIERS ⟸32—RATES—DISCRIMINATION—CARRIAGE OF CARRIER'S PROPERTY.

Conceding that a carrier has no right to enter the field of general business and transport the articles and commodities used and sold therein at less than the regular published rates available to the general public, it has the right to provide eating houses for its passengers and employés at points on its line, and may transport the articles and commodities for the use of such eating houses at less than the full published rate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. ⟸32.]

2. COMMERCE ⟸85—INTERSTATE COMMERCE COMMISSION—POWERS AND FUNCTIONS.

The establishment by carriers of eating houses for passengers and employés, and the transportation of articles and commodities therefor at less than the published rate, are administrative practices, and the ultimate primary judgment and discretion which govern and condition them is lodged in the Interstate Commerce Commission, to be exercised on request and after due investigation and consideration of the public interest concerned, and in view of the preference and discrimination clauses of the statute.

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

3. COMMERCE ⟸92—INTERSTATE COMMERCE COMMISSION—POWERS OF COURTS.

Courts have no power to fix rates or establish practices for carriers, and cannot interfere with those fixed and established by the Interstate Commerce Commission, except where the orders are void.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 142; Dec. Dig. ⟸92.]

4. CARRIERS ⟸36—INTERSTATE COMMERCE—ACTIONS FOR DAMAGES—PLEADING.

The Interstate Commerce Commission adopted a rule that carriers might provide eating houses for passengers and employés, and that property therefor might be regarded as necessary and intended for the use of such carriers in the conduct of their business, but that such eating houses must not serve the general public with food prepared from commodities carried at less than the published rate, and that no utensils, etc., employed in serving others than passengers and employés should be carried at less than tariff rates. In a restaurant proprietor's action for damages, it was alleged that a railroad company had opened a restaurant in connection with a station, and operated it for the accommodation of passengers and employés; that it also served the general public; that it shipped on its trains free of charge most of the commodities and supplies used in such business, while plaintiff for like shipments was required to pay the regular published rates; that by reason thereof it was able to sell at prices below those at which plaintiff could make a profit; that, prior to the establishment of defendant's restaurant, plaintiff's daily receipts exceeded

$100 a day, and his net profits $25 a day; that defendant's competition had caused a decrease in the daily receipts to less than $50 a day and a decrease in the profits to practically nothing; that plaintiff had been damaged by loss of profits in a sum therein specified; and that there had always been ample facility at plaintiff's restaurant and other eating houses for the accommodation of the general public, including defendant's employés. *Held*, that no cause of action was stated, and the case presented was one requiring determination by the Interstate Commerce Commission as to whether the establishment of an eating house at the point in question was proper, as the petition did not show that all supplies were carried free of charge, nor that the general public was served with food prepared from commodities so carried, but did squarely challenge defendant's right to establish an eating house at that point, and, moreover, it did not appear that plaintiff's loss of business was not due to causes not chargeable to defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. ⟸36.]

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

Action by Roy Montgomery against the Chicago, Burlington & Quincy Railroad Company. Judgment dismissing the action, and plaintiff brings error. Affirmed.

Robert P. Parker, of Sheridan, Wyo. (Clyde M. Watts, of Cheyenne, Wyo., on the brief), for plaintiff in error.

Timothy F. Burke, of Cheyenne, Wyo. (Edward T. Clark, of Billings, Mont., and William A. Riner, of Cheyenne, Wyo., on the brief), for defendant in error.

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

VAN VALKENBURGH, District Judge. Plaintiff in error brings suit against the Chicago, Burlington & Quincy Railroad Company under section 8 of the act to regulate commerce, approved February 4, 1887 (24 Stat. 382, c. 104 [Comp. St. 1913, § 8572]), and the various amendments thereto, which provide:

"That in case any common carrier * * * shall do or cause to be done any act * * * in this act declared to be unlawful, such common carrier shall be liable to the person injured thereby for the full amount of damages sustained, together with reasonable attorney's fee to be taxed * * * as costs."

Plaintiff in error, since 1908, has been in the restaurant business in Gillette, Campbell county, Wyo., which point is local to the line of the defendant railroad company. May 15, 1912, defendant opened an eating house or restaurant in Gillette in connection with its station there, and has since operated the same for the accommodation of its passengers and employés; and it is further alleged in the bill that it caters to and serves at its restaurant the general public as well. It is further alleged that the defendant ships on its trains most of the commodities and supplies needed and used by it in its said restaurant business free of any charge for carriage whatever, while plaintiff for like shipments has always been required by defendant to pay thereon the regular published schedule rates then in force on defendant's railroad; that this is largely to plaintiff's prejudice and disadvantage, in that,

by reason of said defendant obtaining most of its supplies free for which similar supplies the plaintiff has been compelled to pay large tariff and freight charges, the defendant is able to sell, and since May 15, 1912, has sold its commodities in its restaurant and eating house at prices much below those for which plaintiff can sell and make a profit. The petition states that prior to the date last aforesaid he had established a lucrative restaurant business, with daily receipts in excess of $100 per day, and net profits in excess of $25 per day; that the competition of defendant immediately caused a decrease in plaintiff's business of daily receipts from $100 per day, as aforesaid, to less than $50 per day, and a decrease of net profits from $25 per day, as aforesaid, to practically nothing; that plaintiff has been damaged by loss of profits in his business in the sum of $2,900, for which he prays judgment, together with a reasonable attorney's fee to be taxed as costs.

It is conceded in the petition that it is lawful for defendant to ship, free of charge, such supplies, articles, or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier; but it is averred that the operation and maintenance of the said restaurant by defendant, and the transporting of commodities and supplies therefor free of charge, is not necessary within the contemplation of the law, because "always, since May 15th, 1912, there has been ample facility, not only at the restaurant of plaintiff, but at other eating houses in Gillette, for the accommodation of the general public, including all employés of defendant." It is charged that by demanding, collecting, and receiving a less compensation for the service rendered in the transportation of the commodities and supplies for its eating house than it charges and receives from other persons, including the plaintiff, for doing for them a like and contemporaneous service, the defendant has been guilty of unjust discrimination and of an unlawful departure from the rates named in its published tariffs.

The defendant demurred to this petition upon the ground that the question, as to whether a railroad company can lawfully run a restaurant in connection with the operation of its road, is an administrative one, and must be referred to the Interstate Commerce Commission for its consideration and determination as a condition precedent to a suit of this nature. The trial court adopted this view. The demurrer was sustained, and, "it further appearing from the petition and from the arguments of counsel that the petition does not admit of being so amended as to state a cause of action," the case was dismissed, from which judgment of the court below plaintiff has sued out this writ of error.

[1, 2] It may be freely conceded that, in the present state of law, a common carrier has no right to enter the field of general business and transport the articles and commodities used and sold therein at less than the regular published rates available to the general public. It has the right to provide eating houses for its passengers and employés at points on its line, and may transport the articles and commodities for the use of such eating houses at less than the full published rate. Such practices are administrative in their nature, and the ultimate primary judgment and discretion which govern and condition them is now

lodged in the Interstate Commerce Commission, to be exercised on request and after due investigation and consideration of the public interest concerned, and in view of the preference and discrimination clauses of the Interstate Commerce Act. Intermountain Rate Cases, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408. Assuming the burden thus cast upon it, the Commission has considered it its duty to construe the law in advance wherever it has appeared obscure or ambiguous, so that the obligations of the railroads and the rights of the public might be promptly understood; and, with respect to the subject in controversy, it has established a rule for the guidance of carriers and public alike. This rule reads as follows:

"*Transportation for Eating Houses Operated by or for Carriers.* Carriers subject to the act may provide at points on their lines, eating houses for passengers and employés of such carriers, and property for use of such eating houses may properly be regarded as necessary and intended for the use of such carriers in the conduct of their business. Such eating houses, however, must not serve the general public or any portion thereof, with food prepared from commodities which have been carried at less than the full published rate, and no utensils, fuel, or servants at all employed in serving others than passengers and employés of the carriers as such should be carried at less than tariff rates. Such privilege as may be extended under this rule shall be applied only as to points local to the line on which the eating house is situated." Barnes on Interstate Transportation, p. 484, par. 315B.

From common knowledge and experience, as well as from the permissive provisions of the statute as thus administratively construed, it must be assumed that railroad eating houses, within the prescribed limitations, are desirable for the convenience of passengers and employés. In this sense they are necessary, and this whether or not other and privately owned restaurants are available at the same point. The advantage of a common control of train schedules and eating facilities makes this so.

[3] Courts have no power to fix rates or establish practices and cannot interfere with those fixed and established by the Commission except in cases where the orders are void. Interstate Commerce Commission v. Union Pac. R. R. Co., 222 U. S. 547, 32 Sup. Ct. 108, 56 L. Ed. 308; Atchison, Topeka & S. F. Ry. Co. v. United States, 232 U. S. 199, 34 Sup. Ct. 291, 58 L. Ed. 568. Plaintiff in error apparently bases its contention upon the rule laid down by the Supreme Court in Pennsylvania R. R. Co. v. Puritan Coal Mining Company, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867. It is there said:

"It must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. * * * But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative ques-

tion involved; the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage."

[4] Plaintiff in error contends that this action is based upon the latter form of discrimination. But is this the case made by his pleading? It is not stated that all the supplies and commodities used by defendant in its eating house are shipped on its trains free of charge, nor that the general public, other than passengers or employés, are served with food prepared from commodities which have been carried at less than the full published rate. The petition squarely challenges the right of the defendant to establish an eating house at this point, on the ground that the same is not necessary in the conduct of its business as a common carrier, because at the restaurant of plaintiff and at other eating houses in Gillette there has been and is ample facility for the accommodation of the general public, including all employés of defendant and presumably all passengers traveling upon its line. This challenge involves the lawful exercise of administrative discretion on the part of the road, subject to the supervisory control of the Interstate Commerce Commission. It is true that in this respect the allegations of the petition might conceivably be strengthened by amendment; but, as stated by the court in its judgment entry, it appeared at the hearing of the demurrer, not only from the petition, but from the arguments of counsel, that it did not admit of such amendment as to state a cause of action. It must be presumed, therefore, that counsel for plaintiff stood upon the case made by his petition as filed. He prays for damages by loss of profits alone; these, in turn, are alleged to result from loss of business. The Interstate Commerce Commission has uniformly held, where a complainant has averred that, as a result of being unjustly discriminated against by the defendant, his business had been less per month than it was during the months previous to such period, that, as such a result might flow from many causes, it could not fairly be said that such a showing entitled complainant to reparation in that respect. Barnes on Interstate Transportation, p. 635, par. 429; Rogers & Co. v. Philadelphia & Reading Co., 12 Interst. Com. R. 308; Eaton v. C., H. & D. Ry. Co., 11 Interst. Com. R. 619.

Ordinarily reparation for unjust discrimination has been awarded for damages reasonably definite and ascertainable, such as excessive freight charges, loss upon specific shipments under express contract, due to delay and established fluctuation in market, and the like. In Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244, this court held that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was, but that the actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Here the plaintiff alleges merely that his business has fallen off and his profits have correspondingly

decreased; but this result, as has been said, might flow from many causes. It might be due to general depression, to fluctuations in prices, or, upon the face of the petition, to the accommodation of its passengers and employés by the eating house of the defendant carrier. None of these causes would be chargeable to the defendant, and resort must be had to the realm of speculation to determine what part, if any, of this falling off in patronage could be legally traced to wrongful conduct on the part of the carrier.

It will be readily seen that the case presented is one which calls for primary reference to the Commission, to determine whether the establishment of a railway eating house at this point was a legitimate exercise of administrative discretion on the part of the carrier, and whether the reasonable rule established by the Commission has been fairly observed in the present instance. The Interstate Commerce Law provides that the Commission shall have authority to inquire into the management of the business of all common carriers, and is authorized and required to execute and enforce the provisions of the act. Any person, firm, corporation, or association feeling itself aggrieved by anything done or omitted to be done may apply to the Commission for redress.

Believing, as we do, that the action of the lower court was right, upon the record as presented, its judgment is affirmed.

BELLEFIELD CO. v. CARLTON INVESTING CO.

(Circuit Court of Appeals, Third Circuit. January 3, 1916.)

No. 1941.

1. CORPORATIONS ⟸642—FOREIGN CORPORATIONS—"DOING BUSINESS" IN STATE.

Complainant, a Delaware corporation, formed for the purpose of promoting corporations to operate hotels in different parts of the United States, entered into a contract in New York with defendant, which was the owner of a hotel in Pennsylvania, by which it undertook to form a corporation to lease and operate defendant's hotel on terms stated in the contract, which it fully performed. *Held*, that complainant was not doing business in Pennsylvania, within the meaning of Act Pa. April 22, 1874 (P. L. 108), requiring such corporations to register, maintain an office in the state, etc., and that the contract was valid, although it did not register thereunder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520–2527; Dec. Dig. ⟸642.

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

2. APPEAL AND ERROR ⟸1008—REVIEW—FINDINGS OF FACT.

Where a general judgment for plaintiff is rendered by a federal court, its findings of fact as to special items, like the verdict of a jury, are not subject to review by an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. ⟸1008.]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action at law by the Carlton Investing Company against the Bellefield Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William M. Hall, of Pittsburgh, Pa., for plaintiff in error.

Hugh M. Hewson, of New York City, and Thomas M. Marshall and Thomas M. Marshall, Jr., both of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, the Carlton Investing Company, a corporation of Delaware, brought suit against the Bellefield Company, a corporation of Pennsylvania, and recovered judgment. The plaintiff claimed to have paid $25,000 to the defendant as earnest money to insure its performance of a written contract between them. It averred full performance by it of such contract, conceded defendant had repaid $10,000 of the earnest money, and claimed it was entitled to a return of the $15,000 unpaid. These facts were not disputed by defendant, but it contended the plaintiff, a foreign corporation, could not maintain this suit by reason of its failure to register under the Pennsylvania statute recited below,[1] and, secondly, that if the suit could be maintained that it was entitled to offset certain expenditures made by it for which it alleged plaintiff was liable. A jury having been waived, the case was tried by a judge, whose opinion and findings of fact and conclusions of law are quoted in part below. In substance, he found the plaintiff was not a corporation doing business in Pennsylvania and held as a conclusion of law that it was not bound to register and could therefore bring suit without registration. He further found the defendant had not proved its claim of expenditures and was not therefore entitled to a set-off. Judgment having been entered for the plaintiff for the full amount of

[1] An act to prohibit foreign corporations from doing business in Pennsylvania, without having known places of business and authorized agents.

Section 1. Be it enacted, etc., that from and after the passage of this act, no foreign corporation shall do any business in this commonwealth, until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein.

Sec. 2. It shall not be lawful for any such corporation to do any business in this commonwealth, until it shall have filed in the office of the secretary of the commonwealth a statement, under the seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein; and the certificate of the secretary of the commonwealth, under the seal of the commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents, in each and every of said offices.

Sec. 3. Any person or persons, agent, officer or employé of any such foreign corporation, who shall transact any business within this commonwealth for any such foreign corporation, without the provisions of this act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding one thousand dollars, or either, at the discretion of the court trying the same.

its claim, the Bellefield Company sued out this writ. The somewhat complicated facts of the case are made clear by the following extracts from the court's opinion. The court's recital of the contract and of what the parties did thereunder, is as follows:

"In September of 1910 plaintiff and defendant entered into an agreement in writing, which was executed in the state of New York, whereby defendant agreed to lease the Hotel Schenley in Pittsburgh to a corporation to be formed by the plaintiff, with a capital stock of $50,000, for a term of 20 years from February 1, 1911, for which the tenant was to pay as rental certain fixed sums and the taxes, and also 6 per centum 'on such amount not to exceed' $300,000 'as shall be expended by the Bellefield Company in altering and enlarging the hotel building, and in the decoration and furnishing thereof,' as therein provided, to be paid monthly. Said agreement further provided that defendant should expend $150,000 in enlarging and altering the hotel according to plans and specifications to be agreed upon, and 'a further sum not exceeding' $150,000 'in furnishing and decorating the hotel and the additions thereto according to plans, specifications, and drawings to be furnished by' plaintiff, 'for which, and for such supervision as may be required,' $5,000 'shall be set apart from the amount to be expended for decorating and furnishing.' Such contract further provided that the above expenditures should be upon contracts made by defendant, but if required by plaintiff the defendant should give contracts, if any, for linen and china to some foreign manufacturers. Said contract further provided that plaintiff as 'earnest money' pay to defendant $25,000, to be repaid to plaintiff at the rate of $2,000 per month, beginning February 1, 1911.

"On December 29, 1910, the parties by writing reaffirmed all the conditions of the prior agreement, except as they were changed by the following language: 'If there shall be executed and delivered to the Bellefield Company a sufficient bond or undertaking in writing in the sum of fifty thousand dollars ($50,000), and no more, of a surety company satisfactory to the party of the first part, guaranteeing payment by the tenant of the rent reserved by the proposed lease, the amount which the Bellefield Company agrees to expend for additions, improvements, and alterations as provided in clause third of said agreement shall be two hundred and twenty thousand dollars ($220,000), and the amount to be expended for furnishment shall be one hundred and forty thousand dollars ($140,000). Should the amount so to be expended for construction prove to be more than sufficient to carry out the plans agreed upon as provided in clause third of the said agreement the excess may be expended upon the furnishment. Upon the additional sixty thousand dollars ($60,000) to be expended as herein provided, the tenant shall pay as part of the rent seven per cent. (7%) upon the same terms and conditions as are provided in the said agreement. Any additional amounts required for such alterations, improvements and furnishment shall be provided by the party of the second part, or its successors or assigns.'

"On January 4, 1911, the defendant executed a formal lease directly to plaintiff for the Hotel Schenley in manner and form as contemplated by the previous agreement to be made by the defendant to a corporation to be formed by the plaintiff. That lease recited the material provisions of the former agreements as to expenditures to be made by the lessor for alterations and improvements, and for decorations, etc. It also contained the lessor's covenant to expend $220,000 in enlarging and altering the building, with a provision that 'the lessor shall not be called upon to expend a sum in excess of' that, and a provision that 'any amount expended above' that amount shall be borne by the lessee.' It also contain a covenant by the lessor to expend the sum of $140,000 as previously expressed in the other contract.

"On January 31, 1911, the plaintiff assigned the lease to the Ritz-Carlton Restaurant & Hotel Company of Pittsburgh, a corporation of Delaware, duly registered in Pennsylvania, which assignment was made with the consent in writing of the defendant, upon condition that the assignee would assume all the obligations of the lease and deposit with a trustee certain securities as collateral for performance by the assignee. The conditions precedent upon

which such consent was given to the lessor were performed by the assignee, and thereupon the lessor, being the defendant in this case, by writing, released the lessee, being the plaintiff, from liability for rent and from other obligations of the lease, with the provision that 'the agreements of 28th of September and 29th of December, 1910,' should otherwise remain in force.

"On March 23, 1911, the defendant sent to the plaintiff on account of the 'earnest money' advanced by plaintiff according to the agreement of September 28, 1910, the sum of $4,000, covering the months of February and March, 1911. During the following months, down to and including July, $8,000 was paid in equal monthly payments, according to the provisions of the contracts."

[1] Taking up the question of registration first, we find no error in the court's ruling. The application of this statute has been heretofore considered by this court. Pittsburgh Construction Co. v. West Side Belt R. R. Co., 154 Fed. 931, 83 C. C. A. 501, 11 L. R. A. (N. S.) 1145; Colonial Trust Co. v. Montello Brick Works, 172 Fed. 310, 97 C. C. A. 144; Buffalo, etc., Co. v. Penn, etc., Co., 178 Fed. 696, 102 C. C. A. 196. In Buffalo, etc., Co. v. Penn, etc., Co., supra, both the state decisions and the former decisions of this court are collected, analyzed and finally summarized in the conclusion:

"These cases turn upon the question whether the company is exercising its corporate activity in the state, or, in other words, is pursuing here the objects which its charter permits it to accomplish."

In that regard it was there said:

"This court has twice had occasion recently to pass upon the effect to be given to the Pennsylvania statute, and has followed the decisions of the state court by holding that, where a corporation seeks to exercise its charter powers in Pennsylvania, it must first comply with the act. In Pittsburgh Construction Co. v. West Side, etc., Co., 154 Fed. 929 [83 C. C. A. 501, 11 L. R. A. (N. S.) 1145], a West Virginia corporation that was organized to construct railways was denied the right to recover on a construction contract that was entered into three weeks before the company obeyed the statute. And in Colonial Trust Co. v. Montello Brick Works, 172 Fed. 310 [97 C. C. A. 144], it was held that an unregistered Delaware company that was chartered to own the stock and finance the operations of certain Pennsylvania corporations and had exercised its franchises for these purposes was doing business in the state and could not recover upon its contracts made in carrying out its corporate objects."

Tested by the principles there laid down the trial judge below was clearly right in holding the plaintiff company was not doing business in Pennsylvania within the purview of the statute. It was chartered for the purpose of promoting corporations to operate hotels in various parts of the United States. It had no chartered power to operate hotels itself, nor did it attempt to do so. By the contract here in suit it undertook to provide a tenant to lease and operate the defendant's hotel in Pennsylvania. This it did by having chartered and itself capitalizing a foreign corporation with chartered powers to engage in the hotel business. This company duly registered in Pennsylvania, took the lease of defendant's hotel, and carried out the contract obligations of the plaintiff. Such acts as the plaintiff did within the state were temporary and incidental in character; they can in no fair sense be regarded as a doing of business by it in the state, but, on the contrary, their purpose and effect was to create and equip another corporation which by its chartered powers, its registration, and its acts was em-

powered to and actually did in the state all the business which this contract contemplated should be done therein. The plaintiff company was not therefore precluded, by its nonregistration, from bringing this suit.

[2] Seeing, then, the plaintiff had a right to bring this suit, and that the defendant had contracted to repay the portion of the earnest money sued for, we next inquire whether the defendant has established its right to set off certain expenditures. This is a question of fact and proof, and in that respect the trial judge found:

"At the trial it was not seriously disputed that plaintiff had performed all the conditions precedent to receiving its money back, yet it was strongly urged that plaintiff was liable to defendant for moneys expended by the latter in excess of the requirements of the written contracts. The burden rested upon the defendant to prove this contention, yet the evidence offered by defendant in support of it was very unsatisfactory. There was no satisfactory evidence that the full amount provided for alterations and extensions had been expended, and therefore no evidence that some portion of that amount could not have been used for furnishment and decoration."

The verdict being a general one for the plaintiff, the findings as to special items are, like a verdict of a jury, not the subject of exception or review by this court. Paxson v. Board of Freeholders, 201 Fed. 660, 120 C. C. A. 84.

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

BALTIMORE & O. R. CO. v. WOOD.

(Circuit Court of Appeals, Third Circuit. January 10, 1916.)

No. 1952.

1. APPEAL AND ERROR ⊜272—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS TO CHARGE.

Rev. St. § 918 (Comp. St. 1913, § 1544), authorizes District Courts to adopt rules regulating their own practice. Pursuant thereto a District Court adopted a rule that points upon which the opinion of the court was desired should be presented at the close of the evidence and before the commencement of the summing up, or that the court might in its discretion refuse to charge upon the points proposed. *Held* that, where defendant neither conformed to this rule by presenting a point at the close of the evidence, nor appealed to the court to suspend the rule and permit the point to be presented at the close of the charge, but merely noted an exception at the close of the charge to the omission of an instruction on such point, such omission could not be reviewed, as the refusal to give instructions upon points presented after the close of the charge is not subject to exception, and the omission to charge upon a point of law is not open to exception when the desired instruction is not requested.

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

2. RAILROADS ⊜327—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—DUTY TO STOP, LOOK, AND LISTEN.

While it is the positive and unbending rule in Pennsylvania that one approaching a railroad must stop, look, and listen, and while the law requires a traveler to continue to look and to observe the precautions which the danger of the situation requires, his subsequent conduct, after once

stopping, looking, and listening, is not determined by a positive rule of law, but by the circumstances of the particular case.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043–1056; Dec. Dig. ⊂⊃327.]

3. TRIAL ⊂⊃252—CROSSING ACCIDENTS—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an action for damages to a motor truck, struck by a train, where the entire controversy respecting the contributory negligence of the driver of the truck related to his conduct in stopping, looking, and listening at a particular place, and whether that was a proper place at which to stop, look, and listen, and whether at that place he could and must have seen the approaching train and heard the warnings given, and there was no controversy as to his subsequent conduct, and no evidence as to what he did after starting from the place at which he stopped, or whether he continued to look and listen, an instruction that it was his duty to look and listen, as he drove on and across the track from the point where he stopped, would not have been applicable, and the omission thereof was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⊂⊃252.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by George Wood against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William B. Linn and H. B. Gill, both of Philadelphia, Pa., for plaintiff in error.

Frank P. Prichard, James Wilson Bayard, and John G. Johnson, all of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The question is, whether the trial court erred in omitting to instruct the jury that it was the duty of the driver of a vehicle, who had stopped, looked and listened when approaching a railroad track at grade, to look and listen as he drove on and across the track.

This suit was instituted to recover for damage to the plaintiff's motor truck caused by collision with a train, at night, at a point in the outskirts of the City of Chester where a highway crosses at grade the tracks of the defendant railroad company. The highway turns at a right angle and then on an up grade crosses the tracks at an acute angle. The driver of the truck, who was the servant of the plaintiff, stopped at a point sixty feet on a diagonal line from the first rail and about one hundred feet from the last rail of the tracks. He looked up and down the railroad, and neither seeing nor hearing an oncoming train, started the truck under low gear, and approached the tracks at a speed of about two and a quarter miles an hour. When the truck was almost clear of the furthermost track, it was struck by a heavy train approaching at a speed of forty miles an hour.

The negligence charged to the defendant was the operation of the

train at a speed violative of a city ordinance, and without giving timely and sufficient warning. The defense was contributory negligence of the driver, in that, first, he did not heed adequate warning; second, he did not stop at the proper place; and third, if at the place he stopped, he had looked and listened, he could and would have seen and heard the approaching train.

The record fails to show, that upon the close of the evidence, the defendant presented points for instructions to the jury. The court delivered an elaborate charge on the law of negligence, and especially on that feature of the law of contributory negligence respecting the duty of a wayfarer, under the inflexible rule of the Pennsylvania law, to stop, look and listen before crossing the tracks of a railroad. The instructions, so far as they went, were in entire accord with the principles of the law of negligence as they prevail in the State of Pennsylvania.

At the conclusion of the charge, this colloquy occurred:

"Mr. Linn (for the railroad company): I desire an exception to the omission of your Honor to state to the jury that the duty of the driver was to look and listen as he drove on and across the track from the point where he is said to have stopped.

"The Court: I think the rule of the Court of Appeals is that you must set forth the parts of the charge excepted to, isn't it?

"Mr. Linn: Yes, sir; but this is an omission.

"The Court: You may take an exception, and then after the charge is transcribed, you may add to that part of the charge to which the exception relates.

"Mr. Linn: This is an exception to something which you did not say." (Exception noted for defendant.)

While the defendant did not move for a directed verdict, the case was argued before us as though such a motion had been made and erroneously denied; and although the defendant presented no point for instruction to the jury upon the law indicated by its exception, the law of the charge is challenged because of its inadequacy and insufficiency.

In opening the argument in the brief, counsel for the railroad company states the case:

"The real complaint here is that the learned trial judge declined to instruct the jury 'that the duty of the driver was to look and listen as he drove on and across the track from the point where he said he stopped.'"

Obviously, counsel did not intend to convey the idea that the court, upon request, *declined* to give that instruction. Not having been requested to charge upon the point, the court *omitted* instructions upon it, and its omission in that respect constitutes the substance of the defendant's several assignments of error.

We are of opinion that the exception noted by the defendant to the omission complained of, does not, for several reasons, entitle it to maintain this writ of error.

[1] Under authority of the act conferring upon courts the power to make rules regulating practice, Rev. Stat. § 918, certain district courts, including the one that tried this case, have promulgated rules to the effect that points upon which the opinion of the court is desired shall be presented at the close of the evidence and before the

commencement of the summing up, or the court may, at its discretion, refuse to charge the jury upon the points proposed. Refusal by the trial court to give instructions upon points presented after the close of the charge, is not subject to exception. Keystone Bank v. Safety Banking & Trust Co. (C. C.) 179 Fed. 727. The enforcement of such a rule, however, is in the discretion of the court. Atchison, T. & S. F. Ry. Co. v. Hamble, 177 Fed. 644, 652, 101 C. C. A. 270.

In the case under consideration, the defendant neither conformed to the rule by presenting the point at the close of the evidence, nor appealed to the court to suspend the rule and permit it to present the point at the close of the charge. What the defendant did was to note an exception to the omission of an instruction not prayed for, which it now specifies as error, upon the ground that the court should have correctly charged without request. This procedure suggests a purpose to be fortified against an adverse verdict rather than a desire to have the jury instructed upon the point proposed. The defendant, therefore, is without redress in this court, not only because of an insufficient exception in the trial court, but under the settled rule of the Supreme Court, that the omission of a trial court to instruct the jury upon a point of law arising in the case is not open to exception in an appellate court, when the bill of exceptions does not show that the defendant requested the instructions desired. Texas & Pacific Ry. Co. v. Volk, 151 U. S. 73, 77, 14 Sup. Ct. 239, 38 L. Ed. 78.

[2, 3] However, if we were to construe the exception allowed, as it appears in the bill of exceptions, to amount to a point presented, we are not at all persuaded that if the court had given an instruction in the language of the exception, it would have correctly stated the law. The statement in the exception is "that the duty of the driver was to look and listen as he drove on and across the track from the point where he is said to have stopped." This may or may not have been the duty of the driver, according as the evidence disclosed the opportunity or necessity for continued observation; and a charge upon the driver's duty in the language of the exception, may or may not have been an accurate or pertinent instruction, according as the driver's conduct was in evidence and in issue. There is no question as to the measure of duty imposed by the law of Pennsylvania upon a wayfarer approaching and crossing at grade a railroad track. This has been established beyond dispute by many decisions of the Supreme Court of that State, the substance of which, as announced by Mr. Justice Fell in Muckinhaupt v. Erie R. R. Co., 196 Pa. 213, 46 Atl. 364, is:

"The whole duty of one about to cross the tracks of a steam road at grade is not in all cases confined to his stopping, looking and listening for the approach of a train. He must stop at a proper place, and when he proceeds he should continue to look and to observe the precautions which the danger of the situation requires. He should stop again if there is another place nearer the tracks from which he can better discern whether there is danger. But whether the place at which he stopped was the proper place at which to stop, and whether there is a second place at which he should stop, are questions of fact for the jury, and not matters of law for the court." Ellis v. Lake Shore R. R. Co., 138 Pa. 506, 21 Atl. 140, 21 Am. St. Rep. 914; Urias v. Pennsylvania R. Co., 152 Pa. 326, 25 Atl. 566; Whitman v. Pennsylvania R. Co., 156 Pa.

175, 27 Atl. 290; Ely v. Pittsburgh Ry. Co., 158 Pa. 233, 27 Atl. 970; Cookson v. Pittsburgh Ry. Co., 179 Pa. 184, 36 Atl. 194; Gangawer v. P. & R. R. Co., 168 Pa. 265, 32 Atl. 21; Hartman v. Harris, 182 Pa. 172, 37 Atl. 942; Ayres v. Railway Co., 201 Pa. 124, 50 Atl. 958; Corcoran v. Railroad, 203 Pa. 380, 53 Atl. 240; Harvey v. Erie R. R., 210 Pa. 95, 59 Atl. 691; Cohen v. P. & R. Ry. Co., 211 Pa. 227, 60 Atl. 729.

In Ayres v. Railway Co., 201 Pa. 124, 50 Atl. 958, Mr. Justice Dean, speaking for the court, said:

"While it is an unbending rule that a traveler must stop, look and listen before crossing at grade the rails of a railroad, it has not been held, that as an invariable rule, he must stop, look and listen when on the tracks or between them. * * * We have adopted the rule that a traveler at a crossing having once stopped in a place of safety before going upon the road, and there looking and listening, and, neither seeing nor hearing danger, has then undertaken to cross, yet nevertheless the fact that he has once exercised care does not relieve him from the duty of exercising care while in the act of crossing. *But what exactly he should then do to absolve himself from negligence must depend on the circumstances of the particular case.*"

The full measure of duty thus imposed by the law of Pennsylvania upon a traveler in crossing at grade the tracks of a railroad, has reference to his conduct both in approaching tracks and in crossing them. With respect to the former, it lays down a positive and unbending rule that he must stop, look and listen. With respect to the latter, while the law requires him to look and to observe the precautions which the danger of the situation requires, it nevertheless lays upon him no positive rule as to the precise conduct which, in varied situations, he must pursue. The conduct of the traveler in approaching the tracks of a railroad is determined by positive rule of law. He must stop, look and listen. His subsequent conduct in going on and passing over the tracks is determined by "the circumstances of the particular case."

In the case under consideration, it appears that the driver stopped where the positive rule of the Pennsylvania law stops, assuming, as the jury has determined, it to be a proper place. The driver's duty, with respect to his subsequent conduct, is to be measured by the varied circumstances and conditions which he encountered and by which his actions were controlled. What was his conduct in moving from the place at which he had stopped and driving on and across the track, to justify or require the court to instruct the jury with respect to that conduct, and to bind the jury by the positive rule now proposed by the defendant?

The defense was contributory negligence of the plaintiff's servant, the driver of the truck. The testimony discloses that the entire controversy respecting his contributory negligence related to his conduct in stopping, looking and listening at a particular place, and whether that was the proper place at which to stop, look and listen, and whether at that place he could and must have seen the approaching train and heard the warnings given and did not extend to his after conduct. While the law unquestionably required of the driver a care and caution in his subsequent conduct commensurate with the hazards of the situation, nevertheless, there was no controversy at the trial with respect to what he did or failed to do after he started from the place

at which he stopped and moved on and across the track. There was no evidence that he did not continue to look and listen. When upon the stand as a witness, he made no statement and was asked no question with respect to what he did after he started to cross the track. In fact there appears in the case neither evidence nor issue concerning negligence in the driver's subsequent conduct to which the omitted instruction, if it had been requested by the defendant and charged by the court, would have been applicable. We therefore find no error in the omission by the court to charge beyond the issues.

The judgment below is affirmed.

JACOWAY v. YOUNG et al.

(Circuit Court of Appeals, Eighth Circuit. November 16, 1915.)

No. 4434.

1. TRADE-MARKS AND TRADE-NAMES ⟸30—RIGHTS OF EMPLOYÉS.

Complainant owned a tobacco store, known as the "Old Smoke House," and placed on the market a mixture of smoking tobacco known as the "Old Smoke House Blend," and registered those words as his trade-mark. R., who was in complainant's employ, and who had previously owned the business, claimed to have been the originator of the blend, and when he left complainant's employ, and entered that of defendants, he claimed to carry with him the right and title to such blend. Defendants put out packages of smoking tobacco similar in size and general appearance to those of complainant, bearing a label describing it as the "Famous Magic Blend," and stating, "None genuine without the picture of 'Old Smoke House' Root, the Tobacco Wizard." Complainant's bill for infringement was dismissed on the grounds that R. never parted with the exclusive right to compound and sell his brand of smoking tobacco, and that the label containing the words "Smoke House" used the words to indicate by whom the article was compounded. *Held*, that this was error, as a trade-mark has no efficacy except in connection with the business in which it is used, and R. going from complainant to defendants in the capacity of a mere employé, and dealing with goods and a business not his own, could not carry with him a registered trade-mark or personal rights destructive thereof, while the doctrine of prior use did not apply, as the exclusive right to the use of a trade-mark rests on such use as makes it point out the origin of the claimant's goods, and whatever prior use was shown took place in the Old Smoke House business, which, with all its rights, had accrued to complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 33, 34; Dec. Dig. ⟸30.]

2. TRADE-MARKS AND TRADE-NAMES ⟸33—CONVEYANCES AND ASSIGNMENTS.

A trade-mark cannot be assigned separately from the business in which it is used, and ordinarily passes with a transfer of the business.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 37; Dec. Dig. ⟸33.]

3. TRADE-MARKS AND TRADE-NAMES ⟸70—INFRINGEMENT—ACTS CONSTITUTING.

Complainant's trade-mark, "Old Smoke House Blend," used in connection with a mixture of smoking tobacco, *held* infringed by defendants' label, referring to person whose picture appeared thereon as "Old Smoke

House Root"; the entire wording being such as to persuade the buyers that defendants' product was in reality the "Old Smoke House" product.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⟸70.]

4. EQUITY ⟸39—COMPLETE RELIEF—UNFAIR COMPETITION.

In a suit to enjoin infringement of a valid trade-mark used in connection with a mixture of smoking tobacco, where the District Court had jurisdiction of the parties and of the subject-matter, for the purpose of enjoining the infringement, it had jurisdiction also to enjoin the use by defendant of an address to pipe smokers, originating in complainant's place of business or used on its labels, under the rule that equity, having taken cognizance of a case on any ground on which jurisdiction is given, will proceed to dispose of the whole controversy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104–114; Dec. Dig. ⟸39.]

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

Suit by Duncan L. Jacoway against Charles A. Young and others. From a decree dismissing the bill, complainant appeals. Reversed, with directions.

John A. Gordon, of Denver, Colo. (John Thomas Maley, of Denver, Colo., on the brief), for appellant.

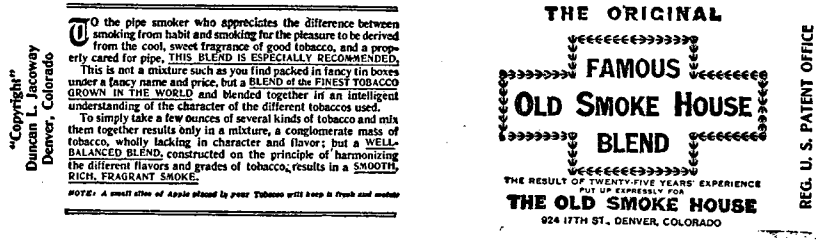
D. Edgar Wilson, of Denver, Colo. (George L. Hodges and Lafayette F. Crawford, both of Denver, Colo., on the brief), for appellees.

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

VAN VALKENBURGH, District Judge. This is a bill to restrain infringement of trade-mark and for accounting. The court below held that the action complained of did not constitute infringement, and entered a decree dismissing the bill.

The trade-mark involved concerns smoking tobacco, and is registered as "Old Smoke House." This mark, as disclosed by the application and statement filed in the United States Patent Office, is designed to be applied or affixed to the goods or to the packages, boxes, or receptacles containing the same, etc., and is intended to stamp the goods put out by complainant, who has, for some years owned and operated, in Denver, Colo., a store known and characterized as the "Old Smoke House." The trade-mark was applied for December 21, 1906, and was duly registered March 19, 1907. The statement alleges and the proof shows that this mark has been continuously used in complainant's business since about June 1, 1905. On that date one Myron A. Root was in the employ of complainant. He had previously owned this same place of business, but it had passed from his hands, and, by conveyance and by operation of law, had become vested in complainant Jacoway. It was while Root was thus employed at complainant's place of business that a mixture of smoking tobacco known and characterized as "Old Smoke House Blend" was prepared and offered to the trade. Root claims to have

been the originator of this blend. However that may be, Jacoway applied for and obtained this trade-mark for the protection of this product of his business. A label containing the trade-mark was applied to packages of tobacco prepared by the house, and upon that label appeared an address to pipe smokers, which originated in appellant's place of business. This label, containing both the trade-mark and the address aforesaid, is as follows:



Later on Root left the employ of appellant and entered that of appellees. He claims that while in the employ of appellant he had been accorded the soubriquet "Old Smoke House Root, the Tobacco Wizard," and that he carried with him also the right and title to the "Old Smoke House Blend," of which he likewise claims he was the originator. In conformity with these claims, appellees have put out packages of smoking tobacco, similar in size and general appearance to those prepared by appellant as aforesaid, upon which the following label appears:

In this action appears the invasion of appellant's rights, of which complaint is made. The court below dismissed the bill on the stated grounds: First, that Root never parted with the exclusive right to compound and sell his particular blend of smoking tobacco; second, that the label containing the words "Smoke House" used these words not to indicate where, but by whom, the article is compounded.

[1-3] This holding involves a misconception of the theory which underlies the law governing trade-marks and affording protection to the property right created thereby. A trade-mark has no efficacy except in connection with the business in which it is used. It cannot be assigned separately therefrom, and ordinarily passes with a transfer of the business. It may be true that Root was a handler and blender of tobaccos, as he claims. This alone would not confer trade-mark rights. Nothing of record impeaches this mark, which is arbitrary, distinctive, and apt for the purposes for which it was

designed. It was applied for and secured by complainant in connection with his business. Root, the individual, going from complainant to respondent, in the capacity of a mere employé, dealing with goods and a business not his own, could not carry with him a registered trade-mark, nor personal rights destructive thereof. The doctrine of prior use does not apply in such a case, because the exclusive right to the use of a trade-mark rests not on invention, but on such use as makes it point out the origin of the claimant's goods. It must be early enough for that, but absolute priority is not required. Tetlow v. Tappan (C. C.) 85 Fed. 774. Moreover, whatever prior use is shown took place in the Old Smoke House business, which, with all its rights, has accrued to appellant. It is very evident that respondent's package is intended to, and does, appropriate the characteristic trade-mark features of complainant's package. The employment of the word "Magic" as descriptive of respondents' blend does not relieve, because the entire wording of the trade-mark appears upon the packages in such connection as to persuade the buyer that this is, in reality, the "Old Smoke House," product. The trade-mark being valid, and no serious contention is made to the contrary, respondents' package is, well within the doctrine announced in all the cases, an infringement.

[4] Appellant also charges appellees with unfair trade in the use of the address to pipe smokers, to which reference has been made, in connection with the unwarranted use of the trade-mark itself. The trade-mark found to be valid, the District Court had jurisdiction of the parties, and of the subject-matter, for the purpose of enjoining not only the infringement of that trade-mark, but also all wrongful acts done in connection with the infringement which augment and aggravate the wrong. Ross v. Geer (C. C.) 188 Fed. 731. This flows from the general rule of equity that, having taken cognizance of the case upon any ground on which jurisdiction is given, the court will proceed to dispose of the whole controversy between the parties. Woods Co. v. Valley Iron Works (C. C.) 166 Fed. 770; Hobbs v. Gooding (C. C.) 164 Fed. 91; White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67.

Appellant is entitled to a decree enjoining appellees, their agents, and employés from using the trade-mark "Old Smoke House" in connection with packages of smoking tobacco as prayed; also from using the address to pipe smokers upon their labels applied to such packages of smoking tobacco; also for an accounting for the period beginning with the filing of the petition in the court below.

The decree of the District Court is reversed, with directions to enter a decree in accordance with the views herein expressed. It is so ordered.

LENOIR CAR WORKS v. TRINKLE.

(Circuit Court of Appeals, Sixth Circuit. December 17, 1915.)

No. 2672.

1. JUDGMENT ⟸273—ENTRY NUNC PRO TUNC—DEATH OF PARTY.
After a motion for a new trial was overruled, and after the court had ordered judgment entered on a verdict for plaintiff, defendant filed a petition for a rehearing of the motion, and it was taken under advisement by the court. Before its denial, plaintiff died. *Held*, that the court was justified in ordering entry of the judgment nunc pro tunc as of the date when the petition for rehearing was heard and submitted to the court.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525–541; Dec. Dig. ⟸273.]

2. ABATEMENT AND REVIVAL ⟸72—DEATH OF PARTY—REVIVOR.
Under the laws of Tennessee, where such action arose, the revivor of the case in the name of plaintiff's personal representative was justified, especially as the claim must be considered in judgment at the time plaintiff died.
[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 377–402, 412–416; Dec. Dig. ⟸72.]

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by E. Lee Trinkle, administrator of A. F. Friend, deceased, against the Lenoir Car Works. Judgment for plaintiff, and defendant brings error. Affirmed.

J. G. Johnson, of Knoxville, Tenn., for plaintiff in error.
W. T. Kennerly, of Knoxville, Tenn., for defendant in error.

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

CLARKE, District Judge. In this action, A. F. Friend, in his lifetime, sued the plaintiff in error for damages for injuries which he sustained while in its employ. The injury complained of was caused by the falling of a steel car sill, about 36 feet in length, which weighed 1,800 pounds, and the cause of its falling was the breaking of one of two clevis pins by which it was supported when suspended about four feet from the floor, in the position required for the doing of the work upon the sill in which Friend and two other workmen were engaged when the accident occurred.

The negligence claimed is failure on the part of the employer to exercise the care required by law to furnish a clevis pin reasonably safe for the purpose for which it was intended to be used and failure to inspect such pin after it was put into use. The defenses relied upon at the trial were proper care on the part of the plaintiff in error in furnishing to its workmen clevis pins for the purpose for which the pin which broke was used and assumption of risk by the plaintiff.

We are clearly satisfied that the testimony in the cause presented a conflict upon both of the issues between the parties as we have stated them, such that the trial court was abundantly justified in overruling

the motion of the plaintiff in error for a verdict in its favor when it rested its case.

The plaintiff in error claims that the trial court erred in several respects: First, in the admission of testimony, designated in the amended assignment of errors. It is sufficient to say of these claims that the exceptions taken were in form such that they are wholly insufficient to present any question to this court for review. Second, error is assigned in the refusal of the court to charge the jury as requested by the plaintiff in error. The record shows that the trial court dealt with each of these requests to charge in a manner entirely satisfactory to this court, even if we should regard the form of exceptions taken as adequate to present the refusal of them for review, which is by no means clear.

[1, 2] After the trial court had overruled the motion of the plaintiff in error for a new trial, and on September 29, 1913, had ordered judgment entered on the verdict, on October 15, 1913, a petition was filed for a rehearing of the motion for a new trial. This petition was heard and submitted to the court about November 7, 1913, and was taken under advisement. A press of official duty rendered it impossible for the court to dispose of this petition until January 2, 1914, when it was denied. In the meantime the plaintiff died, and to the end that injustice might not be done judgment nunc pro tunc was ordered entered as of November 7, 1913. This action is assigned as error, but it was clearly justified by these authorities cited by the trial court when he made the order, viz.: Mitchell v. Overman, 103 U. S. 62, 26 L. Ed. 369; Richardson v. Green, 130 U. S. 104, 9 Sup. Ct. 443, 32 L. Ed. 872; Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804; Arredondo v. Arredondo, 223 U. S. 376, 32 Sup. Ct. 277, 56 L. Ed. 476. It is also claimed that error was committed in permitting revivor of the case in the name of the personal representative of the deceased plaintiff. The laws of the state of Tennessee, where this action arose, justify this action of the trial court, especially since the claim must be considered in judgment at the time the plaintiff died.

There are several other assignments of error, all of which we have considered; but we find them so without substantial merit that special discussion of them is neither necessary nor justified.

We think it not necessary to consider the motion of the plaintiff in error to dismiss this proceeding in error upon the claim that the last extension of the time for printing and filing the record was not properly allowed by the trial court and for the assessment of a penalty upon the plaintiff in error upon the ground that this proceeding has been prosecuted merely for delay. Affirming the judgment, as we are doing, gives to the defendant in error all the rights which dismissal of the petition in error would give to him, and while there is much in this record indicating a disposition on the part of counsel for the plaintiff in error to delay without just cause the final decision of the case, nevertheless, we have concluded in this instance not to impose a penalty.

The learned trial judge submitted this case to the jury in a charge so clear and comprehensive that counsel for the plaintiff in error, alert, as this record proves them to have been, in watching for possible error,

saw fit to take only a general, formal, and so an entirely futile, exception to it, and he dealt with the multiplied motions, amended motions, and applications of various kinds filed by the plaintiff in error, with such patience and intelligence as to leave nothing to be desired.

Judgment affirmed, with costs.

CASEY-HEDGES CO. v. OLIPHANT.

(Circuit Court of Appeals, Sixth Circuit. January 4, 1916.)

No. 2657.

1. APPEAL AND ERROR ⟸729—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Under rule 11 (224 Fed. vii, 137 C. C. A. vii), requiring assignments of error to set out separately and particularly each error asserted and intended to be urged, where a motion for a directed verdict was specific in its statement of the supporting reasons, and these were fully considered in the charge, resulting in clearly defining the issues upon which the case was submitted, an assignment that the court erred in overruling such motion sufficiently disclosed the nature of the error relied on, though the grounds of the motion were not restated in the assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2998, 3013; Dec. Dig. ⟸729.]

2. TRIAL ⟸168—MOTION FOR DIRECTED VERDICT—DENIAL.

A motion to direct a verdict is simply a demurrer to the evidence, and where any one of the grounds stated or reasonably to be implied is good it is error to deny the motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376–380; Dec. Dig. ⟸168.]

3. MASTER AND SERVANT ⟸286—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

A foundry employé was injured by an explosion caused by molten iron coming in contact with the cold iron, or wet sand, or both, of a green sand core used in molding, as the melted iron was being poured into the mold. He was called from another part of the foundry to assist in the pouring, and had nothing to do with preparing the mold. For two years he had worked as a molder where dry sand cores were used, but it appeared that, while there was danger of an explosion in using either kind of core, the explosion where a dry core was used was gradual, while that incident to the use of a green core was sudden. He had been assisting in the pouring for about 15 minutes each day for a period stated by himself as a few days and by his foreman as two weeks, and at other times worked on another "floor" of the foundry, separated by a wall from the one where the explosion occurred. He testified that he had no knowledge of the danger attending the use of green cores. *Held*, that fair-minded men might have drawn different conclusions as to his knowledge of the particular danger, and the question whether the employer was negligent in failing to warn him of the danger was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ⟸286.]

4. MASTER AND SERVANT ⟸150—LIABILITY FOR INJURIES—DUTY TO WARN.

Where a master has knowledge of a danger likely to be encountered, and of the servant's lack of such knowledge and consequent inexperince, it is his duty to use reasonable care in warning him of the danger and in instructing him how best to perform the particular service; and this

rule is applicable where the danger to be encountered results from a change in service imposed upon an employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299–302, 305–307; Dec. Dig. ⊂⊃150.]

5. MASTER AND SERVANT ⊂⊃151—LIABILITY FOR INJURIES—DELEGATION OF DUTIES.

The duty resting upon a master to warn a servant of a danger, and to instruct him how best to perform the particular service, is a primary one, and nondelegable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 298; Dec. Dig. ⊂⊃151.]

In Error to the District Court of the United States for the Southern Division of the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by J. R. Oliphant against the Casey-Hedges Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Sizer, of Chattanooga, Tenn., for plaintiff in error.

W. B. Miller, of Chattanooga, Tenn., for defendant in error.

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

WARRINGTON, Circuit Judge. Oliphant recovered a verdict and judgment against the company for personal injuries suffered while in its employ. At the close of Oliphant's evidence, which was all that was offered, the company moved that a verdict be directed in its favor. The motion was overruled, exception reserved, and the only assignment presented here is that "the court erred in overruling the motion * * * to direct the jury to render a verdict for the defendant."

[1, 2] 1. Motion is made to dismiss the writ of error for the reason that the assignment is insufficient under rule 11 (224 Fed. vii, 137 C. C. A. vii). In the view we take of the case, the rights of Oliphant cannot be affected by either granting or denying his motion (Lenoir Car Works v. Trinkle, Adm'r, 228 Fed. 634, — C. C. A. —, decided December 17, 1915); still, as the motion questions our right to consider the case, it may not be inappropriate to say that the motion to direct was specific in statement of supporting reasons, and these were fully considered in the charge. This resulted in clearly defining the issues upon which the case was submitted to the jury. One of the issues in effect was whether there was evidence tending to show negligence on the part of the defendant which either caused or contributed to the plaintiff's injury. Where exception has been reserved, and error is assigned simply to the denial of such a motion, even where the motion fails to state any ground, it has been the practice here to indulge a presumption that an issue such as the one just stated was submitted to the jury. Louisville & N. R. Co. v. Womack, 173 Fed. 752, 759, 97 C. C. A. 559. And where grounds are stated in the motion, as here, it would place a strained construction upon rule 11, and could serve no useful purpose, to require the grounds to be re-stated in

the assignment. Chicago, M. & St. P. R. Co. v. Bennett, 181 Fed. 799, 800, 104 C. C. A. 309 (C. C. A. 8th Cir.); Atchison, T. & S. F. R. Co. v. Meyers, 76 Fed. 443, 447, 22 C. C. A. 268 (C. C. A. 7th Cir.). See, also, Metropolitan Life Insurance Co. v. Hartman, 174 Fed. 801, 804, 98 C. C. A. 509 (C. C. A. 8th Cir.). A motion to direct a verdict is after all simply a demurrer to the evidence, and where even one of the grounds stated or reasonably to be implied is good it is error to deny the motion. It is therefore vain to say that the present assignment does not sufficiently disclose the nature of the error relied on here; and so the motion to dismiss the writ of error must be overruled.

[3] 2. Oliphant received his injuries from an explosion, which occurred in a flask within the company's foundry, while he was pouring molten iron into the mold for casting pipe. The explosion was caused through contact of the hot iron with the cold iron, or the wet sand, or both, of what is known as the green sand core within the flask. After stating that the flask consists of a "rectangular, box-like structure filled with damp sand," counsel for the company we think correctly describe the method of such molding:

"A form is first put into the flasks to make the impression of the exterior surface of the pipe; then the form is taken out and a core, consisting of a hollow metal pipe, also covered with damp sand, is put into the flask. The diameter of the core being less than that of the form with which the first impression was made, there is a hollow space left between the outside of the core and the sand in the flask; and into this space the melted iron is poured through the 'gates' or openings left in the sand for that purpose, and thus the pipe is formed around the core or arbor."

It will thus be seen that, while the molten iron comes into contact with the entire damp sand coating of the core, it cannot do so with any part of the interior metal pipe unless the coating is imperfect; and it is quite plain that neither the condition of the sand nor the extent of the coating is visible to a person engaged in pouring hot iron through one of the gates. Oliphant had nothing to do with preparing the green sand core or any part of the contents of the flask. It was necessary that four persons should unite in pouring melted iron from hand ladles through the gates; and after everything had been prepared for the operation Oliphant was called from another part of the foundry to assist in the pouring.

The evidence tends to show that the operation is dangerous, when the sand coating of the core is either too damp or the interior metal pipe is not fully and adequately covered; that for some two years previous to the injuries plaintiff was working as a molder where dry sand cores, though not where green sand cores, were used; and that there is a marked difference between the dangers attending these two kinds of molding. One way in which this difference is described is that the danger incident to green sand core molding is from "explosion," while that attending dry sand core molding is from a "blow"; the first being sudden, while the other is gradual. The dry sand core is composed of a mixture of sand and other materials, though rarely of iron within the mixture; and before the dry core is used it is placed in an oven and baked. When the molten iron is poured into the

gates gas forms and escapes in each process through vents, but the difference between the sudden and violent exit of the gas generated in the use of the wet core and its gradual exit in the use of the dry core is shown without material conflict in the evidence.

Plaintiff gained his experience in dry core work while in the employ of this company, and shortly before the accident the company placed him in charge of the dry core floor with an increase in compensation. However, he was always subject to the orders of the foreman of the foundry department; and it was this foreman who ordered him to assist in the pouring in question. There is conflict in the testimony as to the time plaintiff rendered such service, he testifying that it was from two to four days and the foreman that it was about two weeks; but it is not disputed that the time required for each day's pouring did not exceed fifteen minutes. The new service then may be said to have lasted only from one hour to three hours. The foundry comprises something like 22 "floors," as they are called; and the only floor on which the wet process was conducted was the place where plaintiff was injured. The distance between that floor and the floor occupied by plaintiff while working in the dry process is variously estimated to be from 50 feet to more than 50 steps, with a wall intervening and having an opening of about 20 feet. The plaintiff testifies, however, that he had no knowledge of the danger attending the wet process until after he was injured; and concededly he was at no time instructed or warned in respect of the danger.

The grounds stated in support of the motion to direct, in substance, were (1) that the danger of explosion was incident to the business; (2) that Oliphant was an experienced molder, and did not request or need instructions or warning with respect to pouring molten iron; and (3) that there was no evidence to warrant a finding that the company was guilty of negligence which either caused or contributed to the injury. These grounds in effect concede plaintiff's employment and injury, the dangerous character of the particular service, and the failure of the master to give instructions or warning to the plaintiff.

Judge Sanford felt constrained to submit the case to the jury upon the single question:

"Whether or not the defendant negligently failed to give the plaintiff any warning as to the danger of explosions of the molten metal in the work in which he was engaged when injured."

The charge was comprehensive as respects the admitted facts, the tendency of the conflicting features of the testimony, and the theories respectively upon which the plaintiff presented his case and the company urged its defense. This was also true of the burden of proof, and of the rules of law which the court deemed applicable to each phase of the case—as, for instance, the rules respecting the acts and omissions of fellow servants and the plaintiff's assumption of risk. No exception was taken to any part of the charge, and it is therefore to be accepted as containing correct instructions upon every question to which the evidence gave rise.

[4, 5] Was it error, then, to refer to the jury under proper instructions, instead of determining, as a matter of law, the question arising

upon defendant's omission to warn plaintiff of the danger incident to the new work he was required to perform? Since defendant was admittedly familiar with this danger, and also with the fact that plaintiff had never before taken part in that kind of work, its duty or not to warn him of the danger depended upon whether, in view of his previous experience, fair-minded men might honestly draw different conclusions as to his knowledge of the particular danger in question. We do not see how the trial judge could safely say they might not; indeed, the jury might think that plaintiff's experience in dry core molding was calculated to lull him into a sense of security in performing the new service. The failure, then, to warn presented a question for the jury. It appears in the opinion denying the motion for a new trial that the court relied in part upon two decisions of this court. Louisville Co. v. Miller, 104 Fed. 124, 43 C. C. A. 436; Felton v. Girardy, 104 Fed. 127, 43 C. C. A. 439, cited approvingly in Railroad v. Jarrett, 111 Tenn. 565, 574, 82 S. W. 224. The principle of those decisions is that, where the master has knowledge of the danger likely to be encountered and of the servant's lack of such knowledge and consequent inexperience, it is the master's duty to use reasonable care in warning him of the danger and in instructing him how best to perform the particular service. This principle is applicable where the danger so to be encountered results, as here, from a change in service imposed upon an employé. Montana Coal & Coke Co. v. Kovec, 176 Fed. 211, 213, 214, 99 C. C. A. 565 (C. C. A. 9th Cir.); Valley Camp Coal Co. v. Kucewicz, 211 Fed. 953, 955, 128 C. C. A. 451 (C. C. A. 3d Cir.); Klauder-Weldon Dyeing Mach. Co. v. Gagnon, 183 Fed. 962, 965, 106 C. C. A. 302 (C. C. A. 2d Cir.); Cincinnati, N. O. & T. P. Ry. Co. v. Gray, 101 Fed. 623, 630, 41 C. C. A. 535, 50 L. R. A. 47 (C. C. A. 6th Cir.); McCalman v. Illinois Central R. Co., 215 Fed. 465, 469, 132 C. C. A. 15, and citations (C. C. A. 6th Cir.); Borkowski v. American Radiator Co., 165 Mich. 266, 267, 271, 272, 130 N. W. 640; Burns v. Vesta Coal Co., 223 Pa. St. 473, 481, 72 Atl. 800. The duty so resting upon the master is of a primary character, and is therefore nondelegable. McCalman v. Illinois Cent. R. Co., supra, 215 Fed. 470, 132 C. C. A. 15, and citations. In our judgment the cases relied on by counsel for the company are upon their facts fairly distinguishable from the instant case.

The judgment is affirmed, with costs.

MEERS & DAYTON v. CHILDERS.

(Circuit Court of Appeals, Sixth Circuit, January 10, 1916.)

No. 2677.

1. MASTER AND SERVANT ⊂=286—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries to a carpenter's helper, caused by the collapse of a so-called scaffold upon which from 1,500 to 2,000 feet of lumber were piled, evidence as to the employer's responsibility for the character of

materials used in the scaffold *held* to justify the submission of the case 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.]

2. TRIAL ⊂⊃178—MOTION FOR DIRECTED VERDICT—CONSIDERATION OF EVIDENCE.

On a motion by defendant to direct a verdict, it is the court's duty to take that view of the evidence most favorable to plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401–403; Dec. Dig. ⊂⊃178.]

3. APPEAL AND ERROR ⊂⊃994—REVIEW—QUESTIONS OF FACT.

The Circuit Court of Appeals cannot pass upon the credibility of witnesses, as the demeanor of the witnesses necessarily has much to do with the question of their credibility, and the jury and trial judge have the advantage of seeing and hearing the witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901–3906; Dec. Dig. ⊂⊃994.]

4. MASTER AND SERVANT ⊂⊃226—LIABILITY FOR INJURIES—CONCURRING NEGLIGENCE.

That an employé's injuries were in part due to the negligence of his fellow servants does not defeat a recovery against the employer, whose negligence concurred with that of the fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659–667; Dec. Dig. ⊂⊃226.]

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

Action by Albert Childers against Meers & Dayton. Judgment for plaintiff, and defendants bring error. Affirmed.

J. C. Wilson and W. P. Armstrong, both of Memphis, Tenn., for plaintiffs in error.

M. J. Anderson and Ike W. Crabtree, both of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Defendant in error brought an action for personal injuries against plaintiffs in error, and recovered a verdict of $3,500, which, upon an accepted order of remittitur, was reduced to $2,000 and judgment was entered accordingly. We shall speak of Childers as plaintiff, and Meers & Dayton as defendants. At the close of the testimony offered on both sides, the defendants upon specific grounds moved that a verdict be directed in their favor. The motion was denied, and exception reserved. Error is prosecuted upon assignments which are treated by all the counsel as presenting simply the question whether the record discloses any evidence that entitled plaintiff to have the case submitted to the jury. The charge of the court does not appear in the record, and for the reason, as counsel agree, that no exception was taken to it. It must therefore be assumed that the court rightly instructed the jury in respect of each of the is-

sues. Upon motion of defendants for a new trial (which, in addition to the grounds contained in the motion to direct a verdict, stated that there was "no evidence to support the verdict"), arguments were heard, and relief was denied except in reduction of damages. The jury, under proper instructions, and also the trial court, upon the motion, were thus required to weigh the testimony; and this court is asked to hold that there was no substantial evidence for submission to the jury.

[1] One of the issues in substance was whether, in view of the dimensions and the use made of the particular structure in question, called a "scaffold," the defendants were primarily responsible for the character of materials it comprised. At the time of the injury the defendants were engaged in the erection of concrete walls for a power house in the city of Memphis, and plaintiff was in their employ as a carpenter's helper and in other kinds of work about the plant. Evidence was introduced tending to show, among other things, that the so-called scaffold, which was built on a hillside and adjoining a concrete wall then in course of construction, was composed of pine lumber, 2x6, and was 28 feet long and 12 feet wide, with one end 4 feet and the other 8 feet above the ground; that it was built by a carpenter with whom plaintiff was accustomed to work, and from 1,500 to 2,000 feet of lumber was piled upon the structure, while plaintiff was absent from the plant; that shortly afterwards, and while plaintiff was assisting the carpenters in the construction of the wooden form which was designed temporarily to hold the concrete, he was directed to hand a plank from the so-called scaffold to the carpenters. He either "swung down" with his hands or climbed down a ladder to the structure, when the structure gave way at the end nearest the ground and caused his injuries.

The evidence in several ways tends to show that this structure was not the ordinary scaffold which is constructed from time to time for the temporary accommodation of workmen and materials as the work progresses. Indeed, one of the defendants, Meers, testified in reference to the structure that it was "not exactly what I term a scaffold," and further that as the carpenters—

"built the forms they built bracing and put boards on them and used that as a scaffold. This bracing, boards and scaffold was put up by the carpenters for their own convenience and was erected whenever the carpenters thought it was necessary."

And defendants' "general foreman," who, as he testified, was "bossing the men and directing the work," described the structure as a "scaffold or platform." A witness, who assisted in piling the lumber upon the structure, testified that this foreman "was there all the time," and that he told the witness to "put the lumber up there." The structure gave way by reason of an obvious defect in one of its sustaining parts. The cross-piece at the end nearest the ground contained a knot which extended across the entire width of the piece, and the piece broke at this knot. Meers' knowledge of the structure appears from his statement that it was not a "scaffold," and the evidence tending to show the general foreman's presence and his order to load the structure with the apparently large quantity of lumber that was placed upon it would seem fairly to have justified an inference that defendants intended the

structure to be used for that purpose and also as a safe place for such employés as might be required to enter upon it.

[2-4] It is not necessary further to state the tendency or effect of the evidence; for, upon the motion to direct, it was the duty of the court to take that view of the evidence which was most favorable to the plaintiff. We cannot, as counsel seem to think, pass upon the credibility of any of the witnesses. Rochford v. Pennsylvania Co., 174 Fed. 81, 83, 98 C. C. A. 105 (C. C. A. 6th Cir.); Byers v. Carnegie Steel Co., 159 Fed. 347, 350, 86 C. C. A. 347, 16 L. R. A. (N. S.) 214 (C. C. A. 6th Cir.). The demeanor of witnesses necessarily has much to do with the question of their credibility; the jury has the advantage of seeing and hearing the witnesses; the judge, presiding at the trial, carries the same advantage with him when subsequently passing upon a motion for a new trial; a reviewing court cannot disregard such an advantage as this. We are unable to say upon this record that there was no substantial evidence to submit to the jury. Ducktown Sulphur, Copper & Iron Co. v. Fortner, 228 Fed. 191, —— C. C. A. ——, decided December 14, 1915; and see Casey-Hedges Co. v. Oliphant, 228 Fed. 636, —— C. C. A. ——, decided January 4, 1916. The theory of the argument presented for defendants is that the instant case is like Noble v. C. Crane & Co., 169 Fed. 65, 94 C. C. A. 423 (C. C. A. 6th Cir.), and cases of that class; but we cannot think the cases relied on are controlling here. It is of no importance that plaintiff's injuries were in part due to negligence of his fellow servants; for we feel bound to conclude that there was evidence from which concurring negligence on the part of defendants might reasonably have been inferred, and this is the test of their liability. Kreigh v. Westinghouse & Co., 214 U. S. 257, 29 Sup. Ct. 619, 53 L. Ed. 984; Bryson v. Gallo, 180 Fed. 70, 76, 103 C. C. A. 424.

The judgment must be affirmed, with costs.

CHICAGO, R. I. & P. RY. CO. v. EDDY.

(Circuit Court of Appeals, Eighth Circuit. November 17, 1915.)

No. 4436.

1. CARRIERS ⇐318—ACTIONS FOR INJURIES TO PASSENGERS—SUFFICIENCY OF EVIDENCE.

In an action for the death of a person, struck by a train while at a railroad station for the purpose of taking passage on a train, an admission in the answer that he was struck by one of defendant's trains, and a stipulation that he was carrying mileage and was a passenger, made a prima facie case for plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307–1314; Dec. Dig. ⇐318.]

2. CARRIERS ⇐320, 347—ACTIONS FOR INJURIES TO PASSENGERS—QUESTION FOR JURY.

In an action for the death of a person, who went upon planking between east-bound and west-bound railroad tracks for the purpose of taking passage on an approaching west-bound train, though an east-bound train was approaching at the same time, evidence *held* to make questions

for the jury as to defendant's negligence and plaintiff's contributory negligence, and as to whether the company, in the exercise of the care required of it, could have seen him and prevented the injury, notwithstanding his negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325, 1346, 1350–1386, 1388–1397, 1402; Dec. Dig. ⊂=320, 347.]

3. COURTS ⊂=338—JURISDICTION—ACTIONS FOR DEATH.

Though, under a statute of Illinois, actions for death occurring outside the state of Illinois cannot be brought in the courts of that state, it was not error for the District Court for the District of Minnesota to take jurisdiction of an action for death occurring in Illinois, as it would have been contrary to the public policy of Minnesota to decline jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 901; Dec. Dig. ⊂=338.]

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Action by Horace W. Eddy, as executor of Walter N. Sanborn, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward S. Stringer, of St. Paul, Minn. (Edward C. Stringer and McNeil V. Seymour, both of St. Paul, Minn., on the brief), for plaintiff in error.

Humphrey Barton, of St. Paul, Minn. (John H. Kay, of St. Paul, Minn., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. The parties to this controversy will in this opinion be designated as in the trial court. The action was instituted by the plaintiff to recover damages for the death of Walter N. Sanborn, alleged to have been caused by the negligence of the defendant. The action is based on the statute of Illinois; the injury causing death having been received at Ottawa, in said state. There was a trial, resulting in judgment for the plaintiff. The defendant brings the case here, assigning as error the refusal of the trial court to direct a verdict in its favor.

[1] It is claimed in support of the assignment of error that there was no evidence of negligence on the part of the defendant, and also that the evidence of contributory negligence on the part of Mr. Sanborn was so undisputed as to require the court to declare as matter of law that the plaintiff could not recover. At the trial it was stipulated by counsel as follows:

"It is also stipulated between counsel for the respective parties that the deceased in this case was carrying mileage good on the defendant road, and that the defendant was carrying him as a passenger on its road."

The answer of the defendant alleged as follows:

"On said 7th day of October, 1913, said Walter N. Sanborn, wrongfully, unlawfully, and negligently, at Ottawa, in said state, walked between the tracks of this defendant, well knowing the approach of one of defendant's trains, and

then and there walked upon and near the track upon which said train was approaching and was struck by said train, sustaining an injury resulting in death."

We have, then, upon the record, regardless of the testimony, the conceded fact that Sanborn was a passenger and that he was killed by one of the trains of defendant striking him. This constituted a prima facie case on the part of the plaintiff. Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115; Railway Co. v. Pollard, 22 Wall. 341, 22 L. Ed. 877; Inland Coasting Co. v. Tolson, 130 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; Gleeson v. Virginia Midland R. Co., 140 U. S. 345, 11 Sup. Ct. 859, 35 L. Ed. 458; Kirkendall v. Union Pacific, 200 Fed. 197, 118 C. C. A. 383 (8th Cir.).

[2] The evidence introduced at the trial showed without much dispute the following facts: The defendant has a station at Ottawa, Ill. In front thereof, running east and west, are two main railway tracks. The first track, nearest the station platform, carries trains going east; and the second track carries trains going west. The distance between the second rail of the first track and the first rail of the second track is 8 feet. Freight and passenger cars extend over the rails of the track about 2 feet. This would leave 4 feet in the clear between two trains standing or moving on the tracks in question. Horn, a witness for defendant, made the distance between trains 4½ feet.

Mr. Sanborn, on October 4, 1913, proceeded to defendant's station at Ottawa, Ill., for the purpose of taking passage on a passenger train going west and due to arrive at said station at 7:42 p. m. This train on the evening in question was late and did not arrive until about 8:10 p. m. Mr. Sanborn remained in the station until some one said, "It's a-coming;" then he walked out. Mr. K. S. Sampson followed Mr. Sanborn, and they both crossed the first track and stood upon the planking between the first and second track, which planking extends between the tracks and in front of the station 160 feet.

When Mr. Sanborn and his companion were crossing the first track, a freight train moving from 4 to 6 miles an hour was approaching the station at Ottawa from the west. The freight train consisted of 30 loaded cars, 4 empties, and the caboose. The conductor of the freight train looked ahead of his train, as he testified, expecting to find at the station train No. 231, which was the passenger train that Sanborn was to take. Not seeing the passenger train, the freight train passed on over the first track, and at the time the caboose of the freight train was directly in front of the station the engine attached to the train which Sanborn was to take passed the caboose going west. At this same time the conductor of the freight train also testified that he was standing on the steps of the caboose, looking to see the number of the passenger engine. As soon as he saw the number, or at the same time, he saw a man lying on the ground, and a man standing up. The man lying down was about the center of the baggage car of the passenger train. His head was toward the east.

Mr. Sampson, who was standing upon the planking with Mr. Sanborn and was to take the same train, testified as to the circumstances surrounding the accident as follows:

"Q. After going across the first track, and noticing the passenger train coming, and later the freight train, what did you do then? A. I stood right on the platform there, right in between the tracks there, on the planks between the two tracks. Q. Which engine passed you first, the engine pulling the freight train, or the engine pulling the passenger train? A. The freight train passed us quite a little while before the passenger train came up. Q. Had the passenger train engine and the passenger train passed you before the freight train got entirely past you? A. No; it had not passed us yet. There was a few coaches yet left when the passenger engine pulled up. Just how many there was I don't remember. I didn't count them, either. Q. Then the engine that was pulling the passenger train passed you before the freight train had got entirely past? A. Oh; yes, sir. Q. How close were you standing to this other man at the time the engine went by? A. I should judge about 3 or 4 feet. He was standing east of me. Q. Where were you standing with reference to the two tracks? A. We were kind of faced—I was facing; I think I was facing; it was dark; I think we were both trying to face—the passenger train. Q. Looking easterly? A. Yes, sir; looking easterly. Q. Where, with reference to the two tracks; in the middle? A. Yes. Q. Between them, or to one side or the other? A. How is that? Q. Whereabouts between the two tracks were you standing? A. About in the center, when both trains were pulling in. We stood near the center of the platform. Q. Where was this other man standing? A. Well, we both stood about the same way. He told me that we had better stand closer to the freight train. I thought he was pretty close to the passenger train at the time. That is all. That is the last he spoke to me. Q. How much room was there between the two trains as they were passing there? A. Well, I thought there was plenty of room until I got struck with something. I don't know what it was. Q. What was the first thing that you knew of anything going wrong? A. When it hit me here on the hip. I can't say what happened then; but I put up my hands this way (indicating), and then he fell, too, and he groaned. He fell down on the ground. Q. How much of the freight train had passed you before you were hit? A. Not a great deal of it. Q. Have you any idea as to how many cars there were in the freight train? A. In the rear? Q. Yes. A. I couldn't say positively about that; I think it couldn't have exceeded—I don't know how many. I was kind of excited at the time. Q. Did you move your position at all whilst standing there between the two trains? A. To the best of my recollection I didn't. Q. Did you notice the other man move at all? A. No; I didn't. Q. You were looking like towards the other man? A. Yes; I was looking kind of eastwards. I looked kind of sideways, with my grip in my hand. Q. This other man was standing east of you, I understood you to say? A. Yes; he stood on the east side of me. Q. You were hurt on your hip? A. Yes. Q. Which hip were you hurt on? A. On the right hip. Q. Were you struck any place else? A. No; not to amount to anything. One of my fingers bled a little. I expect I hit the ground with my hand as I was struck. I don't know, but I might have. I just had a scratch; I think it was on the left hand. I got twisted round some way; I don't know how. But it was nothing to speak of. Q. Did you fall down? A. Well, I couldn't say now. No; I didn't fall down. I might have fell on my knees at that time, but I didn't fall right down. I was not down. Q. The other man fell clean down? A. Yes, sir; I saw him roll right over. Q. Which track was his head nearest to after he fell down? A. My recollection is he fell towards the passenger train, and that his head leaned north. That is the best of my recollection. Q. Were your clothes injured at all? A. Yes, sir; I had my pants torn. Q. Did you bring them here with you? A. Yes. Q. Will you produce them? (A pair of trousers is now produced in court.) Q. Is this the pair of pants you had on? A. Yes, sir; that is the pair of pants I had on. Q. I believe you said they were torn. A. Yes; they were torn. I had them glued by a tailor at the Rapids, glued up. It does not show very much; it shows some. Q. Is that the place? (Indicating a place on the trousers.) A. Yes; that is the patch, that was torn out. They never was torn before, I know, except that this kind of a square patch place. Q. The square patch on the right leg of your pants is where your pants were torn at the time you were struck? A.

That had torn my trousers, so there was a hole in there. You see I was looking eastwards, and it came that way. I would hardly have expected it, but it must have given me a terrible knock, because I thought I seen stars, and I was twisted around. Q. Do you know what did hit you? A. No; I do not. Q. I take it it must have been something on the freight train that struck you? A. That is my opinion. I don't know what it was; I couldn't say."

It is clear that passengers, in order to take a passenger train going west, would be obliged to cross the first track and stand upon the planking between the tracks; at least it could not be said to be negligence on the part of the passenger in so doing, laying aside for the moment the fact that the freight train was moving upon the first track in the opposite direction. The planking was an invitation for passengers to stand there. While standing there, it is conceded that Mr. Sanborn was injured by either the freight train or the passenger train striking him. Although it is conceded that one or the other of the trains hit Mr. Sanborn, none of the employés of the defendant in charge of said trains claim to have seen Mr. Sanborn or Mr. Sampson at all. There was some testimony on the part of the railway company, given by the witnesses Brady and Rigdon, that they called out to Mr. Sanborn and his companion, when they were crossing the first track, not to go there. It does not appear, however, that Mr. Sanborn heard the warning, if it was given, and the witness Sampson testified that he did not hear any such call. But, however this may be, we are of the opinion that whether defendant was negligent, or whether Mr. Sanborn was guilty of contributory negligence, or whether, even if he was guilty of contributory negligence, the company, in the exercise of the care required of it, could not have seen him and prevented the injury, were all questions of fact under the evidence for the jury, within the ruling of the Supreme Court of United States in the case of Chunn v. Railroad Co., 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219; and the cases therein cited.

[3] It is claimed that the court below should not have taken jurisdiction of this action, because a statute of Illinois provides that no cause of action for death occurring outside the state of Illinois can be brought in the courts of Illinois, and therefore it is argued that the courts of Minnesota should not take jurisdiction in cases where the injury was received in Illinois. There is nothing in this point. The public policy of Minnesota is against it. Herrich v. Railway Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Negaubauer v. Railway Co., 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674, 2 Ann. Cas. 150; Powell v. Railway Co., 102 Minn. 448, 113 N. W. 1017.

The judgment below should be affirmed; and it is so ordered.

TRENT et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1916.)

No. 3934.

1. POST OFFICE ⟸35—CRIMINAL OFFENSES—FRAUDULENT USE OF MAILS—ELEMENTS.

Penal Code, § 215 (Comp. St. 1913, § 10385), provides that whoever, having devised any scheme to defraud, shall for the purpose of executing it, or attempting so to do, place or cause to be placed, any letter in any post office, or take or receive therefrom any such letter, shall be punished as therein provided. *Held*, that the fact that a letter defendants were charged with receiving from the post office was mailed by their agent did not prevent their act constituting the offense.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⟸35.]

2. POST OFFICE ⟸48—FRAUDULENT USE OF MAILS—INDICTMENT—SUFFICIENCY.

An indictment charged the use of the mails for the purpose of executing a scheme to defraud, described therein as embracing the purchase and platting into lots of a track of rough and rocky land, devoid of merchantable timber, unfit for cultivation, and some distance from any railroad, town, or hamlet, the printing and distribution of circulars extolling by indirection the value of the lots and the rare opportunity for investment, and the pretended giving away of certain of the lots for the cost of abstracts of title and deeds to induce immigration. It alleged that the lots were of no value whatever for the purposes represented. *Held*, that the indictment was not defective because of the possibility of a value of the lots for some other purpose, which might save the purchasers from loss, especially as the purchasers were led to believe that they were buying town lots, and not remote little pieces of ground, valueless as such.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⟸48.]

3. POST OFFICE ⟸49—FRAUDULENT USE OF MAILS—EVIDENCE.

Where a letter defendants were charged with taking from the post office in aid of such scheme was written to one of the defendants by a local agent, intrusted with the delivery of abstracts and deeds and the collection of the price from the purchasers, and contained a remittance on account of collections, and mentioned other deeds not delivered, and asked for a plat, it did not, as claimed, show on its face that the scheme had been fully executed.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⟸49.]

4. CRIMINAL LAW ⟸371—EVIDENCE—OTHER OFFENSES.

On a trial for using the mails in aid of a scheme to defraud, evidence of a different, but similar, venture by defendants, was properly received as bearing on the question of fraudulent intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. ⟸371.]

5. CRIMINAL LAW ⟸402—EVIDENCE—BEST AND SECONDARY EVIDENCE—LETTERS.

On a trial for taking letters from the post office for the purpose of executing or attempting to execute a scheme to defraud, proved copies of letters mailed to accused were admissible, without otherwise accounting for the absence of the originals.

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

6. POST OFFICE ⇐35—FRAUDULENT USE OF MAILS—ELEMENTS OF OFFENSE.
Penal Code, § 215, provides that whoever, having devised any scheme to defraud, shall for the purpose of executing it, or attempting so to do, place or cause to be placed any letter, etc., in any post office, or shall take or receive any letter therefrom, shall be punished as therein provided. *Held* that, to constitute the offense, it is sufficient that, having devised a scheme to defraud, the mails are actually used in effecting it, and a purpose to use the mails is not an essential element of the scheme devised.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⇐35.]

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

I. E. Trent and another were convicted of fraudulent use of the mails, and they bring error. Affirmed.

Halbert H. McCluer and J. R. Page, both of Kansas City, Mo. (Sparrow & Page, of Kansas City, Mo., on the brief), for plaintiffs in error.

William G. Lynch, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

Before HOOK, Circuit Judge, and ELLIOTT and YOUMANS, District Judges.

HOOK, Circuit Judge. Trent and Frad were convicted of fraudulent use of the mails (Penal Code, § 215), as charged in three counts of the indictment. The scheme to defraud may be briefly described as follows:

The accused, operating as the Oakland City Townsite & Emigration Company, obtained title to 420 acres of land in Oklahoma. The land was on the summit of a range of hills called the Poteau Mountains. It was very rough and rocky, and embraced abrupt hills and deep ravines or canyons. It was devoid of merchantable timber, unfit for cultivation, four or five miles from the nearest railroad, and about five miles from the nearest town or hamlet. No buildings were on it, or in the vicinity. At the instance of the accused a surveyor ran the exterior boundaries of the land and then platted it into blocks, lots, streets, and alleys. It was a mere paper plat, prepared in the office of the surveyor, without reference to the lay of the surface of the ground. No survey was made of the blocks, lots, streets, and alleys, and no stakes or other guides were placed to indicate their location. The plat showed 4,243 lots, each with a frontage of 25 feet. The subdivision was called Oakland City. The land was worth from $1 to $2 per acre. The accused caused illustrated circulars to be printed and distributed, extolling by indirection the value of the lots and the rare opportunity for investment, and guaranteeing 10 per cent., inferentially profit, within a year from purchase. The illustrations were of an extensive oil field with derricks and buildings, a large and thrifty orchard, tall growing corn, and a broad level alfalfa field during harvest. There was nothing of the kind on or in the vicinity of the land. The prices of the residence lots were specified in the circular at from

$50 to $250 each; business lots from $450 to $700 each—according to location. They then sent a representative abroad, who addressed meetings in the towns visited, called attention to the circulars, and proceeded as though to give away certain of the lots for the mere cost of abstracts of title and deeds to induce immigration to the pretended Oakland City. Names were selected by lot from the audiences, and in due course abstracts and deeds were sent from the office of the accused in Kansas City, Mo., to local magistrates or other persons of standing, and delivered to the persons selected upon payment of $4.45 per lot. The local agents, who acted innocently, retained 45 cents and remitted to the accused $4 of the proceeds of each sale. Quite a number of lots were disposed of in this way. There was substantial evidence that the lots were practically worthless, and that the accused were engaged in a scheme to defraud the purchasers.

[1-3] In the first count of the indictment the accused were charged with having caused a letter to be mailed, and in the other two counts with having received letters from the mails. The letters were set forth. Various contentions are made as to the sufficiency of the counts and of the evidence. Since the sentence by the court was no more than could have been imposed upon conviction under a single count, consideration may be confined to the third. If no error was committed in respect thereof, the sentence should stand.

It is urged that the letter charged to have been received by the accused was mailed by their agent, and therefore cannot be considered as aiding a scheme to defraud. Of course, the relation of principal and agent cannot help the accused, if the letter is otherwise of the character condemned by the statute. Correspondence of some sort was essential to the consummation of the fraud, and if by mail the law was violated.

It is also claimed that no scheme to defraud is set forth, because the averment that the lots "were of no value whatever for the purposes represented" does not negative a value for some other purpose. The averment in question is but a small part of an elaborate description of the scheme to defraud, and in the circumstances the suggestion of the possibility of a value which might save the purchasers from loss does not merit serious consideration. Besides, the purchasers were led to believe they were buying town lots, not remote little pieces of ground, valueless as such.

Again, it is contended the letter shows on its face the scheme had been fully executed and could not have been in aid of a scheme still afoot. Stewart v. United States, 55 C. C. A. 641, 119 Fed. 89. But the letter shows quite the reverse. It was written to one of the accused by a local agent intrusted with the delivery of abstracts and deeds and the collection of the price from the purchasers, contained a remittance on account of collections, mentioned the number of deeds not delivered, asked for a plat of the city, so called, showing the railroad, etc.

[4-6] The evidence of another, but similar, venture by the accused, was properly received as bearing on the question of fraudulent intent. Exchange Bank v. Moss, 79 C. C. A. 278, 149 Fed. 340. Also the

proved copies of letters mailed to the accused, without otherwise accounting for the absence of the originals. McKnight v. United States, 61 C. C. A. 112, 122 Fed. 926. There was sufficient proof that the letter in the third count was sent through the mails and was received therefrom by one of the accused, acting for both in the conduct of their common scheme. By section 215 of the Penal Code a purpose to use the mails ceased to be an essential element of the scheme devised. It is sufficient that, having devised a scheme to defraud, the mails are actually used in effecting it. There is no merit in the criticisms of the charge to the jury, nor in various other contentions asserted by the assignments of error.

The sentences are affirmed.

MARTIN et al. v. COMMERCIAL NAT. BANK OF MACON, GA. COMMERCIAL NAT. BANK OF MACON, GA., v. MARTIN et al. In re VIRGIN.

(Circuit Court of Appeals, Fifth Circuit. January 4, 1916.)

No. 2816.

1. BANKRUPTCY ⊂=151—LIENS—RIGHT OF TRUSTEE.

Under Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557, cl. 2, as amended Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), providing that the trustee, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, where at the time a mortgage, executed more than four months before the filing of the petition in bankruptcy, was recorded within such four months, no other creditor had acquired a lien by legal or equitable proceedings, the trustee subsequently appointed did not acquire the status of a creditor holding a lien superior to that of the mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239; Dec. Dig. ⊂=151.]

2. BANKRUPTCY ⊂=159—VOIDABLE PREFERENCES—CONSTRUCTION OF STATUTE.

Bankr. Act, § 60b, as amended in 1910 (Comp. St. 1913, § 9644), provides that if the bankrupt shall have made a transfer of property, and if at the time of the transfer, or of the recording or registering thereof, if by law recording or registering is required, and being within four months before the filing of the petition, the bankrupt be insolvent and the transfer then operate as a preference, and the person receiving it shall then have reasonable cause to believe that its enforcement would effect a preference, it shall be voidable by the trustee. *Held*, that unless a transfer, though made within four months before the filing of the petition, is one required by law to be recorded or registered, it is not voidable unless the bankrupt was insolvent at the time of the transfer, and the transfer then operated as a preference, and the person receiving it then had reasonable cause to believe that its enforcement would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248, 262, 268–281; Dec. Dig. ⊂=159.]

3. BANKRUPTCY ⊂=161—VOIDABLE PREFERENCES—CONSTRUCTION OF STATUTE.

Under Bankr. Act, § 60b, when a transfer by a bankrupt was made more than four months before the petition was filed, but was recorded within that period, it is not voidable unless it was one required by law to be recorded or registered, and the stated invalidating circumstances existed

when it was recorded or registered, and if the transfer was not one required to be recorded, the transferee's knowledge at the time of the recording of the transferror's insolvency, and that a preference would be effected, does not make the transfer voidable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261–263; Dec. Dig. ⊂⊃161.]

4. BANKRUPTCY ⊂⊃184—VOIDABLE PREFERENCES—CONSTRUCTION OF STATUTE.

Under Code Ga. 1910, § 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, or purchases made, prior to the actual record of the mortgage, a mortgage was not a transfer required to be recorded, within Bankr. Act, § 60b.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. ⊂⊃184.]

5. BANKRUPTCY ⊂⊃345—LIENS—RIGHTS OF HOLDER OF LIEN AND OTHER CREDITORS.

Where a mortgage executed by a bankrupt more than four months before bankruptcy, but recorded within that period, and which was not required to be recorded within the meaning of Bankr. Act, § 60b, was not withheld from record fraudulently, or for the purpose of enabling the mortgagor to obtain credit from others, creditors whose debts were created after its execution and before it was recorded were not entitled to prorate in the distribution of the assets of the estate on equal terms with the mortgagee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⊂⊃345.]

Appeal and Cross-Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

In the matter of J. H. Virgin, bankrupt. From an order allowing as a secured claim the claim of the Commercial National Bank of Macon, Ga., but denying it priority over certain other claims, W. E. Martin, Jr., trustee, and others appeal, and the claimant cross-appeals. Affirmed in part, and reversed in part.

Oliver C. Hancock, R. Douglas Feagin, and R. S. Wimberly, all of Macon, Ga., for appellants and cross-appellees.

George S. Jones and Orville A. Park, both of Macon, Ga., for appellee and cross-appellant.

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

WALKER, Circuit Judge. [1] In this case an attack is made on a mortgage executed by the bankrupt more than four months before the petition in bankruptcy was filed, but recorded within that period. Section 47a, clause 2, of the Bankruptcy Act, as amended in 1910 (36 Stat. 838, 840), provides that:

> The trustee in bankruptcy, "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."

Very recently it has been authoritatively decided that under this provision the trustee takes the status of such creditor as of the time

the petition in bankruptcy is filed. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. —— (Nov. 29, 1915). When the mortgage in question was filed for record, no other creditor of the bankrupt had acquired a lien on the mortgaged property by legal or equitable proceedings. It follows that the trustee appointed in the subsequently instituted bankruptcy proceeding did not acquire the status of a creditor holding a lien superior to that of the mortgage. The ruling of the District Court to this effect was correct.

[2-4] The provision of section 60b of the Bankruptcy Act, as amended in 1910 (36 Stat. 842), so far as it has a bearing upon any question presented in this case, is as follows:

"If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer, * * * or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

It seems to us that the language of this provision requires the conclusion that unless a transfer, though it was made by the bankrupt within four months before the filing of the petition in bankruptcy, is one required by law to be recorded or registered, it is not voidable by the trustee unless the bankrupt was insolvent "at the time of the transfer," and the transfer then operated as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, then had reasonable cause to believe that the enforcement of such transfer would effect a preference. When a transfer by the bankrupt was made more than four months before the petition in bankruptcy was filed, but was recorded within that period, the statute does not have the effect of making it voidable at the instance of the trustee, unless it was one required by law to be recorded or registered and the stated invalidating circumstances existed when it was recorded or registered. In other words, if a transfer, made more than four months before the filing of the petition, was not one required by law to be recorded or registered, the transferee's knowledge, at the time of the recording within the four months period, of the transferror's insolvency and that a preference would be effected, does not make the transfer voidable by the trustee.

A different conclusion was reached in the case of In re T. H. Bunch Commission Co., 225 Fed. 243. We do not think that the considerations which influenced that conclusion are such as to warrant giving to the statute a meaning different from the one which its words express. The mortgage in question was not a transfer which the Georgia law "required" to be recorded. Before its record it was valid as against the mortgagor, and is subordinate only to other liens created or obtained, or purchases made, prior to its actual record. Code of Georgia 1910, § 3260; Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240; In re Jacobson & Perrill (D. C.) 200

Fed. 812; In re Roberts (D. C.) 227 Fed. 177. We are not of opinion that the conclusion of the District Court to this effect is opposed to the provision found in amended section 60b of the Bankruptcy Act.

[5] The referee's finding that the mortgage was not withheld from record fraudulently, or for the purpose of enabling the mortgagor subsequently to obtain credit from others, was well supported by the evidence, and this finding was confirmed by the District Judge, who, in the opinion rendered, said:

"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."

Notwithstanding the finding of the absence of any fraud in the withholding of the mortgage from the record, it was held that the creditors whose debts were created after the execution of the mortgage and before it was recorded were entitled to prorate in the distribution of the assets on equal terms with the mortgagee. For support of the ruling to this effect reference was made to the decisions in the cases of Clayton v. Exchange Bank, 121 Fed. 630, 57 C. C. A. 656, and In re Jacobson & Perrill (D. C.) 200 Fed. 812. In each of those cases subsequent creditors were permitted to share in the security of a mortgage made before they became creditors, but recorded afterwards, because the withholding of the instrument from record was found to have constituted a fraud upon them. The reason which supported those rulings does not exist in the case at bar, where the explicit finding is that there was an absence of any such fraud. There was nothing in the conduct of the mortgagee which should be given the effect of entitling subsequent unsecured creditors to share with the mortgagee in the benefits of the mortgage. In re Roberts (D. C.) 227 Fed. 177.

From the above-stated conclusions it follows that there should be an affirmance, except as to the part of the decree which is brought into question by the cross-appeal, and that there should be a reversal as to that part of the decree; and it is so ordered.

AMERICAN CREDIT INDEMNITY CO. OF NEW YORK v. HENRY A. HITNER'S SONS CO.

(Circuit Court of Appeals, Third Circuit. December 9, 1915. Rehearing Denied January 31, 1916.)

No. 1957.

1. TRIAL ⟸136—PROVINCE OF COURT AND JURY—CONSTRUCTION OF CONTRACT.
In an action on an indemnity bond, the duty of construing the bond was primarily for the court.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323–327; Dec. Dig. ⟸136.]

2. INSURANCE ⟸150—INDEMNITY INSURANCE—RISKS ASSUMED.
A bond indemnifying plaintiff against loss on sales of merchandise to parties given specified ratings by a named mercantile agency provided

that the term of the bond should be from March 18, 1912, to March 17, 1913, inclusive, but that the bond did not cover any loss occurring prior to April 4, 1912, the date of the payment of the premium, though the bond might have been delivered. The application for the bond was made on March 18th, and was accompanied by notes for the premium, with interest from that day. A rider attached to the bond extended the term back from March 17, 1912, and provided for indemnity against losses occurring during the term of the bond, but after April 4th, on goods sold, shipped, and delivered between December 18, 1911, and March 17, 1912, inclusive. Another rider provided that the notes for the premium should be the same in effect, if paid at maturity, as if the premium had been paid by check, and that all other terms and provisions of the bond should remain in full force and effect. It did not appear that the small amount of interest accruing on the notes between the date of the application and the date of the bond was intended to work any change in the bond. *Held*, that the riders did not affect the application of the provision that the bond should not cover any loss prior to April 4th, and such provision was operative, and hence, where sales were made, a loss occurred, and the rating of the purchaser was detrimentally changed during the term of the bond, but prior to April 4th, there could be no recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 305–307; Dec. Dig. ⟸150.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by the Henry A. Hitner's Sons Company against the American Credit Indemnity Company of New York. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

John G. Johnson, Frank P. Prichard, and James W. Bayard, all of Philadelphia, Pa., for plaintiff in error.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Henry A. Hitner's Sons Company, a corporation of Pennsylvania, brought suit against the American Credit Indemnity Company, a corporation of New York, on a bond of indemnity, alleging a loss covered by such bond. A verdict having been recovered for the plaintiff and judgment entered thereon, defendant sued out this writ, and avers the court erred in its charge to the jury and in refusing certain instructions requested by defendant. In considering such errors the case resolves itself into two questions: First, was the loss of the Dreifus account within the terms of the bond? And, second, did the failure of the insured to give notice of such loss to the insurer, in accordance with the terms of the bond, prevent recovery?

[1, 2] The suit was based on the alleged breach of a contract, and that contract was in writing and constituted the bond in suit. The duty of construing such contract was primarily for the court. On its face the bond is self-explanatory. It was dated April 6, 1912, and indemnified the plaintiff to an amount not exceeding $20,000—

"against actual loss * * * through the insolvency of debtors * * * occurring during the term of this bond * * * on the indemnified's sales of merchandise shipped and delivered during the term of this bond, in the usu-

al course of said business, to individuals, firms, copartnerships, or corporations in the United States of America or in the Dominion of Canada. The term of this bond shall be from the 18th day of March, 1912, to the 17th day of March, 1913, both days inclusive. * * * This bond does not cover any loss occurring prior to April 4, 1912, the date of the payment of the premium thereon, although the bond may have been delivered."

The bond further provided:

"No loss is covered by this bond, unless the debtor to whom the goods were shipped and delivered, shall have in the latest published book of the R. G. Dun & Co. Mercantile Agency, at the date of shipment, one of the ratings of the said agency, both as to capital and credit, as tabulated below."

There is no dispute that the sales in question were made by the plaintiff to the Dreifus Company within the term provided by the policy, that the loss on such sales was made prior to April 4, 1912, and that the rating of the Dreifus Company had been detrimentally changed before April 4th. Clearly such loss prior to April 4th was not covered by the bond, and, if the clause quoted above is to govern, it was the duty of the court below to construe the contract and to so hold, and its action in refusing to affirm defendant's point, which read, "that if the rating of E. Dreifus & Co. had been detrimentally changed" (of which fact there was no question) "before April 4, 1912, then the plaintiff was not entitled to recover for loss on that account," was error. The court, however, denied the point and submitted the case to the jury, with instructions hereafter quoted, which in effect held that, if the jury found that the premium on this bond was paid on March 20th, their verdict should be for the plaintiff. The practical effect of this ruling and finding is to eliminate from the bond the provision:

"This bond does not cover any loss prior to April 4, 1912, the date of the payment of the premium thereon," etc.

Such instruction is sought to be justified by reason of a certain rider attached to the bond and the facts connected with the payment of the premium. By the copy of the application attached to the bond it appears that the bond was applied for on March 18, 1912. Such application was accompanied by two notes of the insured for the premium, dated March 18, and payable May 1, 1912, with interest from date. Negotiations took place between the parties, which were evidenced by two riders attached to the bond when finally issued, and the term of the bond was extended back from March 17, 1912, so as to cover losses from December 18, 1911; the rider providing:

"It is agreed that losses of the indemnified occurring during the term of this bond, but after April 4th, the date of the payment of the premium therefor, on goods sold, shipped, and delivered by the indemnified between the 18th day of December, 1911, and the 17th day of March, 1912, both days inclusive, shall, if otherwise coming within the provisions of this bond," etc.

This rider still continued the limitation as to losses occurring prior to April 4th. The other rider provided as follows:

"It is agreed that the indemnified's two notes aggregating amount of premium on this bond, receipt of which is hereby acknowledged and which are ac-

cepted by the American Credit Indemnity Company of New York in payment of said premium, shall be the same in effect, provided said notes are paid at or before their maturity as if the entire amount of premium had been paid by the indemnified by check. But if said notes are not paid at or before maturity then losses occurring prior to the payment of said notes shall not be covered or provable under this bond. All other terms and provisions of the said bond to remain in full force and effect."

This agreement, it is manifest, related solely to the payment of the premiums, and stipulated for a payment of such premium after the date and delivery of the bond. It defined the effect of such payment, viz. "the same in effect * * * as if the entire amount of premium had been paid by the indemnified by check," and by the further definition, viz. "All other terms and provisions of the said bond to remain in full force and effect," it precluded any other effect than that, namely, "as if the entire amount of premium had been paid by the indemnified by check." Now, what would have been the effect if the indemnified had paid the premium by check or cash when the policy was delivered, or when the application was made? Manifestly, it would simply have amounted to a cash payment of the premium. The mere fact that the notes, when paid, involved the payment of interest on the premium for the few days that intervened between the date of the application and the date of the bond, does not serve to change the two provisions of the rider, that the payment of such notes (which included interest from their dates) shall be "the same in effect * * * as if the entire amount of premium had been paid by the indemnified by check," and that "all other terms and provisions of the said bond to remain in full force and effect."

There is no testimony or stipulation that this small amount of interest was to work any change in the bond, and in the absence of such proof or stipulation, its payment may be attributed to its being so small as not to be material, or that the agreement of the company to extend the bond back from March 18, 1912, to December 18, 1911, or to accept notes instead of cash for the premium, was the consideration for such payment of interest. It follows, therefore, that the provision in the bond that the bond does not cover any loss occurring prior to April 4, 1912, constituted the written contract between the parties, that it was the duty of the court below to so instruct the jury, and that there was error when the court charged the jury:

"If you find from the evidence that the payment [of the premium] was made prior to April 1, that is to say, on March 20, 1912, then the defense as to the change of rating would not be a valid defense in this case, and as to that defense it would be your duty to find in favor of the plaintiff. If, on the other hand, you find that payment was made on April 4, 1912, then it is apparent from the evidence that there was a change in rating which was a detrimental change to the credit of Dreifus & Co., and the plaintiff cannot recover"

—and permitted it to change the written contract which the parties themselves had not changed. As the determination of this question shows the plaintiff had, under the policy, no right to recover for the Dreifus loss, it is not necessary to pass on the question of plain-

tiff's alleged failure to give the defendant the notice of such loss as the policy required.

The judgment will therefore be reversed, and the case remanded to the court below for further proceedings in accord with this opinion.

BARBRE et al. v. HOOD.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1916.)

No. 4429.

1. INDIANS ⟸15—ALIENATION OF LANDS—CONVEYANCE BY "MINOR."

Act May 27, 1908, c. 199, § 1, 35 Stat. 312, relative to the Five Civilized Tribes, discharges lands allotted to intermarried whites, freedmen, and Indians of less than half Indian blood, including minors, "from all restrictions." Section 2 defines the term "minor" or "minors," as used therein, as including all males under the age of 21 years and all females under 18. Section 4 subjects the lands from which restrictions are removed to taxation and all other civil burdens, as though the property of other persons than allottees of the Five Civilized Tribes, but provides that such allotted lands shall not be subjected or held liable to any personal claim or demand against the allottees arising or existing prior to the removal of the restrictions. Section 6 provides that the persons and property of minor allottees shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of Oklahoma, empowers the Secretary of the Interior to appoint representatives to investigate the conduct of guardians, authorizes such representatives to report any dereliction of duty by guardians to the probate court and prosecute any necessary remedy to protect the interests of such allottees, requires them to make full and complete reports to the Secretary of the Interior, and authorizes the probate courts to appoint such representatives as guardians. Rev. Laws Okl. 1910, § 885, requires the restoration of the consideration received, or payment of its equivalent, with interest, as a condition to the disaffirmance of a contract of a minor over the age of 18 years. *Held*, that the deed of an allottee, executed when he was a minor, and not by a guardian acting under the authority of the court having jurisdiction, was void, and compliance with the conditions prescribed by the state law was not required, since, construing sections 1 and 4 in connection with sections 2 and 6, it is clear that Congress did not intend wholly to relinquish its care for such Indians and their allotments and to subject them to conditions inconsistent with those expressed in its statute.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37–44; Dec. Dig. ⟸15.

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

2. INDIANS ⟸28—PROBATE JURISDICTION OF STATE COURTS.

The provision of Act May 27, 1908, § 6, that the persons and property of minor allottees of the Five Civilized Tribes shall, "except as otherwise specifically provided by law," be subject to the jurisdiction of the probate courts of Oklahoma, refers to the federal laws, and not to state laws.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 21; Dec. Dig. ⟸28.]

3. INDIANS ⟸28—PROBATE JURISDICTION OF STATE COURTS.

The jurisdiction over the persons and property of minor allottees of the Five Civilized Tribes, conferred upon the probate courts of Oklahoma by

Act May 27, 1908, § 6, is exclusive of that of other tribunals, and is to be exercised in the customary way, through guardians or curators.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 21; Dec. Dig. ⇐28.]

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

Action by J. A. Barbre and another against L. E. Hood. Decree in favor of defendant (214 Fed. 473), and plaintiffs appeal. Affirmed.

James C. Denton, of Muskogee, Okl. (Frank Lee, of Muskogee, Okl., on the brief), for appellants.

Fred A. Fulghum, of Tulsa, Okl., and Gilbert M. Gander, of Coffeyville, Kan. (Charles B. Rogers, of Tulsa, Okl., on the brief), for appellee.

Malcolm E. Rosser, William S. Cochran, George S. Ramsey, and Edgar A. De Meules, all of Muskogee, Okl., amici curiæ.

Before HOOK, Circuit Judge, and ELLIOTT and YOUMANS, District Judges.

HOOK, Circuit Judge. [1] This suit involves the title to 20 acres of land in Nowata county, Okl., a part of the surplus allotment to Willie Merrill as a minor freedman citizen of the Cherokee Nation of Indians. Both the appellants and the appellee claim under Merrill, the allottee; the former by a warranty deed April 23, 1910, when he was a minor between 20 and 21 years of age, and the latter by a similar deed September 3, 1910, when he was of full age. The question presented is whether the first deed, made by the allottee during minority, is void, or merely voidable. In other words, did Act May 27, 1908, 35 Stat. 312, relating to the Five Civilized Tribes, so free the minor and his allotment from federal disabilities and restrictions as to admit of the application of a state statute (section 885, Rev. Laws Okl. 1910) which prescribes the restoration of the consideration received, or payment of its equivalent, with interest, as a condition to the disaffirmance of a contract of a minor over the age of 18 years? An argument is also made upon the common law; but no reason is perceived for holding it tenable, if the state statute on the same subject does not apply.

Sections 1, 2, 4, and 6 of the act of May 27, 1908, bear upon the controversy. Section 1 discharges lands allotted to intermarried whites, freedmen, and Indians of less than half Indian blood, including minors, "from all restrictions." Section 2 defines the term "minor" or "minors," used in the act, as including all males under the age of 21 years and all females under the age of 18 years. Section 4 subjects the lands from which restrictions are removed to taxation and all other civil burdens as though the property of other persons than allottees of the Five Civilized Tribes. Section 6 provides:

"That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma."

It also empowers the Secretary of the Interior to appoint representatives to inquire into and investigate the conduct of the guardians

of the estates of such minors, and provides that if the representatives are of opinion that the estate of any minor is not being properly cared for, or is being dissipated, wasted, or permitted to deteriorate by the guardian's carelessness or incompetency, they shall report the matter to the proper probate court, take necessary steps to have it fully investigated, and "go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees." They are also to make full and complete reports to the Secretary of the Interior. The probate courts are authorized to appoint the Secretary's representatives as guardians, without fee or charge. Additional provisions are made in the same section for minor allottees having lands from which the restrictions were not removed, but the foregoing embraces minors of the class to which Willie Merrill belonged.

[2] Sections 1 and 4 are to be construed with 2 and 6, not independently, with the result that minors like Willie Merrill and their allotments, though released from all restrictions imposed by prior acts of Congress, were thenceforth to be governed by the limitations of that act. It is manifest that the definition of minority in section 2 and the provisions of section 6 respecting guardians, committing jurisdiction to the local probate courts, and for continued oversight by the Secretary of the Interior and his representatives, show that Congress did not intend wholly to relinquish its care for such Indians and their allotments. It is also clear that the intent of the act of Congress must prevail over local statutes, wherever inconsistent or conflicting. The phrase "except as otherwise provided by law," in section 6, means federal law, not state law. Truskett v. Closser, 236 U. S. 223, 35 Sup. Ct. 385, 59 L. Ed. 549, affirming 198 Fed. 835, 117 C. C. A. 477. That case involved the validity of a lease by a Cherokee allottee of less than half Indian blood, made when he was between 20 and 21 years of age. A state district court, acting under authority of a state statute, had conferred upon him the rights of majority, and the emancipation so obtained was urged to sustain the lease. We held the decree of the state court and the lease inconsistent with the act of Congress and void. The decision was affirmed by the Supreme Court, which cited with approval Jefferson v. Winkler, 26 Okl. 653, 110 Pac. 755, holding void a conveyance by a minor Indian girl, though by state law she was emancipated by marriage; also Tirey v. Darneal, 37 Okl. 606, 133 Pac. 614, a similar case, in which the court said that the provision of section 6 committing jurisdiction to the state probate courts was in the nature of a restriction upon alienation, removable only by a proceeding in one of those courts, and that alienations contrary thereto were absolutely void. See also Tirey v. Darneal, 37 Okl. 611, 132 Pac. 1087.

[3] The continued interest of the government in the welfare of the Indians is further evidenced by the provision in section 4 of the act of May 27, 1908, that:

"Allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law"

Section 6 definitely commits the persons and property of the minors to the jurisdiction of the state probate courts. The jurisdiction so intrusted was exclusive of that of other tribunals, as, for example, of the local district courts to confer rights of majority upon minors, and was to be exercised in the customary way, through guardians or curators. Were it otherwise, the careful provisions of the section for protective oversight by the Secretary of the Interior and his representatives could easily be made of no avail. The deed of the allottee, executed when he was a minor, and not by a guardian acting under the authority of the court having jurisdiction, is void. To sustain the validity of such conveyances by estoppel, or to hold them effective until compliance with conditions not prescribed by Congress, would impair and in some cases wholly defeat the policy of the government with respect to the Indians.

Bailey v. King, 157 Pac. 763, recently decided by the Supreme Court of Oklahoma, does not help the appellants. There the court held valid a lease by the guardian of a Choctaw minor of less than half Indian blood without an order of approval of the court of probate. The stated ground of decision was the rule that, except when otherwise required by statute, a general guardian regularly appointed and qualified may lease the lands of his ward during minority and the continuance of his guardianship without an order of the court, and that there was no Oklahoma statute to the contrary when the lease in question was made.

The decree is affirmed.

HALLENBECK-HUNGERFORD REALTY CORP. v. JOHN I. DEVLIN CO.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 65.

1. BROKERS ⟸53—RIGHT TO COMPENSATION—PROCURING LOAN.

Plaintiff was a building contractor, who sometimes financed building operations by procuring loans sufficient to carry them through. There was evidence tending to show that defendant authorized him, as a broker, to solicit a building loan; that he rendered services in that regard; that he agreed that, if he secured a building contract from defendant, he would not make any separate charge for his services in getting the loan; that he did not get such building contract, but that defendant availed itself of his services in negotiating for the loan by effecting it with the company with which he had been negotiating. *Held* that, if this loan was in continuation of the negotiations originally opened up by plaintiff as defendant's broker, and was not an entirely independent transaction, plaintiff could recover on a quantum meruit.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 74; Dec. Dig. ⟸53.]

2. APPEAL AND ERROR ⟸1001—REVIEW—QUESTIONS OF FACT.

The verdict of a jury, sustained by evidence, is conclusive on appeal, where there are no errors in the charge, or in the admission or exclusion of testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. ⟸1001.]

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3. COURTS ⇐356—REVIEW—DENIAL OF NEW TRIAL.
The denial of a motion for a new trial is not reviewable in the federal courts.

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

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, who was plaintiff below, which was entered upon the verdict of a jury. The complaint set out three causes of action; of these only one went to the jury. Recovery was sought upon a quantum meruit for services rendered by plaintiff in procuring a building loan of $900,000 upon the security of real estate owned by defendant.

Abel Crook, of New York City (Samuel Crook, of New York City, of counsel), for plaintiff in error.

Knox & Dooling, of New York City (Joseph M. Gazzam, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The principal business of the plaintiff is that of a building contractor, and it frequently undertakes to finance its operations by procuring loans sufficient to carry them through. John O. Devlin was its president, and as such entered into negotiations with officers of the defendant for a contract to erect a building on a piece of property which it owned in New York City. Devlin submitted a proposed contract; the document is a long one, but little of it need be set forth here. By its terms plaintiff offered to erect a building and to accept in payment $1,180,000. Besides doing this work, he also proposed to secure for defendant a building loan from the New York Life Insurance Company of $1,150,000 and to pay all costs and charges necessary to procuring the loan. He further undertook to procure for defendant an agreement by the same insurance company to lease certain floors in the new building, when completed, at a specified rental. While the parties were still negotiating, Devlin discovered that the New York Life would make no loan; thereupon he took the matter up with Metropolitan Life Insurance Company, and advised defendant's officers thereof. Apparently it made no difference to them which company loaned them the money, and they signed formal application to the latter company for a loan of $1,250,000. There was a sharp conflict of testimony as to whether the signature "John O. Devlin Company, Brokers," was on the application when defendant's treasurer signed it; the verdict has determined that question in favor of the plaintiff. It further turned out that the insurance company would not loan so large a sum on the property, but would loan $900,000. That amount was acceptable to defendant, since it took that sum and executed mortgage therefor.

The proposed contract for erecting the building was never consummated; after long negotiations defendant gave the work to another builder. This action was not brought on the building contract, and

therefore much of the testimony and argument bearing on the subject of conditions precedent, on the failure to perform them, and on the responsibility for such failure become unimportant. About the law of the case these seems to be no conflict; the sole question was one of fact. In charging the jury Judge Mack epitomized the contentions of the parties as follows:

"If this were a suit for the refusal of defendant to give plaintiff the building contract, plaintiff could not recover, because it did not get a loan of $1,150,000, and did not get the lease; and so it would not have performed the conditions which were absolutely essential to any obligation at all on the part of defendant to give it a building contract. But that is not this case. The plaintiff says: 'I am not suing because you did not give me the building contract, for profits I lost. I am not claiming that I did the things which entitled me to get the building contract under our talk.' But the plaintiff says, in substance: 'You authorized me, and gave me a written paper, and told me that I could go ahead, in your behalf, in your name, and get a loan for you from the Metropolitan Life; and I went to it on your behalf and got your loan. It is true I did not get $1,250,000, because the insurance company would not give that much; they would only give $900,000. But it was because I went there and had your written application that you eventually got the $900,000. You and I entered into this thing as a business deal * * * If you took the loan and got the benefit of my services, you have got to pay me the reasonable value of those services. If I had got the contract, there would have been no charge, because I would have agreed to pay myself out of what I might make on the work; but if no building contract materialized, and I did not act fraudulently in any way, and rendered you services by which you profited you should pay for them.' The defendant says, on the other hand: 'We did not employ you to get us a loan. You were not our broker. You did what you did only for yourself, in order that you could put yourself in the position to get the building contract. When it became evident that you could not get this lease, that there was not going to be any building contract, we did not take up that loan. * * * We withdrew our application, and there was no connection between the loan we eventually got and the loan which you tried to get for us.'"

The court further told the jury that the vital question was as follows:

"Was this loan of $900,000, that was actually made and accepted, a continuation of the original deal, or was the original deal entirely off, and the new loan made on an entirely different transaction?"

[1-3] Both sides were entirely satisfied with these instructions; no exception was reserved by either to any part of the charge. Plaintiff in error mainly relies on an exception to the court's denial of a motion to dismiss, or to direct verdict for defendant, on the whole case. There was evidence, however, from which it might be found that defendant did authorize plaintiff as broker to solicit a loan for it; that he rendered services in that regard; that plaintiff had agreed that if he secured a building contract from defendant he would not make any separate charge for his services in getting the loan; that when he could not get such building contract, because he could not effect a lease of the upper floors, defendant availed of his services in negotiating for the loan by effecting it with the company with which he had been negotiating. There was a sharp conflict of testimony on several branches of the case, but it was for the jury to determine which narrative was the true one. If the final deal with the company which

made the loan was in continuation of the negotiations originally opened up by plaintiff as defendant's broker, and was not an entirely independent transaction, plaintiff could recover on a quantum meruit. In our opinion there was evidence to support such a conclusion, and it would have been error to take the case from the jury; their verdict, if there be no errors in the charge, or in admission or exclusion of testimony, is of course conclusive. Assignments of error 24, 25, and 26 cannot be considered, as the denial of a motion for a new trial is not reviewable in the federal courts.

As has been stated, there were no errors assigned to the charge. There are a number of exceptions to admission or exclusion of testimony; none of them are of sufficient general importance to call for discussion. Some of the questions ruled on apparently called for opinions, conclusions, or inferences; evidence elicited in response to others would be immaterial if defendant's theory were correct, but would be material if plaintiff's theory were accepted. All of the admitted testimony was illuminative of the whole situation and of possible value in enabling the jury to answer the vital question.

The judgment is affirmed.

EDWARDS et al. v. GOODE.

(Circuit Court of Appeals, Fifth Circuit. January 4, 1916.)

No. 2727.

1. BILLS AND NOTES ⊜138—EXTENSION OF TIME OF PAYMENT—"RENEWED."
   Evidence that notes were "renewed" by one of the makers imported that, so far as he was concerned, they were made new again, so as to be considered as if made anew on the same terms, but of the date of the taking effect of the renewal (citing Words and Phrases "renew").

   [Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 338, 339; Dec. Dig. ⊜138.]

2. PRINCIPAL AND SURETY ⊜104—DISCHARGE OF SURETY—EXTENSION OF TIME OF PAYMENT.
   The renewal of notes before maturity by the principal maker only, so that they were to be considered as if made anew upon the same terms as of the date of the taking effect of the renewal, extended the time of payment and discharged sureties, as such renewal put it out of the power of the surety to pay the debt at maturity and resort to his remedy against the principal.

   [Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 186–190, 193–195, 197–200; Dec. Dig. ⊜104.]

3. PRINCIPAL AND SURETY ⊜127—DISCHARGE OF SURETY—EXTENSION OF TIME OF PAYMENT.
   A stipulation in notes that after maturity the time of payment might be extended from time to time by any one or more of the makers without the knowledge or consent of any of the others, and that the liability of all parties should remain as if no such extension had been made, did not cover an extension of the time of payment before maturity, as the extension stipulated for did not prevent makers who were sureties for other makers from paying the note at or before maturity and having recourse against their principal.

   [Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 352–355; Dec. Dig. ⊜127.]

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4 TRIAL ⊂=282—INSTRUCTIONS—SUFFICIENCY OF EXCEPTIONS.

In an action on notes containing a stipulation that after maturity the time of payment might be extended by any of the makers without the knowledge or consent of any of the others, defendants alleged that they signed merely as sureties, and that before the maturity of the notes, for a valuable consideration, and without their consent or knowledge, the payee granted to the principal an extension of the time of payment, and thereby discharged them from liability as sureties. There was evidence that such extension was granted for a valuable consideration, after the maturity of one of the notes, and before the maturity of the other. Defendants excepted at the close of the charge to the court's failure to submit to the jury the issue, made by the pleadings, that the notes were extended before maturity without the consent of the defendants. *Held*, that this exception so called attention to an issue raised by the pleadings and the evidence as to put upon the court the duty of submitting such issue to the jury by appropriate instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 695, 696; Dec. Dig. ⊂=282.]

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by V. Goode against J. A. Edwards and another. Judgment for plaintiff, and defendants bring error. Reversed, unless remittitur is entered.

Ben H. Stone, of Amarillo, Tex., for plaintiffs in error.

Thomas F. Turner, of Amarillo, Tex., for defendant in error.

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

WALKER, Circuit Judge. This was an action against two of the four signers of two promissory notes, one for $2,000, payable six months after its date, and the other for $1,500, payable three months after its date, each of which contained the following stipulation:

"We agree that after maturity the time of payment may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us, and after such extension the liability of all parties shall remain as if no such extension had been made."

The defendants duly set up as a defense that a signer of the notes, who was not sued, was the principal thereon, that the defendants signed each of the notes merely as sureties, and that before the maturity of the notes and for a valuable consideration, to wit, $50, and without the consent, knowledge, or acquiescence of defendants, or either of them, the plaintiff, the payee of the notes, granted to the principal an extension for six months on the $2,000 note and an extension for three months on the $1,500 note, and thereby discharged the defendants as such sureties from any liability thereon. There was evidence tending to prove that the defendants were sureties, and that the plaintiff, for a consideration of $50 paid to him by the principal, and without the knowledge or consent of the defendants, "renewed" the two notes after the maturity of the one for $2,000, but before the maturity of the one for $1,500. At the conclusion of the court's charge to the jury an exception was duly reserved by the defendants to the failure of the court

to submit to the jury the issue made by the pleadings that the notes were extended before maturity without the consent of the defendants. The court did not give the jury any instruction on that issue, nor submit it to them in any way.

[1-3] We are of opinion that the evidence as to the notes having been "renewed" by one of the makers imported that so far as he was concerned they were made new again, so that they were to be considered as if made anew in the same terms, but of the date of the taking effect of the renewal. 7 Words and Phrases, 6085. An effect of such renewal was to extend the time of payment for the same period the notes originally had to run. By the payee's grant to the principal before maturity of such an extension of the time of payment a surety is discharged, because the creditor, by so giving time to the principal, puts it out of the power of the surety to pay the debt at maturity and then resort to his remedy against the principal. Union Life Insurance Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118. The stipulation in the notes that the liability of none of the makers should be affected by an extension of the time of payment after maturity did not cover such an extension before maturity, as that stipulation did not stand in the way of a surety paying the note at or before maturity and then having recourse against the principal, thus avoiding the risk of his right to proceed against the principal becoming a less valuable one as a result of a subsequent change for the worse in the latter's financial condition.

[4] The exception above mentioned so called attention to an issue in the case which was raised by the pleadings and the evidence therein as to put upon the court the duty of submitting that issue to the jury by appropriate instructions. It was error for the court to fail to do so. This error did not affect the recovery on the $2,000 note, as there was no evidence to support the issue mentioned so far as that note was concerned. As we find no other reversible error in the record, the conclusion is that the judgment should be reversed, unless the plaintiff, the defendant in error here, within 30 days from the filing in the District Court of the mandate of this court, shall file in the District Court a remittitur of three-sevenths of the amount of the judgment, a certified copy of such remittitur to be filed with the clerk of this court—the judgment to be affirmed, if the stated condition shall be complied with; and it is so ordered.

SMITH et al. v. CARLISLE.

(Circuit Court of Appeals, Fifth Circuit. January 4, 1916.)

No. 2776.

EQUITY ⊂=359—DISMISSAL—CONDITION OF CAUSE.

After the reference of a suit to a master to hear and determine all issues of fact and law, and after the master on evidence submitted by both parties had made his report containing a number of findings, including a general one in favor of defendants, and after plaintiff had filed exceptions thereto, the court erred in permitting plaintiff to dismiss his bill without prejudice, as such a discontinuance of the case involved more

for the defendant than the incidental annoyance of a second litigation upon the same subject-matter, and was manifestly prejudicial to defendant, since it deprived him of the benefit of findings in his favor which were prima facie correct, and could not be set aside or modified unless error or mistake clearly appeared.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 749–755; Dec. Dig. ⊂⊃359.]

Appeal from the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Suit by W. A. Carlisle against C. Elmer Smith and others. From a decree dismissing the bill without prejudice (224 Fed. 231), defendants appeal. Reversed.

Robert C. Alston and Philip H. Alston, both of Atlanta, Ga., and Herbert H. Dean, of Gainesville, Ga., for appellants.

Clifford L. Anderson, of Atlanta, Ga., for appellee.

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

WALKER, Circuit Judge. After the issues of fact and of law in this case had, without objection from any of the parties, so far as appears, been referred to a master to hear and determine and to report thereon, after the master, on much evidence submitted to him by the opposing parties, had made his report, containing a number of findings, including a general one in favor of the defendants, and after the plaintiff had filed many exceptions to that report, following the payment of the costs in the case by the plaintiff, he was permitted, over objections made by the defendants, to dismiss his bill without prejudice. The defendants appeal from the decree to this effect.

"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 * * * proposition there are some recognized exceptions. Leave to dismiss a bill is not granted where, beyond the incidental annoyance of a second litigation, * * * such action would be manifestly prejudicial to the defendant." Pullman's Car Co. v. Transportation Co., 171 U. S. 138, 145, 18 Sup. Ct. 808, 811 (43 L. Ed. 108). It is well settled by the authorities that an equity cause, before a final hearing or decision therein by the court, may progress so far and in such a way that the complainant's right to end it by a dismissal of his bill without prejudice ceases to exist. Gilmore v. Bort (C. C.) 134 Fed. 658; City of Detroit v. Detroit City Railway Co. (C. C.) 55 Fed. 569; American Bell Tel. Co. v. Western Union Telegraph Co., 69 Fed. 666, 16 C. C. A. 367; 16 Cyc. 461. This happens when, as a result of proceedings in the cause, the defendant has acquired a substantial right or advantage of which he would be deprived by such a dismissal of the bill. We do not think that with any plausibility it can be contended that it is not manifestly prejudicial to a defendant to permit the complainant to dismiss his bill without prejudice after the filing of such a report of a master in favor of the defendant as was made in this case. Such a discontinuance of the case involves more for the defendant than the incidental annoyance of a second litigation upon

the same subject-matter. It deprives him of the benefit of findings in his favor.

The master's action was a decision in favor of the defendants on the merits of the controversy. It is true that his report is subject to be set aside, modified, or corrected by the court. But the master's findings in matters of fact are prima facie correct, the burden of sustaining exceptions thereto is on the objecting party, and such findings are not to be set aside or modified unless there clearly appears to have been error or mistake on the master's part. Medzker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654; Tilghman v. Proctor, 125 U. S. 136, 149, 8 Sup. Ct. 894, 31 L. Ed. 664; Henry v. Harris, 201 Fed. 872, 120 C. C. A. 210; Continuous Glass Press Co. v. Schmertz Wire Glass Co., 219 Fed. 199, 135 C. C. A. 85; In re Utica Pipe Foundry Co. (D. C.) 221 Fed. 787. A prima facie correct settlement in favor of the defendant in a case of the issues of fact therein, having the effect, as a master's report does, of putting upon the complainant a new burden as to such issues, confers upon the defendant a right and a substantial advantage which he did not have before. Hollingsworth, etc., Co. v. Foxborough District, 171 Mass. 450, 50 N. E. 1037. Of this right and advantage in the contest waged between the parties the defendant is deprived by permitting the complainant, after the case has reached such a stage, to dismiss his bill without prejudice. An effect of the dismissal allowed was to enable the complainant to escape the burden which the master's findings had cast upon him, and to start the controversy anew, with no adverse finding standing in his way. This was a material change for the worse in the situation of the defendants.

The conclusion is that, the defendants having acquired rights which would be lost by a discontinuance of the case at the stage which it had reached, the exercise of a sound discretion called for a denial of the complainant's application to dismiss his bill without prejudice. It follows that the decree appealed from should be reversed; and it is so ordered.

PARMETER v. BUTLER et al.

(Circuit Court of Appeals, Eighth Circuit. November 29, 1915.)

No. 146.

PUBLIC LANDS ⟸35—HOMESTEAD ENTRIES—DEATH OF ENTRYMAN BEFORE ISSUANCE OF PATENT.

Rev. St. § 2291 (Comp. St. 1913, § 4532) provides, relative to homestead entries, that no certificate shall be given or patent issued until the expiration of five years from the date of the entry, and that if at the expiration of such time, or within two years thereafter, the person making the entry, or his widow, heirs, or devisee, or, in case of a widow making such entry, her heirs or devisee, proves by two credible witnesses that he, she, or they have resided upon or cultivated the land for the five years immediately preceding, etc., such person or persons, if citizens of the United States, shall be entitled to a patent. Section 2448 (Comp. St. 1913, § 5098) provides that, where patents for public lands are issued to a person who dies before the date of the patent, the title shall inure to and become vested in

the heirs, devisees, or assignees of such deceased patentee, as if the patent had issued to the deceased person during life. *Held*, that where, after final proof and the issuance of the final certificate, the homesteader died, and the patent was issued to her husband, he took as heir of his wife, and not directly as a purchaser from the government.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72–77; Dec. Dig. ⊂=35.]

Petition to Revise Order of the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

In the matter of William J. Parmeter, bankrupt. On petition of Roy Butler, trustee, and others, an order of the referee was set aside by the District Court (In re Parmeter's Estate, 211 Fed. 757), and the bankrupt files a petition to revise. Petition dismissed.

Barton N. Grant, of St. Louis, Mo. (T. F. Murtha, of Dickinson, N. D., on the brief), for petitioner.

F. C. Heffron, of Dickinson, N. D., for respondents.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SMITH, Circuit Judge. On June 5, 1907, Vina Rasmussen filed upon the S. ½ of the N. ½ of section 20, township 140, range 96, in North Dakota, as a homestead. She thereafter married William J. Parmeter, and the couple went to living upon the land. Subsequently she made final commutation proof under the homestead law, and the final certificate was issued to her by the officers of the Land Department on December 14, 1912. In March, 1913, she died leaving William J. Parmeter as her sole heir. June 5, 1913, the United States issued a patent for the land to Vina Parmeter. June 26, 1913, William J. Parmeter filed a voluntary petition in bankruptcy, and on the same day was adjudged a bankrupt. His debts had all been contracted prior to the issuance of the patent of the land in question. January 24, 1914, upon request of the bankrupt, made in his bankruptcy petition, the referee directed that the land described be set off to the bankrupt as exempt. Upon petition of Roy Butler, who was the trustee of the bankrupt estate, to review and revise this order, it was set aside by the District Court of North Dakota, and the bankrupt filed in this court a petition to revise that order of the District Court.

The following sections of the United States Revised Statutes appear to have some application:

"Sec. 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law." Comp. St. 1913, § 4532.

"Sec. 2296. No lands required under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." Comp. St. 1913, § 4551.

"Sec. 2448. Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee *as if the patent had issued to the deceased person during life.*" Comp. St. 1913, § 5098.

It may be said in passing that section 2291 has especial reference to cases where the entryman dies before final proof, while section 2448 refers primarily to cases where the entryman dies after final proof. In his argument petitioner says:

"Our contention never was, and is not now, that the exemption runs with the land to the patentee's heirs and assigns. Though the statute, literally interpreted, is sufficiently broad to cover the heirs and assigns, we do not contend for such a construction. Our contention is that the bankrupt is the patentee; that it was to him that patent issued; that he took the land as a purchaser direct from the government, and not by descent through Vina Rasmussen."

And again:

"The opinion of Judge Amidon and the law which he cites in support of it is unquestioned, if the bankrupt took by descent. If, however, the bankrupt took as a purchaser from the government, and not through Vina Rasmussen, then the opinion is of no value to us."

This seems to narrow the contention, and fortunately for us, since the submission of this case, the Supreme Court has passed upon the very point thus raised. In Doran v. Kennedy, 237 U. S. 362, 35 Sup. Ct. 615, 59 L. Ed. 996, it was expressly held that when a homesteader has made final proof before his death, and becomes entitled to a patent, his heirs, under section 2448, Revised Statutes, take as such heirs, and not directly under section 2291, Revised Statutes, or as its beneficiaries. Of course there would still be a question which could have been raised under section 2296, but it does not seem to be before us.

The petition to revise must be dismissed, at the cost of the petitioner.

HILLER v. CORNILLE & DE BLONDE et al.

(Circuit Court of Appeals, Fifth Circuit. December 23, 1915.)

No. 2617.

BANKRUPTCY ⇐140—ASSETS PASSING TO TRUSTEE—SALES.

Before bankruptcy D. & Co. had contracted to deliver cotton to defendants, had selected and set aside certain cotton as being of the required grade, and had weighed, marked, and shipped it to a steamship for the account of defendants. *Held*, that this constituted an appropriation and delivery in law, and the cotton had therefore entirely passed beyond the control of the bankrupt before the date of bankruptcy, whether a bill of lading for the cotton obtained by defendants was obtained before or after the bankruptcy.

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

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by Jonas Hiller, trustee in bankruptcy, of Dreuil & Co., and others, against Cornille & De Blonde and others. Judgment on a directed verdict for defendants, and plaintiff brings error. Affirmed.

The trial court's statement of its reasons for directing a verdict was as follows:

I may as well state my reasons for directing a verdict, gentlemen. The defendant had certain contracts for the delivery of cotton with the bankrupts, delivery to be in December. These contracts were according to the rules of the New Orleans Cotton Exchange, known as f. o. b. guaranteed through contracts. About the 27th or 28th of December the bankrupts had selected and set aside certain cotton, as set out in the petition, as being of the grade required to fill these contracts. It was then weighed and marked and shipped by Dreuil & Co. to the steamship for account of Cornille & De Blonde. That constituted an appropriation and delivery in law, and I find nothing in the rules of the cotton exchange which are interpolated into the contracts that would alter or amend the ordinary rules of law applying to this kind of sales. After that Cornille & De Blonde obtained a bill of lading for the cotton and it was subsequently removed and a bond left in its place. This is purely a suit to determine title to the cotton. Of course, the cotton having left the jurisdiction of the court, there would be a money recovery in lieu of the cotton. Under these circumstances, then, it is immaterial whether Cornille & De Blonde obtained the bill of lading after or before the bankruptcy of Dreuil & Co. The trustee was bound to carry out all contracts made in good faith before the date of bankruptcy. As far as that is concerned, the cotton had entirely passed beyond the control of Dreuil & Co. before the date of bankruptcy. Therefore there will be a verdict in favor of the defendants.

J. Blanc Monroe and H. Generes Dufour, both of New Orleans, La., for plaintiff in error.

Henry L. Lazarus, Eldon S. Lazarus, and David Sessler, all of New Orleans, La., for defendants in error.

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

PER CURIAM. Pretermitting passing upon the objections of the defendants in error relating to defects in the bill of exceptions, we are satisfied upon the record as presented, and for the reasons given by Judge Foster, the trial judge, the verdict was properly directed.

Judgment affirmed.

DUNHAM TOWING & WRECKING CO. v. AUSTRALIA TRANSIT CO.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1915.)

No. 2659.

TOWAGE ⊂=11—INJURY TO TOW—FAULT OF TUGS.

Two tugs engaged in towing a steamer from a dry dock out of Chicago Harbor, whose masters had charge of her navigation, *held* in fault, and liable for her injury by collision with the protection piling of a bridge.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. ⊂=11.]

Appeal from the District Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Suit in admiralty by the Australia Transit Company, owner of the steamer Polynesia, against the steam tugs Charnley and Mosher; the Dunham Towing & Wrecking Company, claimant. Decree for libelant, and claimant appeals. Affirmed.

T. C. Robinson, of Chicago, Ill., for appellant.

F. L. Leckie, of Cleveland, Ohio, for appellee.

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

PER CURIAM. The steamer Polynesia, about 380 feet long, owned by appellee, engaged the tugs Charnley and Mosher, owned by appellant, to tow the steamer out of the harbor of Chicago from a dry dock therein. In the course of the towing, which began in the evening after dark, the steamer, which was being towed stern foremost, with a tug at the stern and at the bow, collided with the protection piling of the center pier of the Chicago avenue bridge, about 620 feet (less than two steamers' length) below the dry dock, suffering injury; hence the libel. The District Court found the tugs solely at fault and decreed accordingly.

The questions at issue include, as prominent features, alleged negligence of the tugs as respects both excessive speed and the maneuvers necessary to avoid the pier, as well as a "knuckle" caused by the projection into the river of a coal dock a little above the bridge pier; also, contributory negligence charged against the steamer in failing, as alleged, to respond to the tug's signal and in causing the steamer's bow tow line to foul with the anchor. The controlling questions are purely of fact, whose discussion would profit no one. We content ourselves with saying that, after careful consideration of the record and the able briefs and arguments of counsel, we agree with the conclusion of the District Judge that the tugs, whose masters were in control of the maneuvers and familiar with the attendant difficulties, were at fault in permitting the collision, and that negligence on the part of the steamer contributing thereto is not, in our opinion, made out.

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

UNITED STATES v. INDEPENDENT PACKET CO.

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

No. 4205.

SHIPPING ⊂=16—REGULATION OF STEAM VESSELS—SUIT FOR VIOLATION OF REGULATIONS.

A libel by the United States against the owner of a steam vessel to recover the penalty imposed for violation of Rev. St. § 4463, by failing to have on board on a voyage a licensed mate, considered and *held* sufficient.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 30–44; Dec. Dig. ⊂=16.]

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

On motion for rehearing. Overruled.

For former opinion, see 226 Fed. 721, — C. C. A. —.

Forrest P. Tralles, of St. Louis, Mo., for appellee.

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

LEWIS, District Judge. The motion is based on the claim that the libel of information sought to recover only the penalty fixed by Rev. St. § 4463. It points out the language of the libel as follows:

"That said vessel then and there departed from said port without a licensed mate, as required by her certificate of inspection and in violation of Section 4463 of the Revised Statutes of the United States. Wherefore by force of said statute, said Independent Packet Company, a corporation, the owner of said steamboat, became liable to the United States in the penalty of five hundred dollars."

The charge is true to both law and fact, and was not misleading. It was shown as charged that the requirements of that section were violated. It is nowhere claimed or intimated that the penalty fixed by that section was sought to be imposed. Indeed, any such asserted claim is contradicted by the libel itself, because the penalty of $500.00 there fixed is against the master and not the owner, and the libel seeks to recover a penalty from the owner. Furthermore, it was not necessary that the libel point out the section which imposed the penalty in specific terms. The failure of the owner to comply with the requirements of Section 4463 having been charged and on that failure the claim asserted that the owner was liable to the United States in a penalty of $500.00, it then became a question of law whether the owner was liable for the penalty by virtue of any statute or law of the United States; and that question was as effectively presented without pointing out the particular section of the statute as if that had been done.

We think the point without merit, and the motion is overruled.

PITTSBURGH WATER HEATER CO. v. BELER WATER HEATER CO.*

(Circuit Court of Appeals, Third Circuit. August 9, 1915.)

No. 1975.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—INSTANTANEOUS WATER HEATER.

The Shook patent, No. 993,723, for an instantaneous water heater, in which a single gas valve, under the dual control of a water actuated valve and a thermostat, is substituted for the two valves of the prior art, *held* to disclose invention, and valid as against the claim of prior invention by another; also *held* infringed by the device of the Ellis patent, No. 1,053,370.

2. PATENTS ⊂=20—INFRINGEMENT—REVERSAL IN ORDER OF OPERATION.

A mere departure or reversal in order or form, while identity of principle, process, or result is retained, does not avoid infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 20–22; Dec. Dig. ⊂=20.]

3. PATENTS ⊂=16—PATENTABLE "INVENTION"—REDUCTION TO PRACTICE—"ANTICIPATION."

"Invention," from the statutory standpoint, requires not only an abstract conception, but a concrete adapting to practical use, and to constitute an "anticipation" or prior invention there must have been a reduction of the inventive idea to practice, either by its embodiment in a machine or the filing of an application for a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14, 15; Dec. Dig. ⊂=16.

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

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Pittsburgh Water Heater Company against the Beler Water Heater Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 222 Fed. 950.

S. T. Cameron, of Washington, D. C., and James C. Bradley, of Pittsburgh, Pa. (Synnestvedt & Bradley, of Philadelphia, Pa., of counsel), for appellant.

John H. Roney, of Pittsburgh, Pa., for appellee.

Before BUFFINGTON and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. This case concerns instantaneous water heaters. In them the water flows through a pyramided coil of thin copper pipe. When one wants hot water he opens the hot water spigot, and the flow of water automatically opens a gas valve of the heater and floods the coil with gas. This is ignited from a constantly kept burning pilot light. It was also customary to have in such heater a second gas valve, which was independent and was controlled by a thermostat.

The prior art is aptly described in Ruud v. Pittsburg Co. (D. C.) 200 Fed. 426, a case in the Second Circuit, where the court said:

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

*Rehearing denied October 18, 1915.

"The invention of the patent in suit consists of an automatic instantaneous water heater, in which the water flows through thin copper coils over the burners, as in the old heaters, and the flow of gas to the burners is controlled and regulated both by the flow of water through the * * * conduit and the temperature of the water flowing from the heater acting through the medium of a thermostat; the parts being so arranged that all of the gas which flows to the burners to effect the heating of the water is subjected to the control of the water-actuated element, and to the regulation of the thermostat or temperature-actuated element. By this means all of the objectionable features of both of the old heaters were eliminated, and all of the desirable features of those heaters retained, and in addition to this an entirely new result was secured in this art, viz. the proportioning of the amount of gas consumed to the amount of water heated under all the varying conditions of gas and water main pressures and temperatures (Bartlett, C. R. p. 268). This new result was of the highest importance in the art. If no hot water was withdrawn during a given period, no gas was consumed, except the negligible amount burned by the pilot light; and, if hot water was withdrawn, the amount of gas consumed was always in proportion to the amount of hot water so withdrawn."

[1] This construction, Shook, the present patentee, sought to improve by using but one gas valve, and subjecting it to both the water-actuated and the heat-actuated control. In his patent, No. 993,723, applied for January 4, 1909, and granted May 30, 1911, to him for an instantaneous water heater, he said:

"I have found that one of these gas valves may be dispensed with, and that the controlling means therefor may be so arranged that all the advantages incident to the two-valve construction are retained, and other advantages not present in the two-valve construction secured, in addition to the general simplification and cheapening of the apparatus due to the use of one valve instead of two."

To appreciate the significance and value of Shook's conception, if it could be successfully carried out, we should note the necessity of the independence of the two gas valves. In the two-valve construction, one of the gas valves was subjected to the control of the flow of water through the heater; the other was subjected to the control of the thermostat, which was under the influence of the temperature of the water flowing from the heater, and such two controls were independent of each other. This independence is essential from the standpoint of safety; for by making the two controls independent safety is secured through thermostat control, even if the water piston stick. Shook's device disclosed an independent and dual gas control of a single valve, which he accomplished by subjecting such single valve to the dual control of (1) a water valve actuated by variations of water pressure, and (2) a thermostat governed by the heat of the water in the heater; the parts being so arranged that the thermostat or heat element could close the gas valve, even when the water element was in a position to open such valve. This he did by subjecting the gas valve to the action of two springs, one of which was under thermostat, the other under water, control.

In prosecuting his patent Shook's concept of a compound dual valve control was thrown into interference with two other applicants—Ruud, the subsequent grantee of patent No. 1,028,284, applied for July 8, 1909, and granted June 4, 1912, and Humphreys, the subse-

quent grantee of patent No. 928,310, applied for December 26, 1908, and granted July 20, 1909. In these proceedings Shook prevailed and was awarded priority. As these other inventors were granted specific claims, and as Shook was granted the broader and more generic claims involved in the interference, it would seem that, in the view of the Patent Office, the latter's disclosure was the generic one. It will also appear that the device has proved of large commercial value. In that regard the proof is:

"Q. How are the demands incident to varying pressures in gas and water mains met in the water heater art at the present time? A. By automatic instantaneous water heaters containing the dual control of fuel by independent means; that is, the flow of gas to the burners is independently controlled by a water-actuated element and a thermostatical-actuated element. Q. How important is this, or how has its introduction into the art affected the sale of heaters? A. It is of the greatest importance. It is absolutely essential that these heaters, to be commercially successful, must embody the safety and economy incident to this dual control. And the introduction of this dual control resulted in an enormously increased sale of these heaters."

Taking, therefore, claim 20, the subject-matter of which was involved in the interference, we find it is for:

"In a water heater, the combination of a conduit for water under pressure a burner for heating the water in said conduit, a normally seated valve controlling the flow of fuel to said burner, a compound power mechanism adapted to hold said valve closed, a device operated by the flow of water through said conduit for controlling one part of said power mechanism, and a device operated by variations of temperature in said water for controlling the other part of said mechanism."

We next inquire whether it is infringed by defendant's device. The latter is manufactured under patent No. 1,053,370, applied for April 25, 1912, and granted February 18, 1913, to Ellis. The specification of Ellis concedes his invention has for one of its objects:

"The provision of a single gas-controlling valve and mechanism therefor, to take the place of a plurality of gas valves as usually employed."

This, as we have seen, in language heretofore quoted, was also the object of Shook in his earlier disclosure. And that the machines made under these respective patents secure the same practical results is the proof:

"Q. Are you familiar with the dual-valve control known as the Pittsburgh single-valve heater, on the market to-day? A. I am. Q. Are you familiar with the heater known as the Beler hot water heater? A. I am. Q. Please state whether or not either or both of these heaters possess the control that you have just (above) described as essential to commercial success. A. Both of these heaters have this control. Q. Are there any advantages secured, speaking from the standpoint of a practical commercial man, that are secured by the Pittsburgh construction that are not secured by the Beler construction? A. There are none."

Seeing, then, the purpose of the two patentees is directed toward the same general object, the question of infringement turns on the inquiry whether the means the defendant employs to effect such object are covered by Shook's claims. That the defendant's device embodies the same three functional elements found in the complainant's device is frankly conceded by defendant's expert, whose testimony is:

"Q. Now I understand you to say, in describing defendant's construction, that you found there a gas valve which was under the control of the water valve or piston,, and also under thermostatic control? A. Yes, sir."

The same witness, testifying of the devices of plaintiff and defendant, and also of a third (the Walker referred to below), says:

"Taking the three structures together, they are all alike, in that they employ a single gas valve and a water valve and a thermostat; the gas valve being under the control both of the water valve and of the thermostat. But they differ specifically in details."

[2] These detail differences appear to be that, while in Shook's device the gas valve is opened by the water valve and closed by the thermostat, the defendant's opens the gas valve by the thermostat, and closes by the water, valve. This to our mind is a mere alternative, mechanical choice of details, which in no way affects or modifies the principle of dual control. In both devices, the compound action and joint co-operation of water motor and thermostat to effect dual control of the single valve is utilized. It is in that dual, co-operating control of water motor and thermostat, and not in the mere order in which they are used, that the elements of infringement lie. The essence of the device does not center in whether the hand of the thermostat or that of the water motor be first used to open the gas valve, or be first used to close it, but in the joining of those two hands—water motor and thermostat—to unitedly control the gate when control is vital. That a mere departure or reversal in order and form, while identity of principle, process, or result are retained, will not serve to avoid infringement, is a fundamental principle of patent law that needs no supporting citation. And of even lesser importance is the weighting of a valve whereby the defendant's device obviates the use of one of Shook's springs. Gravity acting through a heavier body and a spring acting through a lighter one are too obvious mechanical equivalents to make the substitution of one an inventive advance over the use of the other. It seems clear to us, therefore, that the defendant must be adjudged an infringer unless, as it contends, one Walker, and not Shook, devised and first reduced to practice the Shook device.

[3] Invention, from the statutory standpoint, requires, not merely an abstract conception, but a concrete adapting to practical use. Reference to opinions of the master minds in judicial patent work makes this clear. In Washburn v. Gould, 3 Story, 122, 123, Fed. Cas. No. 17,214, Mr. Justice Story said:

"The law is that whoever first perfects a machine is entitled to the patent, and is the real inventor, although others may * * * have had the idea, and made some experiments looking towards putting it in practice. * * * He is the inventor, and is entitled to the patent, who first brought the machine to perfection, and made it capable of useful operation."

In Winans v. New York & H. R. Co., Fed. Cas. No. 17,864, Mr. Justice Nelson said:

"It is not the person who has only produced the idea that is entitled to protection as an inventor, but the person who has embodied the idea into a practical machine and reduced it to practical use. He who has first done that is the inventor who is entitled to protection."

And Mr. Justice Bradley, in Clark v. Willimantic, 140 U. S. 489, 11 Sup. Ct. 849, 35 L. Ed. 521, summarized the whole subject in apt words:

"A conception of the mind is not an invention until represented in some physical form, and unsuccessful experiments or projects, abandoned by the inventor, are equally destitute of that character."

Where an invention is described in a specification, and a patent for such invention is applied for, the filing of such application is equivalent to a reduction to practice. In reason this should be so, for since the statute requires, not only that such applicant dislose his invention, but also "the best mode in which he has contemplated applying that principle" (R. S. § 4888 [Comp. St. 1913, § 9432]), it follows that, if the applicant receives a patent, its issue implies a reduction to practice when the application was filed. Of necessity, therefore, the issue of Shook's patent raised a presumption of his reduction to practice of his device on January 4, 1909. But Shook carries both his conception and his reduction to practice to an earlier date. In March, 1907, Shook showed a sketch of his device to Frampton, the president of the Pittsburgh Water Heater Company, and explained its workings. Frampton says he thoroughly understood the invention from Shook's description and it looked promising. He says that, in view of the fact that a large number of other details of heater construction had also to be developed in a new heater the company proposed putting on the market, in order to permit a trial of Shook's device—

"* * * he told Mr. Shook that the testing and developing of his apparatus would have to be deferred until the rest of the heater apparatus was fully constructed and worked out in detail, and that he would bear the construction in mind, and have it built and carried out in a practical way as soon as possible; that they did not get around to this work in the shops for several months, but in the meantime he had a number of conversations with Mr. Shook, and discussed with him the desirability of making certain changes, among which was the placing of the spring inside of the water valve, instead of on the outside of such valve, which idea was that of the deponent instead of Mr. Shook," etc.

Frampton testified also that the work on the company's new heater was carried on steadily, and by November it was so far advanced that Shook's device could be applied to it; that it was so tested on the 1st and 4th of November, 1907, applied to the heater, and proved successful. The heater itself, with Shook's device, was then moved to the company's office, and was subsequently produced in evidence. Frampton says the operation of the device of the photograph as he saw it in November, 1907, was as follows:

"The apparatus was not connected up to a water heater in the usual way, but the pipe *5* was simply connected with the hot water outlet faucet of another heater. The head of the water valve I was removed, and the piston therein blocked in forward position. Hot water of gradually increasing temperature was then passed through the pipe *5* and casing of the thermostat, and, when the temperature of such water rose above a certain point, the spring *8* acting with the spring behind the gas valve, moved the arm *6* to the left, compressing the spring *7* and closing the gas valve. This experiment was repeated many times, and showed conclusively that, in case the water valve piston stuck open, the gas valve would be closed by the spring *8* and

the spring behind the gas disc, without the necessity of moving the piston of the water valve."

Reinecke, also employed then and now by the Pittsburgh Water Heater Company, says Shook showed him a sketch of his device and so explained its workings that as a practical water man—

"* * * he understood the action perfectly, and that the primary purpose of the device as Mr. Shook explained it to him was to do away with the necessity of two gas valves, and at the same time retain the dual control of the single gas valve from the water valve and the thermostat, and that he proposed to accomplish this by the use of the springs *2* and *3*, the strength of the springs *3* and *8* being such that they would together be stronger than the spring *2*, so that, when the temperature of the water rose above a predetermined point, the thermostat arm *4* would move to the left, compressing the spring *2* and closing the gas valve, even though the water valve *5* should be stuck in a forward position."

This witness fixes April as the time Shook showed him the device. Another witness, Charles O. Scholz, was superintendent of the Pittsburgh Heater Company. He says Shook came to work for that company in April, 1907. He corroborates Frampton in the fact that Shook's device could not be applied to the heater the company was then making; that the development of the company's new heater was pushed with the greatest diligence through the summer and fall of 1907; and that he was present when the test of the Shook device was made in November. He identified the machine, says his brother did the construction work, and that it worked successfully. The brother, J. A. Scholz, testified that he did the work as above, and that the tests were made on November 1st and 4th. His dates are corroborated by the time slips, which show he spent six hours on "experimental work on Shook valve" on November 1st, and nearly seven on November 4th. While Shook himself was not present at these tests, the evidence shows that they were made pursuant to prearrangement with him. In that regard the testimony of Frampton is:

"Q. What was said and done about the development of this invention when Mr. Shook disclosed it to you? A. I made a definite arrangement with Mr. Shook at that time that the construction was to be built, tested, and developed, as acquired by our factory. * * * Q. Please state your best recollection as to what was said and done at the time Mr. Shook disclosed this invention to you, and looking toward the development of the invention. A. I can't recall the exact words used, but I know certainly that an arrangement was entered into for the development of the apparatus, and the fact that we were to have the use and benefit of the latter."

The testimony of Shook is that, contemplating employment with the Pittsburgh Water Heater Company, he had a talk with Frampton, its president, the latter part of March, 1907; that at this time that company had just taken over the plant of the Monarch Company, and was engaged in the development of a new heater to supplant the Monarch; that Frampton explained to him their proposed new construction and—

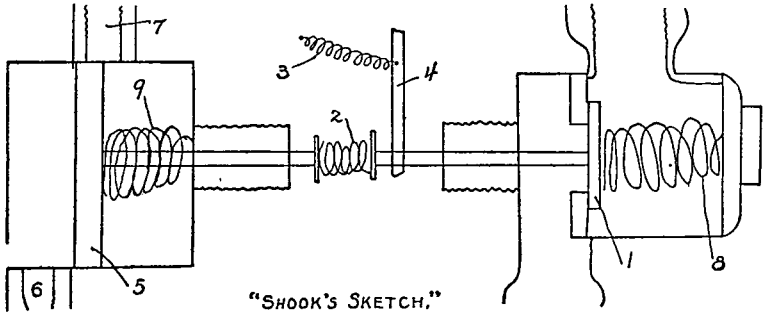
"* * * called his attention particularly to the new gas valve which it was proposed to use, such gas valve involving the use of two seats and telescoping stems for the two discs employed; that at this time it occurred to him that it might be possible to use a gas valve having only a single disc,

inasmuch as such a gas valve would be cheaper to construct and less difficult to machine; that after this interview with Mr. Frampton, in March, 1907, he devised a scheme for securing the double control of the single gas valve by the use of a spring between the stems of the gas and water valves and by the use of an additional stronger spring for operating the thermostat; and that he made sketches of this arrangement."

He further testified he first disclosed the invention to Frampton at the office of the company, about the 1st of April, and—

"* * * suggested that it should be substituted for the double valve construction if it worked out satisfactorily from a practical standpoint; that Mr. Frampton seemed to understand the construction thoroughly and promised to try out an apparatus as soon as the new Pittsburgh construction was sufficiently developed in other respects to permit it, and later did turn the matter over to the experimental department for tests."

Shook says he also explained the invention to Reinecke about the middle of April. He says he made sketches from which he explained the same to Frampton and Reinecke. These sketches cannot be found,



"SHOOK'S SKETCH."

the accompanying one being made by Shook from memory. The statement that they were made is corroborated by the fact that Frampton was able afterwards to install and test the invention without Shook's further help. As to such test being made for him and in pursuance of his request, Shook's testimony is:

"* * * That although he did not work in the testing department, and did not work out the details of the construction as shown in his application drawings, he did disclose very fully and clearly to Mr. Frampton and Reinecke the principle of construction of the apparatus illustrated in his sketch, marked 'Shook's Sketch.' That after his first disclosure he had conversations from time to time with Mr. Frampton as to the development of his construction. That it was his wish and intention, when he disclosed the construction to Mr. Frampton, that the company should develop and use it, instead of their double valve construction. That the work done in developing the apparatus was with his consent, and that since the apparatus has been developed a large number of heaters involving his invention, and made along the lines of the apparatus as shown in Fig. 3 of his application, have been assembled under his supervision in the assembling department and are being placed upon the market."

The fact that Shook subsequently applied for a patent in behalf of the Pittsburgh Water Heater Company is in accord with the testimony that that company bore a relation of interest to the invention from the time of its conception.

Taking the testimony as a whole, we are of opinion it carries back Shook's full conception to March, 1907, and shows his reduction to practice in November following was reasonably prompt, and that under the circumstances the test inured to his benefit and carried the invention back to the latter part of March, 1907.

This brings us to the question: Do the proofs show an earlier conception by Walker, and an earlier reduction to practice by him? Walker places his conception as in December, 1906, and produces a sketch which bears that date. We are not impressed by this paper. The part of the paper in which the date is marked is erased, and does not embody the invention. There is no satisfactory proof to show when the other sketch, which is alleged to embody the invention, was placed on the paper. But, assuming for present purposes such conception was made at the time, it is, as we have seen, necessary for Walker to show also that his device was reduced to practice at an earlier date than Shook's reduction. This it is contended is shown by an alleged reduction by one Kiel, and in what was equivalent to reduction in the application by Walker for a patent.

Turning first to the Kiel reduction to practice, the testimony of Walker is:

"Q. When did you conceive of the invention described and shown in that patent, and particularly that shown in Fig. 2 thereof? A. In the year 1906; some time between August and December of that year; I believe it was about October of that year. Q. What did you do after that date towards perfecting and expediting that invention? A. I had the valves from an old Monarch heater removed, and made some sketches, with the idea of remodeling this heater to agree with my invention. I made several sketches, one of them along in December, 1906; and I made still further sketches in March, 1907, and took the matter up with the patent attorney in March, 1907; and this application was filed in July, 1907. Q. After the time you state you conceived of this invention in 1906, did you ever disclose the invention to anybody, and, if so, to whom, and when, and where? A. Yes; I disclosed the invention to Henry J. Kiel, of Wheeling, W. Va., and also to his brother, Irvin R. Kiel, of Wheeling. That was in 1906, and in the spring of 1907 I also disclosed it to a number of parties. * * * Q. What, if anything, did you do towards making or manufacturing the structure illustrated in your patent? A. As I have said in answer to a previous question, the Kiel brothers had an old Monarch heater of the old style, with a water valve only, no thermal valves, which we undertook to alter to agree with my invention; took the old valves off of this heater and made new ones for it. As I was in the government service, and had lots of other things to do, I am not certain just how far this work progressed. I never actually saw this heater in operation, but I saw the valves for it, and made sketches for the proposed valves for this heater. Q. When did you do this work, or when did you have it done? A. This was in the fall of 1906. Q. And it was prior to the filing of your application for your patent? A. Yes, sir. Q. Was there anything other than this done towards marketing or placing this invention of yours on the market? A. We formed the Kiel Manufacturing & Supply Company for the purpose of placing this on the market; but as a matter of fact, before we actually placed it on the market, this company had concluded to go into another line of business, and we didn't place this heater on the market. * * * Q. Did you ever see this in operation? A. Which? Q. The one first in the Kiel shop? A. No; I didn't see it in actual operation. Q. Will you give us, as nearly as you can, the exact date of that construction? A. It was in the fall of 1906, probably in the month of September or October. Q. Did you ever build another one involving the construction of Fig. 2 before this one was built? A. No. Q. I understand that the one you built never went into

actual use, outside of experiments, to ascertain whether it would work? A. Not in that exact form. It went into use. Q. With that valve mechanism on it? A. No. Q. You took that valve mechanism off? A. Yes. Q. And what did you put in its place? A. We put the original valves back on it, because we didn't care to disclose the patent at that time. Q. Then, up to the time of the making of this heater here in court (Exhibit ——, made as an exhibit in the case), that was the only heater that you ever built that even purported to embody the construction of Fig. 2? A. As far as I know. Q. Were you present when this heater in the Kiel shop, the construction of Fig. 2, was tried out? A. I was not present. I was on government work down the river."

The testimony of Henry J. Kiel shows that he, his brother, and Walker formed a company to market Walker's heater, that they applied for a patent, that the tests were made after the patent was applied for (July 22, 1907), and the projected company was eventually abandoned. His testimony as to the tests is:

"Q. What, if anything, was done after this disclosure to you by Mr. Walker towards perfecting and developing this invention? A. Then we bought a heater, or traded in one, or got one some way—we were in the business—and took off part of the valves, and had some drawings made, and some patterns made, and some valves made, and they were installed on this old Monarch heater, I think it was. Of course, it was very crude, and didn't give absolute service; there's no question about that. But then the features of his patent were there; that's the point. And while I didn't do all this work myself, I had some mechanics there, and, of course, we had made application for a patent and put a lot of work on it. * * * Q. When did these experiments or tests that you say took place take place? A. They took place after we made application for the patent. Q. After you made application for the patent? A. Oh, yes. Q. And what result was secured by those tests? A. Well, I can't just tell you. We had the heater connected up. Our place at that time was on the corner of Fifteenth and McCulloch streets, and we had the heater in the basement of that place, connected up with water and gas. And Mr. Gallagher was one of my plumbers that did a good deal of work on that heater, and there were some things about it that were not right. You know that was only made in a crude way, made by a file, you might say, and, of course, by a very poor mechanic, to my notion, and it worked, but it didn't work properly, and control the water properly. Of course, it wasn't worked out to a fine test; we were only testing it to find out whether it would work or not. Q. And did it satisfy you that it would work? A. Yes, sir. And then we got mixed up with a strike and a lot of other difficulties, and we just dropped it and paid no more attention to it. Of course, we figured that it was all right; but we never went any further with it. We were satisfied that the heater would work. That was our point. Q. The heater, crude though it was, did determine that it would furnish cold and hot water? A. Cold and hot water."

The testimony of William Kiel is:

"Q. Did you ever make a valve in conformity with Mr. Walker's idea? A. I worked on it, but didn't perfect it. Q. When did you work on it? A. At the same time, or shortly afterwards; about a month. I can fix that definitely by the fact that I was back in Omaha on October 2, 1906; and this was about a month prior to that date, not over that. Q. You worked on a valve in September of 1906? A. Yes, sir. Q. And what did you do on it? A. Well, I made a piston and a cylinder. I couldn't state definitely what all. I am sure there were some other things. I bought a spark coil also. Q. Was this valve applied to a water heater, within your knowledge? A. Yes, sir. Q. What kind of a water heater was it put on? A. I don't know. I didn't take notice to the name. Q. Did you put it on, or assist in putting it on? A. I did. Q. What was that valve? Was it a gas valve, or water valve, or what? A. My recollections are that we had a hose connected to it; it was water, I think

it was; I am sure. Q. Did you operate a heater with that valve on it? A. There was no fire in it, I know. Q. Can you give us any idea of the construction of the valve? A. Well, a machinist works by plans, and it doesn't matter to him just what the nature of the valve is; so long as he has definite measurements to make a piece by, he can make it; he might not know what a valve was really intended for. I don't mean to convey the opinion that I didn't know what that valve was intended for, for I did. Q. Under whose supervision was this valve being constructed? A. My brother Henry's. Q. Then I understand you to say that you got most of your information concerning the Walker heater through your brother Henry? A. I did. Q. And he was directing you how to make this valve and how to apply it? A. Yes, sir. Q. And was that in September, 1907? A. Yes; I can fix that by letters that I have that will show that I was here at the time."

This evidence, both in dates and in subject-matter falls short of showing a practical reduction to practice of Walker's device. Such tests as were made resulted in nothing, the proposed company was abandoned, Walker made no claims for any dual-controlled valve in his patent, so that his patent cannot be regarded as a reduction to practice, and, whatever the device was the Kiels made, it went, so far as Walker's testimony above shows, to the junk pile.

We turn next to the alleged constructive reduction to practice which it is contended arises by virtue of the issue to Walker of patent No. 886,100, applied for July 22, 1907, and granted April 28, 1908. That patent concerned a construction in which an electric spark igniter is used, and of every claim of the patent such igniter is in some form an element. That no dual-valve control device was sought to be patented by Walker is shown by the absence of such claims in this patent, by the testimony of Walker himself, viz.:

"Q. As a matter of fact, did you embody this valve mechanism in another application for a patent? A. No; I never applied for the other patent, although I intended to do so"

—and by his statements of his letter of June 19, 1907, to his patent counsel, where he says:

"The new temperature control of the water will be dropped for the present, and possibly patented later, if thought worth the cost."

That Walker had conceived of a dual control of the gas valve as early as July 22, 1907, is indicated by Fig. 2 of his patent application. But, as we have said, he did not claim it, and made no assertion or oath that he was the inventor thereof. Moreover, as we read his claims, none of them are based on Fig. 2, nor does the device therein shown disclose means of operating the igniter by any appliance actuated by the difference of pressure between the cold-water inlet and the hot-water outlet, which in some form is embodied in all the claims. No statute, decision, or principle of the patent law is cited to us which in our view warrants our regarding the mere presence of a drawing in a patent application, lacking the essentials noted, as equivalent to a reduction to practice of the device therein shown.

In the absence, therefore, of satisfactory proof that Walker ever reduced his conception to practice, it follows that the validity of Shook's patent must be sustained. The decree below will therefore

be reversed, and the case remanded, with directions to reinstate the bill and enter a decree adjudging claims 4, 5, 20, 21, and 22 valid and infringed, and directing an accounting.

GAS MACHINERY CO. v. UNITED GAS IMPROVEMENT CO.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1915.)

No. 2642.

1. PATENTS ⊂=328—VALIDITY—APPARATUS FOR MAKING WATER GAS.
The Rusby patent, No. 857,760, for a water gas apparatus, the principal feature of which is an ajutage indicating to the operator the rate and quantity of flow of air into the generator, *held* void on the ground that the relation of the ajutage to the other parts of the apparatus is that between the items of an aggregation, and not that between the elements of a combination.

2. PATENTS ⊂=26—VALIDITY—COMBINATION OR AGGREGATION.
A patentable mechanical combination cannot exist when the product delivered by one device is, by the attendant workman, carried over and used on another machine, and it is not controlling, whether he does this carrying over in his hand or in his head, as by observing a gauge and acting at a time determined thereby.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⊂=26.]

3. PATENTS ⊂=26—VALIDITY—COMBINATION OR AGGREGATION.
A mere measuring device, which does nothing and can do nothing except to give the operator information as to how much material is going into a machine, is no part of a true combination of the operative elements of the machine.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⊂=26.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Suit in equity by the United Gas Improvement Company against the Gas Machinery Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 211 Fed. 672, —— C. C. A. ——.

In an infringement suit brought by the United Gas Improvement Company against the Gas Machinery Company, based upon patent No. 857,760, issued June 25, 1907, to Rusby, and patent No. 940,925 issued to Dickey, November 23, 1909, both for "improvements in water gas apparatus," the court below found for complainant upon the Rusby patent, entering the usual decree for injunction and accounting, but upon the Dickey patent found for the defendant and dismissed the bill. The defendant below appeals, and thus the only questions involved concern the Rusby patent. Its single claim is as follows: "Means for definitely controlling the quantity and quality of the production of gas, which means comprise the gas generating apparatus and its regulatable air supply connections and an ajutage interposed in said connections and provided with a pressure gauge, whereby the attendant is enabled to introduce a definite volume of air during the interval of each blow, regardless of fire and other conditions in the apparatus, substantially as described."

The process of making water gas employs, in series, a generator, a carburetor, and a superheater, which constitute a "water gas set." The generator is an ordinary furnace which carries on a grate a body of burning coal. All

the products of combustion pass from the generator into the carburetor. This is a chamber partly filled with checker brick designed to absorb and retain heat. The carburetor opens into another similar chamber, the superheater, also provided with checker brick; and from the superheater one outlet may be opened to the stack or another toward the reservoir for the finished gas. In operation, an air blast is driven by a blower through a flow pipe discharging into the generator under the grate. This air is driven through the bed of hot fuel, and emerges therefrom and passes into the carburetor largely in the form of a combustible gas, called producer gas. In the carburetor, this is ignited and burned, and, as it passes on through the checker brick in the carburetor and superheater, these are raised to high temperatures before what remains of the gases escapes to the opened stack. This process of storing up heat in the second two chambers is continued for an arbitrary time, say three minutes, and is called the "blow." The operator then shuts off the incoming air by closing a valve in the flow pipe, and he opens a valve in a steam pipe which also leads to the generator below the grate. The steam passes up through the bed of fuel and is decomposed, and the resulting water gas, which will burn with a blue flame and give heat, but not much light, passes into the carburetor. Here it meets a spray coming from an oil pipe, the valve in which has likewise been opened by the operator. The vaporized oil spray is diffused throughout the gas in the carburetor, and by absorption of the contained heat in the carburetor and superheater in its further progress the gas becomes hot enough, so that the oil content is fixed beyond the danger of precipitation. The gas then has illuminating power, and passes off toward the reservoir through a valve provided and opened for that purpose. This, the direct gas-making step of the process, is continued for a predetermined period, say five minutes, and is called the "run." Then the steam and oil are shut off and the air turned on, and so blow and run follow in continuous alternation. From time to time coal is added to the fuel bed to maintain its sufficiency.

The ajutage of the claim is a device interpreting the rate of motion of the entering air blast along the flow pipe. It consists of two very small tubes inserted in the blast pipe and terminating at different points therein, where the air pressure upon the small tubes will, for one reason or another, be different. The pressure conditions induced in the small tubes are then translated by a differential pressure gauge, which displays to the eye the difference of pressure at the two selected interior spots. From this known difference in pressure, in connection with other data, an expert can compute the rate of the flow of the air; and, of course, when the rate of the flow is considered in connection with the time period, the total quantity of flow during the period will be known. At the time of Rusby's invention, this ajutage, with its accompanying differential pressure gauge, was old and commonly known as a means for indicating the rate of flow and the quantity of flow of air or other liquid passing through a pipe. It had been so used upon water pipes, upon air pipes leading into an air exhauster, upon gas pipes from a gas main to a gas engine, and upon gas pipes leading from a gas holder to a gas-burning furnace, but had never been used upon an air pipe leading to a water gas set.

In order that the operator might be informed regarding the condition of the air supply during the blow, it had been customary to provide a water gauge, which indicated the air pressure below the generator grate. As the propelling force of the blast is supposed to be constant, it would seem to follow that an increase in the pressure below the grate would indicate the passage of an additional quantity of air; but this would be strictly true only so long as the obstructing or retarding conditions in the fuel bed remained the same. If the obstructions increased, as by a cinder bed or an ash bank, there would be a back pressure, and the pressure gauge at this point might show an increase, even though a decreased quantity of air was getting through the fire. It results that the indication furnished to the operator by this pressure gauge would be approximate, but not accurate. Ordinarily, when he saw the pressure falling, he would open the valve to admit more air, or, if the pressure gauge rose, he would know that a smaller opening of the valve was sufficient; but, as the fuel bed becomes obstructed, to maintain the same amount of air

passing through the pressure under the grate must be increased enough to compensate for the obstruction, and after allowing for the back pressure increase. Operators had been instructed accordingly, and, for example, had been told to keep the pressure at 18 inches during the earlier part of the day, but in the later part of the day to run it up as high as 21 inches. The defendant was constructing and installing water gas sets operating in this way before the Rusby patent.

E. L. Thurston, of Cleveland, Ohio, for appellant.
A. B. Stoughton, of Philadelphia, Pa., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] Whether it was invention to take the ajutage from a pipe leading to an exhauster, which is one kind of an air pump, and put it on a pipe leading from a blower, which is another kind of an air pump, or to take it from a pipe carrying gas from a gas holder and put it on a pipe carrying an element of the gas on its way into the gas holder, is, to say the least, a question of doubt; but this case may be more clearly, as we think, disposed of on another ground. We conclude that the relation of Rusby's ajutage and gauge to the "set" is the relation between the items of an aggregate, and not the relation between the elements of a combination. This conclusion depends on the general proposition that a metering device, the only office of which is to measure the raw material entering a machine so that the operator may stop when he has put in enough, does not so coact with the machine itself as to be properly characterized as being in combination therewith.

The authoritative cases are few which have considered the distinction between aggregations and combinations, except as it is complicated and confused by the effort to find the line between invention and mechanical skill. See Walker on Patents (4th Ed.) § 32, and cases cited. The rule of aggregation is stated—probably as well as possible—in Macomber's Fixed Law of Patents (2d Ed.) p. 6 (with reference to sections 42–51, q. v.):

"The distinction between an aggregation and a true combination is not always clear. The main test lies in an examination of the result—the function performed. If that result is the sum of the several actions of the elements, it is an aggregation; if it is the product of those actions—if the action of one element so modifies the action of another that the resultant action differs from the sum of the separate actions—it is a true combination."

We must first disclaim doubting that there would be a combination if the changes in the ajutage or its pressure gauge directly actuated the regulating valve—as, for example, on the principle of the household thermostat. There would then be a direct inter-relation, just as there is between the air regulating valve and the parts of the apparatus further along whose variable action depends on the amount of air passing through. Likewise, it must be remembered that the existing ajutage was not modified or adapted in any degree or applied in any physically new way, to make it fit this situation. There is no claim of novelty in this respect.

We disclaim, also, the idea that there can be no true combination in any case where the action of either the operator or material operated upon is necessary to cause one element to modify the action of any of the others. Such a case was Krell Co. v. Story Co. (C. C. A. 7) 207 Fed. 946, 952, 125 C. C. A. 394. The piano case, the controlling levers and the swinging fallboard all were parts of one structure when at rest, and when the operator was moving the levers the fallboard in another position assisted the operator's hand. Not only would all the elements of the combination be in action at the same time (not a controlling consideration of itself), but each would be causing the whole device to act. To make that case parallel with this, we must assume—if the piano device was pneumatic, worked by foot power—that a gauge indicated the air pressure, so that the operator might not pump too much air in, and that it was sought to put this gauge into combination with the piano case. Of the same kind was the decision of the same court in Oshkosh Co. v. Waite Co., 207 Fed. 937, 941, 125 C. C. A. 385. This involved feeding mechanism and wrapping mechanism, but it was found that both acted upon the same material passing along, and one conveyed it to the other. It was thought that there was the necessary degree of co-operation to make it a combination; and the analogue of that combination is found in the water gas set in the relation between (e. g.) generator and carburetor.

Of the same type is the Automobile Case (Columbia Co. v. Duerr, 184 Fed. 893, 107 C. C. A. 215), decided by the Court of Appeals of the Second Circuit, and referred to in the Krell Case. The existence of a patentable combination was assumed as between the rear wheels and their driving devices and the front wheels and their steering devices, although only the mediation of the human driver causes them to work efficiently together. Here, too, when the operator's action develops their inherent interrelation, the front wheels, turned by the steering column, direct the course of the rear wheels, and the rear wheels, driven by their motive power, compel the revolution of the front wheels. We can find in an automobile the same question as in our present case by supposing that a combination was claimed between the speedometer, which tells the driver when he has reached the speed limit, and the gas throttle which the driver manipulates in obedience to the speedometer's suggestion.

We should also discard the thought that Rusby discovered the necessity for having information about the quantity of air entering during the blow. If he had been the first to learn that the quantity of air should be adjusted to existing conditions, and that if conditions remained the same in successive blows, the amount which had been proper in one was the amount which should be admitted on the next, and in connection with this discovery he had put it to use through being the first to provide any measuring or indicating apparatus, the defense of mere aggregation might have a different aspect—though it seems that this pertains rather to the question, "Invention or skill?" The discovery that the air should be measured would be the principal thing, and providing the means for measuring would be incidental. The record does not permit us to think that Rusby made any such dis-

covery. His patent itself seems to assume that it was already common to predetermine the amount of air to be used during a blow; but, if we misjudge his specification in this respect, it can make no difference. The whole purpose of the blow was to get the three members of the set hot enough for the ensuing run, and the operator must continue the blow long enough to get this result. Whether the air blast is spoken of in terms of volume or of time makes no difference. Each pertains to the question, "How much air?" Each run was observed and tested in different ways, and, according to these conditions and observations, the operator concluded whether there had been just enough, or too much, or too little air on the previous blow, and then he regulated the next blow accordingly. After the practice was established, or in so far as it was established, of having a fixed period of time for the blow, the quantity of air was regulated by opening or closing the valve. It may be true that it had not been customary to "predetermine" the quantity of air in terms of cubic feet, nor, indeed, does that method ever appear to have been used by defendant; but with each blow after the first it was "predetermined" by the operator that for the next blow he would have either the same amount of air or more or less. The operator was not dependent merely on his observation of the run. He was provided with the water gauge, and he knew that the maintenance of certain indicated pressures would show the passage of the "predetermined" amount of air with fair accuracy.

[2] So we are led to the proposition first stated. If we apply the test of the quotation from Macomber, can we say that the resultant action differs from the sum of the separate actions? The resultant action—the effect upon the fire, the carburetor, and the superheater —has been modified by the turning of the air valve; but how is it modified by the pressure gauge? The gauge gave notice to the operator that he should do something, and then its function was finished until it again gave him similar notice. The final result—satisfactory gas—is the sum of the information which the gauge gives the operator plus the complete gas-making action of the machine as managed and controlled by the operator. If the operator does not pay attention, nothing happens. The action of the gauge may continue, but it affects nothing. To draw upon the law of negligence for a figure, between the gauge and the air valve stands the free-willed operator as an intervening cause, and the chain of causation is broken. So a mechanical combination cannot exist when the product delivered by one device is, by the attendant workman, carried over and used on another machine, and it cannot be controlling whether he does this carrying over—as typically—in his hands or, as here, in his head.

Meters have a complete function in and by themselves. Any operator of a machine may guess at the quantities and proportions of raw materials going in, and may guess at the amount of product coming out. He frequently wants to know more accurately, and then he puts on a suitable meter, wherever it is needed; but the meter does not affect anything except the operator, and the operator is not a part of the combination. In a water gas set, four different raw materials are fed to the apparatus: Air, steam, coke, and oil. The operator must

know that the proper quantity of each is being supplied. The general behavior of the apparatus gives the approximate information; but, if he wants to be more exact, he can be. The coke can be, and doubtless is, measured by weight or by volume, and the operator controls the quantity; the oil may be, and in fact is, measured as to its rate of flow by a pressure gauge displayed before the operator, and he manipulates the valve in the oil feed pipe; the steam may be, and is, measured by a pressure gauge, and if the operator wants more or less, he changes the valve in the steam pipe; and, by the device now in question, the air is measured, the result displayed to the operator, and if he wants more or less, he changes the valve in the air pipe. As to each of these entering materials, the operator is merely supplied with data from which he exercises his judgment as to what he will do.

The operation of the ajutage is as obscure as its name is unfamiliar, but in spite of that it does nothing excepting to indicate, and in a sense measure, the entering air. It does not co-operate with the three main members of the set any more than does the oil measuring device or the steam measuring device, or, for that matter, the scales that weigh the coal. Indeed, it is just as important to the operator to know the period of elapsed time as it is to know the rate of flow of the air, and the clock that tells him when fully to close the valve is as essential to the gas-making operation as is the gauge which tells him when to shut it part way.

It is only another form of expressing the lack of real combination to say that the gas-making apparatus does not extend beyond the gates at which the materials enter, and it is only fortuitous that the air measuring device happens to be set close to the entrance valve. It might as well be in another room.

The fallacy involved in the theory that the ajutage is in combination with the set is materialized in the "whereby" clause of the claim. This says, "whereby the attendant is enabled to introduce a definite volume of air," etc. This is a mistake. The air valve is the means whereby the operator is "enabled to introduce" the definite volume of air. The ajutage does not enable him to do this. It only enables him to decide whether he will introduce more or less.

[3] Upon principle, it seems clear to us that a mere measuring device, which does nothing and can do nothing except to give the operator information as to how much material is going into the machine, is no part of a true combination of the operative elements of the machine; and we can find no case where the contrary has been held.

The Supreme Court, in a long line of comparatively early cases which consider—or seem to—the precise question, has found mere aggregation in: Bringing together parts of a coal stove;[1] the eraser and the lead of a pencil;[2] the former and the mould;[3] the tack and the washer;[4] the stove reservoir and the base pan;[5] the mirror and the street

1 Halles v. Van Wormer, 20 Wall. 353, 368, 22 L. Ed. 241.
2 Reckendorfer v. Faber, 92 U. S. 347, 357, 23 L. Ed. 719.
3 Pickering v. McCullough, 104 U. S. 310, 317, 26 L. Ed. 749.
4 Tack Co. v. Two Rivers Co., 109 U. S. 117, 120, 3 Sup. Ct. 105, 27 L. Ed. 877.
5 Bussey v. Excelsior Co., 110 U. S. 131, 146, 4 Sup. Ct. 38, 28 L. Ed. 95.

car front hood;[6] two pairs of dies in series;[7] the fuel magazine and the heater;[8] rollers under a frame and the machine carried by the frame;[9] the reversing device and its machine;[10] the grating and the means for operating a lock on the other side thereof;[11] the tool and its finger rest;[12] buildings and railway tracks.[13] In later years, several patents have been sustained against the defense of aggregation, but in these cases the dominant question was one of fact whether more than mechanical skill had been employed, and did not involve the question of law whether there could be a true combination between the elements considered. Of this class are the decisions of this court and the Supreme Court in the Rubber Tire Cases (Goodyear Co. v. Rubber Co., 116 Fed. 363, 53 C. C. A. 583; Diamond Co. v. Rubber Co., 220 U. S. 438, 31 Sup. Ct. 444, 55 L. Ed. 527), and the decisions of this court cited in the margin.[14] These are not particularly helpful here.

In National Co. v. Powers Co. (C. C. A. 7) 160 Fed. 460, 463, 87 C. C. A. 444, 447, it was held that there could be no combination between the motor that would run any kind of machine and the machine that would run with any kind of motor. We can paraphrase Judge Baker's language by saying:

"If in truth a burst of inspiration points to the measuring of A.'s air current with B.'s meter, nevertheless a monopoly cannot be based merely on bringing the two together."

Perhaps the most apposite comment is found in Diamond Co. v. Ruby Co. (C. C.) 127 Fed. 341, where, in speaking of different parts of the mechanism, Judge Archbald says (page 348):

"No doubt they are all factors to make up a complete machine and turn out good matches, and in that remote sense may be said to work together. But mchanically they are distinct parts, acting separately, there being no more connection between the carrier and the mechanism for raising the paraffine wheel under which it passes than between that and the steam boiler or the standards of the supporting frame. To make the raising mechanism effective, a human factor, the hand of the operator, guided by his judgment, must intervene, and without this it has no influence on the product. Unless he sees

[6] Stephenson v. Brooklyn Co., 114 U. S. 149, 157, 5 Sup. Ct. 777, 29 L. Ed. 58, a pertinent case, because the mirror informed the driver whether passengers were coming in.

[7] Beecher Co. v. Atwater Co., 114 U. S. 523, 524, 5 Sup. Ct. 1007, 29 L. Ed. 232.

[8] Thatcher Co. v. Burtis, 121 U. S. 286, 294, 7 Sup. Ct. 1034, 30 L. Ed. 942.

[9] Hendy v. Miners' Works, 127 U. S. 370, 375, 8 Sup. Ct. 1275, 32 L. Ed. 207.

[10] Royer v. Roth, 132 U. S. 201, 206, 10 Sup. Ct. 58, 33 L. Ed. 322. Was not this double use, rather than aggregation?

[11] Fond du Lac v. May, 137 U. S. 395, 407, 11 Sup. Ct. 98, 34 L. Ed. 714; pertinent, because the grating only affects the operator while he is using the remainder of the alleged combination.

[12] Union Co. v. Keith, 139 U. S. 530, 539, 11 Sup. Ct. 621, 35 L. Ed. 261, thought to be really a case of noninvention in Krell v. Story, 207 Fed., at page 954, 125 C. C. A. 394.

[13] Richards v. Chase Co., 158 U. S. 299, 302 (see examples on page 302), 15 Sup. Ct. 831, 39 L. Ed. 991.

[14] Campbell Co. v. Duplex Co., 101 Fed. 282, 41 C. C. A. 351; Rich v. Baldwin, 133 Fed. 920, 66 C. C. A. 464; Western Co. v. North, 135 Fed. 79, 67 C. C. A. 553; National Co. v. Aiken, 163 Fed. 254, 91 C. C. A. 114; Sheffield Co. v. D'Arcy, 194 Fed. 686, 116 C. C. A. 322; Houser v. Starr, 203 Fed. 264, 121 C. C. A. 462; International Co. v. Sievert, 213 Fed. 225, 129 C. C. A. 569; Jackson Co. v. Peerless Co., 228 Fed. 691, — C. C. A. —, opinion filed December 7, 1915.

occasion to act, the match produced will be equally good or equally bad, whether the wheel-raising mechanism is there or not. It is not as though it were automatic, raising the matches out of the bath on the stoppage of the carrier, and lowering that again on the resumption of its course. That might be regarded as directly co-operating with the other parts named to effect the general result."

The question we are deciding is in some measure similar to that which we recently passed upon in Autosales Co. v. Caille Co., 224 Fed. 473, — C. C. A. —. We there held there was only an aggregate relation between the automatic scales and the table of weights. In that case, the table gave information to the observer as a means of advising him to act by weighing himself. In this case, the meter gives information to the operator, advising him how to act. In each case, when the information is given, the knowledge-imparting element is functus officio.

The holding of the Circuit Court of Appeals for the Third Circuit in Standard Co. v. Burdett Co., 197 Fed. 743, 117 C. C. A. 206 (adopting the opinion in [C. C.] 196 Fed. 43), doubtless "lies within the twilight zone" (196 Fed. 46); but, assuming the patent there involved to have been rightly sustained, we think the conclusion rests on Judge McPherson's statement (196 Fed. 46) that "the result produced by the patent is a method of operation"; and though the claims seem also in the twilight zone between claims for mechanical combinations and claims for method, the stated object of the patent was "to provide a signalling system" (196 Fed. 44). It is not longer to be doubted that successive mechanical steps, taken by an automatic machine or by the human operator, may be patentable as an art (Expanded Co. v. Bradford, 214 U. S. 366, 382, 29 Sup. Ct. 652, 53 L. Ed. 1034); and the "one point control" of the elevator in the Standard-Burdett Case manifestly did constitute a system or method of operation. In the present case, even if we overlook the form of the claim, there is no novelty in the method, as distinguished from the means, the ajutage, by which it is carried out.

The decree is reversed, and the case remanded, with instructions to dismiss the bill.

JACKSON FENCE CO. v. PEERLESS WIRE FENCE CO.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1915.)

No. 2772.

1. PATENTS ⟸51—ANTICIPATION—"THAT WHICH INFRINGES IF LATER," ETC.
Although an invention is made for use in a particular business, yet, if the claims are not limited thereto, the field of prior art must be as broad as the field of infringement, and anticipations or limitations may be looked for in any art within the scope of the invention as fixed by the claim.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 66–69, 72, 74; Dec. Dig. ⟸51.]

2. PATENTS ⟸26—INVENTION—PROBLEMS PECULIAR TO ONE USE.
Even though claims may not be limited to one application of a device, the problems peculiar to that application may bear on the existence of invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⟸26.]

3. PATENTS ⟸328—INVENTION—AGGREGATION—VALIDITY AND INFRINGEMENT—STAPLE MACHINE.

The Hoxie patent, No. 879,965, for a staple forming and discharging mechanism, *held* to involve invention, not aggregation. Claims 2, 3, 7, and 12 *held* infringed.

4. PATENTS ⟸167—VALIDITY—SUFFICIENCY OF SPECIFICATION.

A patentee is entitled to the benefit of every function within the scope of the claims and actually possessed by his mechanism, even if he does not know of it at the time of patenting, and it is not necessary that he should enumerate its advantages.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. ⟸167.]

5. PATENTS ⟸101—CLAIMS—FUNCTIONAL.

A claim is not invalid, because functional, if it is not beyond the broadest equivalency of which the real invention permits.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. ⟸101.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by the Peerless Wire Fence Company against the Jackson Fence Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 226 Fed. 774, —— C. C. A. ——.

The Peerless Company, as owner of patent No. 879,965, issued February 25, 1908, to Vernon Hoxie for "staple forming and discharging mechanism," brought against the Jackson Company the usual form of infringement suit in equity based on defendant's use of the supposed infringing device in a machine or loom for making wire fence. The defense was that upon the proper construction of the claims there was no infringement, and that, if they were construed broadly enough to cover defendant's device, they were invalid. The District Court found with the plaintiff on these issues, and the Jackson Company appeals from the interlocutory decre for injunction and accounting. The claims involved are 2, 3, 7, 9 and 12, quoted in the margin.[1]

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[1] Claim 2. In a staple machine, an incasing member having a fixed staple-forming part, a non-rotatable plunger having a staple-forming part and a staple-discharging part disposed in intersecting planes, the staple-forming part, co-operating with the fixed staple-forming part to form a staple, and a pressure block operative to eject the formed staple from said fixed part to permit it to move into position to be engaged by the discharging part.

Claim 3. In a staple machine, an incasing member, a plunger having a staple-forming part and a staple-discharging part disposed in intersecting planes, a fixed portion within the member with which the forming part co-operates to form a staple, and a pressure block U-shape in cross-section which straddles said fixed portion and effects an ejectment of the formed staple therefrom at a predetermined point in the movement of a plunger to permit the staple to move into position to be discharged.

Claim 7. In a staple machine, an incasing member, a portion in said member about which a staple is formed, forming and discharging parts operative in said member to simultaneously act on a section of wire fed thereto to shape it about said portion and to discharge a previously formed staple from said member, said parts being relatively positioned to cause a staple to have a lateral circular movement in moving from its forming to its discharging position, and means for ejecting a formed staple from said portion when the forming and discharging parts have receded from their forming and discharging positions.

Claim 9. In a staple machine, an incasing member, a portion in said member about which a staple is formed, a tool operative in said member to form and discharge a staple, the forming and discharging parts thereof being relatively positioned to cause a staple to have a lateral turning movement in moving from one to the other, means for ejecting a formed staple from said portion, and means for causing a staple to have a turning movement as it moves by gravity from one to the other of said parts.

Claim 12. In a staple machine, an incasing member, a fixed staple-forming part in said member, mechanism co-operating with said fixed part to form a staple and operating to discharge a formed staple from the member, the forming and discharging parts of

Both parties are engaged in the making of wire fence, and the devices in question are put to practical use for that purpose. In machines of this class, sometimes called looms, because the output approximates a woven fabric, the continuous strand wires, which will be horizontal when the fence is erected, are spaced apart and properly fed intermittently through the machine. At suitable intervals, the stay wires which will, in final use, be vertical, are placed across the strand wires, and at each point of intersection a staple is driven, and its legs are so directed that it will form a tie about the intersection. At the moment of this operation, the intersection of wires lies upon an anvil die which may be supplemented by a die connected with the staple-driving mechanism; but we are now concerned only with the device which drives or ejects the staple out of its guiding ways. The ejecting device is in the form of a flat blade, shaped at its forward end to fit the crown of the staple and forcing the latter along in its guiding slot or way until the point of ejection is reached. The plane of the staple may be thought of as having two kinds of axes; one a longitudinal axis parallel with the legs, located in either leg or anywhere between them, and the other a lateral axis at right angles to the longitudinal axis and located anywhere between the crown and the end of the legs. In the manipulation of the staple in its feeding process, it may revolve upon a longitudinal axis, or it may tilt upon a lateral axis. In a fence loom, the stay wires are horizontally disposed, as the fabric passes over rollers in front of the operator. It may be moving upward or to the rear or in any intermediate direction and, accordingly, the driving plunger may move horizontally rearward or vertically downward or on an intermediate angle. The plane of the driving plunger blade and its carried staple (which obviously must be the same) may be disposed in any desired relation to the plane of the fabric and to its line of travel—all according to the nature of the tie and the position and shape of the anvil die. The form shown and described in the patent in suit drives the staple at an angle of about 45° from the horizontal; but with regard to the functions here involved it may be considered as of the horizontal type.

For rapidity of operation the fence loom has a battery of such plungers and anvils side by side in front of the operator, so aligned and spaced that all the ties along one stay wire are formed simultaneously, and thus, with each plunger stroke and the synchronous motions, the machine intermittently delivers a completed section of the fence. In earlier devices of this class, staples were formed and conveyed to the ejecting plunger by two methods. In the first method, the staples were manufactured by separate machines and from them carried to the driving machine. From the point of ejection, an upwardly inclined bar led away at right angles to the plane of ejection. The staples were manually placed straddling and hanging upon this, and by gravity they slid down upon it as a carrier, so that as the plunger blade on its rising stroke was lifted above the lowermost staple, that one would drop forward into the groove of the plunger blade and be driven by the next descending stroke. In some cases, this carrier bar started toward the operator at right angles to the lateral axis of the driven staple, and after leading in that line for a short distance, was bent in the arc of a circle, perhaps as much at 90°; and it followed that the staples, sliding down along this curved bar, were caused to revolve upon their longitudinal axes in order to get them parallel to the driving plane. In the instances where such a curved bar was used, its bending was simply matter of convenience to get the longer and projecting part of the feed bar where it would be most out of the way. Not only had such bars been so curved that the staples would revolve on their vertical axis in their travel, but in other cases the staples in entering upon or leaving the feed bar had been tilted on their lateral axis for the same purpose—to get them parallel with their discharging plane, so that they would easily feed into that plane. The other method consisted in feeding a continuous wire into what may be called the head of the driving machine, and providing therein two parallel plunger blades both operated simultaneously by a common driving head, and so arranged that the first would sever a section of the wire and form a staple

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said mechanism being relatively positioned to cause a staple to have a lateral turning movement to move from forming to discharging positions, and non-rotatable means for causing a staple to turn from one position to the other after being formed.

with the same descending stroke by which the second blade was ejecting the previously formed staple, and then that the staple so formed would be suitably fed to the ejecting blade.

C. C. Linthicum, of Chicago, Ill., for appellant.

Wilbur Owen, of Toledo, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] In this recital of the prior art, we have not confined ourselves to fence-making machines; but we have extended it, as we think it must be, to include all machines that form or eject or form and eject staples. This is for the reason that, though the proof shows the invention was made by a man engaged in the fence-making business, and for the purpose of being used in that business, yet he deliberately sought and obtained a patent which contained no such limitation. He entitled his device "staple forming and discharging mechanism," he said that it was not restricted to use in connection with fences, but "may be used in any connection for which it may be adapted or appropriated," and his claims all pertain to "a staple machine." The field of prior art must be at least as broad as the field of infringement; and it follows that for anticipations, as well as for the sum of existing knowledge, we may look among machines for making or driving staples in the manufacture of boxes, or shoes, or brushes, as well as in the making of fences. These things are not in analogous arts; they are in the same art which the patentee has selected as fixing the scope of his patent. This is only an application of the familiar rule that whatever infringes if later, anticipates if earlier.

[2] It does not follow that the peculiar problems pertaining to fence making have no bearing in deciding the existence and character of Hoxie's supposed invention. The same type or class of device finds different environment as it has different applications; the application in one instance will present problems that do not exist elsewhere, and the solution of which may be invention just because of the environment existing in that particular field; but the invention and the patent to be had therefor may properly extend to other fields in which its application may be worth while. We considered a somewhat analogous question in Cadillac Co. v. Austin, 225 Fed. 983, —— C. C. A. ——. The difficulty which Austin overcame existed in connection with the common use of the gear box, and, excepting for this common use, he might never have made his device, or it might not have been of much practical value. He did not include the gear box as an element of his claims, nor did we think that this element could be or should be read in so as to save anticipation; but we thought that the practical situation surrounding him was of importance in considering the question of invention. So, in the present case, a finding that Hoxie made an invention, in any sense broad enough to support a finding of infringement, must rest on the fact that he solved a problem which, so far as known, was peculiar to the fence-making business, and that his patented device is of distinct utility for that particular use. What Hoxie did, as compared with the previous fence machines, was: First,

to make his forming and driving devices in compact, unitary form, using a continuously fed wire; but this was not at all new in the field of his patent. Second, he arranged his forming and driving blades in planes having their longitudinal axes parallel, but their lateral axes at an angle to each other. This had never been done before, with the forming and driving blades of a compound plunger; it had only been done, incidentally and without purpose, as the forming and driving blades happened to be located in separate machines. Third, and last, he provided for revolving the staple on its longitudinal axis as it passed from the plane of the former into the plane of the driver, and while free from control by either. This was new, except in cases where, as above described, the staples had been carried from the forming machine manually and placed upon a feed bar, where, as incidental to their travel, they made that revolution. Hoxie's second and third steps were correlative; if one was taken, the other must be; either one may be considered as incidental to the other.

[3] The first thought is that, instead of a useful improvement, Hoxie had devised a troublesome complication. It is simpler to form and make the staple in parallel planes, as others had done, and it would seem as though Hoxie's device was only for the purpose of correcting an initial mistake in the direction of the wire feed; but the specific field in which he was working shows a utility not otherwise visible. The wire is fed into the machine lying in the same plane in which the staple is formed, and, in the ordinary and simpler device, this means that the wire must come in from the side, and the head must be wide enough to hold, extended at length, the section of wire which is to be severed and become the staple; in other words, the machine head must be considerably more than twice as wide as the finished staple is long; if the finished staple is, e. g., to be three-fourths of an inch long, the head, in order to extend both legs and provide for the crown and for the side walls of the head, must be two inches wide. The different heads of the battery must be as far apart, center to center, as the strand wires are placed, and it is customary to bring the lower strands quite close together—so close as to leave only one inch between them. The width of the head must therefore be kept within the space of one inch, and it would be impossible within that width to form even a half-inch staple in the manner described. The depth of the head—that is, the distance from the front to the rear—involves no such limitation. It can as well be two or three inches, and so give ample room for the making of a staple in a plane at right angles to the ejecting plane and for it to be revolved, from one to the other. This is simple enough, when observed, but Hoxie was the first one to see both that it was a desirable thing to do and how to do it; and we have no doubt that his combined thinking and acting in these respects amounted to invention above and beyond the mere details of construction. Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Diamond Co. v. Consolidated Co., 220 U. S. 428, 434, 31 Sup. Ct. 444, 55 L. Ed. 527.

Snedeker's earlier machine not only tilted the staples laterally instead of revolving them vertically, as they moved from former to

driver, but—much more important—his forming and driving mechanism were separate machines. They were mounted on the same frame, and, doubtless, had some timing relation; but they were a considerable distance apart. If they moved in unison, it was because they happened to. Either could continue at work, if the other was out of order. They were essentially distinct. They were very likely, if not certainly, within the definition of a mere aggregation. Hoxie made them unitary. One stroke of the plunger head both formed and drove. One incasing frame included all parts. The turning of the staple permitted the right-angled relation of the blades, and this relation permitted the wire to be fed in from another direction, and this permitted the manufacture of a narrow mesh fence with an automatic wire feed stapling machine—a result not attainable by any existing machine of that class except through substantial reorganization. He did more than merely to bring close together two existing machines; he combined them into one. When we consider the whole situation, the making and driving of staples in a continuous wire machine and by a compound right-angled plunger, appears to be a joint function—not an aggregate one. (See discussion of aggregation in our opinion in Gas Machinery Co. v. United Co., 228 Fed. 684, — C. C. A. —.)

In another earlier device, the staple was turned on its longitudinal axis by causing the driving plunger to revolve as it descended, carrying the staple. This shows that it was not new to turn the staple on this axis, but, at the most, it only furnished one of the ideas which Hoxie adapted to his much simpler plan.

[4] We do not overlook the fact that the peculiar utility which his invention is now seen to possess, and which we have described, is not stated in so many words in his specification; but there are two sufficient reasons why this omission is not important. The first is that if he had undertaken to state the practical, commercial benefits, and had omitted what afterwards proved to be the chief one, he would, nevertheless, be entitled to have his patent construed with reference to that unspoken advantage, since the patentee is entitled to the benefit of every function within the scope of the claims and actually possessed by his mechanism, even if he does not know of it at the time of patenting. Morgan Co. v. Alliance Co. (C. C. A. 6) 176 Fed. 100, 107, 100 C. C. A. 30; Kellogg v. Deane (C. C. A. 6), 182 Fed. 991, 998, 105 C. C. A. 545. The second reason is that this patent does not undertake to name any practical advantages or benefits, save, in general terms, "to simplify and improve upon the construction and apparatus of this class, whereby to enhance the practicability and commercial value thereof"; and no obligation rests upon the patentee to convert his specification into a trade circular. Its proper office is to describe the structure, and in so far as the patentee claims commercial benefits and advantages, he is giving unnecessary information. If it were important, we see no reason to think that Hoxie was ignorant of the specific advantage which has been described, viz. reducing the necessary width of the driver head. He was the superintendent of the factory in which machines of this class were in use. There is no apparent object in going to the trouble of making the two blades in dif-

ferent planes, and passing a staple from one plane to the other, except the object of reducing the width of the head, and it is rather an impeachment of Hoxie's intelligence to suppose he had any purpose, excepting this, or that he did not understand substantially the closer spacing possibility which would result. Diamond Co. v. Consolidated Co., 220 U. S. 425, 437, 31 Sup. Ct. 444, 55 L. Ed. 527.

Nor do we overlook the fact that neither Hoxie nor complainant has operated a device made in the specific form shown by Hoxie's specification and drawing. A little later he devised another method of transforming a section of wire lying at right angles to the plane of ejection into a staple lying in that plane, and of this later form there has been large practical use by complainant. We can neither hold, as complainant asks us to do, that this is a use evidencing invention, nor, as defendant asks us to do, that there has been no practical use and that the patent is only a paper patent, without assuming either that the patent does or does not cover this modified form which has been thus actually used; and we find no necessity in the present case for going far enough to reach that question.

We come, now, to the distinctions between the form shown in the patent and the form used by defendant, and to determine whether either the scope of the invention, as reflected in the claims, or limitations—even perhaps unnecessary—expressly stated in the claims show noninfringement. The striking difference between the two devices flows from the fact that the patented driver is of the horizontal type while the defendant's is vertical; consequently, in the patented form, the staple, after being shaped, lies vertically, resting upon one leg, and is then pushed so that it falls over and lies flat upon the floor. The axis of revolution is horizontal and coincident with the bottom leg. In defendant's device, the legs of the staple are always vertical, and the revolution is on a longitudinal axis midway between the legs. This revolution is caused by pushing the staple along while it straddles and rides upon a carrier leading from one blade to the other and around a 90° curve. To accomplish this result, the arc of the circle between the centers of the two blades, instead of being about one inch long, as in Hoxie, is about three inches, and the two plunger blades, instead of having their inner edges united, as in Hoxie, have these edges about one inch apart; but both are, at their upper ends, united to and carried on a common head. The fact is, as claimed by defendant, that it has used without material change one of the old curved carrier bars for delivering staples to the driving plunger; but it has united with this a forming plunger practically integral with the driver. The two are not directly united along one edge; but, like Hoxie, they form two fingers of one hand. Whether there is a web connecting the fingers is of no functional importance. We have already said that this combination involved invention; and we see no inherent reason why the scope of this invention should be confined to a revolution on the longitudinal axis when that axis is horizontal, rather than extend also to the same motion when the axis is vertical, or to staple motion resulting from gravity alone rather than to motion more largely dependent upon the direct action of other parts.

Are there, then, express limitations in the claims which differentiate defendant's structure? It will be noticed that in the patented form the chief agent in causing the staple to turn from one plane to the other is gravity. When formed, it lies on its edge, and at the right instant a spring-propelled yoke causes a slight push which moves all of it laterally out of the plane of the forming blade, and also causes it to fall over flat on its side. This spring push block has not been described because it is common to the old art and to the devices of both parties. The patent also provides a development of the forming anvil into a flat bar which the staple straddles as it revolves and falls, and which bar is along the arc of the circle followed by the center of the crown in its falling motion. This central curved guide assists in the revolution in that it holds the staple from slipping back into the forming plane from which it has been pushed, and accurately positions the staple as it turns and as it lies on the floor at the end of the turn, and its office is, in part, though not wholly, the same as the office of the curved carrier bar in defendant's form. In the latter form, gravity plays a subordinate part in the revolving motion. In so far as the carrier bar is downwardly inclined, the forward travel of the staples along the bar is assisted by gravity; but with each reciprocation of the machine there comes a lateral push from the starting point, and apparently the staples would be delivered from one blade to the other nearly as well as if the bar were level and gravity cut no figure. We find that several of the claims not sued upon distinctly specify that the staple "falls by gravity from one position to the other," or has "a free circular falling movement from forming to discharging position," and it is said that defendant's staple does not have this motion. Claims 2, 3, 7, and 12 contain no reference to gravity as the active force, and, under the familiar rule for differentiating claims, this limitation cannot be read into these four claims.

Each claim calls for "an incasing member," and it is urged that defendant eliminates this element. To take this view is to give an unduly strict construction. The patented device has what might be considered an incasing member in that it has a completely inclosed, more or less cubical chamber, along one side of which the staple is formed, in the body of which it turns and along another side of which it is ejected; but here, again, comparison of the claims shows that this chamber is not "the incasing member" to which the claims in suit refer. In other claims, this chamber is expressly specified as an element additional to and contained in the "incasing member," and it necessarily follows that the incasing member is not the chamber, but is something else. With this broader but reasonable view, the incasing member is the casing or framework which surrounds and contains all the working parts—the machine head, which condenses into a unitary structure the two reciprocating blades, their ways, the wire cut-off, the space within which the staples turn, the curved guide, and the spring push block. In this sense, we find the incasing chamber embodied in the defendant's device. It has a structural framework in which all the working parts are held and operate; but, even if the claims called for a chamber containing and retaining the staple in its

first, intermediate and final positions, defendant's device would respond. It has one closed side along which the staple is formed, and another closed side along which it is ejected. The two other sides of the head are only partly closed, but each is developed far enough to position and hold the staple at each end of its turn. It follows that during a part of its travel along the inclined guide the staple is exposed to view, but that the incasing member should fully incase these two sides is of no importance, and the greater parts of these sides of the incasing member have no function in the patented device. The fair meaning of the phrase is therefore satisfied by a member which incases, as far as incasing has any function, and it should not be construed to refer only to a member which completely incases on all sides.

[5] It is next urged that unless claim 2, and similar claims, are by construction limited to gravity means for turning the staple, they are void because functional, in that they attempt to cover the mere idea of revolving the staple by whatsoever means it may be accomplished, and reliance to this effect is had on Westinghouse v. Boyden, 170 U. S. 537, 568, 18 Sup. Ct. 707, 42 L. Ed. 1136. If it were attempted to make these claims cover complainant's modified device, in which the staple is being revolved as it is being formed, there would be greater force in the claim that so broad a construction would make them functional; but the construction which merely makes them reach defendant's present device is not open to that objection. The claims in suit clearly contemplate that there should be, first, a staple completely formed in one plane, then a pressure block for ejecting it from that plane and starting it on its way to the other, and then some means for guiding the staple into its final position as it is pushed or falls. This breadth of interpretation to the words "guiding means," not found in every claim, but necessarily implied in each of those in suit (since without such guiding means the device would not operate), does not extend them beyond the "convenient formula of the broadest equivalency of which the real invention permits," which extension we have thought was a test of whether a claim was invalid because functional. Davis Co. v. New Departure Co., 217 Fed. 775, 133 C. C. A. 505.

From this view it follows that claims 2, 3, 7, and 12 are infringed. Whether claim 9 so far implies the exclusive use of gravity for turning the staple as to exonerate defendant's form we need not decide. When all the claims are considered, those not sued upon, as well as those that are, it cannot now be important either to the injunction or to the accounting whether claim 9 is infringed, and we see no likelihood that any future possibly infringing structure will involve that question.

The decree below will therefore be affirmed, except as to claim 9, which in the decree will be omitted from the enumeration of claims infringed. This modification will not affect the question of costs, which will be awarded against appellant.

MUNISING PAPER CO., Limited, v. AMERICAN SULPHITE PULP CO.

(Circuit Court of Appeals, Sixth Circuit. December 10, 1915.)

No. 2649.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PULP-DIGESTER LINING.
The Russell reissue patent, No. 11,282 (original No. 445,235), for a pulp-digester lining of cement, was not anticipated and discloses patentable invention; the construction shown being of practical utility. Also, *held* infringed.

2. PATENTS ⟸66—ANTICIPATION—PRIOR PATENTS.
Prior patents are part of the prior art only by what they disclose on their face.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. ⟸66.]

3. PATENTS ⟸52—ANTICIPATION—PRIOR PATENT.
Prior accidental production of the same thing, when the character and function were not recognized until the invention of the later patent, does not effect anticipation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 70; Dec. Dig. ⟸52.]

4. PATENTS ⟸66—ANTICIPATION—PRIOR PATENT.
Anticipation is not disclosed by a patent drawing which incidentally shows a similar arrangement of parts, where such arrangement is not essential to the first invention and was not designed, adapted, or used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. ⟸66.]

5. PATENTS ⟸240—INFRINGEMENT—PATENT FOR IMPROVEMENT.
That a patent is for a patentable improvement upon the invention of a prior patent has no tendency to negative infringement of the prior patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 379; Dec. Dig. ⟸240.]

6. PATENTS ⟸319—DAMAGE FOR INFRINGEMENT—INTEREST.
When an established license fee for the use of a patented device is shown, the court may properly accept it as measuring the damages recoverable from an infringer, and allow interest thereon from the time the license fee should have been paid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 577–586; Dec. Dig. ⟸319.]

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by the American Sulphite Pulp Company against the Munising Paper Company, Limited. Decree for complainant, and defendant appeals. Affirmed.

Henry Schreiter, of New York City, for appellant.

A. P. Browne and F. T. Benner, both of Boston, Mass., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. [1] Suit for infringement of reissued patent to Russell, No. 11,282, November 15, 1892, for an improvement

in digesters for manufacturing by the "sulphite process" wood pulp used in paper manufacture. The digester (which is usually of the rotary type) is a large structure frequently 50 feet in height or more, and has a metal shell, usually of iron or steel, about one inch in thickness. The wood pulp to be "digested" is placed in the digester in small pieces and there treated with the bisulphite of lime solution under intense heat and high pressure. The acid of the bisulphite solution is quickly destructive of the metal shell, and it has always been necessary to protect the latter by some acid-resisting agency.

Mitscherlich's patent, No. 284,319, September 4, 1883, disclosed a lining of thin sheet lead applied to the interior surface of the shell by a cement of tar and pitch, and covered with a lining of brick. Reynolds' patent, No. 423,531, March 18, 1890, disclosed a lining made by coating the inner surface of the shell with a paste of red lead, and an interior structure of brick with lead joints; a "fluid chamber" being left between the shell and the brick structure. The specification of Pierredon (French patent No. 154,589, March 31, 1883) disclosed a lining composed of "square blocks of stone or brick, preferably volvic stone [quarried lava], set in a mortar of Portland cement" so as to fill the joints to about half their height; the remainder of each joint being filled by melted lead. In all three of these patents lead was relied upon as the acid-resisting element.

Russell believed that he discovered a fact unknown until demonstrated by him, "that a cement lining would stop the passage of the acid solution to the digester shell" in spite of the high temperature and steam pressure (sometimes as high as 100 pounds to the square inch). His specification discloses "a continuous lining or coat * * * of acid-resisting material, applied in a plastic condition" upon the interior of the shell of the digester. He says that:

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

He also names, as "a convenient material for the purpose," "commercial cement, preferably Portland, made plastic with water and applied with any suitable implement upon the interior of the digester shell, so as to form a continuous cover therefor," adding that "other cement-like materials or mixtures having similar properties or characteristics may be used, as the ordinary cement mixtures, sand, and Portland cement, sand, and tar, and the like." He disclaims (for several reasons) a lining "comprising a layer or coat of masonry or brickwork laid in cement," saying "this feature may be entirely dispensed with where my improvement is adopted." He also disclaims a lining of sheet lead between the brick or tile lining and the digester shell. His disclaimer thus includes Mitscherlich and Reynolds, whose lead paste he considered the equivalent of Mitscherlich's sheet lead. The Pierredon patent was not referred to. Russell's specification states that it will be found in practice that the friction of the mass of pulp within the digester, particularly one of the rotary pattern, is likely under some

circumstances to mechanically wear away his lining, which result may be remedied by setting an inner lining of tiles upon the continuous cement lining, "the plasticity and adhesiveness of which may be utilized to hold the tiles in place," stating that "in many cases, however, the use of this inner lining of tiles will not be found necessary." The patent has but two claims, which we print in the margin.[1]

The appeal before us is from the decree of the District Court upon hearing upon pleadings and proofs, adjudging the patent valid and infringed and awarding damages to complainant. The defenses here presented are, first, that the reissued patent is invalid because the original patent was itself invalid; and, second, noninfringement.

In American Sulphite Pulp Co. v. Howland Falls Pulp Co. (1897) 80 Fed. 395, 25 C. C. A. 500, the Russell patent was passed upon by the Circuit Court of Appeals for the First Circuit, in an elaborate opinion by Judge Aldrich. It was there held that the first claim was intended to cover cementitious mixtures which could be applied in a plastic condition and which would adhere to the outer shell and become a part of it, and so compactly form and harden under pressure and process of application as to prevent the acid from reaching the iron; and that Russell "should not be limited to such materials in the class of cementitious mixtures as he had chemically and commercially isolated as individuals, but that his claims and description should be construed as including all cementitious mixtures which ordinarily skilled practical chemists might be expected to find as answering the requirements of the described conditions, or such as would naturally develop in the growth of the art without invention." The court concluded that Russell was the first and original inventor of the device of the patent, and that "the patent is valid, and protection should be commensurate with the invention stated in the claims and the discovery and process described in the specification; and in our view the patent covers homogeneous structural linings composed of adhesive, acid-resisting materials in the nature of cement, which possess the required qualities described in the specification." The second claim seems impliedly, at least, to have been held valid.

Upon a contested application in American Sulphite Pulp Co. v. Burgess Sulphite Fiber Co. (C. C.) 103 Fed. 975, Judge Putnam, following the decision of the Circuit Court of Appeals in the Howland Falls Case, awarded a preliminary injunction as to certain digesters there involved.

In American Sulphite Pulp Co. v. De Grasse Paper Co. (1907) 157 Fed. 660, 87 C. C. A. 260, the Russell patent was before the United States Circuit Court of Appeals for the Second Circuit. The only defenses there presented where a denial that Russell was the inventor of the improvements described in the patent, and an allegation that the

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

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

reissue was invalid. There being no prior art before the court, the case was heard as if on demurrer to the bill. The Reynolds and Mitscherlich patents (referred to in the patent in suit) were tested so far as there disclosed as affecting Russell's invention. The patent was held on its face valid, and it was thus at least impliedly held that there was nothing in the Mitscherlich and Reynolds patents which, as matter of law, precluded invention. The court, speaking through Judge Coxe, saw "no reason to differ with" the Court of Appeals of the First Circuit in its construction of the patent as contained in the two paragraphs we have already quoted.

[2] The alleged grounds of invalidity to be considered are: First, that Russell was anticipated by Pierredon and others; and, second, that the Russell patent discloses no invention. Defendant has, of course, the burden of proving anticipation by clear and convincing evidence. Enough has already been said to show that neither Mitscherlich nor Reynolds anticipated Russell, and we are cited to no other disclosures except Pierredon justifying specific mention. Pierredon's specification does not disclose a continuous lining of cement or cementitious mixtures next to the digester shell. There is nothing in his claims containing such suggestion. It is obvious that it never occurred to him that cement had in the slightest degree capacity to resist the digesting acid. True, one of the drawings accompanying the specification, and referred to therein as representing "in plan and in section some of the assembled square blocks," shows, if we assume it was drawn to scale, a substantial thickness of cement between the stone blocks and the shell; but it is nowhere said that the figure is drawn to scale, and the manifest design was only to show the assembling of the blocks. Prior patents are part of the prior art only by what they disclose on their face. Naylor v. Alsop Process Co. (C. C. A. 8th Cir.) 168 Fed. 911, 920, 94 C. C. A. 315. We are not justified in concluding that Pierredon disclosed or intended to disclose more (as respects cement lining) than a "lining comprising a layer of masonry or brickwork laid in cement," disclaimed by Russell. Pierredon's device is not shown to have been operative or applied to actual use.

[3, 4] The case of Pierredon is thus not within the rule which gives an inventor the benefit of his complete discovery, although he may not have appreciated or known its full uses, for he made no discovery so far as cement lining is concerned. The case falls rather within the rule that prior accidental production of the same thing, when the character and function were not recognized until the invention of the later patent, does not effect anticipation. Tilghman v. Proctor, 102 U. S. 707, 711, 26 L. Ed. 279; Topliff v. Topliff, 145 U. S. 156, 161, 12 Sup. Ct. 825, 36 L. Ed. 658; Wickelman v. Dick (C. C. A. 2d Cir.) 88 Fed. 264, 266, 31 C. C. A. 530; Canda v. Michigan Iron Co. (C. C. A. 6th Cir.) 124 Fed. 486, 492, 61 C. C. A. 194. And that anticipation is not disclosed by a drawing which incidentally shows a similar arrangement of parts, where such arrangement is not essential to the first invention and was not designed, adapted, and used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished

by the second inventor. Brill v. Third Ave. Railroad Co. (C. C.) 103 Fed. 289; Gray Telephone Co. v. Baird Co. (C. C. A. 7th Cir.) 174 Fed. 417, 421, 98 C. C. A. 353. We think the defense of anticipation is not made out.

The allegation that Russell's patent disclosed no invention is a distinct challenge of the truth of his alleged discovery declared in the specification that a cement lining would stop the passage of the acid solution to the digester shell. The question whether a cement lining would in fact protect the shell from acid was not litigated in the Howland Falls Case for the sufficient reason that the proposition was not there denied; and what we have said of the history of the De Grasse Case negatives the existence of the question there. There are several considerations which operate to throw on defendant a heavy burden with respect to the defense in question. Among these considerations are the vigorous defense presented in the Howland Falls Case, it appearing by the statement of Judge Coxe in the De Grasse Case that "in the prior litigation 94 anticipatory patents, 40 prior publications and 57 alleged instances of prior use were set up"; the fact of the alleged admission in the Howland Falls Case that Russell's lining was acid-resisting, that is, that it would stop the passage of the acid solution to the digester shell, which admission would seem presumably to be based on tangible experience somewhere; the fact that such defenses were omitted in the De Grasse Case; the express testimony of experts in the Howland Falls Case, which the Circuit Court of Appeals said "abundantly shows that there exists in cementitious mixtures generally when formed of acid-resisting materials a common hot-bisulphite-resistant quality"; the conclusion of Judge Putnam in the Howland Falls Case that "it is evident that in the practical judgment of a large portion of those who manufacture pulp with the aid of acid it accomplishes what the art has been looking for"; that when the testimony in the instant case was taken, of the 330 sulphite pulp-digesters in use in the United States, two-thirds were licensed under the Russell patent.

Upon the trial in the instant case the testimony in the Howland Falls Case was supplemented on both sides by considerable new testimony, some of it scientific, much of it devoted to actual experience with the Russell linings, which experience of course had continued for several years since the Howland Falls litigation. The testimony ranged from a denial, on the one hand, that hydraulic cement has of itself any appreciable acid-resisting quality, including testimony, based on experience, that Russell's cementitious linings have not in fact afforded substantial protection to the digester shell for any considerable length of time, to testimony, on the other hand, sustaining Russell's claims for his invention, and, concretely, that his linings have been shown by actual experience to be at least acid-resisting, and that they afford not only substantial but practical protection to the shell when relieved from the mechanical scouring effect of the contents. The testimony on this subject cannot satisfactorily be reconciled, but from all the evidence, scientific and nonscientific, we think the following situation can fairly be deduced:

Russell had apparently an exaggerated idea of the effectiveness and permanency of his cementitious mixture as an acid-proof agent; his views seem to have been shared by many practical operators; his mixture is not strictly acid-proof; on the other hand, his linings of cementitious materials do possess utility and acid-resisting qualities to a substantial degree, the extent of the protection depending largely upon the care and skill with which the mixture is compounded, prepared, and applied; the protection is not permanent if the digesting acid is allowed to come into direct contact with the cement mixture; at the least the friction of the wood material in motion and under high pressure wears off the inner surface of the lining, causing disintegration and mingling of lime with the mixture; from an early period Russell's linings have been in practice protected by a facing of acid-resisting tile contacting with the pulp mixture; one of the problems has been to provide a pointing for the joints between the tiles which would prevent the escape of the acid therethrough. Cement mortar was found ineffective; the pointings now in use are of litharge (oxide of lead) made plastic with glycerine, to which mixture is sometimes added Portland cement, sometimes also sand or pulverized quartz; such pointings, while being to a greater extent acid-resisting, are not durable, for the contraction and expansion of the tiles (as well as the scouring action of the pulp mixture) creates fissures between the pointing and the tiles, making necessary frequent inspection and actual repointing at intervals varying in experience from two weeks to two months. Just how far such tile facing would be necessary to the protection of the cement lining from the chemical action of the acid solution, if relieved from the pulverizing of the cement caused by the breaking of the surface through the friction of the wood mass, and the consequent disintegration, is not clear; perhaps the use in later years of stronger digesting liquor has made the linings more vulnerable. Just how long Russell's linings would last without the tile facing, and apart from the mechanical or scouring action referred to, cannot be accurately stated. There is credible testimony that acid has been known to work through the joints between the tile without reaching the shell and without apparently damaging the lining—mere discoloration of the surface next to the tile appearing. It satisfactorily appears, however, that some of his cement linings, entirely unprotected by tile facing or otherwise, were in active use for periods of a year to a year and one-half without the penetration of the acid to the shell to any extent, although there was appreciable wearing away of the surface of the lining, in some cases at least. We are satisfied that Russell's cementitious lining, as conceived by him, possesses practical utility and acid-resisting qualities to a substantial degree. We think it clear that Russell was the first to perceive that such lining had utility in the direction stated; and the defense that the patent does not disclose invention is, in our judgment, not sustained.

We find nothing in the prior use of cement linings in open vessels for heating hot acid solutions anticipating invention in the use of such lining in the bisulphite pulp manufacture. This feature was suffi-

ciently considered by the Court of Appeals for the Second Circuit in the De Grasse Case.

In our opinion the Russell patent is valid, and must be construed as covering broadly the continuous digester linings composed of cementitious acid-resisting mixtures applied in a plastic state to the outer metal shell, and adhering thereto, so as to furnish protection to the shell from the acid.

We thus come to the question of infringement. The construction of defendant's lining seems to be this: There was applied by trowels to the inner surface of the digester shell a continuous layer of plastic, adhering, quickly-setting cementitious material about one inch in thickness; against this layer of cementitious material there was laid a course of tile in the same material, the tiling being laid following the carrying up of the cement to a height of 18 to 24 inches; on this course of tile was plastered a continuous course of the same material of a thickness of about one-half inch to one inch (according to the differing statements of the witnesses); against this second coating was laid a second course of tile in the same material; and so on until the lining was carried completely up.

The third claim of the Panzl patent (No. 644,367, February 27, 1900) calls for a composition for acid-proof linings consisting of 26 per cent. hydraulic cement, 12 per cent. chamotte (a species of specially pure calcined clay), 21 per cent. of quartz, and a suitable quantity of diluted silicate of soda. This claim was held valid by the Circuit Court of Appeals for the Second Circuit in Panzl v. Battle Island Co., 138 Fed. 48, 70 C. C. A. 474. The cementitious material used by defendant is made according to the formula of this claim, with the addition of finely crushed slag and hard pitch. (Defendant's linings are—as are apparently Panzl's linings universally—protected by a tile facing whose joints are pointed with a mixture of litharge and cement made plastic with glycerine, which, in the case of defendant's digesters at least, requires renewal about once in two months.)

[5] Infringement is denied upon the grounds: (a) That Panzl's cementitious mixture is not covered by the Russell patent, but is of a fundamentally different nature, involving invention over Russell and protected by patent; and (b) that it is not the continuous cement lining of the Russell patent, but is in substance a layer or coating of masonry or brickwork laid in cement, which construction was disclaimed by Russell in his patent. The fact that the Panzl mixture is the subject of valid patent is not material. Patentable difference has no tendency to negative infringement. As said by Judge Denison, speaking for this court in Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 585, 112 C. C. A. 185:

"It [patentable invention] may just as well be based upon infringement, plus improvement, and improvement may lie in addition, simplification, or variance."

See, also, Murray v. Detroit Spring Co. (C. C. A. 6th Cir.) 206 Fed. 465, 467, 124 C. C. A. 371.

The case is not within the exception suggested in the Youngstown Case, for the Russell patent is generic, while the Panzl patent relates

only to a specific mixture which is applicable for use in connection with the generic Russell patent. The consideration that the Circuit Courts of Appeals in the Howland and De Grasse Cases limited the claim to such cementitious mixtures as would naturally develop "without invention" impresses us as without force. The expression "without invention" was, in our opinion, inadvertent, for the law recognizes no such limitation in cases such as this.

Disregarding proportions used, Panzl's ingredients are plainly within the scope of the Russell patent. The fact that by the proportions adopted Panzl has (as claimed) caused such chemical changes to take place as to produce a chemically different substance which is acid-proof, instead of merely acid-resisting cement, is not, in our opinion, a result so fundamentally different as to avoid infringement, which we think does not depend upon the chemical equivalency of defendant's mixture with that employed by plaintiff. Russell was striving to accomplish that very thing. His was the broad conception that cementitious materials could be, and he thought they were by him so combined as to produce an acid-proof mixture in the sense of resisting the action of the acid so far as to prevent its reaching the shell. It is by improving upon Russell, through ascertaining the particular ingredients to be mixed with the hydraulic cement and their exact proportions, that Panzl has succeeded as is claimed. This was invention, and meritorious invention, whether or not his broad claim that his mixture is absolutely acid-proof is well founded. But defendant's use of Panzl's formula for the specific cementitious mixture infringes (because it employs) Russell's broader invention of a continuous lining of cementitious, acid-resisting material. We are aware that a different conclusion has been reached by the District Court for the Northern District of New York, in American Sulphite Pulp Co. v. Hinckley Fiber Co. (D. C.) 217 Fed. 57; but we cannot agree with that conclusion.

The determining question thus is whether defendant's lining, including, as it does, two layers of cement mixture, one of which is plastically applied and adheres to the shell, the two layers completely embracing between them the layer of tile, is in substance and spirit a continuous lining of cementitious material, or whether it is merely masonry or brickwork laid up in cement. Pierredon not having anticipated Russell, because not disclosing a cementitious lining, may be disregarded upon the question of infringement. The thickness of the cement lining is important only as it affects the ultimate question we have just stated. The inventor's statement in the specification that he finds in practice that "with a lining composed of sand and Portland cement a layer of from three to five inches suffices to prevent acid from reaching the metal shell" is not conclusive that the thickness mentioned is necessary. He later found in practice that much less than this was enough, that he had been employing too high "a factor of safety." The inclusion of a layer of tile between two substantial layers of stone-like cement may well have the same effect as a layer of cement thicker than either layer so employed, or even thicker than the aggregate of the two. The fact that the specification of Panzl's later patent

(No. 744,601—1903) states that the cementitious lining there described "need not be more than one inch thick" has some pertinency. The specific method of applying the cement lining, whether by plastering upon the shell or by pouring in grout between the shell and a wall of masonry, is not the test of infringement. We think defendant's construction is in substance and spirit the continuous lining of cementitious material upon the digester shell within the meaning of the Russell patent. We think this conclusion accords with the decision of the Circuit Court of Appeals in the De Grasse Case, and that it is in harmony with what, upon careful consideration of Judge Putnam's opinion, we think was made the test of infringement in the Burgess Case. In our opinion infringement is established.

[6] Plaintiff was awarded as "profits and damages" on account of the infringement, a sum amounting to 70 cents per cubic foot computed upon the contents of defendant's digester shells, with interest at the statutory rate from the time defendant's digesters were completed. The intended basis of this award was the price charged by plaintiff for license to use the Russell patent; the opinion stating:

"A license fee with interest thereon from the time of the completion of the defendant's pulp-digester would be a fair measure of plaintiff's profits and damages."

Defendant therefore cannot complain that no inquiry into profits was had, for the award was in effect purely one of damages; moreover, the testimony on both sides was confined to damages. The amount of the license fee is no greater than the ordinary license fee charged by plaintiff (it seems to be slightly less), unless the so-called "Jurschina patent" was included in the prices which the court accepted as relating to the Russell patent. We think the record does not bear out this criticism; for although it shows that the Jurschina patent was included in many of the licenses, yet in others it was not, and there was testimony that the licensee did not, usually at least, know that any other patent than the Russell patent was to be in his license, and that the only license in fact paid for was under the Russell patent. The record does not convince us that the district judge was under any misapprehension in the respect stated.

The criticism that interest should not be allowed until after the damages were liquidated is without merit. This is not a case of profits, and the rule relating thereto does not necessarily apply. The measure of plaintiff's damages is the amount it has lost by defendant's failure to buy a license when he should have bought it. In such case it was at least within the court's discretion to award interest from the time the license should have been purchased as part of the damages for defendant's failure to do so. Tilghman v. Proctor, 125 U. S. 136, 143, 8 Sup. Ct. 894, 31 L. Ed. 664; Walker on Patents (4th Ed.) p. 446, § 571.

We are not impressed by the contention that the degree to which Russell's lining was inoperative should be considered upon the question of damages. In view of plaintiff's practice of selling the licenses and the substantial and continued market therefor, we think the court did not err in the assessment of damages, and that the decree of the District Court should be affirmed, with costs.

UNION SWITCH & SIGNAL CO. v. HALL SWITCH & SIGNAL CO.

(District Court, D. Maine. December 14, 1915.)

No. 726.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—ELECTRIC RAILWAY SIGNALING SYSTEM.

The Struble patent, No. 819,322, for an electric signaling system for use on electric railways, in view of the prior art, and especially of the Spang patent, No. 168,059, for an electrical railway signaling apparatus, does not cover a broad or generic invention, but must be limited to the specific construction shown. As so construed, *held* not infringed.

In Equity. Suit by the Union Switch & Signal Company against the Hall Switch & Signal Company. On final hearing. Decree for defendant.

Gifford & Bull and George E. Cruse, all of New York City, and Benjamin Thompson, of Portland, Me., for complainant.

Kenyon & Kenyon and Richard Eyre, all of New York City, and Thaxter & Holt, of Portland, Me., for defendant.

HALE, District Judge. This is a suit to enjoin the infringement of United States letters patent 819,322, issued May 1, 1906, to Jacob B. Struble, for improvements in electric signaling. At the opening of the specification, the character of the invention is stated as follows:

> The invention described herein relates to certain improvements in automatic electric signals for electric railways, and has for its object the overcoming the danger of a signal being operated by reason of leakage of the current employed in operating the cars or other foreign current and the improper energizing of the signal-controlling mechanism by such wild currents.
>
> In general terms the invention consists in the employment of an alternating current in the track circuits for energizing the translating device or relay controlling the signal circuit, which is controlled by neutral and polarized armatures of the track relay or relays.

The complainant alleges infringement of claims 4, 11, 12, 13, and 15, namely:

> 4. In a signaling system, the combination of a closed track circuit, an alternating current supply therefor, a signal, and means to control the operation of said signal, said means responding to the absence or presence of the alternating current in the track circuit and not responding to continuous or direct currents traversing said track circuit in its control of the signal.
>
> 11. In a signaling system for use on railways employing an electric current as a motive power and the track as a return for the electric current, the combination of a circuit which includes portions of both rails, an alternating current supply for such circuit, and a translating device responsive to the presence or absence in it of the alternating current in said track circuit to control a signal and not responsive to the motive power current or continuous or direct currents in said circuit in its control of a signal.
>
> 12. In a signaling system for use on railways employing a direct current as a motive power and the track as a return for the direct current, the combination of a circuit which includes portions of both rails, an alternating current supply for such circuit, and a translating device responding to the presence or absence in it of alternating current in said circuit in its control of a

signal and not responding to continuous or direct currents in said circuit in its control of a signal.

13. In a signaling system the combination of a track circuit, a constant source of alternating current supply therefor, a signal, and means to control the operation of said signal, said means responding to the absence or presence of the alternating current in the track circuit and not responding to continuous or direct currents traversing said track circuit in its control of the signal.

15. In a signaling system the combination of a closed track circuit, a constant source of alternating current supply therefor, a signal and means to control the operation of said signal, said means responding to the absence or presence of the alternating current in the track circuit, and not responding to continuous or direct currents traversing said track circuit when the signal is at "danger."

The complainant contends that, in these claims, Struble presents a generic invention; that he was the first to provide a system of electric block signaling suitable for use on electric railroads, a system in which interference between the signaling circuit and the power circuit was prevented, and that he did this by using a signal current different from the propulsion current; that he used a direct current for operating the car motors, and an alternating current for providing energy to the signal relays; that nothing in the prior art discloses such invention; and that hence the claims at issue show Struble to be the pioneer in this field. The defendant denies infringement, and says that these claims are invalid in view of the prior patented art, and because they are not pertinent to anything disclosed in the drawings and specification of the patent in suit; that they are invalid, also, because the system disclosed by them is inherently useless and inoperative.

1. Anticipation. The claims at issue present a combination of five elements, to wit:

1. A railway track divided into blocks.
2. A closed track circuit.
3. An alternating current supply therefor.
4. A signal.
5. Means responding to the absence or presence of the alternating current on the track circuit and not responding to continuous or direct currents traversing said track circuit in its control of the signal.

The defendant says that this combination is found broadly in prior patents, and was well known in the art. It therefore becomes necessary to consider first what is disclosed in the prior patented art. In March, 1875, Henry W. Spang, of Reading, Pa., applied for his patent, No. 168,059. At the outset of his specification, he says:

My invention relates to that class of electrical railway signaling apparatus, audible or visual, or both combined, which is operated in connection with the rails of an insulated section or sections of railway track, and in which the electric circuit or circuits which control the signaling apparatus can only be properly brought into action, and a safety signal given, when the opposite rails of the said insulated section or sections of track are not occupied or metallically connected, as by the wheels and axles of a locomotive or car.

It consists, first, in certain novel combinations and arrangements of the rails of an insulated section or sections of railway, one or more galvanic batteries or other sources of electricity, conductors, devices for changing, closing, and breaking circuit, and one or more signaling apparatus, audible or visual, or both combined, in which the safety signal is indicated by a series of movements of signal, or series of bell taps, or other series of signs or sounds, or

by a single movement of signal; produced by, or dependent upon, a series of reverse currents of electricity, the whole being so arranged that said safety signal can only be given when the opposite rails of said insulated section or sections of track are not metallically connected, as by the wheels and axles of a locomotive or car, or are not occupied by means of a series of reverse or opposite currents passing over the entire length of said rails, and the conductors forming the circuit or circuits which control the signaling apparatus, and cannot be given by a single current passing over them, thereby preventing the liability of the safety signal being given by atmospheric electricity, such as produces lightning, aurora borealis, or earth currents, or by any other accidental current, and particularly when the rails of said section or sections are occupied by a locomotive or car; second, in certain novel combinations and arrangements of conductors and a galvanic battery, by which a series of opposite or reverse currents will be transmitted; third, in an improved semaphoric signal apparatus, in which a visual signal rotating or moving upon its center, or a shaft, in one direction, is in combination with a toothed wheel, an impelling escapement, and a lever which vibrates between the poles of an electro-magnet, when said magnet is alternately charged by a series of electric currents which alternately pass in opposite directions over the coils thereof; fourth, in a combination and arrangement of devices by means of which my invention may be used for the protection of two or more adjacent insulated sections of track at the same time, the combined length of said sections exceeding the length of railway rails over which the current of a single galvanic battery can be with certainty employed for signaling purposes.

Claim 1 presents a broad view of his invention. It is:

1. The combination of one or more insulated sections of railway track, a main or primary battery and commutator, circuit changing relay magnets, and local or secondary batteries, an electric signaling apparatus, and intermediate conductors between the foregoing, arranged and operated for producing a series of signals in said signaling apparatus, or a single signal by a series of reverse currents, substantially as described.

The defendant contends: That Spang discloses broadly the inventive thought found in the combination of elements in the patent in suit. That he introduced to the art three ideas which are now found in the electric railway signaling art, namely: (1) The employment of alternating current in the track circuit with suitable distinguishing apparatus to prevent direct currents from clearing the signals; (2) the introduction of a normal danger system of signaling while maintaining the closed track circuit idea as the means for indicating the condition of the block to an oncoming train; and (3) the division of blocks into relayed sections to enable longer blocks to be employed without correspondingly increasing the voltage applied to the block. The standard block signaling system was not new with Spang. That system shows the track divided into blocks by insulation in the rails, each block having a source of current connected across one end, and a signal controlling device connected across the other end. This makes a closed track circuit, short-circuited by the wheels and axles of the train when it enters the block, thus shunting the current from the signal controlling device, and opening a local signal actuating circuit, allowing the signal to go to danger by gravity. This is the substantial system introduced by Robinson (1874), No. 5958 reissued patent. Robinson is called the "father of the system." It has been known by signaling engineers as the closed track circuit system, defined to consist of "a circuit that depends upon the continuity of the parts and the flow of cur-

rent to clear a signal." While Spang did not invent the automatic block signal of the closed circuit type, the proofs are convincing that he intended to make use of a completely closed track circuit, and that he employed the best appliances of his time. His specification, to which I have referred, shows that his primary thought was to prevent "the liability of the safety signal being given by atmospheric electricity, such as produces lightning, aurora borealis, or earth current, or any other accidental current." Such wild currents have been defined by Dr. Hering to be those that are not implicitly involved in operating. Dr. Robb speaks of these earth currents as being analogous to direct currents, and says that they should be treated as such. In his specification, Spang speaks of the liability of interruption by contact of conductors with another line which is apt to give a wrong signal and endanger the trains of a railway upon which the apparatus is used. He says:

> The object, therefore, of employing and depending upon a series of alternately opposite or reverse currents of electricity to pass over the said primary, or both primary and secondary circuits, and give a series of bell taps, or a series of movements of a semaphoric signal, or both, at regular intervals, to indicate safety, as hereinbefore described, is to prevent the liability of a safety signal being given by a current or currents of atmospheric electricity, or a current or currents from any other source than that regularly employed in connection with the rails and signaling apparatus.

Spang discloses signals of various kinds: A bell signal; a rotating disc signal; an electric lamp signal; and a form of semaphoric signal. It is clear, too, that he shows apparatus to control the signal, and that this apparatus was operated by an alternating or reverse current. His technical language was not the language of the later art; it has been characterized as "quaint" language. He referred to the current which he selected as a current having reversals in direction. He produced this current in one of two ways: First, by his commutator so connected to a battery and track that when the commutator is rotated there will be rapid alternations of direction of the current in the track rails. He produced a current, also, by a magneto inductor, which appears to have been the alternating current dynamo of that time, this dynamo having a permanent magnet, instead of an electro-magnet.

The proofs are clear, I think, that Spang provided distinguishing apparatus. He clearly had apparatus permitting the signal to be operated by alternating currents traversing the circuit, and for preventing the signal being operated by continuous or direct currents traversing the track circuit. He employed the distinguishing effects of an alternating and a direct current upon a polarized armature. I think the defendant is correct in saying that:

> Spang so designed his relay that its polarized armature would oscillate with the alternations of the current, and so applied the relay that only such oscillations would have any effect upon the signal.

Dr. Robb says that the distinguishing apparatus of Spang was the best apparatus of the day, and that it operated by an alternating current to clear a signal. He says, too, that late advancements in the art have been merely the substitutions of improved apparatus without

change of principle; that Spang achieved his results with mechanisms of the same general character as those employed in the later art. Dr. Robb alludes, also, to the Roome patent, 558,565 (1896), and the Shreuder patent, 566,541 (1896), and says that each discloses an alternating current, that both used neutral relays, and that any one who had installed a Roome or a Shreuder system, and had met with interference from stray direct currents, would at once think of the use of some sort of distinguishing apparatus. Alternating currents with distinguishing apparatus are found to be applied to electric railway currents in the Urquhart patent, No. 600,101 (1897). It is not necessary to refer in detail to other patents showing similar disclosures. Dr. Hering said that distinguishing apparatus and distinctive currents were the A B C of electrical engineering. In reference to distinctive currents and distinguishing apparatus Mr. Waterman said that:

Those facts have been known and widely known, known to everybody, for so long as I can remember; many, many years.

A study of the prior patents cannot fail to lead the court to the conclusion that the distinctive current idea of means involving a distinguishing apparatus in its embodiment is found long before Struble's invention. Spang's prevailing idea of means was the requirement that, in order to give a clear signal, there should be a completely closed track circuit, and an alternating current flowing throughout that circuit. Spang did not have an electric railway before him; but clearly he was dealing with direct currents, with the same kind of currents to which Struble refers in the language which I have quoted from his specification. Spang seems to me to have had the inventive thought applicable as distinctly to an electric railway as to the direct currents with which he was dealing, and against which he provided. And so it cannot be said that any new problem arose later, when one of the two currents disclosed was an electric railway current; for there is no difference in principle between superimposing an alternating current upon an electric railway current, and superimposing an alternating current upon any other direct current. The principal attack made upon the Spang system by the complainant is that Spang did not disclose an always closed circuit. The closed circuit, as I have said, existed before Spang. Robinson shows it in his 1874 patent, No. 5,958 (reissue), to which I have referred. Let us see precisely what Robinson did. In his specification he says:

The invention consists, first, in a constant electric circuit for the purpose of operating electric railway signals, audible or visual; second, in a visual or semaphoric electric signal, in combination with a constant metallic circuit composed in part of a rail or rails of the track; third, in an alarm or audible signal, in combination with a constant metallic circuit consisting in part of a rail or rails of the track; fourth, in an additional or secondary circuit, in combination with a primary circuit composed in part of a rail or rails of the track; fifth, in a visual and audible signal, in combination with each other, and with a constant metallic circuit composed in part of a rail or rails of the track; sixth, in an electro-magnet and a battery so connected to the rails of a section of railroad track that when connection is established between said rails by the wheels and axles of a car, or by other superior conductor, the electric circuit is partially changed and the signal operated through the

demagnetization of the magnet; seventh, in an improved signal of very simple construction, whereby great ease of action is secured.

He says, too, that a constant circuit for railway signaling purposes is the chief feature of his invention; and he defines such constant circuit to be a circuit whose "magnet or magnets are operated or controlled without actually opening the circuit through said magnet or magnets." His broad idea is disclosed in claim 1:

The combination of a constant circuit, a magnet or magnets operated or controlled without actually opening the circuit of said magnets, and an electric railway signal or signals, substantially as described.

Spang adopted a device which he regarded as an improvement upon Robinson, namely, that of using a closed circuit only when a train was approaching. His purpose was economy. For such purpose, he says, he kept "the secondary or local signaling circuit open when not required to be brought into action to operate the signaling apparatus, and thereby prevent the waste and weakening of the batteries." The necessity of economy in those early days of the art is shown by Dr. Robb and other experts. In order to produce this result, Spang's original, crude method was by means of a commutator operated by a signalman. His principal and practical method was: When it was desired that the signal should be observed by an approaching train, he made the train automatically close the circuit. At other times the signal stood at danger; a train would not proceed until something affirmative was done to show the safety signal; and such showing could not be made until a closed circuit was established, and the flow of a definite kind of a current introduced into the circuit.

The sharp contention is made by the complainant that, in order to anticipate Struble, the closed track circuit must be always closed. The defendant contends that there is no functional difference between the operation of the always closed track circuit and the closed track circuit which is opened or de-energized when not needed, and that there is no difference whatever, so far as relates to the idea of supplying distinctive currents and distinguishing apparatus, to prevent direct currents from interfering with the signaling. Dr. Hering says that the idea of a closed circuit system does not involve the notion that the circuit must be closed all the time, day and night, trains or no trains; that there is no reason why the circuit should not be cut off and opened whenever there is no use for a signal. He says that the "constant" source referred to by Robinson, and insisted upon by the complainant, is a source that is constant while it is being used, and that it does not necessarily mean that the current is continuously flowing when not in use and when not required; that an electric railway has a closed circuit, even if that particular railway shuts down its power house each day in the morning, and at such time opens the circuit. By analogy, he urges that a waterfall is a waterfall, even if water is artificially diverted to a pond for a part of the time; that a shower bath is a shower bath, whether one starts it, either by hand, or by stepping upon a platform, as one approaches it; and that it makes no difference whether it is allowed to run all the time, or a

part of the time. I asked Mr. Waterman, the expert who testified in behalf of the complainant, to state fully the functional difference between an always closed circuit and a circuit closed only when needed. He put his objection substantially upon the fact that there is no time but that some exigency of the traffic may arise which will make the need for a track circuit, not only closed, but continuously energized. He discusses the figure of Spang's patent, in which the signalman is required, and supposes that the signalman turns the crank and signals the train to go ahead, and goes back to his newspaper. The substance of his complaint of the system is that in his opinion the only way to guard against accident is to have the track circuit always closed; but he points out nothing definite and distinct which, I think, is inconsistent with the defendant's contention that Spang's circuit is a closed circuit, even though it is purposely opened when not needed for a signal. Upon carefully examining the proofs on this subject, I cannot believe there is any functional advantage in the always closed track circuit over a closed track circuit provided with means to cut it open until a train approaches. It clearly did not involve invention for Spang to take the always closed circuit which he had before him in the prior art, and to put upon it what he regarded as the economical improvement of a circuit closed whenever required to be closed—if that had been all which Spang did. It seems equally clear that a change from Spang's circuit to a circuit always closed, and always energized, was a change that any one skilled in the art could have made without involving any use of the inventive faculties. Much of the comment upon Spang's system as disclosed by his patent comes from the fact that in 1875 all the apparatus known to the art of railway signaling was crude.

The complainant makes the sharp contention that Spang's patent was absolutely inoperative and unusable. I cannot conclude that the proofs sustain this contention. A working structure illustrating the Spang system was shown to me in the courthouse at the time of the hearing. Although this was subject to the attacks of learned counsel for the complainant as not presenting the Spang invention at all, it seemed to me to present the Spang system, and to illustrate the Spang patent as an operative and workable patent, as it was said to be by the experts on behalf of the defendant. A model also of the Orcutt patent was constructed and was explained to the court at the time of the hearing. This patent, No. 664,819, in its essential disclosure, is so similar to the Spang patent that I need not discuss it.

In considering the question of anticipation, it may be helpful to examine the broad character of the several claims at issue, and to make some comparison. Claim 4 is directed to apparatus for any signaling system employing track circuits. Spang's inventive thought was directed to substantially the same end. It cannot be said that the elements of an electric railway can be read into claim 4, though claims, not now at issue in the patent, include this element. It seems clear, too, as I have pointed out, that even though this element could be read into the claim, there would be no inventive thought disclosed in applying an old signaling system, without change, to an electric

railway, if such old signaling system was found to be applicable and useful on an electric railway. Claim 4 calls also for an alternating current supply for the track circuit. Spang supplied this alternating current for substantially the same purpose. I have already referred to the signal of Spang. Claim 4 calls for means to control the operation of the signal, said means responding to the absence or presence of the alternating current in the track circuit, and not responding to continuous or direct currents traversing said track circuit in its control of the signal. I have already called attention to the means employed by Spang. Spang's relay and Struble's relay are not the same. Struble employed two conflicting armatures, and made use of the open circuit principle. Spang made the clearing of the signal dependent upon a vibration which could be produced only by an alternating current. Claims 11 and 12 do not describe a closed track circuit. The combination which is disclosed in these claims seems broadly to have been covered by Spang's disclosure; for, although these claims specify that the signal system is for use on electric railways, this can only mean that the system is suitable for use on an electric railway. Upon a careful study of Spang and Orcutt, I think it must be found that their systems were also suitable for use on an electric railway, although an electric railway in their day had not been thought of; for substantially the same problem was presented in applying an alternating current and distinguishing apparatus to the track of a direct current electric railway as in applying such current and such apparatus to any conductors carrying a direct current.

Claim 13 does not describe a closed track circuit. It describes an alternating current as a constant source. It cannot be said that "constant" must necessarily have the meaning of a source which is always in use. A source which is steady in purpose is not necessarily always in use; but even though always in use, in view of the prior art it cannot be said, as I have already pointed out, there was any invention in this element. Claim 15 is substantially like claim 4, except that it is limited to the "constant source of alternating current supply" for the track circuit, and the prevention of the return of the signal from its danger position of indication by direct currents.

Upon comparing the two patents, I am constrained to believe that Spang shows broadly and substantially the same combination which Struble has pointed out in the claims at issue of the patent at bar, and that in each element of the combination he has used the best instrumentalities of his day; just as Struble and the defendant have employed the instrumentalities of a later day, without changing the broad principles shown in prior patents. It is undoubtedly true that great difficulties and dangers must be met in operating cars propelled by electricity on a block or section of railroad having an electric signal current. These difficulties and dangers have been fully presented by learned counsel. But, upon a careful examination of Struble's specification and claims at issue, I am constrained to find that in them Struble did not undertake to deal with this broad problem, and did not disclose to the art anything which applies a remedy. I think the principles to be applied to this problem had already been disclosed in prior patents.

The proofs are persuasive that Struble was not the first to use a signal current different from the propulsion current; that he was not the first to use a direct current and an alternating current; that he was not the first to use distinguishing apparatus; that he was not the first to provide an electric block signaling system suitable for use upon electric roads.

After a careful study of the proofs and of the prior art, I cannot agree with the complainant that the claims at issue of the patent in suit can be sustained as disclosing a broadly novel idea. In the light of the prior patents, I must decide that the claims at issue cannot be held to involve a generic invention. They are so broad in language that, in view of prior patents, they must be pronounced invalid, unless restricted to the specific construction shown in the patent. This construction consists substantially of the system set out in the specification, namely, a system centering about a relay for polarized and neutral armatures.

In thus restricting the scope of the patent, I am not unmindful of the heed that should be given to the action of the Patent Office. The patent was before the Patent Office in interference with the Winsor patent. Without discussing the contents of the file wrapper, it is necessary to say only that in the first instance the examiner found the subject-matter of the interference met by Spang and Orcutt. An appeal was taken; the examiners in chief reversed the examiner. A different primary examiner then took charge of the application. This examiner agreed with the former examiner. Thereupon Struble took an appeal to the board of examiners. The board dismissed consideration of the question with the brief statement that the question had been reviewed on Struble's ex parte appeal, and that there were no new considerations to change their decision. At the same time with the appeal to the board, Struble filed an appeal to the Commissioner. The case was postponed by the Commissioner from time to time, but was finally heard. Before any further action was taken, the complainant got the title to the Winsor patent, and thus closed all contest. It is true that, where trained experts of the Patent Office have decided that what was done by the patentee rose to the dignity of an invention, such decision carries weight with a court. Beer v. Waldridge, 100 Fed. 465, 466, 40 C. C. A. 496. In the case before me, the record of the Patent Office, under all the circumstances shown in the proofs, should clearly be given no greater moral weight than the ordinary prima facie force to which it is entitled under the patent law. And it is clear that Patent Office proceedings do not relieve the court from the duty of carefully and patiently considering all questions of anticipation.

I am aware that the patent has received from a District Court a construction giving it a much wider scope than I am able to give it. The patent has been before the court in the Second district in New York in 1910. Union Switch & Signal Co. v. General Ry. Signal Co. (C. C.) 180 Fed. 456. In the case before Judge Ray, the complainant in this case sued the General Railway Signal Company, charging infringement of the patent in suit before me, and another Struble pat-

ent, No. 819,323. A cross-suit resulted; the General Railway Signal Company sued the railway using complainant's apparatus, and charged infringement of several patents to Young. There is no need of going into the details of the litigation. Judge Ray held that there was a generic invention, defined in the opinion as the distinctive current idea of means involving a distinguishing apparatus in its embodiment. This idea was held to be involved in the claims of both the two Struble patents then before the court; and no distinction was made between the two patents. They were treated as if involving the same invention. Judge Ray does not discuss the particular structure presented for consideration in the patent at bar. Some of his conclusions of fact clearly show that he had before him entirely different proofs from those in the record before me. Some of his conclusions would have been obviously impossible upon the proofs presented before me relating to the one patent upon which I am called to pass. I have alluded to his clear and able opinion, because I give it great deference, as I ought. But, of course, I can be governed only by the proofs in the hearing before me, occupying several weeks in time. In that hearing, I gave the broadest scope to the issues, and listened to the examination of some of the most learned and scientific men in the country, who testified as experts. After careful consideration, it is my duty to come to my own conclusions from the proofs before me. In Beach v. Hobbs (C. C.) 82 Fed. 916, Judge Putnam pointed out that new parties litigant are entitled to have facts carefully scrutinized, with a view to determine whether such facts present a different case from that adjudicated in the prior litigation; as, he says, was pointed out in Andrews v. Hovey, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160, where the result is an illustration of the necessity of securing to new defendants all their rights as shown by the special facts exhibited by them, notwithstanding determination in prior litigation with reference to the same subject-matter. Learned counsel for complainant urge that the great use of alternating current track circuits in recent years tends to show that invention was exercised by Struble in the patent before me. This argument is useful in deciding a close case of invention. In Beer v. Waldridge, 100 Fed. 465, 40 C. C. A. 496, Judge Wallace points out that, in view of authorities like Krementz v. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, the question whether or not a given improvement involves invention is one upon which judicial minds divide, sometimes even in very simple cases, and in close cases of that character evidence of the commercial value of the patented article may be often persuasive that the patent is valid. I think the case at bar is not such a case. It is true that after Struble's time there became great necessity for the application of alternating currents upon railroads. Dr. Robb, and other experts, refer to this fact. But the proofs do not tend to show great commercial success of the patent at bar; and in considering the questions I must, of course, look to this patent, and not to the general utility and success which the complainant may have found in other patents. In a recent case, Cadillac Motor Car Co. v. Austin, 225 Fed. 933, 990, —— C. C. A. ——, the Circuit Court of Appeals for the Sixth Circuit pass upon a case where a selection of ele-

ments from existing machines and putting them into a combination produced a new result from a practical and commercial aspect; and the court predicated invention upon that fact, citing Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177. A similar state of facts was presented in Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, — C. C. A. —. In the case before me, the proofs fail to show any practical and commercial aspect relating to this patent which aids the court in coming to a conclusion.

2. Has the defendant infringed the claims at issue of the patent in suit? In the specification, the inventor says that his—

> invention consists in the employment of an alternating current in the track circuits for energizing the translating device, or relay, controlling the signal circuit which is controlled by neutral and polarized armatures of the track relay, or relays.

In the restricted scope which I have given the claims before me, the complainant must be held to the combination which Struble had in mind, and which can be no broader than the distinct elements of his original idea of means, as shown in this patent. The complainant is entitled, then, to the specific construction pointed out in the patent, namely:

> Struble's means responding to the absence or presence of an alternating current in the track circuit, and not responding to continuous or direct currents traversing the track circuit in its control of the signal.

Struble's achievement in this patent must be judged by the combination he disclosed and upon which he made the relay illustrating his idea of means. His conception relates to what is done when a direct current is in the track circuit. In this patent he is not, of course, entitled to any result which he reached in another and later patent. In the claims at issue of the patent at bar, his idea was to employ a polarized armature as an addition to the neutral armature, the ordinary relay of the signaling art; this additional piece of apparatus, namely, the polarized armature, when acted upon by a direct current, was to perform the additional function of breaking the signal circuit at a second point, to compel the signal to show danger, irrespective of traffic conditions. The inventor's idea was to accept the effect of the direct current on the neutral armature, and then to make an independent break in the signal circuit by a direct current, acting positively and reversely on the polarized armature, which was so conditioned as to be wholly nonresponsive to an alternating current. Nothing in his specification, or in the claims at issue, induces me to believe that Struble had, or thought he had, any inventive conception so broad as is attributed to him by the learned counsel for the complainant. From what has been said in discussing anticipation, it is clear, I think, that nothing in these claims before me teaches how to take the well-known system of signaling by alternating currents and to apply it to electric roads. As I have said, the principles involving this problem had already been taught in prior patents. Upon all the proofs, the court would not be justified, I think, in giving to the claims at issue

in the patent at bar the broad monopoly contended for by the complainant.

The defendant also is entitled, I think, to be protected in the disclosure made in its relay. That disclosure is essentially different from Struble's; it differs somewhat from Spang's. It is built on the inductive principle. It gets no effect from the direct current. The defendant eliminated the neutral armature, and substituted one responsive to alternating currents, but not responsive to direct currents. The defendant's combination shows means different in principle and in function from that of the complainant in this patent. I must, therefore, hold that the defendant does not infringe the claims at issue of the patent in suit.

The case has been an absorbing one, involving the labor for many weeks of eminent counsel, and of many witnesses. I found much interest in interrogating the experts and other witnesses, and in bringing out every possible illustration or suggestion that could aid in considering questions of great interest.

The complainant's bill is dismissed.

Let a decree be presented dismissing the bill.

Defendant recovers costs.

Defendant to present draft decree not later than December 22d. Complainant to present corrected decree, if any, not later than December 28th, at 10 o'clock a. m. Decree to be settled December 30th, at 10 o'clock a. m.

BYERS v. F. T. PEARCE CO.

(District Court, D. Rhode Island. December 30, 1915.)

Equity No. 46.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—DESIGN FOR PENCIL CLIP.

The Byers design patent, No. 45,102, for a design for a pen or pencil clip in the form of a serpent, to avoid anticipation by the prior art, must be limited to the special configuration shown, and, as so construed, *held* not infringed.

In Equity. Suit by George T. Byers against the F. T. Pearce Company. On final hearing. Decree for defendant.

Stephen J. Casey, of Providence, R. I., for complainant.
Horatio E. Bellows, of Providence, R. I., for defendant.

BROWN, District Judge. The bill, filed January 14, 1915, charges infringement of design letters patent to George T. Byers, No. 45,102, January 6, 1914, on application of April 14, 1913, for design for holding clip for pens and pencils.

The drawing shows a serpent with coils surrounding a pencil, the tail having a peculiar twist, and the head and neck extending lengthwise of the pencil to form the engaging end of the clip.

The mechanical features of the clip were old. The patent to Lind-

berg, No. 769,951, September, 1904, shows a pencil clip with coils of wire around the pencil and a longitudinal extension of the wire curved to form a spring arm adapted to engage a pocket. The patent to T. K. Felch, No. 1,021,878, April 2, 1913, application of March 24, 1911, shows in the drawings a pencil clip with spiral coils. The engaging end of the clip is ornamented with scales and with a serpent's head, which bears some resemblance to the head of complainant's snake. The engaging end of the clip projects obliquely.

The patentee, Byers, testified that he had decorated pencils with snake ornaments for about 15 years, and produced in evidence a penholder ornamented with a coiled snake (Exhibit 4), which he stated was made in 1905. As an ornamental design for a pencil or pen it resembles the patented design. The head portion, as well as the body portion, is, however, attached close to the body of the pen, and thus cannot perform the mechanical function of a clip.

The snake of this exhibit of 1905 is made from the same dies used to manufacture the snake from which was made by bending, the pencil clips of Complainant's Exhibits 6 and 8.

It appears that, to adapt Byers' old snake ornament for use as a clip, it was bent into a somewhat different and less artistic form, in order to meet the mechanical requirements of a clip.

It is a somewhat curious fact that both the complainant and defendant made their first snake clips out of old stock snake blanks that were commonly used for ornamentation, being made by a die in straight form, and of material suitable to be bent as desired.

The patentee, Byers, testified that he had used for many years his snake ornament bent into different shapes. It appears, also, that the T. W. Lind Company, of Providence, R. I., had made from their snake die No. 932, for from 20 to 25 years, snakes in straight form, which they sold as ornaments, and that the first snake clips made by the defendant were made of such Lind snake blanks No. 932 merely by bending them into the proper shape to meet the mechanical requirements of a pencil clip.

So far as can be judged from the drawing of the Byers patent, and from complainant's exhibits of clips made by him, the only changes made by Byers from his stock form were the cutting off of fangs, the extreme longitudinal extension of the head portion, and a slight upturning of the snake's head, similar to that illustrated in Felch's patent, and a peculiar twist of the tail.

Whether in view of the known mechanical requirements of pencil clips, and of the existence of stock snake ornaments suitable to be bent to any desired shape, and of the prior illustration of snake ornamentation for a pencil clip by Felch, Byers can be regarded as the inventor of a patentable design, rather than as an adapter of an old design to a mechanical use, seems doubtful, in view of the opinion in Smith v. Whitman Saddle Co., 148 U. S. 674, 679, 13 Sup. Ct. 768, 37 L. Ed. 606. But for the purposes of this case, giving to the patentee the benefit of the doubt, it still seems necessary to hold that his patent is limited to the special configuration shown, and cannot cover broadly a pencil clip of snake form.

In considering the question of infringement it is important to note that the defendant's snake clip is of independent origin. It was first made from the T. W. Lind & Co. snake ornament merely by bending. When, however, the defendant decided to manufacture them in quantities, it had new dies made by T. W. Lind & Co., which produced a snake with a much slenderer neck, though otherwise of the same form. This was done partly for mechanical reasons, to give the engaging end of the clip resiliency and thus form a better spring. It also gave a distinctive feature to defendant's clip—a rectangular bend of the snake at the engaging end of the clip.

The defendant's brief fairly states the comparison between the Byers design and the defendant's, as follows:

"In the Byers design the major part of the serpent's body constitutes the depending or arm portion of the clip. There is but a single complete coil, and that is near the tail. The tail itself is upwardly extended to form a closed triangular loop, which is a most striking feature of the design. The maximum breadth of the snake body is at the point where the body is bent to form the depending arm.

"In defendant's structure there are a plurality of coils, rather than a single coil, and these coils are in the central or body portion of the serpent, rather than near the tail; furthermore, there is no terminal loop in the tail. In all these respects defendant's design more nearly resembles that of Felch than it does the patented design. In defendant's design the narrowest portion of the serpent body is located at the point where the Byers serpent body is broadest, namely, where the depending arm joins the body. Not only is this a distinction in appearance, but it is a distinction of mechanical importance, as the depending arm in actual practice has practically no resiliency unless relatively slender at that point, as testified by Wall and Lind."

But the complainant himself gives important evidence as to the difference between his design and defendant's. His application for the patent in suit was filed April 14, 1913. In April, May, or June of that year he made application to T. W. Lind & Co. for snake blanks. He testified that his object was "to get that very snake Pearce was using." Thereafterwards he had dies made, and closely copied defendant's design, which he is now using.

Thus his suit has for its object the appropriation of the defendant's design for himself, and the exclusion of the defendant from its use, rather than the protection or use of the design shown in his letters patent. This is practical evidence of the superiority of defendant's design, and of its substantial difference from complainant's.

I am of the opinion that the defendant has established its first defense of noninfringement.

The defendant next contends that, if its design be held to infringe the Byers patent, that patent is void because of prior knowledge and use.

The defendant has shown, by evidence of the most conclusive character, that the design which it now uses, and which complainant has copied, was on the market for about six months previous to complainant's application date. The T. W. Lind Company, upon previous orders for the modified snake blanks, had manufactured dies and had delivered snake blanks to defendant by October 10, 1912. By October 18, 1912, snake clips had been made and sold, and from that time

on they had been sold in considerable quantities, as appears not only from the sales book of complainant, but from the testimony of witnesses representing well-known firms who produced samples of their purchases.

On April 5, 1913, a large number of pencils provided with defendant's snake clips were distributed as souvenirs at a banquet of the New England Manufacturing Jewelers' & Silversmiths' Association, held in Providence, R. I. The souvenir pencil with defendant's clip attached was illustrated by a drawing published in a regular publication called "The Manufacturing Jeweler" on April 10, 1913.

The complainant's drawing reached the Patent Office on April 14, 1913. There is no testimony to show when it was prepared. As appears by the file wrapper, the original petition and power of attorney concluded with the words:

"Signed at New York * * * this 4th day of April, 1913.
"George T. Byers."

The notary public's attestation left the date of the oath blank; i. e.:

"Sworn to and subscribed before me this ——— day of April, 1913."

A new oath was required by the Patent Office.

There is nothing in the patent record to show that Byers took any steps to patent his design at any time before defendant's design had become well advertised and well known to the trade.

It is clear beyond question, and is expressly conceded by complainant, that the burden is cast upon him to carry back his invention to a date earlier than October, 1912, at which time the defendant's present design was put on the market. I am also of the opinion that the burden rests upon the complainant to establish his date of invention as earlier than December 14, 1911; for upon hearing the oral testimony of Mr. D. W. Wall and Mr. Wm. G. Lind, and upon an examination of Defendant's Exhibit H, I am satisfied that snake clips were manufactured by the late Frank T. Pearce, the late Aldridge G. Pearce, and D. W. Wall, from the Lind blanks No. 932, and were attached to pencils and distributed as gifts on Christmas, 1911. These snake clips more closely resemble the patented design than defendant's present clips, in that they have the thick and inelastic neck.

This testimony is criticized by complainant as resting upon the uncorroborated testimony of Wall, and as insufficient under the rules. I believe the witness, however, and his story does not in its important particulars lack corroboration. Mr. Lind identifies the clip of Exhibit H as made from the No. 932 blank, and testifies that Mr. Aldridge G. Pearce applied to Lind & Co. for such snake ornaments in the latter part of 1911 or early in 1912. The making of a few clips for Christmas presents, or the furnishing of a few snake blanks for this purpose, were transactions not in the ordinary course of commercial manufacture and sale, and the failure to produce books verifying such transactions does not seem at all remarkable.

That the defendant ordered the making of new dies by Lind & Co., differing from the old only in the feature of a narrower neck, corroborates Wall's testimony that clips were first made from Lind's old

stock blanks, but were found too stiff to give the desired amount of spring.

Though the complainant, Byers, had knowledge of the defendant's manufacture at least as early as the time of his application to Lind & Co. for snake blanks like those used by defendant—i. e., in April, May, or June, 1913—his bill was not filed until January 14, 1915. Before that date both Mr. F. T. Pearce and his son, Aldridge G. Pearce, had died. Under the circumstances the defendant cannot be justly charged with any lack of diligence or failure to produce other corroborating witnesses to the manufacture in December, 1911.

The complainant, Byers, produced a snake clip, Exhibit 6, which he says was made in the early spring of either 1910 or 1911; that he went to a patent attorney by the name of Frederick Barker, No. 30 Church street, New York, and applied for a patent, and owing to the cost of the patent deferred taking it out; that he showed it to people in his shop and turned out quite a number. He produced also another sample of the same date, Exhibit 8, which he says was adapted for pencils. It differs from Exhibit 6 in having coils of smaller diameter, but was made from the same blank as Exhibit 6. Both of these exhibits are crude productions, and neither is a perfected commercial design; and it is evident that the drawing of the patent in suit was not made by copying either.

No other exhibits are produced, either from his factory or from customers, to show his production or sale of any snake clips, except those of the design copied from the defendant in 1913.

The only attempt to corroborate the complainant's testimony as to his production of clips like Exhibits 6 and 8 before October, 1912, was by the testimony of Mr. B. P. Soper, whose recollection both as to dates and as to the character or design of anything shown to him by Byers is so vague and uncertain as to have no force as corroboration. His testimony also tends to show that, if any attempts had been made by Byers to make a snake clip out of his stock blank, they had not been taken seriously and were abandoned. The complainant's proofs do not meet the requirements of the rules of law applicable to such cases.

Exhibits 6 and 8 do not prove the completion of the design of the patent in suit at any time before the date of the application.

Comparing defendant's clips with Complainant's Exhibits 6 and 8, rather than with the patent drawing, it seems impossible to hold that the resemblance is such as to deceive an ordinary observer, or that they are substantially the same in point of artistic design.

I am of the opinion that the defendant does not infringe the patent in suit, and that, if the patent should be so liberally interpreted as to cover the defendant's design, it is void on the ground that the defendant's design of December, 1911, and also its design of October, 1912, now used by both complainant and defendant, are proved of earlier date than the design of the patent in suit.

The bill will be dismissed.

METAL PRODUCTS CORP. v. R. E. THORNTON CO.

(District Court, D. Rhode Island. December 11, 1915.)

No. 42.

PATENTS ⟸328—VALIDITY AND INFRINGEMENT—GEM SETTING.

The Dover patent, No. 795,109, for a gem setting, narrowly construed, as it must be to avoid anticipation in the prior art, *held* not infringed.

In Equity. Suit by the Metal Products Corporation against the R. E. Thornton Company. On final hearing. Decree for defendant.

F. Webster Cook, of Providence, R. I., and Browne & Woodworth, of Boston, Mass., for complainant.

James H. Thurston, of Providence, R. I., for respondent.

BROWN, District Judge. The bill charges infringement of letters patent 795,109, July 18, 1905, to George W. Dover, for gem setting. Claim 2 only is in suit.

"2. The improved gem setting herein described, consisting of a tubular body portion having at one end a concentric annular flange integral therewith, but of an external diameter less than that of said body portion and of an internal diameter greater than that of the bore of said tubular body portion."

The specification states that the invention relates to gem settings, commercially known as "box settings," in which the setting comprises a tubular or polygonal body portion and an annular flange extending peripherally from the top portion thereof, and adapted to be bent over to fasten a gem in position.

The old form of box setting is illustrated in Figure 12 of the patent drawings, and consists of a tube with its inner, upper portion beveled so as to form a seat for the gem. The beveling of the tube reduces the thickness of the upper portion, which constitutes an annular flange, adapted to be bent over to fasten a gem into position. The improvement was for the purpose of adapting such box settings for use in grouping or clustering gems set in such box settings. The patentee says:

"The reason why these box settings cannot be used in clusters is that if two or more of them are placed in contact one with another, and solder is applied to unite such contiguous surfaces, the solder, as is well known, flows as far as the contiguous surfaces are in contact."

The result is said to be that the flanges become soldered to each other and cannot be bent over to engage the gems. By making the tubular body portion of a diameter exceeding the diameter of the annular flange a shoulder was formed, and by this shoulder or extension the flanges of two gem settings were separated, and when the solder was applied it extended only to the tubular portions below the flanges, and thus the flanges were prevented from being soldered together.

This was an improvement over a tubular setting of the type exhibited in Figure 12, in which the exterior of the flange was flush with the exterior of the tubular setting.

The defendant has proved, however, that in the prior practical art there were box settings made of flat stock with a flange designed to be bent over to confine a gem; the outer portion of the body being at a considerable distance from the flange, so that, if one desired to solder these together in clusters there was no danger that the solder would unite the flanges of contiguous settings, or prevent them from being bent over to confine the gems. It thus appears that the difficulty in soldering which Dover overcame was one peculiar to a particular tubular form of gem setting, in which the flange was of the same external diameter as the rest of the setting.

The defendant's setting cannot be properly described as a "tubular setting." It is stamped out of flat stock, the central portion of which is raised by stamping, and the flange is formed by punching.

There is no evidence that defendant's settings have in fact ever been soldered together to produce cluster work, or that they are designed, sold, or used for this purpose. They are designed as individual settings. The argument of the complainant is that they are adapted to be clustered; but apparently they have no greater adaptation for this purpose than any flat circular pieces—for example, two 10-cent pieces—for the external walls of the defendant's settings, which would be brought in contact in clustering, are substantially the thickness of the flat stock. For the purpose of soldering together, they are discs rather than tubular settings, like those illustrated in the Dover patent, which, when clustered, would have contiguous surfaces of considerable extent.

If, however, we could accept the complainant's argument that the body portion of the defendant's setting is tubular, rather than flat, with a slightly raised and perforated central portion, the result would be abundant proof of the anticipation of the claim in suit thus construed. The proof of the anticipating exhibits is of a most satisfactory character. Defendant's Exhibits G, H, J, K, L, and M clearly anticipate the claim, if construed so broadly as to cover the defendant's gem settings.

Whether Dover's patent, when properly limited, exhibits patentable invention, it is not necessary to decide. When so limited, it is not infringed by the defendant; and, if construed broadly enough to include the defendant's gem settings, it is void by reason of anticipation.

The bill will be dismissed.

A draft decree may be presented accordingly.

BERWIND-WHITE COAL MINING CO. v. EASTERN S. S. CORP.

(District Court, S. D. New York. January 11, 1916.)

RECEIVERS ⊂=174—ACTIONS—LEAVE TO SUE.

Judicial Code (Act March 3, 1911) c. 231, § 24, 36 Stat. 1091 (Comp. St. 1913, § 991), gives the District Court jurisdiction of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it. Section 267 (Comp. St. 1913, § 1244), provides that suits in equity shall

not be sustained in any case where a plain, adequate, and complete remedy may be had at law. Section 66 (Comp. St. 1913, § 1048), provides that every receiver of any property appointed by any United States court may be sued in respect to any act or transaction in carrying on the business connected with such property without leave of court, but that such suit shall be subject to the general equity jurisdiction of the court in which such receiver was appointed, so for as may be necessary to the ends of justice. Certain persons injured in a collision between a steam yacht and a passenger steamship obtained leave to sue the receiver of the corporation owning the steamship, and brought suits in which the receiver answered. The owner of the yacht commenced limitation proceedings in admiralty, and the receiver thereupon moved to modify the order giving leave to sue so as to limit the actions to suits in equity on the admiralty side of the court. *Held*, that the court had no power to deprive the plaintiffs of a trial by jury, and, even if the motion was addressed to the discretion of the court, it would be denied, as juries are peculiarly fitted to try negligence actions, and the receiver could protect the receivership estate by filing a contingent claim in the limitation proceeding or taking other steps for that purpose.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 333–343; Dec. Dig. ⇐174.]

In Admiralty. Action by the Berwind-White Coal Mining Company against the Eastern Steamship Corporation. On motion by the receiver of the defendant to modify an order giving leave for the commencement of actions at law against the receiver. Motion denied.

John W. Griffin, of New York City, for the motion.

Eidlitz & Hulse and John Delahunty, both of New York City, opposed.

MAYER, District Judge. The receiver of defendant herein seeks to modify an order made on September 23, 1915, giving leave to Martha A. Waugh and Archie E. Waugh, to commence actions at law against the receiver so as to limit their actions to suits in equity on the admiralty side of the court. The Waughs commenced separate actions at law on October 21, 1915, against joint defendants, viz., Cornelius K. G. Billings and Calvin Austin, as receiver of Eastern Steamship Corporation. The receiver filed his answer in each of the actions, but Billings began limitation proceedings in admiralty. The actions of the Waughs are for damages for negligence, and arise out of a collision between the steamer Bunker Hill, a passenger carrying vessel owned by Eastern Steamship Corporation, and the steam yacht Vanadis, owned by Billings.

Judicial Code, § 24, provides, among other things, that the District Court shall have jurisdiction:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. * * *"

And it is further provided in section 267:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

There can be no doubt that the common law is competent to give to the Waughs the remedy which they seek, and it is equally certain

that plaintiffs can obtain, in their cases, a plain, adequate, and complete remedy at law.

Of course, it was not necessary for the Waughs to obtain leave of court to bring action against the receiver, in view of section 66 of the Judicial Code:

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed"

—but it is now urged that the court, because of its general control of its receivers, can and should grant this motion, reference being had to that part of section 66 of the Judicial Code which provides:

"Such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

Naturally, there may be some questions of convenience, but we are not dealing with questions of convenience, but with rights, and I find no power anywhere which will deprive the Waughs, or others similarly situated, of a trial by jury.

The receiver should have no difficulty in safeguarding his rights by filing a contingent claim in the Vanadis limitation proceeding, or taking other steps fully to protect the receivership estate; and, if the receiver takes the necessary steps, there is no reason to doubt that the court will take such course as may appropriately preserve the rights of all concerned.

Finally, if it could be successfully contended that this motion is addressed to the discretion of the court, I would deny it because I think that juries are peculiarly fitted to try negligence actions, and my experience is, as averages go, that they reach very sensible and just results.

TAKACS v. PHILADELPHIA & R. RY. CO.

(District Court, S. D. New York. May 10, 1915.)

CORPORATIONS ⟸668—FOREIGN CORPORATIONS—ACTIONS—SERVICE OF PROCESS.

Even though a foreign corporation was doing business in New York, service of process in New York on a director of the corporation gave a federal court sitting in New York no jurisdiction, where the cause of action arose in another state and the corporation had designated no agent to accept service for it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. ⟸668.]

At Law. Action by Frank Takacs against the Philadelphia & Reading Railway Company. On motion to set aside the service of the summons and complaint. Motion granted.

The plaintiff alleges that at the time of the commencement of this action he was and still is a resident of the state of New York, Southern district of New York, and that on June 30, 1914, at Port Reading, in the state of New

Jersey, he was injured through the fault of defendant. He now asks for judgment for the damages suffered by him. Defendant has moved to set aside the service of the summons and complaint herein.

It appears that the summons and complaint were served upon one George F. Baker, a director of the defendant company, within the state of New York. As the question here presented may arise again, the facts, as bearing upon defendant's business, are fully set forth for the information of counsel interested in cases of this character. These facts, as alleged in an affidavit submitted on behalf of defendant are as follows:

"Defendant operates movable equipment for the transportation of merchandise from other states into New York. Freight cars are delivered by defendant to connecting carriers at points outside of this state, and are hauled by such connecting carriers to the place of destination in this state and thereupon returned to defendant. Defendant does not haul any of said cars in this state, and receives compensation only for such portion of the transportation as is over defendant's lines.

"No part of this equipment is owned or ever was owned by defendant. Since January 5, 1897, such equipment has been in the possession of the Central Trust Company of New York, trustee under a deed of trust from the owner thereof, with no reservation of possession to the owner, which trustee has, by lease, granted to defendant the right, personal to defendant only, to operate said equipment, upon payment of the rentals reserved in said lease, and upon the continued operation of said equipment by defendant as a railroad company.

"Coupon tickets for the transportation of passengers, good over the defendant's lines, are sold in New York; but such tickets are only sold by other carriers, the transportation initiating with such other carriers, and the defendant receives compensation only for the portion of the transportation over its own lines, none of which is in New York. None of such ticket-selling agents are employés, or under the control, of this defendant.

"The case is in no wise different from that of some railroad in California, transportation over whose lines may be effected in connection with a through ticket, purchased at the office of the Pennsylvania Railroad Company, or any other large trunk road having an office in New York.

"The defendant has agents in this state, employed to request shippers of merchandise to send freight, part of the transportation of which would be over the defendant's lines. The contracts made by said agents are forwarded to defendant's main office in Philadelphia for acceptance and approval.

"None of said soliciting agents have offices in the city of New York, nor has the defendant any office whatever for the conduct of its railroad business in the city or state of New York.

"This cause of action is in favor of an alleged resident of the state of New York, who upon information and belief is an alien and a Hungarian, against the defendant, which is a foreign corporation organized under and by virtue of the laws of the state of Pennsylvania, for a tort alleged to have been committed at Port Reading, N. J.

"The summons and complaint herein were served upon George F. Baker at No. 2 Wall street, New York City, on April 13, 1915. Said Baker is neither the president, vice president, treasurer, assistant treasurer, secretary, or assistant secretary of the defendant, nor is he an officer performing corresponding functions under any other name.

"The defendant has no designated agent upon whom process can be served within the state of New York, pursuant to the General Corporation Law, nor has it ever had one.

"The defendant has no property within this state, nor did this cause of action, which is transitory, being for personal injuries, arise within this state. Said George F. Baker, at the time of such service, was a director of the defendant and resided in this state. He had no connection with the business or operation of the defendant company or its railway, except that he attends directors' meetings in the state of Pennsylvania."

Pierre M. Brown, of New York City, for the motion.

Leon Sanders, of New York City, opposed.

MAYER, District Judge (after stating the facts as above). If it be assumed (for it need not now be decided) that the defendant was doing business within the state of New York at the times referred to in the complaint (and this is doubtful), nevertheless this case clearly falls within the principle laid down in Simon v. Southern Railway Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492.

The recent opinion of Judge Learned Hand in Smolik v. Philadelphia & Reading Coal & Iron Co., and Tobias v. Same, 222 Fed. 148, related to a case wherein the defendant had designated an agent to accept service as provided in section 16 of the General Corporation Law of the State of New York (Consol. Laws, c. 23), and in section 432 of the New York Code of Civil Procedure. But in the case at bar the defendant has not designated any such agent. The Simon Case, supra, in my opinion, disposes of the question so decisively that no further discussion is necessary.

Motion granted.

JOHNSON & HIGGINS v. HARPER TRANSP. CO.

(District Court, D. Massachusetts. April 13, 1915.)

1. INSURANCE ⟸103—BROKERS—PERFORMANCE OF CONTRACT—DELAY—RESPONSIBILITY.

An insurance broker, who by agreement with defendant was to have the placing of insurance on defendant's fleet of steamers for two years, was not responsible for any delay in taking steps to procure such insurance prior to the date on which defendant furnished it with instructions as to the number, amount, and forms of policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 130; Dec. Dig. ⟸103.]

2. INSURANCE ⟸103—BROKERS—PERFORMANCE OF CONTRACT—DUTIES OF AGENT.

Where defendant agreed that plaintiff, an insurance broker, should have the placing of insurance on defendant's fleet of steamers for two years at rates to be approved by defendant before final acceptance, it devolved upon plaintiff to get and submit rates from underwriters, this being the usual course of business, and defendant was not required to indicate the rates which it would approve.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 130; Dec. Dig. ⟸103.]

3. INSURANCE ⟸102—BROKERS—PERFORMANCE OF CONTRACT—WAIVER OF BREACH.

Where, under a contract, plaintiff, an insurance broker, was to have the placing of insurance on defendant's fleet of steamers for two years at rates to be approved by defendant before final acceptance, and a dispute arose as to whether it was plaintiff's place to procure and submit offers from underwriters, or defendant's duty to indicate rates which it would approve, but defendant receded from its position, indicated the rates which it would approve, and directed plaintiff to secure the insurance at once, it thereby recognized the contract as still existing, and waived any failure of plaintiff to proceed to get and submit rates.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ⟸102.]

4. INSURANCE ⟸106—BROKERS—PERFORMANCE OF CONTRACT—TERMINATION.

Defendant agreed that plaintiff, insurance broker, should have the placing of insurance on defendant's fleet of steamers for two years at

rates to be approved by defendant before final acceptance. The first of defendant's 1911 policies ran out on August 21st, and under an agreement with a trust company holding title to the vessels had to be renewed 30 days before that date. Defendant did not furnish plaintiff instructions as to the number, amount, and forms of policies until July 26th, when it directed plaintiff to secure the insurance at once. The amount of insurance required was large, and both parties knew that part of it would probably be obtained in London, and that considerable time would be required to secure it upon the most advantageous terms. On August 1st, two nonbusiness days in England having intervened in the meantime, defendant's directors had an interview with plaintiff's representative, in which he gave them to understand that he was endeavoring to obtain the insurance at the rate which defendant had approved, but stated that he doubted whether he would be able to do so at the approved rates. Defendant immediately notified plaintiff that it was no longer authorized to act, and thereupon procured insurance through other persons. On August 6th plaintiff offered to defendant cover notes covering all the insurance at the specified rate. *Held*, that defendant had no right to terminate the contract, and its action in doing so constituted a breach of the entire contract.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ⇐106.]

5. INSURANCE ⇐96—AGENCY FOR INSURED—CONTRACTS—REQUISITES AND SUFFICIENCY.

Defendant wrote an insurance broker, referring to a resolution of its board of directors authorizing a contract with the broker for the placing of insurance on defendant's fleet of steamers for two years at rates to be approved by the board of directors before final acceptance, and stating that "we herewith enter into a contract with you for the insurance covering said fleet as per the terms of said resolution." The broker acknowledged the letter, and stated that in good time it would take up the matter of renewals, and see that they were arranged at the lowest possible rate, and upon the most favorable terms procurable. *Held*, that this constituted a contract between the parties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 126; Dec. Dig. ⇐96.]

6. INSURANCE ⇐96—BROKERS—CONTRACT OF AGENCY—CONSIDERATION.

Defendant was indebted to plaintiff, an insurance broker, who was pressing for payment. Plaintiff offered to grant an extension of credit if defendant would give it its insurance business for three years, and in the early part of 1912 an agreement was reached that plaintiff should have the placing of insurance on defendant's steamers for two years. The duration of the extension to be granted was not very exactly stated, but both parties understood that defendant was to make payment as fast as it reasonably could from its receipts as they came in, and that the account should in any event be paid in full on or about July 1, 1912. *Held*, that under the law of New York, where the contract was made, the forbearance to sue or press for payment and plaintiff's agreement to act for defendant in placing the insurance for the two ensuing years constituted a sufficient consideration for defendant's agreement that plaintiff should have the placing of such insurance, as in that state forbearance to bring a suit which a party is on the point of instituting, and a promise, express or implied, to give further time, are sufficient considerations to support a promise by the other party, though there is no definite agreement as to the length of the time for which the forbearance should continue.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 126; Dec. Dig. ⇐96.]

7. FRAUDS, STATUTE OF ⇐45—AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

Plaintiff was an insurance broker, and had placed insurance on defendant's fleet of steamers in 1911, expiring in 1912. In the early part

of 1912, defendant agreed that plaintiff should have the placing of its insurance for the next two years at rates to be approved by it. Defendant broke the contract, and plaintiff brought suit. In the contract, the declaration, and the correspondence between the parties there appeared such expressions as "place insurance for the next two years," "act as your brokers," "handling this insurance for the next two years," "appointing us as your insurance representatives for at least two renewals of your current policies," "to handle the insurance on your fleet for at least two renewals, commencing 1912," and "to place insurance on the defendant's fleet for two years." It appeared that it would have been possible to go into the market within one year from the date of the contract and procure, not only renewals of the policies then in force, but future renewals to follow the policies written in 1912; but this would have been an unusual transaction, which could not have been put through upon terms advantageous to defendant, and would have involved elements of uncertainty, as with respect to vessels lost during the first year, and would have subjected defendant to liability for two years' premium, instead of one. *Held*, that it was not contemplated that defendant should be put to these disadvantages, and it was intended that the relations existing with respect to the 1911 insurance should be continued, and that the future business should be done in the usual way, and hence the contract was not one which, according to the reasonable interpretation of its terms, could be performed within a year, and was within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 67, 68, 70, 71; Dec. Dig. ⊂⊃45.]

8. FRAUDS, STATUTE OF ⊂⊃118—SUFFICIENCY OF MEMORANDUM—CORRESPONDENCE.

The entire correspondence between parties, resulting in a contract between them, may be resorted to in determining whether there is a sufficient memorandum in writing to satisfy the New York statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 199, 262–265; Dec. Dig. ⊂⊃118.]

9. FRAUDS, STATUTE OF ⊂⊃108—SUFFICIENCY OF MEMORANDUM—STATEMENT OF CONSIDERATION.

Plaintiff was an insurance broker, and had placed insurance on defendant's fleet of steamers in 1911, for which defendant was indebted to it, and was pressing for payment. On November 10, 1911, defendant wrote plaintiff, requesting an extension of credit, and suggesting dates for the postponed payments. On November 18th plaintiff replied, declining to grant the extensions as matters then stood, but stating that, if they could have an understanding that they would act as defendant's brokers for three years, plaintiff's finance committee would probably be willing to extend credit on the conditions therein stated as to dates of payment. The letter also suggested that the consent of a trust company holding title to the vessels would have to be obtained, provided that collections for losses should be held against the premium accounts, and stated that this arrangement would not apply to any future premiums. On December 18th defendant wrote plaintiff, referring to an oral restatement of the position outlined in plaintiff's letter, except as to the dates and amounts of payment and sums which might be received for losses, and including also arrangements as to the premiums on 1912 policies, and stating that they were in accord with this position, and were going to get the approval of defendant's directors to the making of a contract for the handling of the insurance for the next two years. On December 30th plaintiff wrote defendant that they had defendant's telephone message to the effect that defendant was prepared to negotiate a contract along the lines suggested in the letter of November 18th. On January 12th defendant's directors adopted a resolution to make a contract authorizing plaintiff to place the insurance for two years at rates to be approved by the board of directors. On January

17th plaintiff wrote defendant, referring to its letter of November 18th, and to the vote of the directors, and suggesting dates of payment, and, though defendant replied in writing, it did not controvert the statements therein, or in the letter of December 30th. On March 8th defendant wrote plaintiff, quoting the resolution of its directors, and stating that "we herewith enter into a contract with you for the insurance covering said fleet as per the terms of said resolution," and on March 11th plaintiff replied, acknowledging receipt of such letter, and stating that in good time they would take up the matter of renewals. *Held*, that plaintiff's forbearance to sue or press for payment, and its agreement to act for defendant, constituting the consideration for defendant's agreement, sufficiently appeared in the correspondence, and there was therefore a sufficient memorandum in writing to bind defendant.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 214–221; Dec. Dig. ⊂⊃108.]

10. FRAUDS, STATUTE OF ⊂⊃129—SUFFICIENCY OF MEMORANDUM—STATEMENT OF CONSIDERATION.

Where part of the consideration for defendant's agreement that an insurance broker should have the placing of insurance on defendant's steamers for two years was the broker's forbearace to sue or press for payment of an indebtedness, and pending the negotiations resulting in the contract the broker did forbear to sue or press for payment, the consideration for defendant's promise was to that extent received by defendant before the contract was completed, and the contract was to that extent executed, and in so far as defendant's promise was given in exchange for a present executed consideration the statute of frauds did not apply.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292, 303, 306–308, 310–312, 314, 318–320, 322, 323, 325, 326; Dec. Dig. ⊂⊃129.]

11. INSURANCE ⊂⊃105—DUTIES OF AGENT—FIDELITY.

Plaintiff was an insurance broker, and had placed insurance on defendant's fleet of steamers in 1911, and in the early part of 1912 an agreement was reached that it should have the placing of such insurance for the next two years. It acted merely as a middleman, and defendant knew this, and knew that plaintiff was to receive compensation from the underwriters for its services, and the agreement was entered into on that footing, and was intended to continue the arrangement which had existed as to the 1911 insurance. *Held* that, while plaintiff to the extent which it had agreed to act for defendant was bound to act faithfully, its right to commissions was not defeated by the fact that in its effort to bring the parties together it advised defendant to raise its price, and the underwriters to lower theirs, at the same time giving each party to understand that it was doing all it could to secure the most favorable terms for such parties; it not appearing that this interfered with its undertaking, constituting part of the contract, to see that the insurance was procured at the lowest possible rate, and on the most favorable terms procurable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 131; Dec. Dig. ⊂⊃105.]

12. INSURANCE ⊂⊃106—AGENTS—BREACH OF CONTRACT—TERMINATION OF AUTHORITY.

Defendant authorized an insurance broker to place insurance on its fleet of steamers for two years, but without giving sufficient time to place the insurance after furnishing the necessary instructions, its directors adopted a resolution terminating the contract, and notified the broker that it was no longer authorized to act, and thereupon procured the insurance for the first of the two years through another broker. *Held*, that the broker was entitled to treat this as a termination of the entire contract, and to have its damages assessed accordingly.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ⊂⊃106.]

13. DAMAGES ⊂=23—BREACH OF CONTRACT—DAMAGES RECOVERABLE.
The damages recoverable for the breach of a contract are such as are within the contemplation of the parties as the proximate, natural, and probable consequences of a breach of the contract, and such as will put the plaintiff in as good a position as nearly as possible as it would have been in but for the breach.
[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 58, 62; Dec. Dig. ⊂=23.]

14. DAMAGES ⊂=24—BREACH OF CONTRACT—DAMAGES RECOVERABLE.
Damages which are remote, conjectural, or purely speculative are not recoverable for the breach of a contract; but it is not necessary that they should be computable with mathematical accuracy, and the fact that they may be to some extent contingent, and not capable of being accurately determined, does not prevent recovery.
[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 65–67; Dec. Dig. ⊂=24.]

15. INSURANCE ⊂=106—CONTRACT OF AGENCY—BREACH—DAMAGES RECOVERABLE.
Defendant agreed that plaintiff, an insurance broker, should have the placing of insurance on its fleet of steamers for two years at rates to be approved by defendant before final acceptance. Without giving plaintiff sufficient time to place the insurance, it terminated the contract and placed the insurance through another broker. A few days later plaintiff offered to defendant cover notes covering all the insurance for the first of the two years at the rate which defendant had approved, on which its commissions would have amounted to $8,453.94. *Held*, that these commissions were recoverable as damages for defendant's breach of the contract.
[Ed. Note.—For other cases, see Insurance, Dec. Dig. ⊂=106.]

16. INSURANCE ⊂=106—CONTRACT OF AGENCY—BREACH—DAMAGES RECOVERABLE.
Both parties having evidently contemplated that the size of defendant's fleet, the rates of insurance, and the amount and kind of insurance would be substantially unchanged for both years, and plaintiff having been able to meet the rates approved by defendant for the first of the two years, the commissions which plaintiff would have earned on the insurance for the second year, less expenses incident to the placing of the insurance, were not too remote, contingent, or uncertain, and were recoverable for the breach.
[Ed. Note.—For other cases, see Insurance, Dec. Dig. ⊂=106.]

At Law. Action by Johnson & Higgins, a corporation, against the Harper Transportation Company. Judgment for plaintiff.

Warner, Warner & Stackpole, of Boston, Mass., for plaintiff.

Stimson, Stockton, Livermore & Palmer and Goodwin, Procter & Ballantine, all of Boston, Mass., for defendant.

MORTON, District Judge. This is an action at law to recover for an alleged breach of contract by the defendant to employ the plaintiff as its insurance broker or representative. A jury was waived and the case was tried before me upon fact and law.

The defendant operated a fleet of steamers and barges employed in coastwise transportation on the Atlantic coast. The plaintiff is a corporation engaged in the business of a broker in marine insurance. It had placed for the defendant during the early or middle part of the

year 1911 a large amount of insurance on the vessels composing the defendant's fleet. The defendant did not pay promptly the premiums due on this insurance, and in November, 1911, appears to have been indebted therefor in the sum of more than $100,000, due in part to the plaintiff for premiums paid by it to the underwriters on the defendant's account, and in part to the underwriters with whom the insurance had been placed by the plaintiff. At that time the plaintiff began to press the defendant, both orally and by letters, for payment of this account. The defendant was unable to make payment, and by letter to the plaintiff dated November 10, 1911, requested extensions of credit running about a year. The plaintiff declined to accede to this request, but suggested, in a letter bearing date of November 18, 1911, that if it could be sure of the defendant's insurance business for three years it would consider an extension of credit. Both parties understood at this time that, if a satisfactory arrangement was not reached between them, the plaintiff was likely to proceed at once to enforce payment of its overdue account, something which the defendant greatly desired to avoid. The defendant informed the plaintiff that it was prepared to agree in principle to the suggestions made to it in the plaintiff's letter of November 18, 1911, the exact details of the arrangement being left open; and, relying upon this assurance, the plaintiff took no steps at that time to enforce payment of its demand. There were several conferences between the parties. Finally they agreed that the plaintiff should have the defendant's marine insurance business for two more years, subject to the latter's approval as to rates, should forbear immediate suit and pressure, should pay to the underwriters on the defendant's account the balance of the 1911 premiums, and should grant to the defendant an extension of credit. The duration of the extension was not very exactly stated at the time when the agreement was entered into. Both parties then understood that the defendant was to make payments as fast as it reasonably could from its receipts as they came in, that dates and amounts of future payments should be settled later, and that the account should, in any event, be paid in full by July 1, 1912, or thereabouts. Substantial payments on account were made by the defendant to the plaintiff between November 18 and January 12, 1912; and the result of the arrangement finally agreed upon was not substantially different in the forbearance part of it from the proposal in the plaintiff's letter of November 18.

By January 12, 1912, the parties had reached a satisfactory understanding as above stated, and on that date the defendant's directors passed the following vote:

"Resolved, that a contract be entered into with Messrs. Johnson & Higgins authorizing them to place insurance on the fleet of the Harper Transportation Company for the next two years, commencing on or about October 1, 1912, at rates to be approved by the board of directors of the Harper Transportation Company before final acceptance."

The plaintiff was within a few days notified orally of this resolution. Thereafter both parties understood that a contract as above stated was in force between them.

About the 1st of March, 1912, the plaintiff called the defendant's attention to the fact that there was nothing in writing confirming the oral understanding, and requested that the matter be put into writing. In consequence of this the defendant wrote to the plaintiff, on March 8, 1912, as follows:

"Pursuant to the following resolution passed on January 12, 1912, as follows:

"Resolved, that a contract be entered into with Messrs. Johnson & Higgins authorizing them to place insurance on the fleet of the Harper Transportation Company for the next two years, commencing on or about October 1, 1912, at rates to be approved by the board of directors of the Harper Transportation Company before final acceptance"—we herewith enter into a contract with you for the insurance covering said fleet as per the terms of said resolution.

"Very truly yours."

To which the plaintiff replied on March 11, 1912, as follows:

"Dear Sir: We have your favor of the 8th inclosing copy of resolution passed at your January 12th meeting and also note your confirmation of the contract with us to handle the insurance on your fleet for at least two renewals, commencing 1912. This we have placed on file and in good time will take up the matter of renewals and will see that they are arranged at the lowest possible rate and upon the most favorable terms securable."

It is these two letters, in connection with the correspondence more particularly referred to hereafter, which are relied upon by the plaintiff as constituting a memorandum in writing of the contract, upon which recovery is sought in this action.

[1] The first of the 1911 policies ran out on August 21, 1912, and by the terms of the agreement between the defendant and the Trust Company holding title to the vessels had to be renewed at least 30 days before that date. In June of that year the plaintiff called the defendant's attention to the impending expirations and requested definite instructions as to the amount and character of the insurance desired for the coming year. There were interviews between the parties upon this subject. The plaintiff wrote, on July 15, 1912, both to the president and treasurer of the defendant, saying, in substance, that the matter of renewals required immediate attention, and that it had not yet received definite instructions for placing the insurance. It is clear that the plaintiff was entitled to have such instructions, and that the delay up to this point, at least, was the fault of the defendant. Instructions as to the number, amount, forms of policies, etc., were given to the plaintiff on or about July 26, 1912.

By the terms of the contract the defendant reserved the right to approve the rates at which the insurance was to be placed by the plaintiff. A dispute arose between the parties as to whether, according to the contract, it was the business of the plaintiff to procure and submit offers from underwriters of rates on the required insurance for approval by the defendant, or of the defendant to indicate rates which it would approve. The rates on marine insurance in large amounts are not uniform, and are reached by bargaining between the underwriters, the broker, and the insured in each particular case. The plaintiff's objection to the method proposed by the defendant was not so much that

it violated the contract, as that it was inexpedient, because the plaintiff thought that the trading could be more advantageously done on the defendant's behalf by proposing a low rate to the underwriters and working up with them. The plaintiff did not definitely refuse to do as requested, and the parties continued to argue about the matter.

[2, 3] By the strict terms of the contract, I think the usual course of business was to be followed, and that it devolved upon the plaintiff to get and submit rates from the underwriters; but, in view of the defendant's omission to give definite instructions as to the insurance, and upon all the circumstances shown, I do not think that the plaintiff's failure to get and submit rates constituted a breach of the contract. On July 26th the defendant, having in the meantime procured an offer of insurance from another broker, receded from its position, named to the plaintiff rates which it would approve, and directed the plaintiff to secure the insurance at once. This was a recognition by the defendant of the contract as still existing. If there had been a breach of it by the plaintiff, it was at that time waived by the defendant. Forbes v. Appleyard, 181 Mass. 354, 63 N. E. 894; So. Pacific Co. v. Fore River Co. (C. C. A. 1st Circuit) 219 Fed. 378, 384, 385, 135 C. C. A. 120.

[4] The amount of insurance required was large. Both parties knew that part of it would probably be obtained in London, and that considerable time would be required to secure it upon the most advantageous terms. The plaintiff promptly started to do so. Six days later, on August 1, 1912, two nonbusiness days in England having intervened, the defendant notified the plaintiff that it was no longer authorized to act in the matter, and arranged to procure the insurance through other persons, who dealt, in part at least, with underwriters who had been approached by the plaintiff. The causes assigned by the defendant in the vote of its board of directors for terminating the contract were that the plaintiff had not placed the insurance and had not "made any proposition" regarding it. Prior to the revocation of the plaintiff's authority to act for it, the defendant's directors had an interview with the plaintiff's representative on August 1st, at which the latter said, in substance, that he was working on the matter and hoped to place the insurance, although he doubted whether he would be able to do so at the rates which the defendant had approved. He gave the defendant's directors clearly to understand that the plaintiff was at that time endeavoring to obtain the insurance at the approved rate and might or might not be successful. The defendant, immediately after this interview, on the same day, passed the vote last referred to and closed with the other broker, whose offer was then before it. The time between July 26th and August 1st was wholly insufficient for the placing of the insurance in question. The defendant had no right to terminate the contract as it did, and its action in doing so constituted a breach of the entire contract.

I see no reason to doubt that the plaintiff would have been able to get the insurance on as favorable terms as the other broker secured. and could have placed it, if left free to do so. Under date of August 6, 1912, it offered to the defendant cover notes covering all the insur-

ance at the specified rate. Its commission thereon would have amounted to $8,453.94.

The plaintiff's substitute declaration was drawn after I had, in conference with counsel, intimated in a general way what my findings were likely to be; and I find that, except as stated otherwise in this opinion, the allegations of fact in the first 11 paragraphs of it are true.

The defenses relied upon are: (1) That there was no definite contract, and no legal consideration for the defendant's agreement with the plaintiff; (2) that the agreement was not to be performed within a year, was therefore within the statute of frauds of the state of New York, where it was made, and is not evidenced by any sufficient memorandum in writing; (3) that the defendant was justified in repudiating the contract by the plaintiff's breach thereof.

[5, 6] As to 1: The defendant said: "We herewith enter into a contract with you." (Letter of March 8th, supra.) It is plain that there was a contract between the parties, and that there was a sufficient consideration for the defendant's agreement. This consideration consisted of the forbearance of immediate suit and pressure by the plaintiff, and of its agreement to extend credit as above stated. The plaintiff also agreed to act for the defendant in placing the insurance for the two ensuing years. The contract was made in New York and was to be performed there. The rights of the parties are to be determined according to the law of that state. By the law of New York forbearance to bring a suit which a party is on the point of instituting, and a promise, express or implied, to give the debtor further time, are sufficient considerations to support a promise by the other party, even in cases where there is no definite agreement as to the length of the time which the forbearance should continue. Strong v. Sheffield, 144 N. Y. 392, 39 N. E. 330; Traders' Nat. Bank v. Parker, 130 N. Y. 415, 29 N. E. 1094; Muri v. Greene, 191 N. Y. 201, 83 N. E. 685; Union Nat. Bank v. Leary, 77 App. Div. 332, 79 N. Y. Supp. 217. Upon all the evidence I find and rule that there was a contract, and a good consideration for the defendant's promise; and the first point of defense fails.

[7] As to 2, the defense based upon the statute of frauds: The contract authorized Johnson & Higgins "to place insurance on the fleet of the Harper Transportation Company for the next two years, commencing on or about October 1, 1912." The first question is whether this was a contract which could not be performed within one year, and therefore comes within the statute. The plaintiff says that it could be performed within that time, because on the evidence it would have been possible to go into the market within a year from the date of the contract and procure, not only renewals of the policies then in force, but also future renewals to follow the policies written in 1912. I think it would have been possible to do so; but the test is whether the contract gave the plaintiff the right to perform it in that way. "The question is * * * whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year." Gray, J., in Warner v. Texas & Pac. Ry. Co., 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed.

495; McGregor v. McGregor, 21 Q. B. D. 424 (1888). The expressions "place insurance * * * for the next two years," "act as your brokers," "handling this insurance for the next two years," "appointing us as your insurance representatives for at least two renewals of your current policies," "to handle the insurance on your fleet for at least two renewals, commencing 1912," "to place insurance on the defendant's fleet for two years," are used by the parties in different places in the memorandum, declaration, and correspondence as referring to the same thing. Read in the light of their context and surrounding circumstances, they plainly signify a continuance for two more years of the relations which had existed between the plaintiff and the defendant in respect to the 1911 insurance.

To complete the contract within one year would have been an unusual transaction, which could not have been put through upon terms advantageous to the defendant, which would have involved elements of uncertainty (e. g., a vessel insured under a 1912 policy might be lost during that year, and not be in existence when the 1913 renewal was due to attach), which would have subjected the defendant to liability for two years' premiums, instead of one, and which was plainly outside of any reasonable construction of the contract. In order to obtain the best rates, the insurance for each year had to be arranged for as a whole, and not by merely renewing individual policies as they expired. With this qualification, both parties understood by the contract that Johnson & Higgins were to have the placing of the defendant's marine insurance in 1912 and in 1913 as the policies expiring in those years ran out. It was not the understanding of either party that the defendant was to be put to any disadvantages of the kinds above suggested by reason of this contract. It contemplated future business to be done in the usual way. So construed, the contract could not be performed within a year, whether it be regarded as taking effect from the date of the communication to the plaintiff of the defendant's vote of January 12, 1912, or from the date of the formal letter from the defendant stating the contract, March 8, 1912. The significance of the expression, "commencing on or about October 1, 1912," is not perhaps entirely clear. The defendant has made no contention that the contract, if made, did not cover the insurance which began to expire on August 21, 1912. Indeed, it attempted to cancel the contract for the plaintiff's alleged failure to act before August 1st. The plaintiff in its letter of March 11, 1912, refered to the contract as covering "at least two renewals, commencing 1912," omitting the words "October 1." The renewals contemplated by the parties were plainly those to be effected in the year 1912 and in the year 1913. "About October 1" was apparently taken as an approximate average date on which the 1912 policies should attach. The contract was not one which, "according to the reasonable interpretation of the terms," could be performed within a year, and is within the statute of frauds.

[8, 9] It is therefore necessary to determine whether there is a sufficient memorandum in writing to satisfy the New York statute of frauds, the law as to which is shown by the following cases, viz.:

Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502; Blake v. Voight, 134 N. Y. 69, 31 N. E. 256, 30 Am. St. Rep. 622; Warren Chemical Co. v. Holbrook, 118 N. Y. 586, 23 N. E. 908, 16 Am. St. Rep. 788; Ward v. Hasbrouck, 169 N. Y. 407, 419, 62 N. E. 434; Seymour v. Warren, 197 N. Y. 1, 71 N. E. 260. The principal ground upon which the sufficiency of the memorandum is attacked is that it does not disclose the consideration moving from the plaintiff, and therefore does not completely show an enforceable contract between the parties. The entire correspondence between them may be resorted to. J. Spencer Turner Co v. Louis Robinson et al., 55 Misc. Rep. 280 at 286, 105 N. Y. Supp. 98; C. W. Hull Co. v. Marquette Cement Mfg. Co., 208 Fed. 260, 125 C. C. A. 460. In the defendant's letter to the plaintiff of November 10, 1911, an extension of credit is explicitly requested, and dates for the postponed payments are suggested. The plaintiff replied on November 18, 1911, declining to grant the extensions requested as matters then stood, but saying that "on certain modified lines our company would give favorable consideration to an extension of credit." The plaintiff further says in this letter:

"If we could have an understanding with you that we would act as your brokers say for a period of three years, our finance committee would probably be willing to extend credit on the following conditions."

Then follow statements of the amounts due for the different kinds of insurance, aggregating about $110,000, and proposed dates of payment extending to June 15, 1912. The letter then suggests that the consent of the trust company, which held title to the vessels, would have to be obtained, in order that the extension of credit might not operate to discharge its liability, if any, for the insurance premiums. The letter also provides that collections for losses should be held against the premium accounts, and adds:

"Whatever arrangement we may agree upon would, of course, simply apply to the premiums under discussion, and any further premiums will, in the absence of any specific agreement, be subject to the usual cash settlement."

This letter presents a complete and carefully worked out plan to relieve the defendant from its immediate difficulties.

The defendant wrote on December 18, 1911, that:

"We were all in accord with the position taken by you [which was, in substance, an oral restatement of that outlined in the letter just referred to, except as to dates and amounts of payments and sums which might be received for losses, and included also arrangements for the impending premiums on the 1912 policies] and are going to get the approval of the remaining directors of entering into a contract with your good selves for the handling of this insurance for the next two years."

I think—and I find—that this letter, fairly construed, has the same meaning as if the words "on that basis" were added after the final words in it, "next two years."

The plaintiff wrote on December 30, 1911:

"We have your telephone message to the effect that you are prepared to negotiate a contract with us along the lines suggested in our letter of November 18th"

—and then proceeded to discuss the details of the postponed payments. On January 12th the defendant's directors voted to make a contract with the plaintiff. The plaintiff's letter of January 17, 1912, refers explicitly to its letter of November 18th and to the vote of the defendant's directors, and then suggests dates of payment. The defendant's reply, dated January 18, 1912, refers to "the matter of adjusting and arranging with you for the payment of the balance due you." The defendant, although replying in writing to the letter of January 17th, never in any way controverted the statements therein, or in the plaintiff's letter of December 30th, but, on the contrary, acted as if the statements in those letters were correct. And then followed the letters of March 8th and 11th, plainly intended as memoranda in writing of a contract theretofore made. The plaintiff's agreement to act for the defendant is plainly shown by the correspondence.

The defense on this point is of the most technical character. There can be no doubt that the defendant made the promise sued on; it is in black and white over the defendant's signature, supported by a resolution of its board of directors. The defendant contends that it cannot be held to its promise, because a statement of the exact consideration which was to be received therefor, and which the defendant has in fact fully received, cannot be found in writing. It is sufficient, however, if, taking the writings as a whole, the court can ascertain from them with reasonable certainty what the entire contract between the parties was. Of course, the writings are to be read in the light of the surrounding facts. So construed, it seems to me, and I accordingly find and rule, that they evidence with sufficient clearness and certainty the contract sued on.

[10] Inasmuch as the promise upon which the defendant is sought to be charged was signed by it in its letter of March 8th, there may be some doubt, even under the New York law, whether that promise is unenforceable, even if there is no sufficient memorandum to bind the other party to the entire consideration furnished by it. Certainly a statement of such consideration is very easily discovered by the New York courts. Seamore v. Warren, 179 N. Y. 1, 71 N. E. 260. The law of Massachusetts is, of course, different from that of New York on the point under discussion. Browne on Statute of Frauds (5th Ed.) § 39 et seq. At the time when the contract was finally made, a substantial part of the consideration moving from the plaintiff—i. e., the forbearance of suit and pressure while the negotiations were pending —had already been received by the defendant, and further consideration of the same sort was received by the defendant immediately after the making of the contract. The contract was to this extent at least unilateral. At the time when the memorandum of March 8th was signed, the consideration moving from the plaintiff had been still further executed. In so far as the defendant's promise was given in exchange for a present executed consideration moving from the plaintiff, the statute of frauds does not apply.

Upon all the evidence, I find and rule that there was a sufficient memorandum to satisfy the New York statute of frauds.

As to 3: The final question is whether, assuming that there was a

valid contract, and assuming that there is a sufficient memorandum, the defendant was justified by the conduct of the plaintiff in disregarding it. As I understand the defendant's case upon this point, the breaches alleged to have been committed by the plaintiff are of two sorts: (1) That the plaintiff so delayed and failed in performing its part of the contract that the defendant, in order to keep its fleet insured, as it was bound to do under the terms of the trust agreement, was obliged to employ other persons to procure the insurance; and (2) that the plaintiff did not act with the required fidelity to the defendant's interest.

As to the first of these: For reasons before stated, I do not think that the delay prior to July 26th is any more chargeable to the plaintiff than to the defendant. Having on that date approved rates and given definite instructions as to the insurance desired, the defendant was bound to give the plaintiff a reasonable time thereafter in which to obtain the insurance. There was not time enough between July 26th and August 1st for the plaintiff to do so. I find that there was no breach of the contract in this particular by the plaintiff.

[11] As to the second of these points: The plaintiff was an insurance broker; it is not an insurance agent, as those words are commonly understood. It did not act for or represent insurance companies as their duly appointed agent in transacting the business of insurance; its business was placing insurance for persons who desired to secure it, and procuring risks for underwriters who had insurance to offer. It was nothing more or less than a middleman. The defendant knew this, and also knew that the plaintiff was to receive compensation from the underwriters for its services. The agreement between the plaintiff and the defendant was entered into on that footing, and was intended to continue for two years more the arrangement which had existed between the parties at the time when the plaintiff placed for the defendant the 1911 insurance. The plaintiff had no authority to agree upon insurance, either on behalf of the defendant or of the underwriters. The defendant decided what insurance it desired, and claims that it had the right not to approve rates therefor submitted by the plaintiff if the insurance could be procured more cheaply elsewhere. The defendant's contention that the plaintiff was bound to the conduct of a fiduciary in its dealings with the defendant, while the defendant was free to deal with the plaintiff on a competitive basis, is not free from difficulty. To the extent to which the plaintiff had agreed to act for the defendant, it was bound to act faithfully; but I think it would be holding the plaintiff to an accountability altogether too strict to say that it cannot recover commissions, to which it would otherwise be entitled, if in its efforts to bring the parties together it advised the defendant to raise its price and the underwriters to lower theirs, at the same time giving each party to understand that it was doing all it could to secure for it the most favorable terms. If such representations can be regarded as anything more than in the nature of "seller's talk," they are not shown in the present case, and I so find, to have interfered with the plaintiff's undertaking, as expressed in its letter of March 11, 1912, "to see that they [the

renewals] are arranged at the lowest possible rate and on the most favorable terms procurable."

[12, 13] The remaining questions relate principally to the matter of damages. The contract is entire in respect to the agreement and the consideration, but separable in respect to performance. The plaintiff was entitled to treat the vote and written notification of termination, and the employment of another broker to place the insurance for the year 1912–13, and the placing of it through him, as a termination of the entire contract, and to have its damages assessed accordingly. Pierce v. Tenn. Coal, etc., Co., 173 U. S. 1, 11, 19 Sup. Ct. 335, 43 L. Ed. 591. The damages recoverable are such as were within the contemplation of the parties as the proximate, natural, and probable consequences of a breach of the contract, such as will put the plaintiff in as good a position, as nearly as possible, as it would have been but for the breach. U. S. v. Behan, 110 U. S. 338, 344, 4 Sup. Ct. 81, 28 L. Ed. 168. Damages are not recoverable which are remote, or conjectural, or purely speculative. On the other hand, it is not necessary that they should be computable with mathematical accuracy, and the fact that they may be to some extent contingent and not capable of being accurately determined does not prevent recovery. Randall v. Peerless Motor Car Co., 212 Mass. 352, 380, 99 N. E. 221; Pierce v. Tenn. Coal Co., supra.

[15] Applying these principles, it follows that the plaintiff is entitled to recover as damages the loss on commissions to which it would have been entitled if the contract had been performed and of which it has been deprived by the defendant's wrongful termination of the contract. The commissions on the 1912–13 business on the facts above found are clearly recoverable. They amount to $8,453.94; and the defendant is liable therefor.

[16] I also think, although this, perhaps, is not so clear, that the plaintiff is entitled to recover damages for the loss of commissions on the 1913–14 business. The probability that such commissions would be earned was plainly within the contemplation of both parties, and was, indeed, one of the inducements for the making of the contract. The plaintiff's loss of them was within the contemplation of the defendant when it broke the contract and is a natural, and not too remote, consequence of the breach. Nor does it seem to me that they are so contingent or uncertain as to be unassessable. The plaintiff was able to meet the approved rates in 1912; the probability plainly is that it would have been able to do so in 1913. It is true that there can be no positive certainty as to this, nor as to what the rates would be next year, nor the size of the defendant's fleet, nor the amount and kind of insurance required upon it. In making this contract, however, both parties evidently contemplated that conditions in these respects were likely to be substantially unchanged for both years. Howard v. Stillwell & Bierce Co., 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147. The decisions upon this point are distinctly favorable to the plaintiff. Courts have gone a long way in allowing plaintiffs to recover damages as to which there was uncertainty and contingency. Chaplin v. Hicks [1911] 2 K. B. 786; Richardson v. Mellish, 2 Bingham, 229; Neal v. Jefferson, 212

Mass. 517, 99 N. E. 334, 41 L. R. A. (N. S.) 387, Ann. Cas. 1913D, 205; Speirs v. Union Drop Forge Co., 180 Mass. 87, 61 N. E. 825.

The commissions which the plaintiff would have been entitled to, as nearly as can now be estimated, on the 1913 business which it has lost, would have amounted to $8,175.50. There would have been a slight expense in connection with cables, etc., the exact amount of which does not appear. I estimate the net worth to the plaintiff of that business at $8,000, and I find that it is entitled to recover that amount as damages for the loss sustained by it through the defendant's breach of the contract in respect to the 1913 business.

The defendant has presented 167 requests for rulings of law and findings of fact. I have fully indicated in the foregoing memorandum of decision such findings of fact and rulings of law as seem to me necessary to a decision of the case. I give such of the defendant's requests as are contained therein, or are consistent therewith; the others I refuse. Of the plaintiff's requests, it is only necessary to pass upon the ninth, which I give; the case having been decided, as the foregoing memorandum indicates, without regard to the evidence referred to in this request.

Judgment for the plaintiff for $16,453.94, with interest from the date of the writ.

DREYER v. KICKLIGHTER.

(District Court, S. D. Georgia. January 12, 1916.)

1. JUSTICES OF THE PEACE ⟸135—EXECUTION SALES—ADVERTISEMENT.
   Where proper notices of a sale under an execution on a judgment of a justice of the peace were duly posted up, but were washed off the boards, where they were posted, by a heavy rain on the night before the sale, the sale was properly advertised.
   [Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 426–447, 749; Dec. Dig. ⟸135.]

2. EXECUTION ⟸226—SALE—CONDUCT—PRESENCE OF PROPERTY.
   It is a general rule that all levying officers, in the absence of statute or express order from the court, should be required to expose the property at the place of sale.
   [Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 613–619; Dec. Dig. ⟸226.]

3. BANKRUPTCY ⟸203—LIENS—SALES—RIGHTS OF PURCHASERS.
   Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (Comp. St. 1913, § 9651), provides that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and that the property shall be wholly discharged and released therefrom, and shall pass to the trustee, provided that nothing therein shall destroy or impair the title obtained by such levy or other lien of a bona fide purchaser for value, who shall have acquired it without notice or reasonable cause for inquiry. *Held*, that where judgments were obtained against an insolvent, and executions issued and a sale had within four months before bankruptcy, the sale, as well as the levies and the judgments, was void, and the purchaser could be protected only in case he

was a bona fide purchaser for value, and acquired the property without notice, or reasonable cause for inquiry as to the bankrupt's insolvency.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⇐203.]

4. BANKRUPTCY ⇐203—LIENS—SALES—RIGHTS OF PURCHASERS.

Defendant was a creditor of the P. Lumber Co., which had ceased to do business and was in the hands of a committee of creditors, and had tried unsuccessfully to collect his debt. He attempted to purchase a skidder from the chairman of such committee, but could not reach an agreement as to the price, and was permitted to move the skidder to a point near his own sawmill, to ascertain whether it was worth more than he had offered. Judgments had been obtained in justice court against the P. Co., and executions issued, and the attorney for the execution plaintiffs sent the executions to a constable of the district to which defendant had moved the skidder, and the skidder was levied on and sold to defendant's agent for about one-third of its value. It appeared that defendant told the constable where he could find the skidder, but did not tell the officers and agents of the bankrupt that it had been levied on. The attorney for the execution plaintiffs kept the levy and sale a secret, and the bankrupt's officers and agents did not learn thereof. The hopeless insolvency of the P. Co. was a matter of common knowledge in the community, and the attorneys in question and defendant's agent both knew of such insolvency, and, though defendant claimed that he did not know thereof, he was a frequent visitor at the company's sawmill plant, and was associated in business with its former president, who had been superseded by the creditors' committee. *Held*, that the facts showed that defendant had full notice of the insolvency at the time he purchased the property, and that he was not a bona fide purchaser, within Bankr. Act, § 67f, and, even though he did not conspire with the attorney for the execution plaintiffs in secretly selling the skidder without the knowledge of the P. Co., he took advantage thereof to buy the property at an inadequate price.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⇐203.]

5. BANKRUPTCY ⇐203—LIENS—SALES—RIGHTS OF PURCHASERS—"BONA FIDE PURCHASER."

To establish that a purchaser of a bankrupt's property at execution sale within four months before bankruptcy was not a bona fide purchaser for value, within Bankr. Act, § 67f, it is not necessary to show actual knowledge, or an actual belief, of the bankrupt's insolvency at the time of the sale, but only such surrounding circumstances as would lead an ordinarily prudent business man to conclude that the bankrupt was insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⇐203.

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

6. BANKRUPTCY ⇐284—LIENS—RECOVERY OF PROPERTY BY TRUSTEE—CONDITIONS PRECEDENT.

A trustee in bankruptcy can maintain a bill to recover property sold under execution within four months before bankruptcy, or its value, without first tendering back to the purchaser the amount paid by him for the property.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⇐284.]

7. BANKRUPTCY ⇐203—LIENS—SALES—RIGHTS OF PURCHASERS.

Where a purchaser of the property of a bankrupt at execution sale within four months before bankruptcy, though he purchased for an inadequate price and was not a bona fide purchaser, was not guilty of such actual fraud as to warrant the setting aside of the sale if bankruptcy had not intervened, he was entitled, upon recovery of the property

or its value by the trustee, to reimbursement for the amount paid by him.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃203.]

8. BANKRUPTCY ⊂⊃165—VOIDABLE PREFERENCES—RECOVERY BY TRUSTEE.

The trustee was entitled to collect the amount so paid by such purchaser from the execution plaintiffs as a voidable preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. ⊂⊃165.]

9. BANKRUPTCY ⊂⊃186—LIENS—RECOVERY BY TRUSTEE.

In a suit by a trustee in bankruptcy to recover property sold under execution within four months before bankruptcy, where several years had intervened between the purchase and the trial of the action on the merits, and the property in the meantime has deteriorated in value, its value at the time of the execution sale would be adopted as the basis of a decree.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 285, 319; Dec. Dig. ⊂⊃186.]

In Equity. Bill by Joseph M. Dreyer, trustee in bankruptcy of the Perkins Lumber Company, against W. T. Kicklighter. Decree for complainant.

In the first part of the year 1912, certain creditors of the Perkins Lumber Company, a corporation of this district, obtained judgments against that company in the justice court of the 1607th district, G. M., of Tattnall county, and executions were duly issued on these judgments. These executions were turned over to the constable of the 401st district, G. M., and they were by him on the 9th day of April, 1912, levied upon a certain skidder as the property of the defendant company, and on the third Saturday in April, 1912, to wit, April 20, 1912, said skidder was sold at public outcry by the constable and bought by one Dr. Ellabee acting as agent for the defendant, W. T. Kicklighter, at the price of $200. Subsequently on May 4, 1912, a petition in involuntary bankruptcy was filed against the Perkins Lumber Company and an order of adjudication was entered on May 24, 1912, and thereafter Mr. A. E. Moynelo was appointed trustee for the bankrupt, and on the 26th day of June, 1912, the trustee brought a bill in equity against the defendant, Kicklighter, for the recovery of said skidder or its value, which was claimed to be $1,000. Moynelo died while the suit was pending, and Mr. Joseph M. Dreyer was elected trustee in his stead, and the bill proceeded in his name. Complainant alleged that the bankrupt was hopelessly insolvent for many months preceding its adjudication, and that during this time its business was shut down and its affairs were in the hands of a committee of creditors, and that these facts were well known to the defendant, Kicklighter, and that the judgments were rendered and the sale occurred within four months of the filing of the petition in bankruptcy; that the property was not exposed at the place of sale when sold by the constable; that the defendant, Kicklighter, conspired with the constable and with the plaintiffs in fi. fa. in having the sale made secretly and without notice to the Perkins Lumber Company or any of its officers or agents or attorneys; that the property was bid off at the inadequate price of $200, whereas as a matter of fact it was worth $1,000; and that for this and other reasons the said defendant was not a bona fide purchaser for value, and that the sale was void. The trustee prayed that the sale be declared null and void and that he be allowed to recover the property or its value for administration as a part of the estate of the bankrupt. The defendant demurred to the petition, and the demurrer was overruled, and thereupon the case proceeded to a trial upon its merits.

Saussy & Saussy, of Savannah, Ga., for complainant.

M. A. Smith, Jr., and W. G. Warnell, both of Hagan, Ga., and Edward S. Elliott, of Savannah, Ga., for defendant.

LAMBDIN, District Judge (after stating the facts as above). The trustee, who is the complainant here, seeks to recover a certain skidder from the defendant, who had bought same at a sale made thereof under several justice court executions based upon judgments less than four months old, as stated above, and the trustee claims that said sale was null and void for the following reasons: Because it was not properly advertised; because the levy was an excessive one; because, under the law of Georgia, it is not legal for a constable to sell personal property without exposing it at the time and place of sale; and, lastly, because the facts in the case show that the defendant was not a bona fide purchaser for value without notice of the insolvency of the defendant, or reasonable cause for inquiry, as provided by the Bankruptcy Act.

[1] 1. The evidence seems to be clear that proper notices of the sale were posted up, but that same were washed off the boards where posted by a heavy rain on the night before the sale. The court, therefore, is of the opinion that the sale was properly advertised. Nor does the court think that the levy was such an excessive one as to be void.

[2] The next point made by the trustee is that the sale was void because the constable did not bring the skidder to the court ground on the day of the sale, and this raises a more serious question. Section 6060 of the Georgia Code of 1910 is in the following language:

"No sales shall be made, by the sheriffs or coroners, of property taken under execution, but at the courthouse of the county where such levy was made, on the first Tuesday in each month, between the hours of 10 a. m. and 4 p. m., and at public outcry: Provided, that in all cases where any sheriff, coroner, or other levying officer shall levy any execution or other legal process upon any corn, lumber, timber of any kind, bricks, machinery, or other articles difficult and expensive to transport, said officer may sell said property without carrying and exposing the same at the courthouse door on the day of sale. But the levying officer shall give a full description of the property, and the place where it is located, in the advertisement of the sale."

Counsel for the trustee contends that the proviso in the section of the Code above quoted applies only to the sales of personal property made by sheriffs and other levying officers who sell same at the door of the courthouse of the county, and that only such officers are authorized to sell machinery and other articles difficult and expensive to transport without carrying and exposing the same "at the courthouse door," but that this does not apply to constables, who make their sales, in some instances, remote from the county seat, at places where the justice courts are held. I do not find that this precise question has ever been decided by the courts of this state. It is a general rule that all levying officers, in the absence of statute or express order from the court, should be required to expose the property at the place of sale where they sell same. Had the constable in this case brought the skidder in question to the justice court on the day of the sale, the attorney for the bankrupt company would have seen it, and would have had notice of the sale, and the property would not have been sacrificed by sale to the defendant at the small price which he paid for it. According to the strict letter of the statute above quoted, the court is of

the opinion that there is some merit in the contention of the trustee on this point; but it is not necessary, however, for the court to decide this question, as the court holds that the sale was void for other reasons, as shown in this opinion.

[3] 2. The judgments under which the skidder involved in this case was sold were obtained within four months prior to the filing of the petition in bankruptcy against the Perkins Lumber Company, and were therefore, in accordance with the provisions of the Bankruptcy Law, null and void. Section 67f of the Bankruptcy Act is in the following language:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

This provision of the Bankruptcy Law not only strikes down the judgments under which the property was sold, because rendered within the inhibited period, but also the levies made by the constable of the executions issued on these judgments, and the sale itself made by virtue thereof to the defendant. The only way in which the defendant can be protected in his title to this property is by showing that he comes within the proviso which is at the conclusion of the subsection of the Bankruptcy Act quoted above—that is, by showing that he was a "bona fide purchaser for value" of the property in question, and that he "acquired the same without notice or reasonable cause for inquiry" as to the insolvency of the bankrupt.

It has been held that the burden is upon the purchaser at such a sale to show that he comes within the terms of said proviso, and that, in order for his title to be protected, the duty is upon him to show that he is a bona fide purchaser for value, and that he acquired the property without notice of the insolvency of the bankrupt or reasonable cause for inquiry. 1 Remington on Bankruptcy, § 1482, p. 883; Mencke v. Rosenberg, 9 Am. Bank. R. 323, 202 Pa. 131, 51 Atl. 767, 90 Am. St. Rep. 618.

It is not necessary, however, for this court to decide whether the burden of proof in this case was upon the defendant or upon the trustee, as the trustee assumed the burden of proof and introduced evidence tending to show that the defendant was not a bona fide purchaser for value, and that he acquired the property with full knowledge of the bankrupt's insolvency at the time of the sale. It is necessary, therefore, in order to decide the case, to thoroughly consider and

analyze the evidence adduced at the hearing of the case, so as to determine whether the defendant is an innocent purchaser for value without notice or reasonable ground for inquiry.

[4, 5] 3. The court has carefully read and reread this evidence, and has come to the conclusion that the defendant is not a bona fide purchaser for value of the property, and did not acquire same without notice or reasonable cause for inquiry, as required by the statute.

For several months prior to the sale the bankrupt company had ceased to do business and was in the hands of a committee of its creditors, who were engaged in trying to realize upon its assets. This was fully known to the defendant. He was himself a creditor of the bankrupt, and had tried unsuccessfully to collect his debt. The hopeless insolvency of the bankrupt for several months prior to the bankruptcy proceedings was a matter of common knowledge in the community in which the bankrupt company conducted its operations and in which the defendant resided, and defendant was a frequent visitor at the sawmill plant of the bankrupt and was associated in business with Dr. Perkins, the former president of the company, who had been superseded by the creditors' committee of the company. The attorney for the plaintiffs in fi. fa. testified that he knew of the insolvency of the company, and Dr. Ellabee, the defendant's agent, who bought this skidder for him at the constable sale, also testified that he knew at the time that the company was insolvent. It is true that the defendant denies that he knew of this insolvency; but this general denial, under the circumstances of the case, should not be permitted to avail him. There is no one so blind as those who will not see. Under the Bankruptcy Law, mere lack of knowledge will not protect the defendant. He must also be "without notice or reasonable cause for inquiry." The Code of Georgia lays down the principle here involved in the following very apt language:

Section 4530: "Notice sufficient to excite attention and put a party on inquiry is notice of everything to which it is afterwards found such inquiry might have led. Ignorance of a fact, due to negligence, is equivalent to knowledge, in fixing the rights of parties."

It is not necessary in this case for the trustee to adduce proof either of actual knowledge or of actual belief on the part of the defendant of the insolvency of the bankrupt at the time of the sale. It is only necessary to show such surrounding circumstances as would lead an ordinarily prudent business man to conclude that the bankrupt was insolvent at the time in question.

"Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop." Collier on Bankruptcy (10th Ed.) pp. 820 and 821, and cases there cited; Wager v. Hall, 16 Wall. 584, 601, 21 L. Ed. 504; Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489; In re Moody, 134 Fed. 628.

Upon a careful consideration of the evidence, therefore, the court is forced to the conclusion that the defendant, in spite of his professed ignorance, had full notice of the insolvency of the bankrupt at the time

he bought the property in question, which was only two weeks before the bankruptcy petition was filed.

4. The defendant at the time of the purchase was engaged in the sawmill business as a member of the firm of Perkins, Kicklighter & Co., and was very anxious to buy this skidder, and approached the chairman of this committee several times with reference to the purchase of same. The skidder cost when new $3,000, and had been in use some eight or nine years, and the chairman asked $1,000 for it. The defendant offered him $500. The chairman refused to accept this price, and thereupon the defendant at a later date told the chairman he thought he might give $750 for it, but first wanted to ascertain its condition. With this purpose in view defendant testified that he had it moved from its original place in the woods up near his sawmill, where he could see it. This was done on April 8th. The next day it was levied on by the constable, and it seems clear from the evidence that defendant told the constable where he could find the skidder. This was done while defendant was negotiating with the chairman of the creditors' committee for the purchase of the skidder. This chairman lived in Savannah, and his representative, Mr. Willingham, was at the sawmill plant of the bankrupt, and yet, although the defendant knew the skidder was levied on while negotiations for the purchase were pending, same was kept secret from the officers and agents of the bankrupt. Defendant, Kicklighter, was at the sawmill plant of the bankrupt a few days before the time when the constable went to that location in search of property on which to levy the executions in question, and knew his purpose. There was sufficient property at the sawmill plant of the bankrupt, which was located in the 1607th district, G. M., of Tattnall county, in which the judgments in question were rendered, to produce the amount, if same had been levied on; but, instead thereof, the attorney for the plaintiffs in fi. fa. took the executions out of the hands of the constable of that district and sent them to the constable of the 401st district, G. M., and had him to levy on the skidder in question, which had been just a day or two before that time moved by defendant up near his sawmill. No notice of this levy was given to the bankrupt, and the constable advertised the sale of same to occur on the regular court day of his justice court in his district on the 20th day of April, 1912, by posting up notices at the door of the building in which the justice court was held and at two other places in the district. Otherwise, the attorney for the plaintiffs in fi. fa. kept the matter secret, for fear, as he testified, that some other creditor would claim the proceeds of the sale of the property, and thus keep him from collecting his judgments. On the day when the sale occurred the attorney for the bankrupt went to the justice court ground where the sale was to occur and looked upon the door of the justice court to see if any sales were advertised for that day. He saw no notices of any sales. Later in the day, between 11 and 12 o'clock, defendant approached this attorney and invited him to ride back to Claxton, where this attorney lived, in his automobile, which invitation was accepted, and thus the attorney for the bankrupt was ignorant of the sale of the property. Thereafter, at a later hour on the same day, the

skidder was sold by the constable and bought by Dr. Ellabee, the agent of defendant, at the price of $200. The skidder was not brought to the place of sale, but was allowed to remain at a place some eight miles distant, near defendant's sawmill, where it was located when it was levied upon.

The court is of the opinion that the defendant was not a bona fide purchaser of the property for value, but that he acted in bad faith in the matter, and that as a result of same he acquired the property at a totally inadequate price. The utmost secrecy was observed in the levy and advertisement and sale of the property. The defendant for reasons of his own did not bid on the property personally on the day of the sale, but had it bid in by his kinsman, Dr. Ellabee. He was very anxious to purchase the skidder, and had tried to buy same several times from the chairman of the creditors' committee of the bankrupt, as above stated, and yet, while these negotiations were pending, he moved the skidder near his own mill and disclosed its location to the constable, who levied upon same the next day and did not notify the officers or agents of the bankrupt that the skidder had been levied on. The attorney for the plaintiffs in fi. fa. kept the levy and sale a secret, and though the defendant may not have conspired with him in thus secretly selling the skidder without notice to the bankrupt, yet he took advantage of same and was thus enabled to buy the property at a very inadequate price. The court does not think that the conduct of the defendant as set out in this division of its opinion is sufficiently fraudulent of itself to invalidate the sale, but same is referred to as throwing light upon the question involved in this case as to whether he was a bona fide purchaser for value without notice of the insolvency of the bankrupt, or reasonable cause for inquiry, as required by the Bankruptcy Law. While the facts detailed may not show actual fraud sufficient to invalidate the sale, they certainly show that defendant was not a bona fide purchaser for value without notice.

5. The conclusion of the court, therefore, is that the defendant was not a bona fide purchaser of the property for value without notice of the insolvency of the bankrupt, or reasonable cause for inquiry, as required by the statute. His title, therefore, must fall. In re Goldberg, 10 Am. Bank. R. 97, 121 Fed. 578; In re Goldberg, 9 Am. Bank. R. 156, 117 Fed. 692; Mencke v. Rosenberg, 9 Am. Bank. R. 323, 202 Pa. 131, 51 Atl. 767, 90 Am. St. Rep. 618; Brown v. Case, 180 Mass. 45, 61 N. E. 279, 6 Am. Bank. R. 744; 1 Remington on Bankruptcy, pp. 882 and 883. The following cases recognize the principle laid down in these cases, but hold that if the defendant was a bona fide purchaser for value without notice, or reasonable cause for inquiry, the trustee could collect the money realized from the sale of the property either from the sheriff or from the plaintiffs in execution. In re Breslauer, 121 Fed. 910, 10 Am. Bank. R. 33; In re Kenney, 5 Am. Bank. R. 355, 105 Fed. 897, 45 C. C. A. 113; Jones v. Stevens, 94 Me. 582, 48 Atl. 170, 5 Am. Bank. R. 571; In re Raymond W. Kenney, 2 Am. Bank. R. 494, 95 Fed. 427; In re Franks, 2 Am. Bank. R. 634, 95 Fed. 635. However, in this case the defendant is not a bona fide purchaser for value without notice, or reasonable ground for inquiry,

and therefore the trustee can recover the property or its value from him.

[6] 6. Defendant contends that the trustee cannot maintain this bill without first tendering back to defendant the amount of $200 paid by him for the skidder in question. This question is settled adversely to defendant by a decision in this court rendered by Judge Speer in the case of Johnston v. Forsyth Mercantile Co., 127 Fed. 845 (4). See, also, the case of Thomas et al. v. Beals, 154 Mass. 51, 27 N. E. 1004 (3).

[7, 8] 7. The only question remaining for consideration is whether the defendant is entitled to credit in this case for the $200 paid by him. In suits at law, the defendant would have no such right; but the pending bill is in equity, and the general rule on the subject in equity is that, where a conveyance is founded on *actual fraud,* the grantee is regarded as being particeps criminis, and is not entitled to reimbursement. 20 Cyc. 628; Biggins v. Lambert, 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238. But where the conveyance is merely constructively fraudulent the grantee is entitled to reimbursement. 20 Cyc. 626; Scott v. Winship, 20 Ga. 429 (2). In the case of Boyd & Suydam v. Dunlap, 1 Johns. Ch. (N. Y.) 478, quoted in the case of United States v. Griswold (C. C.) 8 Fed. bottom of page 504, the rule is laid down in the following language:

"When a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but there are suspicious circumstances as to the adequacy of the consideration and fairness of the transaction, the court will not set aside the conveyance altogether, but permit it to stand as a security for the sum actually paid."

After careful consideration of all the facts and circumstances of the case, the court is of the opinion that the action of the defendant in this case in buying the skidder in question is only constructively fraudulent, made so by the Bankruptcy Act on account of the retroactive effect of the filing of the petition in bankruptcy, which happened shortly after the defendant bought the property in question. We do not think that defendant actively conspired with the attorney for plaintiffs in execution in having the property levied on and secretly sold, yet he took advantage of the situation and bought the property at an inadequate price. We do not think the transaction was a fair one on his part, and yet if it had not been for the subsequent filing of the petition in bankruptcy we hardly think that he would have been guilty of such actual fraud as to warrant the court in setting aside the sale. As the title held by defendant is, therefore, only constructively fraudulent, we think he should be entitled to reimbursement for the amount of $200 paid by him for the skidder—such claim to be subject to the claim and title of the trustee to the property. The trustee, however, is entitled to collect this amount back as a voidable preference from the plaintiffs in fi. fa., to whom the constable paid over the money. In re Breslauer, 121 Fed. 910, 10 Am. Bank. R. 33; Clarke v. Larremore, Trustee, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, 9 Am. Bank. R. 476.

[9] 8. On account of the fact that several years have intervened since defendant's purchase of the skidder in question, and that, there-

fore, the skidder has deteriorated in value in the meantime, we think that it would be equitable to fix the value of the property at the time defendant bought same as a basis of the decree to be made in this case. It appears from the evidence that defendant offered just before he purchased the skidder $500 for same, and that this price was also offered by another party. We hardly think that this was the full value of the skidder, but under the facts in the case the court finds that the value of the skidder at the time of the sale and the filing of the bill was $600; and allowing defendant credit for the $200 paid by him, defendant would have to pay the sum of $400, with interest from June 26, 1912, and all costs of these proceedings, in order to repurchase said property from the trustee.

A decree will therefore be entered, setting aside the sale made by the constable of said skidder and appurtenances, and vesting the title to same in the complainant in this case, and providing that in the event defendant fails to pay said sum of $400 and interest and costs in 30 days, so as to repurchase said property as aforesaid, said trustee shall sell same, and retain said sum of $400 and interest and all costs, and turn over the balance, if any, to said Kicklighter, his legal representative, or assigns.

KNOX & LEWIS v. ALWOOD et al.

(District Court, S. D. Georgia. December 31, 1915.)

1. COURTS ⊜264—JURISDICTION OF FEDERAL COURT—ANCILLARY SUIT.
   A federal court, which is administering the estate of an insolvent corporation, including timber lands, has jurisdiction of a bill by its receivers for an injunction to prevent waste by the cutting of timber, regardless of the citizenship of the parties; such suit being ancillary.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. ⊜264.]

2. JUDGMENT ⊜564—CONCLUSIVENESS—INTERLOCUTORY DECREE.
   A decree granting a preliminary injunction in a suit subsequently dismissed is not a final adjudication, which renders the questions determined res judicata.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1015–1017; Dec. Dig. ⊜564.]

3. COURTS ⊜367—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.
   The construction of a particular will or deed is a general question, upon which a federal court is not bound to follow a decision of the Supreme Court of the state, as establishing a rule of property.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. ⊜367.]

4. WILLS ⊜693—CONSTRUCTION—DEVISE OF LIFE ESTATE IN TIMBER LAND—RIGHT TO SELL AND DISPOSE OF TIMBER.
   A testator devised to his son a life estate in timber land, with "full power and authority to sell and dispose of the timber," and to have full use and enjoyment of said lands, without impeachment of waste. *Held*, that the son had power, in selling the timber, to give the purchaser a definite time within which to remove the same, provided the time so fixed was reasonable, and did not destroy or seriously impair the rights of the remaindermen in the land itself, and that whether the time so fixed was

reasonable is a question of fact, to be determined in view of all the facts and circumstances existing at the time of the conveyance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655–1661; Dec. Dig. ⊂693.]

In Equity. Suit by Knox & Lewis, receivers of the Hilton & Dodge Lumber Company, against William Alwood and others. On plea to jurisdiction and of res judicata. Overruled.

This is a bill brought by the receivers of the Hilton & Dodge Lumber Company to enjoin respondents from cutting timber on certain lands. Both of the parties in this case derived their title to the timber in dispute from a common grantor. It appears that B. L. Lane once owned the land upon which said timber is located, together with the timber, and that by item 3 of his will, which was probated on April 1, 1895, he devised said land to his son, George W. C. Lane, "for and during his natural life, with remainder to his living children at the time of his death." The twelfth item of his will is as follows: "It is my will that my children whom I have hereinbefore given life estates in the lands of this will given, shall have the full power and authority to sell and dispose of the timber on all said lands, and shall have the full use and enjoyment of said lands, without impeachment of waste. Said Emma S. Lane, as trustee for Lucinda V. Lane, shall have the same power and authority in the disposition of the timber on the lands given herein to said Lucinda V. Lane, applying all money arising from such disposition of said timber to the support and maintenance of the said Lucinda V. Lane." On February 6, 1902, George W. C. Lane sold and conveyed, by deed with warranty of title, to the Hilton & Dodge Lumber Company, "all the cypress timber and trees of every sort and description" on the land which had been devised to him by the third item of said will. The deed contained the following covenant: "It is agreed that the time limit of this conveyance as above set forth shall be 20 years from the date of this conveyance, but the first parties agree that the said time limit may be extended from year to year thereafter, not exceeding 10 years' extension, upon the payment by the second party, its successors or assigns, of interest on the original purchase price at the rate of 6 per cent. per annum."

The defendants, William Alwood et al., derived title by mesne conveyances from the remaindermen under the will of B. L. Lane, and entered upon the lands in question and began to cut the timber therefrom. Thereupon the Hilton & Dodge Lumber Company filed a petition in the superior court of Jenkins county on July 22, 1913, against said William Alwood et al., praying for an injunction. The state court heard the petition upon the application for temporary injunction and granted an order temporarily enjoining both parties, and this order was carried to the Supreme Court of Georgia and reversed, as may be seen by reference to the opinion of the court set out in 141 Ga. 653, 81 S. E. 1119.

Thereafter a bill was filed against the Hilton & Dodge Lumber Company in the District Court of the United States for the Southern District of Georgia, and receivers were appointed for said corporation, and this court thereupon took charge of the assets of said company and is administering same. Said receivers dismissed the action in the state court, and have brought this bill in this court, praying for an injunction against the defendants as to the timber in question. The respondents have filed a plea to the jurisdiction of this court on the ground that there is no diversity of citizenship or federal question involved; and they also file a plea of res judicata, claiming that all questions here involved have been concluded by the litigation in the state court.

Garrard & Gazan and Travis & Travis, all of Savannah, Ga., for complainants.

Osborne & Lawrence and E. H. Abrahams, all of Savannah, Ga., for respondents.

LAMBDIN, District Judge (after stating the facts as above). [1] 1. Inasmuch as this court is administering the estate of the Hilton &

Dodge Lumber Company, through its receivers, and the bill before the court is only an ancillary bill filed for the purpose of protecting a portion of the estate of that company, I am of the opinion that this court has jurisdiction to entertain the bill, although it would not have had jurisdiction for want of diversity of citizenship of an original bill brought for the same purpose. White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; Hollander v. Heaslip, 222 Fed. 808, 137 C. C. A. 1 (C. C. A. 5th Circuit); Wabash R. R. Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379.

[2] 2. The Hilton & Dodge Lumber Company, which was the plaintiff in the state court, brought its bill praying for an injunction against Alwood et al., against their cutting the timber in question, relying upon the timber deed which they held from George W. C. Lane. The defendants filed their answer, in which they averred that the rights of the plaintiff under the timber deed terminated on the death of the life tenant. The superior court of Jenkins county, in which the petition was filed, upon the hearing of the application for temporary injunction in said case, passed an order enjoining both parties from removing the timber in question and also sustaining a general demurrer to the petition. The plaintiff carried the case to the Supreme Court of Georgia, and that court reversed the action of the court below, and held that plaintiff's title to the timber did not terminate upon the death of the life tenant, but that plaintiff had a reasonable time in which to remove the timber, and that, inasmuch as the evidence adduced at the hearing disclosed that such time had not expired at that time, the superior court erred in enjoining the plaintiff, and that the case should proceed to a final hearing upon the right of the plaintiff to an injunction. Thereafter receivers were appointed for the Hilton & Dodge Lumber Company by this court, and these receivers dismissed the petition in the state court and brought their bill in this court for injunction against the cutting of the timber in question, claiming that the timber deed which they held was in all respects valid and that they had 20 years from the time of its execution in which to remove the timber, as provided in said deed.

Respondents filed their plea of res judicata, claiming that complainants were concluded by the former litigation in the state court. The court does not agree with this contention. The judgment in the superior court of Jenkins county was not a final judgment, and never became a final adjudication, upon the merits of the question between the parties. When the case was dismissed in the state court the prior proceedings therein went for naught. The Supreme Court of Georgia, in discussing the question here involved, lays down the rule in such matters in the case of National Bank of Augusta v. Printup Brothers & Co. et al., 63 Ga. 570, and at the bottom of page 576, in the following language:

"The truth is that the purpose of an interlocutory injunction is wholly provisional; it is preliminary and preparatory; it looks to a future and final hearing, more deliberate, solemn, and complete than any which has been had, and while contemplating what the result of that hearing may be, it by no means forestalls it, or settles what it shall be. * * * In one word, there is, with respect to the merits of the main case, nothing final either in granting

or keeping on foot an interlocutory injunction; and the rigid, stationary condition which any proper conception of res adjudicata involves arises out of judgments only which are final in their nature. High on Inj. §§ 3, 4, 5; [Town of Ottawa et al. v. Walker] 21 Ill. 605 [71 Am. Dec. 121]; Freeman on Judg., § 251; [Baugh v. Baugh] 4 Bibb [Ky.] 556; 22 Eng. Ch. R. (2 Phillips) 597."

See, also, the well-considered case of Snare & Triest Company v. Friedman (C. C. A. 3d Circuit) 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367.

[3] 3. Respondents also urge that the opinion of the Supreme Court of Georgia referred to above in the case of Hilton & Dodge Lumber Company v. Alwood et al., 141 Ga. 653 to 658, 81 S. E. 1119, is binding on this court and settles the law for this case. The court recognizes the well-settled principle that questions concerning real property are local questions and "rules of property," and that the courts of the United States will therefore follow the established line of decisions of the state courts on the subject. The court thinks, however, that it was not necessary for the Supreme Court of Georgia, in deciding that case, to determine the precise point here involved, to wit, whether the execution by the life tenant of a timber deed or lease to the timber in question for a period of 20 years was a valid exercise of the power given to him under the will of his father or not, and that therefore the opinion of the State Supreme Court on that point is only obiter dictum, and consequently not binding, either on that court or on this court. Furthermore, the construction by the state court of a single exceptional will and timber deed like the one involved in this case is usually regarded as a general question, as to which federal courts may exercise their own independent judgment, and are not concluded by the decisions of the state court. Foxcroft v. Mallett, 4 How. 353, 11 L. Ed. 1008 (last headnote); Lane et al. v. Vick et al., 3 How. 464, 11 L. Ed. 681 (last headnote); Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228. However, as stated further on in this opinion, this court is in substantial accord with the Supreme Court of Georgia on the principles involved in the case.

[4] 4. By his will B. L. Lane gave the land and timber in question to his son George W. C. Lane for life, with remainder to the children of said son living at the time of his death. The testator further gave to his son "full power and authority to sell and dispose of the timber on said lands," and to have full use and enjoyment of said lands without impeachment of waste. The authority of the son, who was the life tenant, over the land and timber, was limited to the power to "sell and dispose of" the timber on the land. He had no power to sell the land itself. There was a clear intention on the part of the testator, therefore, to separate the land from the timber, and to give the son the right to sell and dispose of the timber, leaving the land for the remaindermen. The court is of the opinion, therefore, that the testator did not intend that the son should have the power to make a perpetual conveyance of the timber on these lands, so as to give his grantee a perpetual estate in the trees and a permanent interest in the soil good for all time, as was done in the case of North Georgia Company v. Bebee, reported in 128 Ga. 563, 57 S. E. 873. It is the opinion of the

court that the testator intended only that his son should have the right to sell and dispose of the timber, and that this timber should not be allowed to remain permanently on the land but should be removed therefrom. Such was the general scheme of the will; and, furthermore, this view is borne out by the fact that the Hilton & Dodge Lumber Company was a sawmill corporation, engaged at the time in removing timber from land and manufacturing it into lumber. The case of North Georgia Company v. Bebee is an exceptional case, growing out of the peculiar provisions of the conveyance involved in that case. The ordinary rule is that, where timber is conveyed, it is done for the purpose of removal, and not for the purpose of giving to the grantee in the conveyance a permanent interest in the land.

The power here given to the son, which he could not go beyond, was to "sell and dispose of the timber." The son, therefore, had the right either to sell the timber or to dispose of it in some other way. Under the power to "sell" by itself, the son would have had no right to have fixed any definite time for the removal of the timber; but under decisions of the Supreme Court of Georgia in the cases of McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513, and Shippen Lumber Company v. Gates, 136 Ga. 37, 70 S. E. 672, and other cases not necessary to cite, the grantee would have had a reasonable time to cut and remove the timber under a sale of same. The son, however, was given the power also to "dispose of" the timber. One method of disposing of timber which is common and usual to sawmill men in this state is to execute a deed to the timber and to grant therein a definite period of time in which to remove the same, and such an instrument is construed by the courts of Georgia to be merely a license to cut and remove the timber during the time fixed in the contract. Johnson v. Truitt, 122 Ga. 327, and top of page 329, 50 S. E. 135.

Under the power to sell only, the court does not think that the son had the right to grant any definite time in which the timber should be removed, but that same would be governed by the principle of law laid down by our Supreme Court as above stated, and the grantee would have a reasonable time to remove the timber; but under the power given the son to "dispose of" the timber the court is of the opinion that the son had the power to sell the timber and allow a definite time in which same was to be removed, and therefore the court holds that the deed in question was authorized by this provision of the will with the limitation expressed below. The testator, however, according to the scheme of his will, intended that the remaindermen should enjoy the land after the timber was removed therefrom. The life tenant, therefore, in exercising his power in disposing of the timber, had no right to destroy or seriously impair the rights of the remaindermen in the land itself. Regard should be had, therefore, both to the rights of the life tenant in the timber and the rights of the remaindermen in the land. The life tenant had no power to unreasonably interfere with the rights of the remaindermen. Such being the case, the court is of the opinion that the son did not have the power to give to the grantee in the timber deed in question an unreasonably long time within which to remove the timber from the land. The

question, therefore, in this case, is whether the grant of a 20-year period in the deed in question was an unreasonable exercise of the power given to the life tenant by the will of his father. The court is of the opinion that this is a question of fact, and not of law. Brinson v. Kirkland, 122 Ga. 486, 50 S. E. 369; McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513.

5. In deciding the question as to whether the time of 20 years for removing the timber as named in the deed was a reasonable time or not, all the facts and circumstances of the case and the conditions surrounding the parties at the time of the execution of the deed should be considered, rather than the conditions which have subsequently arisen. Brinson v. Kirkland, 122 Ga. 488, 50 S. E. 369; McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; Minshew v. A. C. L., 98 S. C. 8, 81 S. E. 1027; Goette v. Lane, 111 Ga. 400, 36 S. E. 758. Of course, under the authorities, the provision in the deed in question allowing 20 years is prima facie valid, and the burden is upon the defendants in this case to show that the time stipulated in the deed is unreasonable in view of all the circumstances existing at the time of the execution of same.

6. The case before me is a bill in equity, and therefore ordinarily it is the duty of the court to decide the question here presented, which is one of fact and not of law. However, as the question involves the consideration of a great many facts and circumstances about which reasonable men may disagree, and which are peculiarly cognizable and determinable by business men and other men of affairs, the court is of the opinion that it would be proper to submit this question to a jury for its advice; the action of the jury being, of course, merely advisory, and not binding upon the court. There is some doubt as to whether, in determining the question of fact as to the reasonableness of time above mentioned, the court and jury should consider the full period of 20 years named in the deed, or the period that elapsed between the execution of the deed in 1902 and the time of the filing of this bill in 1915, or the time that elapsed between the execution of the deed in 1902 and the time of the filing of the action in the state court on July 22, 1913. This question is reserved for future determination.

GENERAL ELECTRIC CO. v. RICHARDSON et al.

(District Court, E. D. Pennsylvania. January 27, 1916.)

No. 1387.

1. SALES ⇐474—CONDITIONAL SALES—BUILDING CONTRACTS—RIGHTS OF SUBCONTRACTORS.

Plaintiff supplied certain electrical apparatus to general contractors working on a construction contract, reserving title thereto. Payment was not made, the general contractors became insolvent, and the contract was completed by their receivers. Sufficient money was due from the owner to pay for the apparatus, and plaintiff sued to require payment thereof to it, on the theory that an equitable lien or trust was impressed thereon in its favor. The owner had made substantial payments to the

general contractors, on architects' estimates of the total work done, without notice of any equities of plaintiff, and the receivers had completed the contract at considerable expense on the faith of the situation as it appeared to be. It was admitted that under the law of Pennsylvania conditional sales were void as against bona fide purchasers and execution creditors, and that the receivers had the standing of creditors. *Held*, that plaintiff had neither a legal right nor an equity to the balance due; it being a principle of the common law that a transfer of chattels under circumstances implying a sale passes title clear of secret liens and unaffected by any secret verbal retention of title, except as against those who are in the secret.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391–1402; Dec Dig. ⇐474.]

2. COURTS ⇐367—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.

The contract being a Pennsylvania contract, the law of that state was a rule of property, to be applied as such in the courts of the United States in any controversy over the right of property, whether the right was invoked in an action at law or in proceedings in equity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. ⇐367.]

In Equity. Suit by the General Electric Company against James A. Richardson and others. On trial hearing upon bill, answer, and proofs. Bill dismissed.

Gill & Linn, of Philadelphia, Pa., for plaintiff.

Samuel L. Howell, of Philadelphia, Pa., for defendant T. W. Evans Museum & Institute Society.

Ira J. Williams and Reynolds D. Brown, both of Philadelphia, Pa., for defendant receivers.

DICKINSON, District Judge. [1] The facts necessary to a presentation of the question involved in this case are few. James G. Doak & Co. had a construction contract with the Thomas Evans Museum & Institute Society. They were what is commonly called the general contractors. The plaintiff supplied to the general contractors, toward the construction, certain electrical apparatus. The only respect in which the transaction differed from the ordinary one between a general contractor and a materialman or subcontractor is that there were provisions in the contract of the plaintiff expressive of the thought that the plaintiff retained title to the apparatus until payment therefor was made. Payment was not made, and the general contractors became insolvent. The contract was completed by the receivers. Enough money is due by the owner to pay the plaintiff for the apparatus supplied, and this bill has been filed to require that this be done. The prayers are for an injunction restraining the owner from paying the receivers, and requiring them to pay the plaintiff the agreed value of what it supplied. It would, at first view, be thought to be not a little difficult to formulate a statement of any theory upon which such a bill can be sustained. The very able counsel for plaintiff has, however, evolved such a theory. It is, in the language of counsel:

"That an equitable lien or trust was impressed upon the unpaid balance of the contract price for the building in favor of the plaintiff for the amount due it."

The acceptance of this proposition encounters these obstacles: There were no contractual relations between the Museum and the plaintiff. If the apparatus remained the property of the latter, the utmost right it would seem to have had was to retake what belonged to it. They surely could not have arranged between themselves that the Museum might retain the property, and the other defendants pay for it, and have enforced such payment by the others. If both could not have done this, upon what equity can the court found a decree to do the same thing at the request of the plaintiff alone? It is clear that, if the owner of the building had given up this property to the plaintiff, its only hope of recoupment would have been through calling upon the other defendants to supply the generators in fulfillment of the contract. It is equally clear that the owner could not have required this if its relinquishment of the property had been voluntary. This would bring the right to the touchstone of the question of whether the Museum could have kept the apparatus.

Stated in the abstract, the question would then be: Can a subcontractor or materialman, who has furnished material to a general contractor, and which has gone into the construction of the building of another, reclaim the material, if not paid for? As applied to this case, the question would have involved the fact that the material had been furnished for this building, and had been delivered by the materialman to the building in furtherance of the contract, and the owner had made very substantial payments to the general contractor without notice of any equities in the materialman. When the other defendants were brought into the discussion of the equities, the further fact is developed that they, after the default of the general contractor, completed the building at considerable expense on the faith of the situation as it appeared to be. When the title of the plaintiff is inquired into, it is found to have no other basis than a secret agreement between itself and the general contractor that the apparatus should be considered the plaintiff's property, after it had been sold to the contractor, unless or until it was paid for. None of the facts give any strength to the case of the plaintiff. A more or less fanciful theory may be built upon nicely balanced equities between the plaintiff and the owner, but the structure will not withstand the shock of contact with the rugged principles of the common law.

Counsel for plaintiff has supported his theory of plaintiff's case by an argument which is both ingenious and plausible. It is easier to deny his conclusions than to controvert his argument. The thread which will guide us out of the labyrinth into which such arguments lead is to hold fast to one simple principle of the common law. That principle is that a transfer of chattels under circumstances which imply a sale passes the title clear of secret liens and unaffected by any secret verbal retention of title, except as against those who are in the secret. Mere verbal pledges or transfers of title are by the statute of Elizabeth void against subsequent bona fide purchasers for value and creditors. The latter, counsel for plaintiff admits, includes these receivers defendant. The literature of the law supplies much aid for arguments in support of such liens, but such aid will, upon examina-

tion, be found to have its source in the principles of other systems of law than those from which the law of Pennsylvania is derived. It is admitted that under the law of Pennsylvania conditional sales are void so far as they affect rights of bona fide purchasers and execution creditors. Property sold to a vendee under a conditional sale agreement in the effort to secure payment of the purchase money is subject to execution if in possession of the vendee. Duplex v. Clipper, 213 Pa. 207, 62 Atl. 841.

[2] The contract here was a Pennsylvania contract. The law of Pennsylvania, therefore, becomes the law of the property, and as such will be applied in the courts of the United States in any controversy over the right of property whether the right is invoked in an action at law or in proceedings in equity. If this transaction be viewed as a sale to Doak & Co., it is conceded that under the law of Pennsylvania plaintiff's title cannot be asserted against the receivers. Although plaintiff does not in terms admit it, the argument also concedes that title could not be asserted against the owner. The apparatus was furnished to the contractor to be used in the construction of the building and was there delivered and so used. On the faith of this having been done and of the value thus received, the owner paid out many thousands of dollars. The fact that other construction work was also done does not take away the fact that this large payment was made in consideration of this apparatus having been furnished, as well as the other constructive work done; nor does it, or the other fact that the payment was made on an architect's estimate of the total work done, detract from the rights or lessen the equities of the owner. Surely no creditor of Doak & Co. could have sold the apparatus, nor could the plaintiff have taken it away from the owner. These considerations have forced the plaintiff into taking the alternative position of no sale to the contractor and of a delivery to the owner through the contractor as agent for plaintiff.

This view adds nothing to plaintiff's equities. The transaction then was this. The plaintiff gave Doak & Co. not merely authority, but express directions, to set up the apparatus on the owner's premises, and on the strength of this (and of other construction work done by Doak & Co.) to demand and receive a large sum of money from the owner without notice of any kind of plaintiff's title. The mere statement of the transaction denies the existence of any equities arising out of it. Nor is the plaintiff helped by taking from Doak & Co. their indefinite agreement to protect plaintiff in the assertion of its title. The only thing Doak could have done would have been to do what plaintiff might itself have done—give notice of this title. The fact that it did not give this notice is proof that it did not wish or expect it to be given by Doak.

Small comfort is to be had from Holly v. New Chester Water Co. (C. C.) 48 Fed. 879, or York v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. The former case is ruled upon the express ground that the contractor and the owner were there one. The case was therefore decided as if between the plaintiff and the contractor with whom it had agreed. The latter case arose before the amendment to

the Bankruptcy Law, and was because of this, in legal effect, also between the parties to the contract.

The case for the plaintiff may be summed up in this statement: The only legal right and the only equity it has is to have Doak & Co. live up to their contractual obligations. The owner of the property and the other creditors have the like right. The plaintiff has no legal right and no equity which it can assert against either the owner or the creditors. Its claim of right to assert such an equity against the creditors represented by the receiver by reaching them through the owner rests upon an argument which, although ingeniously constructed and urged with force and plausibility, fails in convincing power. The owner has no equity against the receivers. As already stated, the plaintiff has none against either owner or receivers. None is created by the simple expedient of proceeding against both. The law of Pennsylvania, by which the rights of these parties is to be determined, is admitted to be as stated. Nothing is gained by attacking the policy of the common law upon which it is founded. That policy might, however, easily be vindicated. It is a distinguishing feature of the common-law system. It is in substance that, when a sale takes place, other persons who deal with the property on the faith of the sale as made shall not be embarrassed by the parties to the sale secretly saying to each other that the sale is not a sale.

The bill of complaint is dismissed, with costs to defendants.

TRIUMPH ELECTRIC CO. v. THULLEN.

(District Court, E. D. Pennsylvania. January 25, 1916.)

1. SPECIFIC PERFORMANCE ⟸32—CONTRACTS ENFORCEABLE—MUTUALITY OF OBLIGATION.

   A contract of employment terminable at will provided that the employé should assign to the employer any patent or patent application for any invention, but that this did not apply to inventions not applicable to the line manufactured by the employer. After an application for a patent and before its issuance, the employer discharged the employé. *Held*, that specific performance of the agreement to assign would be denied on the ground that the contract being at will was so lacking in mutuality as to deny to one party the right to a decree for which the other party, from the nature of the contract, could not ask.

   [Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89–99; Dec. Dig. ⟸32.]

2. SPECIFIC PERFORMANCE ⟸1—CONTRACTS ENFORCEABLE—DOUBTFUL RIGHTS.

   The remedy of specific performance will be withheld until the chancellor is convinced that plaintiff has a clear right to the subject-matter of the contract.

   [Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 1; Dec. Dig. ⟸1.]

3. SPECIFIC PERFORMANCE ⟸28—CONTRACTS ENFORCEABLE—CERTAINTY.

   To warrant specific performance, there must be a satisfying degree of certainty of what the thing is to which plaintiff has the claimed right.

   [Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61–68; Dec. Dig. ⟸28.]

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4. SPECIFIC PERFORMANCE ⟸25—CONTRACTS ENFORCEABLE—INTENTION OF PARTIES.

To warrant specific performance, it must appear that the claimed right was in the contemplation of the parties to the contract, and though the contract is so drawn that a court of law will construe it in plaintiff's favor and permit a recovery and damages for its breach, if it does not appear that defendant had in contemplation that he was contracting away what plaintiff claims, specific performance may be withheld, and plaintiff remitted to his right to recover damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 56–58, 60; Dec. Dig. ⟸25.]

5. SPECIFIC PERFORMANCE ⟸100—GROUNDS OF DENIAL—CHANGE IN SITUATION.

A contract of employment terminable at will, but which the parties contemplated should continue indefinitely, required the employé to assign to the employer inventions in the line of the manufacturing business conducted by the employer. *Held* that, where the employer discharged the employé, though it was justified in standing upon its legal rights, there was such a change in the situation of the parties, brought about by the employer's own act, as justified the denial of specific performance of the agreement to assign.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 305–310; Dec. Dig. ⟸100.]

In Equity. Suit by the Triumph Electric Company against Louis H. Thullen. On trial hearing on bill, answer, and proofs. Bill dismissed.

See, also, 225 Fed. 293.

Edwards, Sager & Wooster, of New York City, for plaintiff.

Richard Eyre, of New York City, and Furth, Singer & Bortin, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case is ruled by Marble Co. v. Ripley, 77 U. S. 339, 19 L. Ed. 955, upon the basis of the finding of this court, affirmed by the Circuit Court of Appeals in Thullen v. Triumph Electric Co., 227 Fed. 837, —— C. C. A. ——. We are asked to dispose of it, and sustain or dismiss the bill of complaint, according as it may be found that the plaintiff is or is not entitled to the specific relief prayed; the plaintiff having expressly waived its right in this suit to any other relief, or to have the cause transferred to the law side of the court.

There is no dispute of any merit over the main facts, and no necessity for any special findings as to them. Ignoring the other features of its business, the plaintiff is a manufacturer of electric motors. The defendant is an electrical engineer. The parties entered into a contract, evidenced by an exchange of letters. The only features of the contract with which we are now concerned are these:

The defendant was to enter the employ of the plaintiff, in charge of the engineering department of its plant, and if in the course of his employment he invented any design in the line of the manufacturing business conducted by plaintiff, for which letters patent were issued, the patent was to be the property of the plaintiff. The expense attending the invention and the grant of letters patent was to be met by the plaintiff. The defendant entered the employ of plaintiff in

pursuance of the contract. An order for a motor came from a customer of the plaintiff. This customer in its business operated saws. The material to be sawed was brought by a carriage contrivance up against the saw. The material varied in bulk. A condition of the operation was that, if the section through which the saw cut was small, the material was properly fed faster to the saw than when the section was large. The customer wished to have a motor supplied which would answer its needs. In working out this problem the defendant conceived the idea of wiring up the parts in such manner that the power which drove the saw and that which moved the carriage would be so correlated that the speed with which the material was fed to the saw would automatically be adjusted to the work put upon the saw. The result was a controller result.

As nearly as one not versed in the science of electrical engineering, nor familiar with its terminology, can grasp or express the controller idea involved in the invention, it is that of a controller system, as distinguished from a controller existing as a separate and individual unit. The defendant in his contract of employment had retained as his property anything of which he might be the inventor outside of the line manufactured by the plaintiff. Thinking the invention above referred to to be one the right to which belonged to him, he paid the plaintiff for the time and material expended in the experimental work of developing and testing the inventive idea, and at his own expense applied for and subsequently was granted letters patent covering the invention. Letters patent were applied for December, 1912, and issued August 19, 1913.

Another feature of the contract of employment was that the defendant was to receive a compensation based upon a yearly salary rate. The plaintiff construed the employment as one at will, and discharged defendant from its employ, paying him to a time between the date of the application for and the grant of the letters patent. The defendant brought his action for breach of contract on the theory that his employment was by the year. The court held the employment to be at will and rendered judgment for the defendant in that action which judgment was, on appeal, affirmed by the Circuit Court of Appeals. Thullen v. Triumph Electric Co., supra.

Subsequently the plaintiff in the present proceedings filed its bill of complaint. The sole question involved, as already stated, is the right of the plaintiff to the equitable remedy of a decree for specific performance of the contract to assign this patent. The language of the contract is as follows:

"In the event of any design being capable of being made the subject-matter of a patent application, such application and patent shall be assigned to the company, they paying the necessary attorney and patent-office fees."

"It is understood that this does not apply to any patentable design you [the defendant] may discover, not applicable to the line manufactured by this company [the plaintiff]."

The letters patent bear the number 1,070,638, and the invention is described in the application as relating—

"to systems for automatically controlling electric motors and has particular reference to the control of electrically driven feed carriages for friction or other saws."

[1] Upon the facts as stated the conclusion reached is that the plaintiff is not entitled to the equitable remedy prayed, and under the stipulation made at the argument the bill should be dismissed. This conclusion may, we think, be based upon the fact that the contract of employment of the defendant was at the will of plaintiff, and upon the equitable doctrine that a contract of this kind is so lacking in mutuality as to deny to one party the right to a decree for which the other party, from the nature of the contract, could not ask. Marble Co. v. Ripley, 77 U. S. (10 Wall.) 339, 19 L. Ed. 955. The subject is treated by textwriters under the head of the "Doctrine of the Mutuality of the Contract." There is some ground for the distinction recognized in some jurisdictions as affording an exception to the rule, which may be made in the case of an employer who has not terminated the contract until after he has himself so far performed as to have given the consideration for the right he asks to have enforced, but we are led to the same conclusion expressed by Judge Dallas in Brooklyn Baseball Club v. McGuire (C. C.) 116 Fed. 782, that the question is no longer an open one.

[2-5] Although these cases are decisive of the question involved, there are other considerations leading to the same conclusion. It is an equitable doctrine known as the certainty of the contract doctrine of universal acceptation that the remedy of specific performance will be withheld until the chancellor is convinced the plaintiff has the clear right to the subject-matter of the contract. The further doctrine is that there must be a satisfying degree of certainty of what the thing is to which the plaintiff has the claimed right, and that it was in the contemplation of the parties to the contract that he should have it. Not merely a plausible, but a forceful, argument has been addressed to us against the existence of even a legal right in the plaintiff. This is based upon the thought that the invention here pertained, not to motors which the plaintiff manufactured, but (for illustration) to saws which the customer used. The owner of such saws could order his motors of this plaintiff, or from any other manufacturer, and obtain the right to use this invention, without any possibility of the thought being presented that by so using it he was in any way encroaching on the field of manufacture occupied by the builder of the motor. If a manufacturer of motors, with a license to use (but not the right to vend) this invention, were to supply it to a customer, who operated saws, this customer would be an infringer.

Another consideration, already adverted to, is that it is not enough that the legal right is in the plaintiff and that he might be able to recover damages for a breach of the contract. It must appear that it was the intendment of the defendant that the plaintiff should have the right. When a contract is so drawn that a court of law will construe it in plaintiff's favor and permit a recovery in damages for its breach, and yet it does not appear that the defendant had in contemplation that he was contracting away what the plaintiff may at law successfully claim, this particular form of equitable remedy may be withheld, and the plaintiff be remitted to his right to recover damages. It is because of this it has been said that the breach by the defendant must have in it an element somewhat akin to the unconscionable. A broad contract

to assign any future invention which might be made the subject of a patent could not be said to confer in itself the absolute right to a decree for specific performance. Subsequent events may change the relations of the parties, and when this change has been brought about by the act of the plaintiff the court may properly have regard to these changes in exercising the power to award specific performance. The parties to this contract, at the time it was made, had in contemplation its indefinite continuance. The plaintiff specifically expressed its intention that the relations should last for years. It was justified in standing upon its legal rights, but cannot complain if it is held to them. Moreover, if the mutuality of remedy test is to be applied as of the date of the filing of the bill, plaintiff's right to this form of remedy would seem to be gone when it terminated the contract. Fry's Specific Performance, § 422 et seq.; Pomeroy Equitable Remedies, § 769.

Independently of the stipulation made by plaintiff, these considerations (except the one denying plaintiff to have any claim to the invention) would lead only to the conclusion of refusing a decree for specific performance. Equity, having taken jurisdiction of the case, might give other relief, as by proceeding to an award of damages, or the cause might be transferred to the law side of the court. Under the stipulation, however, the bill should be dismissed, with costs to defendant, and a decree to this effect may be submitted.

The former disposition made of the case was for the purpose of enabling plaintiff to ask for other relief. As this has now been expressly waived in this proceeding, and for the further reason that the former ruling was in part based upon a mistaken view of one feature of the facts, the opinion handed down is withdrawn. Special findings of certain minor facts and of the conclusions reached are submitted herewith.

Trial Hearing on Bill, Answer, and Proofs.

Findings of Fact.

(1) Payment for the labor employed and materials used in the experimental work of developing the defendant's invention was made in the bona fide belief on the part of the defendant that the invention did not relate to plaintiff's line of manufacture. Such payment was made, however, without the knowledge on the part of plaintiff that it related to the invention involved in this proceeding. As soon as knowledge of the invention came to the plaintiff, it was promptly claimed to be its property.

(2) The invention referred to was not in the contemplation of the defendant as one of the inventions which under the contract of the parties became the property of the plaintiff.

Conclusions.

(1) The contract of employment between the parties was terminable at will.

(2) The plaintiff is not entitled to the relief of the awarding of the remedy of specific performance or to a decree that the letters patent be assigned to it by defendant.

(3) Under the stipulation made by plaintiff, the bill of complaint should be dismissed, with costs to defendant.

In re ASSOCIATED TRUST HOTELS, Inc.

(District Court, D. Massachusetts. August 7, 1915.)

1. CORPORATIONS ⟸546—REORGANIZATION—RIGHTS OF CREDITORS—LEASE—WAIVER—ABANDONMENT.

The L. Co. owned certain hotel property subject to incumbrances. The A. Trust bought all the stock of such company and organized the bankrupt corporation to take over the business. Instead of having the L. Co. sell its property to the new corporation, however, the property was leased to the bankrupt; this course being taken because of the existence of outstanding notes of the L. Co. and because it was considered inadvisable to surrender an existing liquor license. The lease authorized the bankrupt to take out the succeeding license in its own name and this was done. The notes in question were indorsed or guaranteed by the A. Trust and also by the bankrupt, and, one purpose for which the L. Co. was kept alive having been fulfilled, and the other having become unimportant, the L. Co. became dormant, and the referee found that the lease was waived or abandoned. *Held*, that the rights of the creditors of the two corporations, each of which was insolvent, should be worked out along the lines established by the corporations themselves, and the lease should not be treated as abandoned, as the bankrupt could not claim title under the lease and at the same time avoid its obligations thereunder to the L. Co., and abandonment or waiver, merely by conduct, of a fundamental and formal instrument, by which title to real estate is conveyed, if possible at all, requires clear and unequivocal proof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2176, 2177; Dec. Dig. ⟸546.]

2. LANDLORD AND TENANT ⟸148—FAILURE TO PAY INTEREST AND TAXES—DAMAGES.

Where a lessor had not paid interest and taxes, which the lessee agreed, but failed, to pay, it was entitled only to such damages as it sustained through the lessee's failure to pay, and, while this would ordinarily be the amounts agreed to be paid, it could not be held as a matter of law that the damages were necessarily those amounts.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 520–532; Dec. Dig. ⟸148.]

3. CORPORATIONS ⟸546—REORGANIZATION—RIGHTS OF CREDITORS.

A lease between two corporations, all the stock of which was owned by a third corporation, provided that a liquor license in renewal of one then in existence might be applied for or renewed in the name of the lessee. By the custom of the licensing board the holder of a license was allowed, under such circumstances, to nominate the successor to the license, if it did not desire a renewal in its own name. There was no provision that, upon termination of the lease for breach of condition, the lessee would nominate the lessor or such person as the lessor might select. *Held* that, in adjusting the rights of the creditors of the two corporations, each of which was insolvent, no such agreement could be read into the lease.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2176, 2177; Dec. Dig. ⟸546.]

In Bankruptcy. In the matter of the Associated Trust Hotels, Incorporated, bankrupt. On review of two orders of the referee. Order disallowing claim reversed; order denying petition for reclamation affirmed, and proof of claim recommitted to the referee.

See, also, 222 Fed. 1012.

Harold Williams, Jr., of Boston, Mass., for creditor.
William M. Noble and Walter Hartstone, both of Boston, Mass., opposed.

MORTON, District Judge. These petitions for review bring up two orders of Mr. Referee Darling—the first, disallowing a proof of claim against the bankrupt by the receiver of the Lenox Hotel Company for $27,140; the second, denying the petition by the same receiver that rights in his favor be established in certain funds of the bankrupt. The correctness of the referee's narrative of facts is not seriously disputed, but some of his conclusions, and his findings based on them, are disputed. The facts are involved; and I shall not attempt to restate them completely, referring only to such as bear upon what seem to me to be the decisive points.

[1] The Lenox Hotel Company owned, subject to various incumbrances, the real and personal property of the Hotel Lenox. The Associated Trust bought all the stock of that company. For a few months after the change of stock ownership the company continued its operations as before. Then this bankrupt corporation was formed by the new owner of the Lenox stock for the purpose of taking over the entire business of that company. This plan might have been carried out by having the Lenox Company sell all its property to the new corporation, and arrange with it for the payment or assumption of existing indebtedness. That course was not followed; instead the Lenox Company leased the hotel property, real and personal, to the bankrupt for one year from April 1, 1914, with the option to renew for four years more. Two reasons apparently led to the adoption of that course: First, the existence of about $50,000 of outstanding notes of the Lenox Company, issued to the persons who had sold out their stock in it; and, second, considerations concerning the liquor license held by it. As to the latter, the license had about a month to run when the new company took hold of the business. It was thought less expensive to have the Lenox Company continue that part of the business for the month, accounting to the new company therefor, than to surrender the license and take out another for the new company at a cost of $3,000 for the month. This was a temporary matter. The lease explicitly and unreservedly says that, as between the two companies, the right to take out the succeeding license should be in the new one. There was no reason, so far as the liquor license was concerned, why the lease should be kept alive after May 1st, when the 1914 license—which was duly procured—took effect.

As to the notes: These were issued to the persons from whom the Associated Trust had bought the stock of the Lenox Hotel Company. They were indorsed or guaranteed by the Trust, and also at a later date by the bankrupt. Thereafter the lease from the Lenox Hotel Company to the new company apparently added nothing of value to them, except as it might create paper assets available to the creditors of that company against the creditors of the new company (this bankrupt) and of the Associated Trust. This situation has in fact actually arisen, although in deciding whether the lease was waived or aban-

doned, as claimed, it is to be considered whether the parties concerned then acted in contemplation of this eventuality. The facts show clearly that they did not.

It is contended by the trustee that the lease was abandoned by both parties and became inoperative after July 1, 1914. Up to that time various accounts and transfers of cash in which the Lenox Hotel Company figures appear on its own books, and on those of the Trust, and of the bankrupt. Beginning with that date, important changes were made in those matters. The Lenox Hotel Company, largely, if not entirely, ceased to have an active bank account; the receipts of the hotel were all deposited to the bankrupt's credit; the Associated Trust debited itself with the fixed charges on the property, and, as I understand the report, charged them direct to the bankrupt. No lease account by the Lenox Hotel Company against the new company was ever kept by either corporation, or by the Trust. No acts appear to have been done after that date by either of the three parties concerned in recognition of, or proceeding from, the lease. The Trust owned the entire stock of both companies. One purpose for which the Lenox Company had been kept alive (the license) had been fulfilled; the only other purpose for regarding it (the outstanding notes) had, by reason of the indorsement and guaranty of the notes by both of the Trust and the new company, become of no substantial importance as matters then stood. The learned referee has found, as to the lease, "that, if it were not merely colorable, it was by the parties waived, abandoned, or renounced." He therefore disallowed in toto the claim in question based on the lease.

The lease was the only title which the new company, the bankrupt, had to any of the hotel property. The Lenox Company never parted with its reversion, expectant on the termination of the lease. If the lease were waived or abandoned, the result, as it seems to me, must have been to reinstate the Lenox Company as full owner of the property. It was not treated as having that position at any time after the lease was made. It seems clear that the bankrupt cannot claim the title under the lease as it is doing, and at the same time avoid its obligations thereunder to the Lenox Company.

Both corporations are insolvent, and one of them is bankrupt. The rights to be conserved are those of their creditors. All the property of the Lenox Company was by the lease turned over to the bankrupt, which at that time had no substantial property of its own.

The result of the referee's decision is to leave remediless the original creditors of the Lenox Company, who trusted it when it was a solvent, going concern, and the holders in good faith and for value of its notes before referred to. It is not shown that the lease was made in bad faith, or in intentional fraud on anybody's rights. It carried out the plan which the then owner of both companies adopted to govern their inter-relations. That plan left the Lenox Company dormant for the time being, holding its reversionary interest, with its charges and obligations all assumed by the lessee. Abandonment or waiver, merely by conduct, of a fundamental and formal instrument of this character, by which title to real estate was conveyed—

assuming such a thing to be possible, which after delivery and acceptance is certainly doubtful—must require clear and unequivocal proof, especially when, as here, rights of innocent third parties will be affected thereby. I do not think that there was such proof in this case. Moreover, to hold that the lease was abandoned leads to great complication in the relations between the two companies, and to results not expected or intended. I am therefore inclined to disagree with the learned referee in this particular, and to work out the rights of creditors in these two corporations along the lines established by the corporations themselves.

[2] It follows that the order disallowing in toto the claim under the lease was erroneous and must be reversed. As the Lenox Company has not paid the interest and taxes on which its proof of claim is based, its exact right is, not to have those amounts paid to it, but to be repaid such damages as it has sustained through the bankrupt's failure to pay them as it agreed to do. While such damages would ordinarily be the amounts which were agreed to be paid and were not, it cannot, I think, be ruled as a matter of law that the damages must necessarily be those amounts. The matter must go back to the referee to state the amount of damages for which proof should be allowed, and in connection therewith to state, if in his opinion it is advisable to do so, the account between the Lenox Company and the bankrupt.

[3] As to the liquor license: The lease provides that "Said license may be applied for or renewed in the name of said lessee on and after May 1, 1914, in said lessee's own right." This is an explicit conveyance or renunciation of all the lessor's right or interest in the new license. By the custom of the Boston licensing board the holder of a license is allowed, under such circumstances as are here presented, to nominate the successor to the license, if it does not desire a renewal in its own name. That privilege must have been exercised by the Lenox Company in favor of the bankrupt. It is contended by the claimant that there ought to be read into the lease a provision, in effect, that upon any termination of the lease by the lessor for breach of condition the lessee will nominate the lessor or such person as the lessor may select for a renewal of the license. Nothing to that effect is found in the lease. The Lenox Company, as part of the consideration moving from it, relinquished to the lessee all rights in the liquor license after May 1, 1914.

For reasons before suggested, I am of opinion that the best way to adjust rights of the parties interested is to carry out the arrangement between the two companies as it was made. The court cannot change the consideration either way without substantially interfering with and varying that arrangement. The provision in question does not appear to have been in fraud of the creditors of the Lenox Company at the time when it was made, and it ought to be given effect.

The order of the learned referee denying the "petition for reclamation" was right and is affirmed.

It seems highly desirable, as suggested by the learned referee, that some method be adopted whereby the liquidations of these three closely inter-related concerns, viz., the Associated Trust, the Lenox Hotel

Company, and this bankrupt, be carried out consistently, and in harmony with each other. It may therefore be advisable to postpone final action in this estate until the other two are nearer settlement. Of this, however, the referee is the best judge.

The proof of claim is recommitted to the referee for further hearing in accordance with this opinion.

In re CUTLER & JOHN.

(District Court, E. D. North Carolina. January 7, 1916.)

1. BANKRUPTCY ⇐474—COSTS AND FEES—LIABILITY OF SECURED CREDITORS.

An insolvent firm, whose property was covered by valid mortgages executed more than four months prior thereto, executed a deed of trust or assignment directing a sale of the property, the payment of the mortgages, and the payment of any balance to general creditors, whereupon unsecured creditors filed a petition in bankruptcy, and upon demand the assignee surrendered the property to the trustee, who sold it for less than the secured indebtedness. There were practically no other assets. The mortgagees took no action, except to assert their right to the proceeds of the property, and did not ask the aid of the bankruptcy court to foreclose their mortgages. *Held*, that the cost of the bankruptcy proceeding, including the trustee's commissions and the allowance to the counsel for the petitioning creditors, equal to 15 per cent. of the proceeds of the property, could not be paid from such proceeds, as neither the execution of the deed of assignment, the surrender of possession by the assignee, nor the failure to oppose an adjudication affected or imposed any liability upon the property of the mortgagees, and their rights could not be affected by the existence or nonexistence of other assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. ⇐474.]

2. BANKRUPTCY ⇐58—ACT OF BANKRUPTCY—ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Where an insolvent firm, whose property was covered by valid mortgages executed a deed of trust or assignment of the property directing a sale thereof, the payment of the mortgages and the payment of the balance to general creditors, this constituted an act of bankruptcy within Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (Comp. St. 1913, § 9587), specifying as an act of bankruptcy the making of a general assignment for the benefit of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 72–79, 83; Dec. Dig. ⇐58.]

3. BANKRUPTCY ⇐258—ADMINISTRATION OF ESTATE—INCUMBERED PROPERTY.

When property of a bankrupt is subject to valid liens or mortgages, the trustee may, if in his judgment the equity is of value and will yield any benefit to the estate for unsecured creditors, take possession and sell it free from the mortgage liens, in which event the lien will attach to the proceeds in his hands, or he may sell the equity of redemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 358, 359, 362; Dec. Dig. ⇐258.]

4. BANKRUPTCY ⇐178—PROPERTY PASSING TO TRUSTEE—AVOIDANCE OF ASSIGNMENTS FOR CREDITORS.

Where an insolvent firm, whose property was covered by mortgages, executed an assignment directing a sale of the property, the payment of the mortgages, and the payment of any balance to general creditors, whereupon a petition in bankruptcy was filed, the adjudication in bank-

ruptcy avoided the assignment, and the property, subject to the mortgages passed to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264–274, 283, 284; Dec. Dig. ⊂⊃178.]

5. BANKRUPTCY ⊂⊃247—DUTIES OF TRUSTEE—INCUMBERED PROPERTY—REQUESTING INSTRUCTIONS.

When a trustee finds that a bankrupt owns property subject to liens, he should petition the court for instructions as to the course which he should pursue.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 346; Dec. Dig. ⊂⊃247.]

6. BANKRUPTCY ⊂⊃231—MEETINGS OF CREDITORS—PURPOSES.

Under Bankr. Act, § 55d (Comp. St. 1913, § 9639), providing that a meeting of creditors subsequent to the first one may be held at any time and place, when all creditors who have secured the allowance of their claims sign a written consent, and section 55e, providing that the court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect, the referee, if in his judgment it is advisable, may call a meeting of the creditors in order that they may be heard before any action is taken with respect to property subject to liens, subjecting the estate to possible cost and expense.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 541; Dec. Dig. ⊂⊃231.]

In Bankruptcy. In the matter of Cutler & John, bankrupts. On petition for review, based upon exceptions of the Bank of Washington, to an order of the referee. Reversed.

Small, McLean, Bragaw & Rodman, of Washington, N. C., for petitioner.

Daniel & Warren, of Washington, N. C., for trustee.

CONNOR, District Judge. The facts essential to the decision of the question presented by the certificate of the referee and the admissions of counsel are:

(1) Bankrupts executed to Sebron Cox, May 30, 1914, a mortgage on their property, to secure the payment of a debt of $1,000.

(2) On October 15, 1914, they executed a mortgage on the same property to the Bank of Washington to secure a debt of $1,000.

(3) On January 6, 1914, they executed to the Bank of Washington, another mortgage on the same property to secure the payment of a debt of $2,000. All of the mortgages were duly recorded more than four months prior to June 19, 1915.

(4) Within four months prior to June 19, 1915, said bankrupts executed to W. B. Rodman, Jr., a deed of trust or assignment of the same property, directing a sale thereof, and, from the proceeds, the payment of the mortgages in the order of their priority and the balance to their general creditors. The assignee took possession of the property—a stock of goods—and made an inventory thereof. He notified the creditors that he would proceed to advertise the property for sale, either publicly or privately, as should appear to the best interest of all parties concerned.

[1] On June 19, 1915, certain unsecured creditors filed a petition asking that they be adjudged bankrupt, assigning as an act of bankruptcy the execution of the deed of assignment to W. B. Rodman, Jr. Pursuant to the prayer of petitioning creditors, the said Cutler & John were adjudged bankrupts, and at the first meeting of the creditors L. C. Warren, Esq., was duly elected and qualified as trustee. Upon demand of the trustee, the assignee surrendered the property to him, and, pursuant to an order of the bankrupt court, he sold said property for the sum of $3,100. He has collected, on account of choses in action due the bankrupts, $12.58. The mortgagees asserted their claim to the proceeds of the property, by virtue of the mortgages held by them, as hereinbefore set forth. There is no controversy in regard to the validity or the amount of the debts, or the mortgages executed for their security. The referee was of the opinion that the cost incurred in the proceeding in bankruptcy, including commissions, to the trustee, and the allowance to counsel for petitioning creditors, aggregating $342.09, should be paid from the proceeds of the property, and the balance paid to the mortgage creditors, in the order of their priority. To this ruling the Bank of Washington duly execpted and filed petition for review. This is another of the numerous cases in which the general creditors and the trustee overestimate the value of the property of bankrupts upon which there are valid liens.

[2] The execution of the deed of assignment to W. B. Rodman, Jr., the assignors being insolvent, was an act of bankruptcy. Bankr. Act, § 3, subsec. 4. They made no objection to the adjudication. This, however, did not affect or impose any liability upon the property of the mortgage creditors. The execution of the deed of assignment did not have such effect. The surrender of possession to the trustee, by Mr. Rodman, as assignee, did not affect the rights of the mortgagees. He was not entitled to hold it against the trustee. While, as a general proposition, it is true that, by the adjudication in bankruptcy and the election and qualification of the trustee, all of the property of the bankrupt is brought within the control and jurisdiction of the bankrupt court, it is equally true that liens, mortgages, etc., valid under the state laws and the bankrupt law, are preserved in their integrity. Bankr. Act, § 67d (Comp. St. 1913, § 9651).

[3] When the property of a bankrupt is subject to valid liens or mortgages, the trustee is entitled to pursue one of two courses: He may, if in his judgment the equity in the property is of value and will yield any benefit to the estate for the unsecured creditors, take possession of the property and bring it to sale free of the mortgage lien, in which event the lien will attach to the proceeds in his hands, and the lien on the property be discharged; or he may sell the equity of redemption. He will exercise his best judgment, with the approval of the bankrupt court. In neither case can he, without the assent of the lien creditor, reduce the value of the security by attaching to the proceeds of the property liability for the cost of administration in bankruptcy. The correct rule, as I apprehend, in such cases, is stated by Judge Hook in In re Harralson, 179 Fed. 490, 103 C. C. A. 70, 29 L. R. A. (N. S.) 737:

"A court of bankruptcy should not assume charge of incumbered property and liquidate the liens on it, unless there are reasonable grounds for believing some advantage will accrue to the bankrupt's estate. If the validity of the liens is unquestioned, and their amount is such that there is probably no excess of value in the property, it should be surrendered to the lienholders, or others entitled, unless some other reason appears for retaining control. A court of bankruptcy is not a court of general jurisdiction for the adjudication of controversies or the administration of assets in which the bankrupt's estate is in no wise interested. If, however, cognizance is taken, it should be assumed some benefit or advantage was expected to accrue to the general creditors; and if it results otherwise it is equitable to make the general estate bear the cost of the proceeding. Here the proceeds of sale did not equal the admitted encumbrance, and the deficiency should not be further increased by deducting the commissions of the officers, if there is a general estate against which they can be charged. This is in analogy to the general practice in equity in foreclosure."

In that case the court directed the entire proceeds of the sale to be applied to the mortgage indebtedness. I am unable to perceive how the rights of the mortgagee can be affected by the existence or nonexistence of other assets. The cases relied on by the trustee do not conflict with the decision cited. In re Iowa Falls Mfg. Co. (D. C.) 140 Fed. 527, the only question presented was whether the trustee was entitled to commissions, out of the general assets, on the entire proceeds of property sold under the decree of the state court, or only on the net amount received by him, after paying the mortgage indebtedness. It was held that he was entitled to commissions only on the net amount received. In re Sanford Furniture Mfg. Co. (D. C.) 126 Fed. 888, the secured creditor proved his claim, participated in the election of the trustee, and afterwards "surrendered possession of the property to such trustee, who afterwards sold the property at the instance and by the consent of all parties concerned."

Here, the only action taken by the mortgagees was to file their claim, asserting their right to the proceeds of the property. Certainly they did not, by simply asserting the right to the proceeds of the mortgaged property, subject themselves to a liability for the entire cost of the proceeding in bankruptcy, amounting to some 15 per cent. of the proceeds. They were not asking the aid of the court to foreclose their mortgages. In Re Alison Lumber Co. (D. C.) 137 Fed. 643, the course pursued by the mortgagees is thus described by Judge Speer:

"They have appeared in the bankruptcy court, selected it as their forum, availed themselves of the services of its officers, and utilized its process to collect their claims."

They were held liable to contribute their pro rata part of the cost of administration. Nothing of that kind appears in this case.

In Re Goldsmith (D. C.) 118 Fed. 763, cited by counsel for the trustee, it is held that secured creditors, whose property has been taken and sold by the trustee, are not required to prove their claims and have the proceeds paid them as a dividend, but may, in any appropriate manner, intervene and demand the payment to them of the proceeds of the property upon which they have a valid lien. This opinion, and authorities, may be examined with profit.

It is to be regretted that the petitioning creditors have secured the services of the officers of the court, and an expenditure of sums aggregating $342.09, under the mistaken belief that there was a valuable equity in the mortgaged property. But their mistake cannot be charged to the mortgagees. Their rights were based upon a valid contract, and without any act on their part surrendering them they cannot be affected by the proceedings in the bankrupt court. What the liability of the petitioning creditors may be to the officers for their costs and fees is not presented in this proceeding and is not before the court. The mortgagees are entitled to be paid the amount of their debts, to the extent of the proceeds of the property covered by the mortgages, without any diminution by reason of cost or expenses incurred in the proceeding in bankruptcy.

[4] It is suggested that Mr. Rodman, as assignee, collected some small amount from the accounts due the bankrupts. If these were not covered by the mortgages, the right to have such amounts paid over to, or retained by, the trustee, is not presented upon this record. Of course, the adjudication in bankruptcy avoided the deed of assignment, and the property assigned, subject to the mortgages, passed to the trustee.

[5, 6] When a trustee finds that the bankrupt owns property subject to liens, he should present a petition to the court asking for instructions as to the course which he should pursue. The referee, if in his judgment, it is advisable, may call a meeting of the creditors, to the end that they may be heard before action is taken, subjecting the estate to possible cost and expense. Bankr. Act, § 55, subsecs. "d," "e"; Collier on Bankruptcy (10th Ed.) 696.

The order of the referee is reversed.

ROME RY. & LIGHT CO. v. FLOYD COUNTY, GA., et al.

(District Court, N. D. Georgia. December 15, 1915.)

No. 26.

STREET RAILROADS ⊂=31—FRANCHISE TO USE STREETS—RIGHTS IN REBUILT BRIDGES.

Act Ga. Aug. 15, 1914 (Acts 1914, p. 271), which is a special act vesting in Floyd county full title to and control over certain bridges in the city of Rome, with authority to condemn, tear down, and rebuild such bridges, and to require any public service corporation, as a condition to the right to use the new bridges, to pay a certain proportion of their cost, *held* not to violate the constitutional rights of a street railway company having a franchise to use the old bridges, but a legitimate exercise of the police powers of the state and valid.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 67, 68; Dec. Dig. ⊂=31.]

In Equity. Suit by the Rome Railway & Light Company against Floyd County, Ga., and the Board of Commissioners of Roads and Revenues of Floyd County, to wit, J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin, and W. H. Horton. Decree for defendants.

Dean & Dean, of Rome, Ga., and Trabue, Doolan & Cox, of Louisville, Ky., for complainant.

M. B. Eubanks, J. Branham, and Maddox & Doyal, all of Rome, Ga., for defendants.

NEWMAN, District Judge. The case now before the court is a bill brought by the Rome Railway & Light Company against the county of Floyd and J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin, and W. H. Horton, composing the board of commissioners of roads and revenues of Floyd county. The purpose of the bill is to enjoin the enforcement of an act of the Legislature of August 15, 1914 (Acts 1914, p. 271), with reference to the condemnation of certain old bridges and the erection of new bridges in their places; that is to say, the Second avenue bridge, spanning the Etowah river, the Broad street bridge, spanning the same, and the Fifth avenue bridge, spanning the Oostanaula river, at Rome, in said county of Floyd. The act in question has the following title:

"Floyd County, Control of Bridges in Rome.

No. 487.

"An act to vest in Floyd county full and complete title, jurisdiction over and control of the following bridges within the city of Rome, in Floyd county, Georgia, to wit: Second avenue bridge, spanning the Etowah river; Broad street bridge, spanning the Etowah river; and Fifth avenue bridge, spanning the Oostanaula river; to revoke any and all permits granted by legislative or municipal or county authority to any street railway company, electric light, telegraph, telephone or gas company to lay tracks and operate cars on and over said bridges or to place wires or pipes and operate the same on and over said bridges; to repeal all franchises heretofore granted to all such public service corporations to operate on and over said bridges, whether granted by legislative, county or municipal authority upon condition; to authorize the county authorities of Floyd county to condemn and remove the present bridges and to build new bridges at the same points, and to authorize the county to acquire the necessary lands for the purpose of constructing bridges wide enough to meet the demands of public travel; to authorize said county to require of any street railway company or electric railway company desiring to lay the tracks on and operate its cars over said bridges, or either of them, to pay to said county a sum equal to one-third of the actual cost of building either of said bridges before any such company shall be allowed to lay any tracks, place any wires or other equipment or operate any cars on or over such bridge or bridges, and to fix the rights of such corporation by reason of such payments; to grant to the county authorities of Floyd county the exclusive right and jurisdiction to grant permission and franchises to persons, firms and corporations exercising public service functions, to operate on or over said bridges, and to prescribe the terms and limitations of such grants; to provide that any person, firm or corporation desiring to contest the validity of this act shall do so by injunction proceedings before the beginning of the work of tearing down and removing the old bridges, and not otherwise; to provide for the acceptance of this act by the county and city authorities, and for other purposes."

The first section of the act places all right, title, and interest in the bridges named, together with full jurisdiction over and control thereof, in the county of Floyd, such jurisdiction to be exercised by the authorities of Floyd county.

The second section provides that all permits and franchises heretofore granted, either by the General Assembly, the municipal au-

thorities of the city of Rome, or the county authorities of Floyd county to any street railway company, electric light company, or other companies named, to lay tracks and operate cars on and over said bridges, or either of them, or to place any wires, pipes, and equipment and operate the same over said bridges, are revoked and repealed so far as the same apply to any future bridges hereafter to be constructed under this or any other law, unless the said companies will conform to the reasonable terms and conditions required by the county authorities.

The third section gives to the county of Floyd authority to condemn and remove the present bridges and to build new bridges at the same sites, and it is allowed to acquire any land necessary for the purpose, etc., and all public service corporations, street railway companies, telegraph, telephone, light and gas companies are required, when notified to do so, to remove all tracks, wires, pipes and other equipment from said bridges and each of them, as required by the county authorities.

The fourth section is as follows:

"Be it further enacted, that the county authorities of said county are hereby given the exclusive right and jurisdiction to grant permission and franchises to persons, firms and corporations, exercising public service functions, to operate on and over said bridges, and to place railway tracks thereon and to operate cars on and over said bridges, and to prescribe the terms and limitations of such grants; and the county authorities of said county are authorized to require of any street railway company or electric railway company as a condition precedent to the laying of tracks, placing of wires and operating cars on and over said bridges, that it pay to said county a sum equal to one-third of the actual cost of the building of said bridges, and the sum shall be paid to the treasurer of said county before any such company shall be allowed to lay any tracks, to place any wires or other equipment or operate any cars on and over such bridges, but any corporation now having a franchise shall have the right to use any new bridge upon complying with the reasonable conditions imposed by the board of commissioners and the terms of this act."

The fifth section is as follows:

"Be it further enacted, that any railway company, electric railway company or other public service corporation, paying the sum required under and by the preceding section shall acquire only the same rights to operate on and over said bridges as they may have on and over the streets leading to and from such bridges, and shall not be deemed to have acquired any right, title or interest in such bridges, or control over the same."

The sixth section provides that any person, firm, or corporation desiring to contest the validity of any part of this act shall do so by injunction proceeding before the beginning of the work of tearing down and removing the bridges, and for notice to all persons, firms, and corporations of the time when work was to begin by publishing notice thereof by the chairman of the board of commissoners in the newspapers in which sheriff sales are advertised, this notice to state when the work was to commence, as near as practicable, and the estimate of the cost of each bridge, said notice to be published once a week for 2 weeks, the last publication to be at least 30 days before the work was to begin, etc.

No question is made in the bill but that the terms of this act in sections 6, 7, and 8, have been complied with. The real attack is upon the constitutionality of the act as against the rights of the plaintiff company.

A great many acts, ordinances, and resolutions have been presented to the court as giving rights to the plaintiff to occupy these bridges without being required to pay a part of the cost of the same, as provided in this act. There is some doubt about whether the provisions of this act apply to corporations which already have franchises to go upon these bridges or any of them, if they comply with the reasonable requirements of the county commissioners with reference to the occupancy of the same, but I shall assume for the purpose of disposing of the case that the county commissioners will require them to pay one-third of the cost of the bridges before allowing their tracks to be laid and their cars to be run over the same.

This bill was evidently passed in the exercise of the police power of the state. It provides for the condemnation and tearing down of the old bridges in the interest of and for the safety of the public, and, for the same reason, for the erection of new bridges. It is perfectly clear that the Legislature has the power to pass this act in the exercise of the police power. Where the life and safety of the public is endangered, it is perfectly clear that the Legislature may authorize the destruction of the bridges, if, indeed, the county authorities would not themselves have such power. Also it seems to me to be perfectly clear that even if the plaintiff company, or any of its predecessors, had acquired rights as to the use of these bridges, such rights would be entirely destroyed when the bridges became useless and dangerous and large expense would necessarily be involved in the erection of new bridges. The power would, I think, then exist to fix such proportion of the cost of erecting new bridges to be borne by the street railway companies desiring to occupy the same, as the Legislature might deem reasonable, provided it was not so grossly unfair as to render the same entirely unreasonable and unjust. All of this relates to the plaintiff upon the assumption that it has some rights in the bridges by what has occurred heretofore, either by action of the Legislature, or of the county authorities, or of the municipal authorities of Rome.

I have gone carefully through all of the acts of the Legislature and the ordinances and resolutions as stated, and I find nothing whatever in those which gives to this company any such vested interests, or such right to occupy and use these bridges, as would give it any right to object to this act or to the terms of the act. Everything which I have been able to find which it is claimed gives any vested right in these bridges is so qualified, or there are such provisos, or in many instances such direct terms, as to make the right to occupy the bridges subject to revocation or to discontinuance by proper authorities. Certainly there is nothing in any of them which is sufficient to justify its claim of right to occupy the same in case the old bridges are destroyed and new ones built, except upon such terms as the Legislature might prescribe.

I do not think that the decision of the Supreme Court of the state in County of Floyd v. Rome Street Railroad Co., 77 Ga. 614, 3 S. E. 3, is important here, because we now have a distinct act of the Legislature, which I have recited above, providing for the destruction of the bridges and the building of new bridges, and fixing the terms upon which corporations, such as the plaintiff, may occupy them. In my opinion there is nothing whatever in the bill or in anything to which it refers which gives the plaintiff company any right to enjoin the enforcement of the act of the Legislature of August 15, 1914.

I think the defendants are entitled to a decree dismissing the bill, and such a decree may be taken.

HAUCK v. FREY.

(District Court, E. D. Pennsylvania. January 12, 1916.)

1. NEW TRIAL ⟸14—SCOPE OF MOTION—CHANGE OF THEORY.
   Where plaintiff elected to try a case on one of two theories upon which he might have asked for a verdict, and the case was in consequence so submitted to the jury, it was too late on a motion for a new trial to try it otherwise.
   [Ed. Note.—For other cases, see New Trial, Cent. Dig. § 20; Dec. Dig. ⟸14.]

2. BANKRUPTCY ⟸140—VOIDABLE PREFERENCES—SALES—RECLAMATION OF PROPERTY.
   As claimed by defendant, he sold cows at public vendue, the conditions of which were that there was no sale until the amount bid was paid. The bankrupt was a bidder, and made a deposit on his bid, but did not make payment in full, and the cows were driven to a public house, and were not to become the property of the bankrupt until payment was completed. The bankrupt, however, took the cows to his farm, and defendant, fearing loss of his money, reclaimed them, and agreed to and did resell them on the bankrupt's account. *Held* that, if these were the facts, defendant was not liable to the trustee in bankruptcy for the value of the cows, though they were reclaimed within four months before bankruptcy and at a time when defendant was charged with notice of the bankrupt's insolvency, as neither the bankrupt nor the trustee ever had title, and defendant retained title, except as against bona fide purchasers for value or creditors.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⟸140.]

3. COURTS ⟸107—PRECEDENTS—FORCE AND EFFECT.
   A judicial opinion is to be read in the light of the facts of the case.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 360; Dec. Dig. ⟸107.]

4. BANKRUPTCY ⟸303—PREFERENCES—ACTIONS—EVIDENCE.
   In an action by a trustee in bankruptcy for the value of property claimed to have been sold to the bankrupt and retaken by defendant within four months before bankruptcy, thus securing an unlawful advantage, where defendant claimed that there was to be no sale until payment, evidence as to former dealings between the parties had no relevant bearing upon the case, as the transaction involved was based upon a special and specific arrangement.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 1155–1158, 1161; Dec. Dig. ⟸303.]

5. WITNESSES ⊜262—EXAMINATION—RECALL.
The recall of a witness, who had already testified fully, was a matter within the discretion of the trial judge.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 797, 899, 904, 1165; Dec. Dig. ⊜262.]

At Law. Assumpsit by Irwin M. Hauck, trustee in bankruptcy, against George F. Frey. On motion by plaintiff for a new trial. Motion dismissed.

E. F. Slough, of Norristown, Pa., for plaintiff.
Joseph R. Dickinson, of Reading, Pa., for defendant.

DICKINSON, District Judge. When the case was called for trial the sufficiency of the statement was questioned. It was finally agreed that the case be tried upon its merits without regard to the pleadings. The plaintiff's theory of the case was the simple one of a sale of cows by the defendant to plaintiff's bankrupt on credit, or part cash and part credit, and that after the sale and well within four months before bankruptcy the defendant retook possession of the cows and resold them, thus securing to himself an unlawful advantage over the other creditors. The defendant's version of the transaction was that the averred sale was no sale at all. The cattle had been offered for sale at public vendue, the conditions of which were that there was no sale until the amount bid had been paid. The bankrupt was a bidder, but there was no sale, because he had failed to make payment. He did, however, make a deposit on his bid. The cows were driven to a public house, and were not to become the property of the bankrupt until he had completed his purchase by payment. The bankrupt took the cows to his farm, and the defendant, fearing the loss of his money, reclaimed them, agreeing to resell them on the bankrupt's account. This he did, accounting to the trustee for the proceeds of the resale. The defendant was not chargeable with notice of insolvency when the vendue was held. He was chargeable with such notice when the cows were reclaimed.

[1] From this outline of the opposing versions of the facts, it is clear that the plaintiff might have declared in a single count for the value of the property of the bankrupt estate thus appropriated. He might also have declared in an additional count for the deposit moneys, on the theory that if there was no sale these moneys belonged to the estate. He thus could have asked for a verdict for the value of the cows if there had been a sale to the bankrupt, and for the amount of the deposit if there had been no sale. He elected to try on what we have called the first count only. The case was in consequence so submitted to the jury, and it is now too late to try it otherwise.

[2, 3] The jury were instructed that the plaintiff had made out his case if the transaction was as testified to by the bankrupt. If, however, the defendant's version of the facts was accepted, the transaction was as between the parties to it a valid one, and defendant retained title, except as against bona fide purchasers for value or creditors, and that if he reclaimed his property before sale or levy his

title became immune from successful attack. The jury were further charged that the trustee in bankruptcy had every right which belonged to creditors, and that a verdict for defendant must have as a supporting basis a finding that he had made no sale of the cows and had not parted with his title, and that he had reclaimed and taken them back into his actual possession before the rights of creditors or the trustee in bankruptcy had intervened. The vital question now in the case is whether this instruction was right. It is supported by the rulings in a number of cases, among which are Hineman v. Matthews, 138 Pa. 204, 20 Atl. 843, 10 L. R. A. 233; Durr v. Replogle, 167 Pa. 347, 31 Atl. 645; Powell v. Clawson, 38 Pa. Super. Ct. 245. The list might be indefinitely lengthened.

There would be no room for doubt of its correctness, were it not for the case of Bank v. Penn Motor Car Co., 235 Pa. 194, 83 Atl. 622. We must regard the ruling in that case as authoritative, notwithstanding the strong dissent which the record discloses. It is an incident worth noting that trial by jury was waived and the case was tried before a referee in accordance with the state practice. The referee was well equipped for his task, not only by the possession of great natural abilities and a firm grasp of legal principles, but also by long experience and training as a referee in bankruptcy. The report he filed was so able as to evoke from the court a tribute as merited as it was handsome. If the ruling there is applicable here, we deem it to be controlling. Is it so applicable? It is to be observed that the opinion makes it entirely clear that the earlier cases are left unimpaired as binding precedents. The controlling principles remain as they were. It is well, also, to remind ourselves that the language of an opinion is to be read in the light of the facts of the case. What, then, were the essential fact features of that case? The Penn Company was the owner of a number of motor cars. It pledged them to the bank for a loan, but retained possession. Clearly such a transaction was void as to creditors. The owner became insolvent, and a few days before bankruptcy the bank attempted to complete its title by securing possession through an action of replevin. The receiver (afterwards the trustee) in bankruptcy intervened, and the case went on to trial between the bank and the trustee. The ruling was in favor of the latter. The dissent referred to was doubtless based upon the fact that the writ had been executed and the bank was in possession before bankruptcy.

Contrast the facts there with the facts (as found by the jury) here. These cows belonged to the defendant, who had never parted with his title. Richards (the bankrupt) had agreed to purchase them, but had not completed the purchase. Before levy or bankruptcy (although after insolvency and well within the four months period) the defendant reclaimed his property and the agreement of sale was off. The essential difference in the facts of the two cases lies in this: In the Motor Car Case the property belonged to the bankrupt. The bank had no title. It attempted to secure one through delivery of possession for a past consideration. In the present case neither the bankrupt nor the trustee ever had title to the property. The trustee

attempted to secure title after the opportunity to do so had passed. It is beyond dispute that neither Richards nor any creditor could have successfully attacked the title of the defendant, nor are we able to see that the trustee can. This view, although independently reached, we find confirmed by the ruling in East End Mantel Case (D. C.) 202 Fed. 275. There are, it is true, expressions in the Motor Car Case which seem to go to the length of expressing the thought that a trustee in bankruptcy may assert any right which a creditor might have asserted, had he moved at any time within four months of bankruptcy, and that this right is fixed and unaffected by anything which may have been done within the four months. This language, as before remarked, must, however, be interpreted in the light of the facts to which it relates. When so limited, we think the instructions given the jury were consistent with the doctrine of the Motor Car Case. This really disposes of the present motion.

The remaining reasons for a new trial may be disposed of with a passing comment. Had there been a verdict for the plaintiff, the court doubtless would have entered judgment upon it. We do not feel justified in disturbing the verdict rendered. Juries always take a broader view of a case than lawyers are prone to do. Without doubt the defendant had no thought of parting with his property without payment. This, perhaps, was persuasive with the jury to view the transaction as defendant presented it. There is ample room for the opinion that the whole defense was an afterthought. The jury was none the less well within the exercise of its lawful powers in finding otherwise.

[4, 5] The reasons which go to rulings on evidence are disposed of by the observations that, as the transaction here was based upon a special and specific arrangement, former dealings between the parties had no relevant bearing upon the case, and that the recall of a witness who had already testified fully was a matter within the discretion of the trial judge. We think plaintiff was given a fair opportunity to present his whole case.

The motion for a new trial is dismissed, and defendant has leave to enter judgment on the verdict.

HARVEY v. BOOTH FISHERIES CO. OF DELAWARE et al.

(District Court, W. D. Washington, N. D. October 27, 1915.)

No. 3029.

LIMITATION OF ACTIONS ⇐35—LIMITATIONS APPLICABLE—ACTIONS ON PENAL STATUTE.

Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (Comp. St. 1913, § 8829), provides that any person who shall be injured in his business or property by any other person or corporation, by anything forbidden or declared to be unlawful by that act, may sue therefor and recover threefold the damages by him sustained, with costs and a reasonable attorney's fee. Rem. & Bal. Code Wash. § 159, subd. 2, requires an action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the per-

son or rights of another not thereinafter enumerated to be brought within three years. Subdivision 6 requires an action upon a statute for a penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, to be brought within three years, except when the statute imposing it prescribes a different limitation. Section 165 provides that an action for relief not thereinbefore provided for shall be commenced within two years. *Held*, that an action for damages under the Sherman Act is properly brought within three years, as the statute upon which recovery is predicated is penal, while the right of recovery under section 7 is private and remedial, and under any view of the provisions of section 159 the two-year limitation does not apply.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 109, 158–167; Dec. Dig. ⟸35.]

At Law. Action by George L. Harvey against Booth Fisheries Company of Delaware and others. On demurrer to the complaint. Demurrer overruled.

Alfred Gfeller, of Seattle, Wash., for plaintiff.

McClure & McClure, of Seattle, Wash., for defendant San Juan Fishing & Packing Co.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for defendants Booth Fisheries Co. of Delaware, Booth Fisheries Co. of Washington, and International Fisheries Co.

Kerr & McCord, of Seattle, Wash., for defendant New England Fish Co.

W. S. Osborn, of Seattle, Wash., for defendant Occidental Fish Co.

NETERER, District Judge. The complaint in this case is based upon section 7 of the Act of July 2, 1890, 26 Stat. at Large, 209, 210, known as the Sherman Anti-Trust Act, which provides:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit [District] Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Defendants have demurred to the complaint upon the ground that it is barred by the statute of limitations, and does not state facts sufficient to constitute a cause of action. It is conceded that the state statute of limitations applies. Chattanooga Foundry v. Atlanta, 203 U. S. 390, 397, 27 Sup. Ct. 65, 51 L. Ed. 241. Plaintiff contends that the action must be commenced within three years (Remington & Ballinger's Codes of Washington, § 159, subds. 2 and 6), while defendants assert that the two-year limitation applies (section 165 of the same statute). The acts complained of are alleged to have been committed between September 1, 1911, and August 1, 1912, more than two and less than three years prior to the commencement of this action.

Defendants cite Quaker City National Bank v. Tacoma, 27 Wash. 259, 67 Pac. 710; Hinckley v. Seattle, 37 Wash. 271, 79 Pac. 779; Nestelle v. N. P. R. R. Co. (C. C.) 56 Fed. 261; Savannah & O. Canal Co. v. Shuman, 98 Ga. 171, 25 S. E. 415; Bigby v. Douglas, 123 Ga.

635, 51 S. E. 606; Wood v. Mich. Central Co., 81 Mich. 358, 45 N. W. 980; Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79; Welch v. Seattle & Montana R. R. Co., 56 Wash. 97, 105 Pac. 166, 26 L. R. A. (N. S.) 1047; Suter v. Wenatchee Water Power Co., 35 Wash. 1, 76 Pac. 298, 102 Am. St. Rep. 881; Denney v. Everett, 46 Wash. 342, 89 Pac. 934, 123 Am. St. Rep. 934.

Welch v. Seattle & Montana R. R. Co., supra, was an action by tenants of a building for damages resulting from tunneling under property adjacent to the land on which the building was situated. It was held not to be an action for trespass, but an injury resulting indirectly from the act complained of, and within the two-year limitation of section 165, supra. In Suter v. Wenatchee Water Power Co., supra, damages were sought to real property by reason of an overflow caused by negligent construction of an irrigating canal. The two-year limitation was held applicable upon the same principle as in Welch v. Seattle & Montana R. R., supra. In Denney v. Everett, supra, damages to abutting property resulting from the change of a street grade was sought, and for the same reason the two-year limitation was held to apply.

Quaker City National Bank v. Tacoma, supra, is an action upon a warrant payable out of a special street improvement fund. Misappropriation of the moneys of that fund is alleged. The cause was not commenced within three years, as provided by section 159, supra, and was held demurrable on that ground; but the suit was sustained because of a new and subsequent promise to pay. In Hinckley v. Seattle, supra, a street assessment lien was held subject to the statute of limitations, and judgment thereon inoperative after a period of six years. In Nestelle v. Northern Pac. R. Co., supra, Judge Hanford held an action by an administrator to recover damages for the death of his wife to be within the provisions of section 165, Rem. & Bal., supra.

In Savannah & O. Canal Co. v. Shuman, supra, the charter of the defendant Canal Company required it to keep its canal "in good and sufficient order, condition and repair, and at all times free and open to the navigation of boats, rafts, * * * etc., for the transportation of goods, merchandise, and produce," etc. Failure to keep the canal in such a condition as to enable plaintiff to transport his lumber and wood over it in boats is the gravamen of the action. The trial court held the action within the limitation, under a statute providing that:

"All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues."

The Supreme Court of Georgia, in holding that limitation not applicable, said (98 Ga. at page 172, 25 S. E. at page 416):

"There is a duty imposed for the benefit of the public, and any member of the public who has sustained injury by reason of a breach of this duty has a right of action against the company; * * * but the fact that such a duty is imposed does not of itself create such a liability in favor of any individual as would bring the case within the section of the Code above quoted. In order to bring the case within this section, the liability would have to be one expressly created in favor of an individual, or a class to which he belongs, as

distinguished from one arising under the general law in favor of all persons who might be injured by a breach of the corporate duty."

The same principle was enunciated in Bigby v. Douglas, supra, by the same court, and applied to an action founded upon a statute giving to a surety the right of contribution against his cosureties. The court, in pointing out the distinction, said:

"In other words, the General Assembly had in contemplation rights conferred by law upon particular individuals, and not upon the general public, because they sustained a peculiar relation to the incorporators of certain chartered institutions, or were by special enactment given privileges in return for services to be performed by them for the benefit of the public, or were for some other reason entitled to enforce rights which they did not share in common with their fellow citizens."

In Wood v. Michigan Central, supra, it was held that an action for damages for wrongful entry, destruction of fences, etc., of plaintiff, being an action for trespass on the case, does not come within the two-year limitation applicable to actions for trespass. In Duffies v. Duffies, supra, 76 Wis. at page 379, 45 N. W. at page 524, appears the following:

" 'Personal rights' are not rights of person. The latter are physical, and the former are relative and general, and embrace all the rights any person may have, and all the wrongs he may suffer."

Plaintiff relies upon Robinson v. Baltimore & S. M. & R. Co., 26 Wash. 484, 67 Pac. 274; Quaker City National Bank Case, supra; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Brady v. Daly, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109; In re Aubrey, 36 Wash. 308, 78 Pac. 900, 104 Am. St. Rep. 952, 1 Ann. Cas. 927; State ex rel. Richey v. Smith, 42 Wash. 237–247, 84 Pac. 851, 5 L. R. A. (N. S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577; Crum v. Johnson, 3 Neb. (Unof.) 826, 92 N. W. 1054.

Robinson v. Baltimore, etc., supra, was an action prosecuted by a widow for the death of her husband, and was held to be governed by the three-year limitation imposed by section 159, supra, under the clause "or for any other injury to the person or rights of another not hereinafter enumerated." In Huntington v. Attrill, supra, Justice Gray makes an extensive discussion of what constitutes a penal statute, and (146 U. S. at page 668, 13 Sup. Ct. at page 228, 36 L. Ed. 1123), says:

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the classification of Blackstone: 'Wrongs are divisible into two sorts or species: Private wrongs and public wrongs.' "

And (146 U. S. at page 667, 13 Sup. Ct. at page 227, 36 L. Ed. 1123):

"Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be 'penal against the hundred, but certainly remedial as to the sufferer.' Hyde v. Cogan, 2 Doug. 699, 705, 706."

In Brady v. Daly, supra, 175 U. S. at pages 155, 156, 20 Sup. Ct. at page 65, 44 L. Ed. 109, it is said:

"As said by Mr. Justice Ashhurst in the King's Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts, 'it has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action.' Woodgate v. Knatchbull, 2 T. R. 148, 154. * * * Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be 'not like a penal law, where punishment is imposed for a crime,' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty, but it is to the party grieved.'"

In re Aubrey, supra, and State ex rel. Richey v. Smith, supra, are cited to illustrate the proposition that every individual has the right to earn his livelihood in any lawful trade or avocation. Crum v. Johnson, supra, merely holds that, where different sections of the statute of limitations are equally applicable, the one allowing the longer period governs.

This is an action seeking redress for injury sustained by plaintiff in his business by reason of a public wrong by the doing of acts denounced by the Anti-Trust Act by the defendants. It was an invasion of the personal rights of the plaintiff, rights which are relative and general, and embraced rights which are common with all other persons, and as a part of the public he has a right of action for injury sustained. There is no liability to plaintiff by reason of any trespass which is expressly created in his favor, but only as it affects the public, by reason of which he suffers damages. A wrong against the public must first be done before he can be injured. The Supreme Court, in Chattanooga Foundry v. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241, an action under section 7 of the Sherman Anti-Trust Act, in passing upon a statute of limitation of the state of Tennessee, providing that an action "for injury to personal property shall be commenced within three years" (203 U. S. at page 398, 27 Sup. Ct. at page 67, 51 L. Ed. 241), said:

"Of course, it was argued also that this was an injury to property, within the plain meaning of the words. But we are satisfied, on the whole, and in view of its juxtaposition with detention and conversion, that the phrase has a narrower intent. It may be that it has a somewhat broader scope than was intimated below, and that some wrongs are within it besides physical damage to tangible property. But there is a sufficiently clear distinction between injuries to property and 'injured in his business or property'; the latter being the language of the act of Congress. A man is injured in his property when his property is diminished. He would not be said to have suffered an injury to his property unless the harm fell upon some object more definite and less ideal than his total wealth. A trade-mark, or a trade-name, or a title, is property, and is regarded as an object capable of injury in various ways. But when a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded, or subjected to duress, or whatever it may be, and stop there."

Subdivision 2 of section 159, supra, I think clearly comes within this decision, and but for the provisions of subdivision 6 the contention of the defendants would have to be sustained. Subdivision 6, however, provides that "an action upon a statute for a penalty or for-

feiture, where an action is given to the *party aggrieved,* or to such party and the state, * * *" 'shall be commenced within three years, and to make it clear that the Legislature distinguished between the state and a private party, it is provided by section 160, Rem. & Bal. Washington Codes, subdivision 2, that "an action upon a statute for a forfeiture or penalty to the *state*" shall be commenced within two years. The statute upon which recovery is predicated is penal, but the right of recovery under section 7 sought in this action is private and remedial, and under any view of the provisions of section 159, supra, I think the two-year limitation does not apply, and that the complaint states facts sufficient to constitute a cause of action.

The demurrer is overruled.

In re INDEPENDENT PUB. CO. et al.

(District Court, D. Montana. December 11, 1915.)

No. 481.

1. CONTEMPT ⇐9—PUBLICATIONS REGARDING PENDING PROCEEDINGS—"SO NEAR."

Jud. Code, § 268 (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. 1913, § 1245]), provides that United States courts shall have power to punish contempts of their authority, provided that such power shall not extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, etc. Pending a trial for felony, a newspaper published what purported to be the past history of the defendant on trial, mentioning similar felonies, trials, sentences, imprisonments, parole, and exile to escape prosecution of and by such defendant. Several of the jurors having read the article, it was necessary to discharge the jury. *Held,* that the publication obstructed the administration of justice, and was "so near" to the court as to obstruct its administration, as "so near" means not so far off or so distant but what it may obstruct the administration of justice, and it is not a question of linear measurement, but of probable effect.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15–18; Dec. Dig. ⇐9.]

2. CONTEMPT ⇐9—PUBLICATIONS REGARDING PENDING PROCEEDINGS—INTENT.

Where a newspaper article, concerning a person on trial for felony, was read by jurors and made the discharge of the jury necessary, its publication was punishable as a contempt, though there was no willful intent to obstruct justice, the intent to publish the article being all the willful intent necessary, as the publishers knew the trial was on, that the article would probably be read by jury and judge, and that its probable consequence would be the obstruction of the administration of justice.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15–18; Dec. Dig. ⇐9.]

3. CONTEMPT ⇐28—PUBLICATIONS REGARDING PENDING PROCEEDINGS—EFFECT OF TRUTH.

That a newspaper article concerning a person on trial for felony, which was read by jurors and made it necessary to discharge the jury, was true was not a defense to a prosecution for contempt, nor mitigation.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 81–85, 271; Dec. Dig. ⇐28.]

4. CONTEMPT ⊜75—PUNISHMENT—AMOUNT OF FINE.
A proceeding to punish as for contempt the publication of a newspaper article concerning a person on trial for felony, which was read by jurors and made a discharge of the jury necessary, was both civil and criminal in its aspect, and such a fine should be imposed as would reimburse the government to the extent of the costs uselessly paid by it.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 258–260; Dec. Dig. ⊜75.]

Proceeding to punish the Independent Publishing Company and another for contempt. Respondents adjudged in contempt and fined.

B. K. Wheeler, U. S. Atty., of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., for the United States.

C. B. Nolan and E. C. Day, both of Helena, Mont., for respondents.

BOURQUIN, District Judge. Respondents' newspaper published a reference to and during a felony trial herein, which included purported past history, similar felonies, trials, sentences, imprisonment, parole, and exile to escape prosecution, of and by defendant. Brought to the court's notice, and it appearing several jurors had read it, the jury was discharged, the trial ended, and by the court's order respondents were cited to show cause why they should not be adjudged in contempt. They answer the article was by their reporter, believing it true, and was published without the knowledge of the respondent editor or any officer of the respondent corporation, without intent to obstruct the administration of justice, and that they "regret exceedingly" the publication and have guarded against repetition.

[1] Respondents put forward no unmaintainable contention that the article was not calculated to influence jury and judge, to prevent a fair and impartial trial, and so to obstruct the administration of justice. They make no impossible claim that newspaper publishers are peculiarly privileged to thus introduce improper matter to jury and judge; are not subject to the liabilities imposed by law upon any person who orally or in writing does the like. But they contend that since the power of United States Courts to proceed in contempt is limited by section 268, Judicial Code, to "misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice," the power is lacking here in that the publication was not "so near" the court within the meaning of the statute. In argument they refer to Morse v. Ore Purchasing Co. (C. C.) 105 Fed. 337, as indicating support for their contention in that therein the defeated party secured a new trial because of a series of prejudicial publications (presumably by this newspaper) during the trial, but that "it never occurred" to eminent counsel that contempt would lie. Referred to incidentally by them, so is it here. It is clear this publication did obstruct the administration of justice, and obviously because it was "so near" to the court, and that, within the meaning of the statute. "So near" in the statute means not so far off, not so distant but what it may obstruct the administration of justice. It is not a question of linear measurement, but of probable effect; not where the press runs, but where the publication circulates. So long as jury and judge are

engaged in a trial, it is of no moment that the improper influence extended over them was miles away from the courtroom rather than adjoining it. The effect is the same, the consequences the same, the evil as great, and it is the effect, consequences, evil, the law guards against.

The thoughtful mind needs but momentary reflection to subscribe hereto. In Kirk v. United States, 192 Fed. 275, 112 C. C. A. 531, the appeals court of this circuit held oral attempts to influence jurors, made over half a mile from the courtroom, were contempts within the statute, saying:

"It is obvious that any willful attempt improperly to influence jurors, * * * no matter where it is committed, is sufficiently near to the presence of the court to tend to obstruct the administration of justice"

—and that without the power to summarily deal with such attempts, "the courts would be practically helpless." McCaully v. United States, 25 App. D. C. 404, is a like case, and after conviction for contempt, the Supreme Court (198 U. S. 586, 25 Sup. Ct. 803, 49 L. Ed. 1174) refused habeas corpus and certiorari. It hardly needs suggestion that, this being true in respect to oral words, a fortiori must it be true in respect to written words, of more permanency and potency. In United States v. Newspaper Co., 220 Fed. 458, it was held that newspaper publications in the city of a trial, tending to embarrass the court in consideration of the case, or to excite prejudice against a party, or against the court contingent on the nature of its ultimate decision, are so near the court as to obstruct the administration of justice within the meaning of the statute.

In re Josephus Daniels (C. C.) 131 Fed. 95, seems contra, but therein the publication was after the proceeding criticized was finished and so proper subject of criticism.

[2] Respondents further contend that the publication being without "willful intent" to obstruct justice, is not contemptuous. But they or those for whom they must respond, whose acts are their acts, knew the trial was on, and intended to and voluntarily did publish the article, and that is all the willful intent necessary in any case.

"If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." Ellis v. United States, 206 U. S. 257, 27 Sup. Ct. 602, 51 L. Ed. 1047, 11 Ann. Cas. 589.

Doubtless nothing was intended but a "good story" for general circulation, but they knew the circumstances; that the trial was on; that the article would probably be read by jury and judge; and they knew the probable consequences, obstruction of the administration of justice, and an accounting by the responsible publishers.

[3] In the like case of Newspaper Co. v. Com., 188 Mass. 449, 74 N. E. 682, 3 Ann. Cas. 761, it is accordingly held that intent to publish is alone material, though lack of intent to thereby obstruct justice may be considered in mitigation of punishment. If the article was true and not only believed true, it is neither defense nor mitigation.

"A publication likely to reach the eyes of a jury * * * would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with reference to a court. * * * When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied." Patterson's Case, 205 U. S. 462, 27 Sup. Ct. 558, 51 L. Ed. 879, 10 Ann. Cas. 689.

Here, in brief compass, is the law, its reasons and limitations. At argument, that the court had not admonished the jury not to read accounts of the trial was mentioned. It may be answered the article was more than an account of the trial; that no one, including courts, are bound to anticipate and guard against another's negligence, to say nothing of violation of law; that therein is no defense; and that such publications are contempts even if not read by jury or judge, because of the probability that they will be or may be despite admonition, because of their evil tendencies and possibilities. See Newspaper Co. v. Com., 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280.

[4] Respondents' last contention is that if they be in contempt, since they did not intend contempt, they should be adjudged only to pay costs of this proceeding, citing Savings Bank v. Clay Center, 219 U. S. 527, 31 Sup. Ct. 295, 55 L. Ed. 320, Ann. Cas. 1912A, 513, and other cases. If this were strictly a criminal contempt or one involving the court alone, their contention might be conceded. But here the proceeding has a double aspect: Criminal, in that it interfered with discharge of the court's duty and obstructed justice; civil, in that the publication proximately caused the trial's failure and inflicted pecuniary damage on plaintiff therein to the extent of costs uselessly paid, $617.95. In respect to criminal contempts the penalty is usually punitive, fine or imprisonment. In respect to civil contempts the penalty is usually remedial, a fine which may be measured in some degree by the injured party's pecuniary damage and for his use. See Gompers' Case, 221 U. S. 441, 445, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

The plaintiff in the interrupted case, the United States, is the complainant here. Any fine imposed is necessarily for its use. It appears but just that taking into consideration both the civil and the criminal aspects of this proceeding, a fine should be imposed, in amount measured by the pecuniary loss suffered by the United States from respondents' act, wherein is no punishment save that in any case when one at fault makes whole the one he injures. It is a basic principle of morals and law that he who inflicts damage upon another shall indemnify him.

Accordingly, respondents are adjudged in contempt and to pay a fine in the amount of $617.95 and costs.

MAINE NORTHWESTERN DEVELOPMENT CO. v. NORTHWESTERN COMMERCIAL CO.

(District Court, W. D. Washington, N. D. December 2, 1915.)

No. 2117.

1. CORPORATIONS ⟸661—FOREIGN CORPORATIONS—ACTIONS—RIGHT TO SUE.
Rem. & Bal. Code Wash. § 3677, provides that corporations may be formed for certain purposes, but that no such corporation shall commence business until the whole amount of its capital stock has been subscribed. Const. Wash. art. 12, § 7, and Rem. & Bal. Code Wash. § 3720, provide that foreign corporations shall not be allowed to transact business within the state on more favorable conditions than are prescribed for domestic corporations. *Held*, that when a foreign corporation is legally incorporated and authorized to do business under the laws of a foreign state, and a citizen of Washington enters into a contract with it for the payment of money, he may not, in an action on such contract, escape payment on the ground that all of the capital stock has not been subscribed, and the fact that all of the capital stock has not been subscribed does not prevent the corporation from suing and collecting such obligation in the courts of Washington.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536, 2539, 2542–2544, 2546, 2563–2567; Dec. Dig. ⟸661.]

2. CORPORATIONS ⟸661—FOREIGN CORPORATIONS—ACTIONS—RIGHT TO SUE.
Rev. St. Me. 1914, c. 47, § 19, provides that the directors of corporations not charged with the performance of any public duty within the state may hold meetings without the state, and transact business and perform all corporate acts not expressly required by statute to be performed within the state. Rem. & Bal. Code Wash. § 3694, provides that stockholders may in the by-laws prescribe the times, manner, and amounts in which payment of the sum subscribed shall be made, but that, if this shall not be so prescribed, the trustees shall have power to demand and call in from the stockholders the sum subscribed at such time and in such manner as they may deem proper. The stockholders of a Maine corporation directed the levy of an assessment on the stock subscriptions, and pursuant thereto the directors, at a meeting held in the state of Washington, made such assessment. *Held*, that the corporation could sue in Washington to recover the assessment on a stock subscription, though all of the stock had not been subscribed, as required by the Washington statutes in the case of domestic corporations before doing business or collecting stock subscriptions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536, 2539, 2542–2544, 2546, 2563–2567; Dec. Dig. ⟸661.]

At Law. Action by the Maine Northwestern Development Company against the Northwestern Commercial Company. On motion for a nonsuit. Motion denied.

See, also, 213 Fed. 103.

William H. Gorham, of Seattle, Wash., for plaintiff.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for defendant.

NETERER, District Judge. This is an action to recover upon the subscription to the capital stock of a Maine corporation, assessment of which was directed by the stockholders at Portland, Me.,

and made by the board of trustees at Seattle, in the state of Washington. The testimony shows that all of the stock of the corporation was not subscribed, and further shows that compliance was made with the laws of Washington with relation to foreign corporations desiring to do business in the state of Washington, and the issuance of a license by the Secretary of State in evidence of such compliance. The defendant has moved for nonsuit on the grounds that by the provisions of the laws of Washington a domestic corporation shall not commence doing business until all of its capital stock has been subscribed, and section 7, article 12, of the Constitution of Washington provides that foreign corporations shall not be allowed to transact business within this state on more favorable terms than are prescribed by law for similar domestic corporations, and this constitutional provision having been carried into the statutes of Washington, section 3720, Rem. & Bal. Codes of Wash., expresses a legislative intent not to admit foreign corporations on more favorable terms than domestic corporations. Section 3677 of the Washington Code, supra, provides that a corporation shall not begin doing business until all of the capital stock has been subscribed. The Supreme Court of Washington, in Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130, in construing this section, said:

"The only object of collecting assessments from the subscribers is to carry on the business of the corporation, and the law prohibiting it from commencing business until the whole amount of the capital stock has been subscribed, by the strongest implication at least, prohibits it from collecting assessments before that condition is complied with."

In State ex rel. v. Nichols, 47 Wash. 117, 91 Pac. 632, the same court, in passing upon an act relating to the incorporation of trust companies (Laws 1903, page 367), held that a foreign corporation seeking admission did not come within the requirements of domestic corporations and would not permit it to enter the state, and in State ex rel. v. Nichols, 51 Wash. 619, 99 Pac. 876, declined to permit a foreign corporation to come into the state under a name used by another corporation, inasmuch as a domestic corporation was prohibited from using a similar name used by another corporation, and used this language in referring to constitutional provisions as stated in State ex rel. v. Nichols, 47 Wash. supra:

"While the exact question involved here was not discussed in that case, in its last analysis the decision there rendered is a judicial declaration of the avowed public policy of the state that every restriction put upon a domestic corporation shall apply to a foreign corporation doing or seeking to do business in this state."

And to the same effect, with relation to foreign insurance companies doing business within this state, is State ex rel. Leach v. Fishback, 79 Wash. 290, 140 Pac. 387.

The Circuit Court of Appeals, in London, Paris & American Bank, Ltd., v. Aronstein, 117 Fed. 601, 54 C. C. A. 663, held that stock in a foreign corporation doing business in California should be transferred pursuant to the laws of California, and not pursuant to the laws of England, its domiciliary home.

The Washington cases, except Denny Hotel Co. v. Schram, are all cases where the right to do business was raised by the state and not by a third person in a collateral way. The question presented here is the qualification of the plaintiff to do business in Washington. Is it a question which can only be raised by the state, or may it be raised by the defendant? Section 1034, Rem. & Bal. Code, supra, provides for the filing of an information where any association or number of persons shall act within the state without having complied with the laws of the state, and section 1043 provides that when such association or number of persons shall be found guilty of having acted as a corporation without any right to do so, a judgment of ouster shall be entered against them. State ex rel. Conlan v. Min. & Mfg. Co., 48 Wash. 196, 93 Pac. 219.

[1] The constructive work of the plaintiff corporation, as disclosed by the evidence so far as introduced, is in Alaska. No business seems to have been done within this state, unless with relation to the matter in issue, that might not have been done without qualifying to do business within the state of Washington. Where a foreign corporation is legally incorporated and authorized to do business under the laws of a foreign state, and a citizen of Washington enters into a contract with such corporation involving money, such person may not, in an action on such obligation, escape payment upon the ground that all of the capital stock is not subscribed pursuant to the laws and Constitution of Washington. Nor would a foreign corporation be prevented from suing in the courts of this state to collect such obligation. If the contract is one which does not require any act bringing into operation the agency or authority of the laws of Washington to give it validity, the defendant in this case cannot object. If it requires an affirmative act of the board of directors or stockholders pursuant to the laws of Washington, and without which authority of the Washington law the obligation or subscription would not have vitality, then the defendant may defend on the ground of non qualification of plaintiff company. I think that somewhat akin to the issue is the Constitution provision of Washington, prohibiting an alien from holding land, and under the decisions of the Supreme Court of Washington (Oregon Mortgage Co. v. Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841), the right can only be challenged by the state; but if the alien seeks the aid of the statute (eminent domain law) to secure title to or possession of land, the owner whose land is sought to be taken may defend his title without waiting for the state to act. State ex rel. v. Superior Court, 33 Wash. 542, 74 Pac. 686.

[2] Section 19, chapter 47, Rev. Stat. of Maine, 1914, provides:

"After the certificate of organization required by law is filed in the office of the Secretary of State, directors of all corporations not charged with the performance of any public duty within the state may hold meetings without the state and * * * transact business and perform all corporate acts not expressly required by statute to be performed within the state."

By this provision corporation directors may go into another state and transact corporate business within its charter limits. Section 51, chapter 47, supra, provides that a Maine corporation may sell or other-

wise dispose of stock in corporations, and a Washington corporation (section 3684, Rem. & Bal. Codes of Wash., supra) may purchase stock in any other corporation, so that by the provisions of the laws of Maine and the laws of Washington the plaintiff corporation could sell stock to a domestic or foreign corporation, and the defendant company could subscribe for stock in any other corporation without limitation, either domestic or foreign. Under the laws of Washington (section 3694), the stockholders may by by-law provide the time of payment of the subscription of stock. If the stockholders fail to prescribe this by by-law, then the directors may make the calls as the money is required. At a stockholder's meeting at Portland, Me., the directors of the plaintiff company were directed to levy an assessment upon the stock of the company, and pursuant to such direction the directors did make such levy in Seattle, Wash. Under the Maine law the directors had the right to act in the state of Washington and were not limited in their action to the limits of the state of Maine. If this act of the board of directors in making this call or this demand for the assessment pursuant to the direction of the stockholders of Portland, Me., is one which may not be done in Washington, and is an objection which may be raised by the defendant, then this motion must be granted. The necessity of making calls by the proper parties in the manner prescribed arises from the terms of the subscription agreement and not from a limitation of power. The making of calls is not, strictly speaking, a corporate act. Morawetz on Corporations, § 155. The call made by the directors is agreed upon in the contract of subscription, and a call made, authorized as this is by the laws of Maine, and directed by the stockholders, would enable the plaintiff under the law of comity to pursue a subscription of stock in this state, irrespective of statutory authority of Washington.

I think the motion must be denied.

In re SHRIMER.

(District Court, E. D. North Carolina. January 11, 1916.)

No. 408.

1. BANKRUPTCY ⇐409—DISCHARGE—GROUNDS FOR DENIAL—FAILURE TO KEEP BOOKS.

Bankr. Act July 1, 1898, c. 541, § 14b (2), 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (Comp. St. 1913, § 9598) provides for the denial of a discharge where the bankrupt with intent to conceal his financial condition has destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained. A bankrupt in business for three years in a large commercial center, who owed about $7,500, and whose goods on hand were inventoried at $4,000, and who had a bank deposit and drew checks, kept no sales book, cash book, or expense book, and turned over to the trustee no books whatever, except a check book, a pass book, and some canceled checks and bills outstanding, and some bills collectible. His only explanation of his financial troubles and the disposition made of the goods purchased, or the proceeds of their sale, was that he had gambled, and had lost several hundred dollars gambling. *Held*, that the conclusion was natural, and almost irre-

sistible, that his failure to keep books was with intent to conceal his financial condition, especially as a man is presumed to intend the logical and inevitable results of his conduct.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752–757; Dec. Dig. ⊂⊃409.]

2. BANKRUPTCY ⊂⊃414—DISCHARGE—OBJECTIONS—BURDEN OF PROOF.

On objections to a bankrupt's discharge on the ground that he has destroyed, concealed, or failed to keep books of account or records from which his financial condition might be ascertained with intent to conceal such condition, the objecting creditor has the burden of establishing the unlawful intent.

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

3. BANKRUPTCY ⊂⊃414—DISCHARGE—OBJECTIONS—EVIDENCE.

On objections to a bankrupt's discharge, the intent with which he failed to keep books may be shown by resorting to the same methods of proof as for any other fact; and, being a fact peculiarly and, so far as direct evidence goes, exclusively within the knowledge and keeping of the bankrupt, the court may resort to inferences from conceded or established facts.

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

4. BANKRUPTCY ⊂⊃400—EXEMPTIONS—SETTING APART.

Bankr. Act July 1, 1898, § 6 (Comp. St. 1913, § 9590), provides that that act shall not affect the allowance to bankrupts of exemptions prescribed by the state laws. Section 47 (section 9631) requires trustees to set apart the bankrupt's exemptions and report the items and estimated value to the court as soon as practicable after their appointment. General Order 17 (89 Fed. xix, 32 C. C. A. xix) requires the trustee, within 20 days after receiving notice of his appointment, to make a report of the articles set off to the bankrupt. *Held*, that the bankrupt's exemptions should have been set apart to him from his property, instead of paying the amount thereof to him in cash from the proceeds of a sale of the property at about 25 per cent. of its inventoried value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670–675; Dec. Dig. ⊂⊃400.]

5. BANKRUPTCY ⊂⊃415—APPLICATION FOR DISCHARGE—CERTIFICATION TO JUDGE—DELAY.

Under the provision of the Bankruptcy Act requiring every step in the administration and closing of the estate to be taken with all reasonable dispatch, a delay of several months in certifying to the judge an application for a discharge to which a creditor filed objections was unreasonable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698–708, 719, 723, 724, 726, 728; Dec. Dig. ⊂⊃415.]

In Bankruptcy. In the matter of G. A. Shrimer, bankrupt. The bankrupt filed his petition for discharge, to which the Fabian Manufacturing Company, one of his creditors, filed objection, and in support thereof filed four specifications, and the evidence was taken by the referee and certified to the judge. Petition for discharge denied.

D. H. Gladstone, of Durham, N. C., for petitioner.
R. H. Sykes, of Durham, N. C., for creditor.

CONNOR, District Judge. [1] The specifications filed by the creditors, while separated, constitute the charge that the bankrupt has "with intent to conceal his financial condition, destroyed, concealed or failed

to keep books of account or records from which such condition might be ascertained." Bankruptcy Act, § 14b (2); Collier, Bankruptcy (10th Ed.) 308; amendment 1903. Mr. Collier discusses the purpose and the effect of the amendment to this section. Page 345. The evidence shows that the bankrupt began business in the city of Durham, N. C., three years prior to his adjudication; that he owes about $7,500. His trustee found on hand goods inventoried at $4,000, which he sold for $1,078, and from this he paid the bankrupt $500, leaving in his hands for the creditors, after paying the cost of the proceeding, 5 per cent. of their debts. This revelation calls for explanation before the bankrupt is entitled to the benefit of a statute enacted for the relief of unfortunate and honest debtors.

"One of the main objects of the Bankruptcy Act is to protect unfortunate, but honest, debtors. Fraudulent debtors are not intended to be protected, nor to escape payment of their just liabilities." In re Harr (D. C.) 143 Fed. 421.

The bankrupt, upon his examination, says that he kept no books; never kept any books; when he paid a bill he put it in the box file; has no old check stubs; lost money gambling, does not know how much, several hundred dollars; has been gambling ever since he came to Durham. The trustee says that, when he made a demand upon the bankrupt for his books, he received a check book, also a pass book, but no others; made an examination, but could not arrive at any result, because he had no books, papers, or information, except some canceled checks and bills outstanding and "bills collectible." It was absolutely impossible to determine the actual condition of the estate. Before the bankruptcy proceedings were instituted he saw some advertisement that bankrupt was selling off all goods at a reduced price; found no sales book, cash book, or expense book. While the trustee was cross-examined at great length, the foregoing constitutes the substance, in essential respects, of the evidence. That the bankrupt kept no books, in any reasonable sense of the term, from which his financial condition could be ascertained, is manifest. This, however, is not sufficient to sustain the objection to granting the petition for discharge. The act, as amended, requires that it be found that his failure to keep such books shall be "with intent to conceal his financial condition."

[2, 3] The objecting creditor carries the burden of establishing the unlawful intent. It is well settled, both upon reason and authority, that when intent becomes an essential element in a judicial investigation the quest for its existence is to be made by resorting to the same methods of proof as for any other fact. As it is a fact peculiarly and, so far as direct evidence goes, exclusively within the knowledge and keeping of the party charged with the wrongful conduct, of necessity the court may resort to inferences from conceded or established facts, the probative value of which will depend largely upon the reason of the thing. It is customary for honest merchants, having a regard for the success of their business and their commercial credit, to make and keep some record—entries in books, or at least memoranda—showing the course of the business. The form, manner, method of doing this depends largely upon the character, volume, etc., of the business; the accuracy of such records will depend largely upon the experience and

intelligence of the person making them. So their absence, or character, may be accounted for by reference to the same conditions. The only facts disclosed by the record are that the bankrupt was, for three years, in one of the largest of our commercial centers, conducting the business of buying and selling goods and merchandise; it does not appear that he was ignorant or illiterate; his business involved carrying a stock of at least $4,000 and contracting an indebtedness of $7,500; he made deposits in a bank and drew checks. Certainly his creditors were entitled to assume that, in the event of his insolvency, they would find some record of the manner in which his business was conducted, showing the amount of his purchases, sales and expenses, and how his insolvency came about—what disposition he made of the goods, or the proceeds of their sale. It falls far short of meeting this reasonable expectation to say that, with a payment of 5 per cent. of their debts, the bankrupt, with half the proceeds of their property in his pocket as his exemptions, gives no other account of his "business troubles" than that he has lost "several hundred dollars gambling" and "has kept no books."

There is a rule of reason—sound in morals and in law—that a man is presumed to intend the logical and inevitable results of his conduct. His creditors were entitled to know his financial condition and to ascertain it from an examination of his books or records of his business; this he must have known. The process of reasoning from the admitted facts, unexplained, which brings the mind to the conclusion that his failure to keep books was with the "intent to conceal his financial condition," is natural and almost irresistible. The result of the thought of the courts is well formulated by Mr. Collier. He says:

"The act proclaims the presumption and intent of the law that honest merchants will keep account books which will disclose their true financial condition. If the evidence shows that the business was conducted without books of account, so that nothing could be ascertained as to the bankrupt's purchases and sales, or the disposition of the proceeds of such sales, the intent to conceal the financial condition will be presumed." Bankruptcy, 348.

"A failure to show by books a large shrinkage of assets during a short period of time may prevent a discharge." Id.

In Re Koelle (D. C.) 171 Fed. 259, after discussing the evidence in regard to the failure to keep books, it is said:

"Prima facie, at least, a man must be held to intend the natural and probable consequences of his acts, and the inevitable consequence of this omission was to conceal his financial condition. The presumption of such an intent may not be conclusive, but it has not been met by the testimony that was offered before the referee."

Here the only explanation of the so-called "failure" is the loss of "several hundred dollars in gambling." This is entirely insufficient to rebut the natural and logical inference, which should be drawn from the bankrupt's failure to keep books. It rather strengthens the inference and sustains the conclusion.

[4] It appears that the bankrupt's goods were sold for about 25 per cent. of their invoice, and of this amount $500 in cash was paid to him on account of his exemptions, thus absorbing about $2,000 of the in-

voice value of his property. This is not in accordance with the law. The bankrupt is entitled to the exemptions allowed to him by the state Constitution. Bankruptcy Law, § 6. It is the duty of the trustee to set apart his exemption from his property, as soon as practicable after his appointment. Section 47. By General Order 17 (89 Fed. xix, 32 C. C. A. xix), his duties in that respect are further prescribed. While the question is not presented, I deem it appropriate to call attention to the irregular procedure and its effect upon the rights of the creditors.

[5] Although this petition was filed several months since, it was not certified to the judge until January 4, 1916. This was an unreasonable delay. The act prescribes that every step in the administration in closing the estate shall be with all reasonable dispatch.

The petition for discharge is denied.

In re KARP.

(District Court, D. Massachusetts. July 12, 1915.)

No. 19027.

1. BANKRUPTCY ⊂⊃288—COMMON-LAW ASSIGNEE—ACCOUNT—SUMMARY PROCEEDINGS.

Where a common-law assignee carried on the business of a bankrupt for several days after the petition was filed, and then closed out the business by selling all of the assets, and paid over to the trustee the amount claimed by him to be due after deducting payments made after the institution of the bankruptcy proceedings, the bankruptcy court had power to settle his account with the trustee in summary proceedings, as a common-law assignee is to be regarded as an adverse claimant, and not amenable to summary process, only as to payments or dispositions of property made by him in good faith before the institution of the bankruptcy proceedings and as to liens in his favor which accrued prior to that time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⊂⊃288.]

2. BANKRUPTCY ⊂⊃186—COMMON-LAW ASSIGNEE—INTERFERENCE WITH PROPERTY—LIABILITY.

After the filing of a petition in bankruptcy, a common-law assignee acts at his peril in carrying on the bankrupt's business, selling it out, and winding it up, or in doing anything beyond what is necessary to preserve the property in his hands when the petition is filed, as Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, gives creditors the right to have the assignment superseded and set aside, and the filing of the petition is notice that the petitioning creditors object to the assignment and oppose liquidation of the bankrupt's affairs thereunder.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 285, 319; Dec. Dig. ⊂⊃186.]

3. BANKRUPTCY ⊂⊃186, 303—COMMON-LAW ASSIGNMENT—VALIDITY OF ASSIGNEE'S ACTS.

Common-law assignments are not outlawed by the Bankruptcy Act, and where creditors allow the assignee to continue in possession and operate the business, the assignee is not necessarily to be charged with a resulting loss, whether occurring before or after the filing of the petition in bankruptcy. The burden is upon a bankrupt's assignee to satisfy the

bankruptcy court that in carrying on the business after the institution of bankruptcy proceedings he acted in good faith and with sound business judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 285, 319, 458–462; Dec. Dig. ⟸186, 303.]

4. BANKRUPTCY ⟸186—COMMON-LAW ASSIGNEE'S LIABILITY FOR LOSSES FROM CARRYING ON BUSINESS.

A bankrupt's assignee was liable for a loss incurred by him in carrying on the bankrupt's business, where there was no finding that it was good judgment on his part to continue the business, and he did not show what part of the loss was incurred before and what part after the filing of the petition in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 285, 319; Dec. Dig. ⟸186.]

In Bankruptcy. In the matter of Abraham Karp, bankrupt. On review of an order of the referee. Affirmed.

Arthur E. Burr, of Boston, Mass., for trustee.
Carl Gerstein, of Boston, Mass., for assignee.

MORTON, District Judge. This is a summary proceeding, commenced by a petition by the trustee in bankruptcy of A. Karp, praying that Charles Porter, who had been common-law assignee of Karp, "be directed to turn over forthwith to said trustee all the property, or the value thereof, which came into the possession of said Porter by virtue of said assignment." The matter was heard by Mr. Referee Warner, who made an order that Porter pay over forthwith to the trustee the sum of $467.50. The case is here on the certificate of the referee on a petition for review. The evidence is not reported. The findings of fact by the referee must therefore stand, unless they appear from his certificate to be erroneous. At the beginning of the proceedings Porter objected that this court had no jurisdiction of the matter on summary proceedings, and has never waived or abandoned that objection.

[1] The bankrupt carried on a banking business. He made a common-law assignment to Porter on January 6, 1913, under which Porter took possession the next day. On January 11th the involuntary petition in bankruptcy was filed, upon which adjudication has been made. Porter carried on the business under the assignment to him till January 17th, when he closed it out by selling all the assets. He "acted in good faith and under advice of counsel." He paid over to the trustee $218.50, which he contends is all that was due.

It is not clear on what basis the account was stated by the assignee before the referee. Apparently the debit side of it was made up of an itemized schedule of the property received, with no values given, and the sums collected by him from the operation of the business; and the credit side was made up of sums paid for running the business, of various disbursements to himself, his counsel, and other persons in connection with the sale of the assets and the liquidation of the business, of accounts receivable resulting from his operation of the business, of claims on certain scheduled property said to belong to Karp,

and to have been withheld or taken away by the present holders thereof, and of a reservation of cash to protect himself against a suit brought against him on account of the Karp business. Porter apparently took over no cash from the bankrupt, and had run the business only four days before the bankruptcy petition was filed. I infer that all the payments in controversy were made after the institution of the bankruptcy proceedings.

Upon these facts, I am of opinion that the bankruptcy court had power to settle Porter's account with the trustee in summary proceedings. To hold that a common-law assignee, who, with notice of pending bankruptcy proceedings against his assignor, goes ahead and operates, and finally liquidates, the bankrupt's business and property, can only be made to account to the trustee by plenary proceedings, perhaps in a state court, would introduce such delay, expense, and lack of uniformity in the settlement of bankrupt estates that such a ruling ought not to be made, unless required by decisions binding on this court. According to what seems to be established law, a common-law assignee is to be regarded as an adverse claimant (and therefore not amenable to summary process) only as to payments or dispositions of property made by him in good faith, before the institution of the bankruptcy proceedings, and as to liens in his favor which accrued prior to that time. Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, 7 Am. Bankr. Rep. 421; Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; Re Chase, 124 Fed. 753, 59 C. C. A. 629 (C. C. A. 1st Circuit); Re Thompson, 128 Fed. 575, 63 C. C. A. 217, 11 Am. Bankr. Rep. 719 (C. C. A. 2d Circuit); Remington on Bankruptcy (2d Ed.) §§ 1611, 1612. It does not appear that any of the matters here in controversy are of those sorts.

The items of the account in dispute are as follows:

(1) Alleged overpayment to attorney for assignee	$105.00
(2) Goods received by assignee and unaccounted for by him	293.50
(3) Amount reserved by assignee for Silbert claim	69.00
	$467.50

[2] As to the first of these items: The assignee paid his attorney $205. The referee has found that this was $105 more than a proper charge for the services rendered, and has charged the assignee with the overpayment. There are no facts before me as to the nature and extent of the legal services, or the occasion for them. The referee's findings cannot, therefore, be revised, and must be confirmed.

As to items 2 and 3: In operating the business the assignee paid out $629.53; he took in from sales made by him (and perhaps also from accounts receivable of the bankrupt) $635.83; and he has uncollected book accounts for goods sold by him on credit amounting to $109.73. The learned referee, in stating the account, apparently disregarded altogether Porter's operation of the business, found that he had not accounted for $293.50 worth of goods that he took over, and thereupon charged him with that difference. The uncollected book accounts are

left to Porter, and a bill of $69 for flour, on which he has been sued by a third party (Silbert), who claims to have sold him flour for use in the Karp business, is also disregarded. The apparent excess of cash taken in over that paid out, amounting to $6.30, is also left with the assignee.

The assignee's explanation was, as I understand the facts stated on the second page of the certificate, that this $293.50 represented, as to $116.03, cash and book accounts resulting from his operation of the business, and as to the balance, $177.47, an operating loss during the eleven days; in other words, that he obtained the gross cash and credit intake of the business above stated by the expenditures which have been scheduled and allowed, plus $293.50 worth of flour received by him from Karp, which was used up in carrying on the business.

[3] The filing of the petition was notice that the petitioning creditors objected to the common-law assignment and opposed liquidation of the bankrupt's affairs under it. The Bankruptcy Act gave them the right to have the assignment superseded and set aside. Re Slomka, 122 Fed. 630, 58 C. C. A. 322 (C. C. A. 2d Circuit). Under such circumstances, I think that the assignee must be held to have acted at his peril in carrying on the bankrupt's business, and eventually selling it out and winding it up (see Bryan v. Bernheimer, ubi supra), and in doing anything beyond what was necessary to preserve the property which was in his hands when the petition was filed (Re Hays, 181 Fed. 674, 104 C. C. A. 656, 24 Am. Bankr. Rep. 691 [C. C. A. 6th Circuit]). More than that can be safely done after the bankruptcy proceedings are instituted only by a receiver acting under the authority of the bankruptcy court.

[4] As the cases above cited show, however, common-law assignments are by no means outlawed by the Bankruptcy Act. They are generally made with the object of holding a debtor's business together pending an effort to settle his affairs without bankruptcy; they usually authorize and contemplate a continuance of the business while the effort is being made. Where the creditors allow the assignee to continue in possession of the property and to operate the business, he is not necessarily to be charged with a resulting loss, whether occurring before or after the filing of the petition in bankruptcy. As the assignment under which he acts is voidable, the burden is certainly upon him to satisfy the court that he acted, after the institution of the bankruptcy proceedings, not only in good faith, but with sound business judgment under the circumstances; in other words, that the court, if seasonably applied to, would have authorized him to do what he did. Bryan v. Bernheimer, ubi supra. It may well be that the assignee has greater freedom of action and is held to a less strict accountability as to his conduct before the bankruptcy petition is filed, both because until that is done he cannot be sure the assignment will be set aside and is forced to act on his own responsibility, and also because the filing of the petition gives certain inchoate rights over the respondent's property, which become fixed by the adjudication. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

If the assignee desires to raise this point, however, it devolves upon

him to divide his account and present it in such shape as to show the necessary facts. That was not done in this case. The accounts submitted by the assignee do not show what part of the flour was used, or what part of the accounts receivable was obtained, prior to the filing of the bankruptcy petition. There is no way of telling how much of the alleged loss was incurred before that time, and how much afterwards. Nor is there any finding by the referee that it was good judgment on the part of the assignee to continue the business as he did. Without these facts, and without such a finding, the loss resulting from the operation of the business after the filing of the petition in bankruptcy certainly ought not to be allowed; and it does not appear that the whole loss was not of that character.

Upon the record before me, no error appears to have been made by the learned referee, and his order must be affirmed.

CITY OF MEMPHIS, TENN., v. BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DIST. et al.

(District Court, W. D. Tennessee, W. D. January 15, 1916.)

COURTS ⊜270—UNITED STATES COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT—"ONLY."

Judicial Code (Act March 3, 1911, c. 231) § 51, 36 Stat. 1101 (Comp. St. 1913, § 1033) provides that with certain exceptions no civil suit shall be brought against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but that, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant. *Held* that, where a cause of action arising under the Constitution and laws of the United States is alleged, an allegation of diversity of citizenship does not permit the bringing of the action in a district other than that of defendant's residence, as the exception to the rule that actions must be brought in the district of defendant's residence is restricted to cases where the jurisdiction is founded "only" on diversity of citizenship, and "only" means alone; of or by itself; without anything more; or exclusive.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. ⊜270.

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

At Law. Action by the City of Memphis, Tenn., against the Board of Directors of St. Francis Levee District and others. On plea in abatement by the defendant named. Plea held sufficient, and case dismissed, as to such defendant.

Barnette E. Moses and Charles M. Bryan, both of Memphis, Tenn., for plaintiff.

Allen Hughes and J. W. Canada, both of Memphis, Tenn., for defendants.

McCALL, District Judge. This case is now before me upon the plea in abatement of the board of directors of the St. Francis levee

district. Among other things, it is averred that said levee board is a corporation, created under the laws of the state of Arkansas; that it is a citizen of that state, and is not subject to be sued in the state of Tennessee, or in any other state except the state of Arkansas, and in the district whereof it is an inhabitant; and that this court has no jurisdiction in the premises. Whether this court has jurisdiction, provided there has been a proper service (which is now assumed, but not decided), depends upon the jurisdictional facts alleged.

An examination of the declaration discloses that there are two jurisdictional grounds relied upon, to wit: First, a diversity of citizenship; second, that the cause of action arises under the Constitution and laws of the United States. That the requisite diversity of citizenship exists is admitted. This would ordinarily give a federal court jurisdiction, in a case where the requisite amount was involved; but, as has been seen, there is coupled with it the further jurisdictional fact that the action arises under the Constitution and laws of the United States.

It is insisted by the defendant the levee board that it cannot be sued outside of the state of Arkansas, and the district whereof it is an inhabitant, without its consent, except in a case wherein the jurisdiction is founded *only* on the fact that the action is between citizens of different states. The question presented is: Has a federal court jurisdiction in a case, brought in a district other than that whereof the defendant is an inhabitant, where it appears that jurisdiction is not founded *only* on diversity of citizenship?

Section 51 of the federal Judicial Code provides that, excepting the six succeeding sections thereto (which are not material here):

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

The defendant relies upon In re Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402. In that case the same jurisdictional grounds were alleged as are here, to wit, diversity of citizenship and an action arising under the laws of the United States. Although that was a suit between citizens of different states, it appears that it was between a citizen of one state against a citizen of a second state, brought in a federal court of a third state. The objection being raised in limine to the jurisdiction, for want of requisite diversity of citizenship, and also because the defendant could not be sued outside the district whereof it was an inhabitant, it was held that the court was without jurisdiction—as to the first ground, under the well-settled rule (Interior Construction Co. v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401) that a federal court of one state is without jurisdiction in a case, wherein both the plaintiff and the defendant are citizens of different states, but neither a citizen of the state wherein the suit was brought, when the question of jurisdiction is seasonably raised; as to the second ground, by virtue of section 1 of the act

of August 13, 1888 (18 Stat. 470, c. 866), now section 51 of the Judicial Code.

In discussing the Keasbey Case, supra, after quoting from section 1 of the act of August 13, 1888, the court said:

"The last clause is added by way of proviso to the next preceding clause, which, in its present form, forbids any suit to be brought in any other district than that of which the defendant is an inhabitant; and the effect is that, in every suit between citizens of the United States, when the jurisdiction is founded upon any of the grounds mentioned in this section, other than the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant. * * * And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant, or a resident of a state in which it has not been incorporated, and, consequently, that a corporation incorporated in a state of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a Circuit Court of the United States held in another state, even if the corporation has a usual place of business in that state. McCormick Co. v. Walthers, 134 U. S. 41, 43 [10 Sup. Ct. 485, 33 L. Ed. 833]; Shaw v. Quincy Mining Co., 145 U. S. 444 [12 Sup. Ct. 935, 36 L. Ed. 768]; Southern Pacific Co. v. Denton, 146 U. S. 202 [13 Sup. Ct. 44, 36 L. Ed. 942]. Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of different states. But the reasoning on which they proceeded is equally applicable to the other class, mentioned in the same section, of suits arising under the Constitution, laws, or treaties of the United States; and the only difference is that, by the very terms of the statute, a suit of this class is to be brought in the district of which the defendant is an inhabitant, and cannot, without the consent of the defendant, be brought in any other district, even in one of which the plaintiff is an inhabitant. * * * The suit comes within the terms of that act, both as arising under a law of the United States, and as being between citizens of different states. In either aspect, by the provisions of the same act, the defendant cannot be compelled to answer in a district of which neither the defendant nor the plaintiff is an inhabitant."

Thus it appears that the Keasbey Case is not on all fours with the case at bar. None such were cited by counsel, nor have we been able to find an adjudication of the precise question here considered.

Treating the last clause of section 51 of the Judicial Code, which provides that, "where the jurisdiction is founded *only* on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," as a proviso to the next preceding clause, as we must under the Keasbey Case, supra, it would seem to make an exception to the class of cases which must be brought in the district whereof the defendant is an inhabitant. That exception is restricted to cases where the jurisdiction is founded *only* on the requisite diversity of citizenship.

Congress had some purpose in using the word "only" in the last clause of said section 51. It is reasonably clear to my mind that it was to restrict bringing suits in the United States court to the district whereof the defendant was an inhabitant, with the one exception mentioned in the section. If this purpose is to be carried out, the word "only" in said last clause must be construed, as we think, synonymous with the word "alone"—that is, "of or by itself," "without anything more," "exclusive"; and, so considered, it would seem that, when it is sought to found jurisdiction on diversity of

citizenship and also upon another jurisdictional fact, the case would not fall within the exception made in the last clause of said section.

One of the causes of action alleged in this case is that the levee board has deprived the plaintiff of a right guaranteed to it by the Constitution of the United States. This allegation would give a federal court jurisdiction, if the action were brought in the district whereof the defendant is an inhabitant, or in the district whereof the plaintiff is an inhabitant, with the consent of the defendant.

The diversity of citizenship alleged is not a cause of action, but is the allegation on which it is sought to invoke the jurisdiction of the court, and thus to compel the levee board to answer in a district other than the one of which it is an inhabitant. Such a course, if permitted, would result in nullifying, or at least evading, the plain provisions of section 51 of the Judicial Code. Hence we think a federal court, in a state or district whereof a defendant is not an inhabitant, is without jurisdiction in a case wherein two grounds of jurisdiction are alleged, one of which is a diversity of citizenship, if the objection is seasonably made.

It follows that the plea in abatement of the levee board, in so far as it is based upon the ground now under consideration, is held to be sufficient, and the court is without jurisdiction. An order will be entered dismissing the case as to the levee board, with costs.

N. W. HALSEY & CO. et al. v. MERRICK, Bank Com'r, et al.

WEIS FIBER CONTAINER CORP. v. SAME.

(District Court, E. D. Michigan. December 30, 1915.)

Nos. 131, 132.

1. COURTS ⊂=489—FEDERAL COURTS—JURISDICTION.
A federal court has jurisdiction of a suit to enjoin the enforcement of a state statute which is in violation of the federal Constitution.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 404, 1324–1330, 1333–1341, 1372–1374; Dec. Dig. ⊂=489.]

2. COMMERCE ⊂=60—INTERSTATE COMMERCE—INTERFERENCE BY STATE.
The Michigan "Blue Sky Law" of 1915 (P. A. Mich. 1915, No. 46), which prohibits the sale in the state of the stock or securities of any investment company until it shall have obtained the approval of the State Securities Commission, which is authorized to make any examination it may see fit of the business and property of the company at the company's expense, and to withhold its approval if it finds that the proposed plan of business of the company, or its proposed contracts, stock, bonds, or other securities, are fraudulent, or are of such a nature that their sale "would in the opinion of said commission work a fraud upon the purchaser," *held* void, as imposing a direct burden upon interstate commerce.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 91–95; Dec. Dig. ⊂=60.]

In Equity. Suits by N. W. Halsey & Co. and others and by the Weis Fiber Container Corporation against Frank W. Merrick, Bank Commissioner, John W. Haarer, Treasurer, and Grant Fellows, At-

torney General, composing the Michigan Securities Commission. On motions for preliminary injunction to enjoin enforcement of Michigan Blue Sky Law of 1915. Motion granted.

Beaumont, Smith & Harris, of Detroit, Mich., and Robert R. Reed, of New York City, for plaintiffs.

Grant Fellows, Atty. Gen., of Lansing, Mich., for defendants.

Before DENISON, Circuit Judge, and SESSIONS and TUTTLE, District Judges, pursuant to section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1913, § 1243]).

PER CURIAM. Two years ago, the same three judges now sitting considered the Michigan "Blue Sky Law" of 1913, and for the reasons stated in Alabama Co. v. Doyle (D. C.) 210 Fed. 173, held it invalid. No appeal was taken, but the Legislature of 1915 passed the substitute law which is now before us (Act No. 46, P. A. 1915). By the two pending bills and the various interventions, injunctions against the law's enforcement are sought by an issuing corporation and by corporate, partnership, and individual dealers, all citizens of other states, and thus the law's validity is challenged by every kind of nonresident interest.

[1] We do not doubt the jurisdiction of the court. See Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Traux v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. —; Phœnix Co. v. Geary, 239 U. S. 277, 36 Sup. Ct. 45, 60 L. Ed. —; Michigan v. Baird, 173 Mich. 655, 139 N. W. 1030; Nolen v. Riechman (D. C. Tenn.) 225 Fed. 813.

[2] It is not important to go over the same ground as before. Our conclusions then announced have been more or less completely approved—in the Eighth Circuit, by Judges Smith, McPherson, and Pollock (Compton v. Allen [D. C.] 216 Fed. 537); in the Fourth, by Judges Pritchard and Dayton, Judge Woods dissenting, but not on these points (Bracey v. Darst [D. C.] 218 Fed. 482); and in the Eighth again, by Judges Sanborn, T. C. Munger, and Elliott (Sioux Falls Co. v. Caldwell, Attorney General of South Dakota, Nov. 18, 1915, without written opinion).

The only question now open is whether the differences between the laws of 1913 and 1915 justify any different result as to the latter. We think not, because we find no substantial changes in those respects which were held to be fatal. Some minor details have been corrected, but the new law, like the old, impresses upon interstate commerce a burden which is direct and which is beyond the limits of the police power.

The 1913 law suspended all deals for 30 days, and then, lacking actual objection, automatically withdrew legal objection. The new law forbids all dealings until after affirmative approval by the Commission. This approval would not, normally, be obtainable for several days, and it may be indefinitely withheld, without objection made or reason given, but at the mere convenience of the Commission. The change in the law has not diminished this burden, in directness or in weight.

Under the 1913 act sales were to be forbidden, if the Commission finds that the plan of business is unfair, or that the securities (a) are fraudulent, (b) will, in all probability, work a fraud upon the purchaser, or (c) will, in all probability, result in loss to the purchaser. The 1915 act in terms seems to eliminate the tests of unfairness and of probable loss, but in fact provides for disapproval, if the Commission finds:

"That the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds or other securities are fraudulent, or are of such a nature that the sale of such contracts, stocks, bonds or other securities would, in the opinion of said Commission, work a fraud upon the purchaser." Section 9.

Has there been any substantial change, or has the omission of the words "unfair" and "loss" left the statute unchanged in true intent and meaning? Obviously, the statute is not content to rest the Commission's condemnation alone on the fraudulent character of plan or securities. They must also meet the additional test whether, "in the opinion of the Commission," the sale of the securities would "work a fraud upon the purchaser." To "work a fraud upon the purchaser" must be something different from being "fraudulent"; and the clause would seem to be difficult of interpretation, save for the aid given by the history of the statute and by an additional section which first appears in the new law. This is section 8, copied in the margin.[1] It provides in substance that the Commission may, by its own experts and physical examination, determine the value of the property involved, and may prohibit the sale, unless all securities in excess of the value so determined are surrendered to the Commission—all of which plainly

[1] Sec. 8. The said Commission shall have power to demand from any investment company seeking to come under the provisions of this act any further information other than such investment company is required to furnish under the provisions of this act which shall be necessary to the end that the Commission may be put in possession of all facts and information necessary to qualify it to properly pass upon all questions that may come before it. It may make or have made under its direction a detailed examination of such investment company's property, business and affairs, which examination shall be at the expense of such investment company. It may cause an appraisal to be made, at the expense of said investment company, of the property of said investment company, including the value of patents, good will, promotion and tangible assets, and it may fix the amount of stocks, bonds and securities that shall be issued by any corporation, foreign or domestic, in payment for property, patents, good will, promotion and intangible assets at the value it shall find the same to be worth and may require that such stocks, and securities so issued for such property, patents, good will, promotion and intangible assets shall be deposited in escrow under such terms as said Commission may prescribe. And said Commission may withhold its license to sell such stocks, bonds and securities if such corporation has issued stocks, bonds and securities in payment for property, patents, good will, promotion and intangible assets in excess of their value as found by said commission or if said stocks, bonds and securities are not deposited in escrow according to the terms fixed by such Commission until such stocks, bonds and securities issued in payment for property, patents, good will, promotion and intangible assets in excess of the value so found by said Commission have been surrendered to such corporation and canceled by it, and until said stock has been deposited in escrow under the terms prescribed by said Commission.

means that the Commission is, directly or indirectly, to fix the price at which securities may be sold. When this provision is read in connection with the general rule of prohibition in section 9, it is clear enough that "in the opinion of said Commission work a fraud upon the purchaser" means "in the opinion of said Commission will in all probability result in loss to the purchaser," and no real change in the meaning has been accomplished.

The burden of examination imposed by section 8 need only be noticed to be appreciated. There is no limit to either the time which may be consumed or the amount of expense which may be imposed; and from the whole statute the conclusion that interstate dealings in legitimate securities is forbidden, save at the practically unregulated discretion of an administrative board, seems to us entirely clear. The fees to be paid, the delays imposed, and the large, often very large, expense involved in furnishing information and conducting examinations, amount to a practical prohibition of all small dealings, and they emphasize the directness and extent of the restrictions placed on all interstate commerce in these securities.

Several serious objections to the validity of the law are urged in addition to those passed upon in our former opinion; but it is unnecessary to consider them. The preliminary injunctions prayed for should issue; but each complainant or intervener, before an injunction may be issued for his benefit, must give a bond to the state, conditioned that, in case the law should ultimately be held valid, he will pay all fees and charges required by the act. The penalty and the detailed form of all such bonds shall be as from time to time determined by the judge of this district.

UNITED STATES v. BREYMANN et al.

(District Court, D. Massachusetts. October 26, 1915.)

No. 427.

1. UNITED STATES ⟸67—CONTRACTORS' BONDS—LIABILITY.

A dredging contract with the United States required the contractor to dredge to a depth of 35 feet, entitled him to be paid for material dredged to a depth of 36 feet, provided that for material taken from below that depth he should not be paid, and specified the manner of making deductions for dredging below that depth, but did not forbid dredging below such depth. It expressly gave the United States the right to recover from the contractor in certain cases, but contained no such provision in regard to possible overpayments. *Held*, that neither overdredging nor a failure to repay payments made by mistake for dredging done below a depth of 36 feet constituted a breach of the contract, within a bond conditioned for the performance by the contractor of all covenants, conditions, and agreements agreed to be performed by him, and while the United States might have a claim against the contractor in the nature of an action for money had and received, it had no cause of action on the bond.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⟸67.]

2. UNITED STATES ⟸67—CONTRACTOR'S BONDS—LIABILITY.

Sums expended by the United States for inspection and supervision, after the time when by the terms of a contract the contractor was to have

completed the work, were caused by the contractor's breach of the contract, and were recoverable on a bond conditioned for performance of the contract by the contractor.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⊂⊃67.]

3. BONDS ⊂⊃124—ACTIONS—DECLARATION—REQUISITES AND SUFFICIENCY.

Rev. Laws Mass. c. 173, § 6, cl. 11, provides relative to declarations that the condition of a bond or other conditional obligation, contract, or grant declared on shall be set forth, that the breaches relied on shall be assigned, and that the performance of conditions precedent to the right of the plaintiff to maintain his action shall be averred, or that his reason for nonperformance thereof shall be stated. *Held* that, in an action on a bond, the breaches relied upon should have been assigned and so separated that it would be possible to make a proper order upon a demurrer as to each.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 98, 157–179; Dec. Dig. ⊂⊃124.]

Action on bond by the United States against George H. Breymann and others. On demurrer to the declaration. Demurrer sustained.

Edward E. Blodgett, of Boston, Mass., for defendant Breymann.

Charles F. Choate, Jr., of Boston, Mass., for defendants Shaw and Wilcox.

MORTON, District Judge. [1] This is an action by the United States upon a bond made by the defendants to it, conditioned, so far as it is now material, to secure the performance by Breymann of "all and singular the covenants, conditions and agreements in and by said contract agreed and covenanted by said George H. Breymann to be observed and performed according to the true intent and meaning of the said contract." The defendants have demurred, and the question is whether the declaration states a cause of action on the bond.

The contract referred to was for dredging in Boston Harbor; and the work under it extended over a period of seven years. Until one-half the work was completed, Breymann was paid each month for only 90 per cent. of the work done during the preceding month, the United States reserving 10 per cent. against the final completion of the contract. (Specifications, clause 30.) After such completion, a final inspection and survey was made, and it was discovered, according to the allegations of the declaration, that Breymann had overdredged to a very large amount and—construing the declaration according to the plaintiff's contention—had been paid for such overdredging. By the terms of the contract overdredging was not to be paid for. The payments made to Breymann for it largely exceeded the amount reserved by the United States; and he was called upon to repay such a sum as, with the reserved amount, would equal the payments which had been made to him for overdredging. Upon his refusal to do so, this action was brought upon the bond.

As the obligation under the bond is, in substance, that Breymann should perform his contract, the plaintiff must establish that Breymann's refusal to refund overpayments was a breach of the contract.

That the United States may have a claim against him in the nature of an action for money had and received to recover payments made by it under a mistake of fact is not sufficient to entitle it to maintain action upon the bond. There is no clause in the contract by which Breymann expressly agreed to repay overpayments, or to repay such sum, if any, as might be found due from him upon the final accounting under the contract, which, upon this point, says only:

"Deductions for dredging to a depth in excess of thirty-six (36) feet except as provided in paragraph 38, will be made at the rate of 1.2 cubic yards as measured in scows for every cubic yard estimated in situ from survey after dredging."

No fraud or misconduct on Breymann's part in obtaining overpayments is alleged. Indeed, it is not charged that Breymann knew he was receiving money to which he was not entitled, nor is it stated that, in order to obtain the payments, Breymann made any assertion or representation that the material for which he was being paid had been taken from above the 36-foot line.

The contentions on the part of the United States are: (1) That Breymann had no right to go below 36 feet and broke the contract by doing so, that the overpayments were a natural result of that breach, and that the defendants, sureties on his bond, are therefore liable under it for the overpayments, as damages sustained by the United States through Breymann's breach of contract; and (2) that the right of the United States to deduct for overdredging expressly given in the contract implies an actual agreement by the contractor to repay sums received by him for overdredging.

Disregarding its provisions as to ledges, which do not figure in this controversy, the contract obliged Breymann to dredge to a depth of 35 feet, entitled him to be paid for material dredged to a depth of 36 feet, and provided that for material taken from below that depth he should not be paid. There is no clause forbidding Breymann from dredging below 36 feet; and I do not think that any such prohibition can fairly be read into the contract. The overdredging did not, therefore, constitute a breach of the contract, and the contention based upon that assumption fails.

The contract itself was drawn by the United States; it is exact and stringent in its provisions. It expressly gave the United States "the right to recover from the" contractor in certain events. (Contract, clause 4.) The absence of such a provision in reference to possible overpayments is not without significance. The plaintiff had inspectors on the work. (Spec. Cl. 49.) It could, before making payment, have determined whether there had been overdredging. It did not do so, supposing, no doubt, that the reserved sums would be sufficient to meet any deductions on that account. It is one thing to guarantee performance of a contract by a contractor; it is quite a different thing to guarantee that he will refund money paid to him by mistake, years after the receipt of such money and the completion of the work. I do not think that the right to deduct reserved in the contract can, as against sureties on the bond to secure performance of the contract, fairly be enlarged into an agreement by the contractor to repay. His

failure to do so did not, therefore, constitute a breach either of his contract or of the bond.

[2] The declaration also seeks to recover sums expended by the United States for inspection and supervision after the time when, by the terms of the contract, Breymann was to have completed the work. Such expenses were caused by the contractor's breach of the contract. So far as the declaration seeks to recover them, the defendants concede that it is not demurrable.

[3] The declaration is informal, in that the alleged breaches of the bond are not assigned (Rev. Laws Mass. c. 173, § 6, cl. 11); and this informality is one of the grounds of demurrer. The breaches relied upon should be assigned and so separated that it will be possible to make a proper order upon the demurrer as to each. The present order will therefore be:

Demurrer sustained, with leave to the plaintiff to amend for the purpose of assigning breaches of the bond, and so separating the claims made in the declaration that a proper order as to each can be made on the demurrer.

WOLCOTT v. NATIONAL ELECTRIC SIGNALING CO.

(District Court, D. Massachusetts. October 20, 1915.)

No. 374.

1. INJUNCTION ⇐118—ENJOINING ACTION AT LAW—PLEADING.
A contract was made between F. and W. on the one side, and the Signaling Company on the other, whereby the company agreed to pay F. and W. $300,000 out of profits and to do certain other specified things. F., alleging that he acted under W.'s consent, modified this contract by a subsequent agreement with the Signaling Company, under which the rights formerly secured to F. and W. ran to F. alone. F. brought suit on the modified contract. W. filed this bill to enjoin prosecution of that suit, upon the ground that W. never consented to the modification of the contract. On motion to dismiss, *held*, that a cause of action was stated.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223–242; Dec. Dig. ⇐118.]

2. INJUNCTION ⇐26—ENJOINING PROCEEDINGS AT LAW—JURISDICTION.
F. and W. were joint parties to a contract, and it had been held that any claim under the contract must be made by both jointly. As claimed by W., F., without W.'s consent, agreed to a modification of the contract, and without his consent brought an action at law on the modified contract, and W. sued to enjoin the further prosecution of such action by F. *Held* that, as any claim under the original contract must be made jointly, anything which would defeat an action thereon by F. would defeat an action altogether, and a judgment in his favor on the modified contract would bar any action on the original contract, and W.'s rights were thus involved in the pending action, and hence W.'s petition for an injunction involved a settlement of rights between joint tenants or joint owners of property and was within the jurisdiction of equity.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24–49, 54–61; Dec. Dig. ⇐26.]

In Equity. Suit by Darwin S. Wolcott against the National Electric Signaling Company, in which R. A. Fessenden intervened. On motion to dismiss petition for injunction. Motion denied.

William G. Thompson, of Boston, Mass., for plaintiff.
Browne & Woodworth, of Boston, Mass., for intervener.

MORTON, District Judge. The original bill of complaint in this case was brought by Wolcott to secure the appointment of receivers for the respondent; and receivers were duly appointed. Fessenden intervened and became a party to the suit.

The present questions arise on an intervening petition by Wolcott which seeks to have Fessenden enjoined from further prosecuting an action at law brought by him in this court against the respondent company, and from bringing any other action against said company based upon certain contracts with it in which Wolcott claims an interest; it also seeks to have the rights of the parties under said contracts determined. Fessenden has moved to dismiss the petition upon grounds which amount to a general demurrer for lack of equity and an assertion of laches.

The business transactions on which the petition is based are the same as those involved in National Electric Signaling Co. v. Fessenden, and have been fully stated by the Court of Appeals in its opinion in that case. 207 Fed. 915, 125 C. C. A. 363. It is not necessary to restate them here, and I shall only refer to those allegations in the petition which seem to me significant on the questions raised by the motion.

The petition alleges, in substance, that Fessenden and Wolcott were jointly interested in a contract whereby the National Electric Signaling Company was to pay them $300,000 out of its first profits; that subsequently Fessenden, without Wolcott's knowledge or consent, and without right to do so, attempted, by an agreement between him and certain persons, to surrender his and Wolcott's rights under said contract, and to substitute therefor certain other rights of less value, enforceable by himself alone; that without Wolcott's knowledge or consent Fessenden brought the action at law before referred to against the company on said modified contract; that Wolcott is not and cannot of right become a party to said suit; that it is based ultimately on the contract to which Wolcott was a party, is unwarranted, and is injurious to Wolcott's interests; that Fessenden's allegations in that action that Wolcott consented to the modification of the original contract [1] are untrue; that his further allegations that he is suing for the benefit of Wolcott as well as himself are unauthorized and untrue; that the only contract in which Fessenden and Wolcott and the company are interested is that first above referred to; that no action can be brought upon it without Wolcott's consent and participation; and that Fessenden has no right to prosecute an action on it, nor on the alleged modification of it, under the circumstances stated.

The petition also alleged that many different suits are pending and others will be necessary to determine the rights of the parties in the premises, and that multiplicity of actions will be avoided by this proceeding.

[1] There was a contract before this one, but as to the present questions it may be disregarded.

[1, 2] On this motion the allegations in the petition are to be taken as true. Fessenden's position, briefly stated, is that Wolcott assented to the abrogation of the original contract and the substitution therefor of the modified contract; that Fessenden is exercising a legal right in bringing action on the modified contract as he understands it to be; that he cannot recover without proving Wolcott's assent to the modified contract; that if he shall obtain judgment thereon Wolcott's rights will not be prejudiced, because it will still be open to Wolcott to sue the company upon the original contract, and his right to do so will not be affected or impaired by a judgment in Fessenden's favor in his pending action at law. In the brief for Fessenden on this motion it is said:

"If Wolcott subsequently sues to enforce rights under Exhibit B [the original contract], and in that case Exhibit C [the modified contract], together with Fessenden's judgment is set up as a defense against him, that defense could be maintained only if Fessenden had authority from Wolcott to make Exhibit C and to enforce it for his benefit. The issue of that authority must be tried out again as between Wolcott and the company, in order to establish this defense. Unless Fessenden's authority is shown, the defense would not be maintained. The chance that there might be inconsistent results in the two cases upon that issue is immaterial. Such a situation always arises when the same issue is tried at separate trials between several plaintiffs and one defendant. Conceivably there may be as many different results as there are separate trials."

The Court of Appeals expressly held, however, that any claim under the original contract must be made by Fessenden and Wolcott jointly.

"We are also of the opinion that the court erred in refusing a request for instruction that, as Wolcott was jointly interested in the sum of $300,000, any claim for enforcement could be made only by Wolcott and the plaintiff jointly." Brown, J., 207 Fed. 922, 125 C. C. A. 363.

If so, anything which would bar action thereon by Fessenden would suffice to defeat action on it altogether. A judgment in his favor in his pending suit upon the alleged modified contract would bar any subsequent action by him upon the original contract, and would therefore operate to defeat all action thereon. Cowley v. Patch, Executor, 120 Mass. 137; Osborn v. Martha's Vineyard Ry. Co., 140 Mass. 549, 5 N. E. 486; Spencer v. Dearth, 43 Vt. 98, 115. Wolcott's rights are thus involved in Fessenden's action at law. Fessenden's acts in attempting to modify the contract and in bringing suit are, upon the allegations of the petition, breaches of his duty towards his joint promisee, Wolcott. The settlement of rights between joint tenants or joint owners of property is a familiar subject-matter of equity jurisdiction. Such rights appear to me to be involved in this petition.

"When two or more persons have a common interest in a security, equity will not allow one to appropriate it exclusively to himself, or to impair its worth to the others. Community of interest involves mutual obligation." Strong, J., Jackson v. Ludeling, 21 Wall. 616, at 620, 22 L. Ed. 492.

See Turner v. Sawyer, 150 U. S. 578, 586, 14 Sup. Ct. 192, 37 L. Ed. 1189; Ballou v. Wood, 8 Cush. 48, 52; Roy v. Henderson, 132 Ala. 175, 31 South. 457.

It cannot be ruled as a matter of law that upon the allegations of the petition the petitioner has been guilty of laches. The other grounds alleged in the motion to dismiss seem to me not to be well founded, nor to require discussion. No objection is made by any party that the matters and issues involved are not properly presented by this intervening petition. It is unnecessary to pass upon the other points urged in support of the petition.

Motion to dismiss denied.

PROVIDENCE BLDG. CO. v. ATLANTIC NAT. BANK et al.

(District Court, D. Rhode Island. January 17, 1916.)

Law No. 1232.

1. LANDLORD AND TENANT ⟸182—RE-ENTRY—COVENANTS TO INDEMNIFY.
A lease provided that, upon a re-entry by the lessor before the expiration of the term pursuant to provisions therefor, the lessee would indemnify the lessor against all loss of rent or other payments which it might incur by reason of such termination during the residue of the term. *Held*, that this contract was entire and not apportionable, and where the premises had not been relet for the unexpired term at a lower rent the lessor could not recover for each month which had elapsed since the re-entry, as the lessor might relet at an advanced rent that would more than indemnify him for any period during which the premises were unoccupied, and whether there would be any loss was merely a contingency.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 732–735; Dec. Dig. ⟸182.]

2. LANDLORD AND TENANT ⟸182—RE-ENTRY BY LESSOR—DAMAGES.
Where a lease was terminated and the future term cut off by the lessor as authorized by the lease, damages caused by the premises remaining unoccupied could not be recovered as for an anticipatory breach of the lease, or a breach of contract for the entire term of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 732–735; Dec. Dig. ⟸182.]

3. COURTS ⟸294—UNITED STATES COURTS—JURISDICTION—ACTIONS UNDER BANKING STATUTES.
Where a suit against a national bank and its receiver upon the bank's covenant in a lease to indemnify the lessor from any loss of rent in case of the lessor's re-entry was one to wind up the affairs of the bank, a federal court had jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 836; Dec. Dig. ⟸294.]

In Equity. Suit by the Providence Building Company against the Atlantic National Bank and another. On defendants' demurrers to the declaration, and on plaintiff's motion to remand. Demurrers sustained, and motion denied.

Edwards & Angell, of Providence, R. I., for plaintiff.
Mumford, Huddy & Emerson, of Providence, R. I., for defendants.

BROWN, District Judge. [1] Upon re-entry by the lessor before the expiration of the full term of the lease, pursuant to provisions for

such entry, and upon termination of the lease by such entry, the lessor is entitled to the benefit of the following covenant:

"The lessee for itself and for its successors and assigns covenants that in case of such termination it or they will indemnify the lessor and its assigns against all loss of rent or other payments which it or they may incur by reason of such termination during the residue of the term aforesaid. * * *"

The plaintiff contends that this covenant must be construed as a promise to indemnify each month, and that the plaintiff has a right of action for each month which has elapsed since the termination of the lease up to the date of the writ.

I am unable to give such construction to the covenant. The contract is to indemnify for loss of rent during the residue of the term. Whether there will be such loss is merely a contingency. The lessor may occupy the premises himself, or may relet at an advanced rent that will more than indemnify him for any period during which the premises were unoccupied. The contract is entire, and in its nature not apportionable.

In Woodbury v. Sparrell Print, 187 Mass. 426, 73 N. E. 547, the court considered the following provision:

"And, in case of such determination, the lessee shall be liable to the lessor for all loss and damage sustained by the lessors on account of the premises remaining unleased, or being let for the remainder of the term for a less rent than that herein reserved."

The opinion by Knowlton, C. J., states:

"The question is: When is the lessee to pay the sums referred to? The liability is independent of the obligation under the covenant to pay the rent during the term of the lease. No rent accrues after the lease is determined. The lessor has the premises, and presumably uses them or lets them to another tenant. They are liable, however, to remain unleased and unused for a time, but ordinarily not for a very long time. The lessee agrees to pay for the loss that may come from this liability. He is to pay it once for all. He does not agree to pay it in instalments. Much less does he agree to pay rent as rent, according to the covenants, for the term previously ended by the lessor's entry. We can discover nothing to show that he is to make this payment until the premises cease to remain unleased. The liability rests upon the agreement contained in the lease, and as to this there is no breach of contract on the part of the lessee, until the time for payment arrives.

"In this case the premises remained unleased until after the commencement of the suit, and the defendants had not then become liable for this loss. It follows that the decree must be reversed, and the exceptions touching this subject be sustained."

See, also, Tiffany, Landlord and Tenant, pp. 1177, 1178.

We may pass the inquiry whether, under the covenant in the case at bar, the lessor might, without express provision therefor, relet for the unexpired term of the lease, and if at a lower rent thus at once liquidate the amount of his loss, since each count in effect alleges that this has not been done. The term of the lease is 10 years, beginning January 1, 1912, and terminating December 31, 1921. It was terminated by entry in April, May, or December, 1913.

Whether there will be any loss, and, if a loss, its amount, are in the nature of the thing too conjectural to permit a present liquidation

of the liability. There is simply a contingency that there may be a claim.

[2] The doctrine of anticipatory breach of contract has, of course, no application to this covenant for indemnity; nor is there here any question of anticipatory breach of the lease, nor of damages for a breach of contract for the entire term of the lease; for the lease was terminated and the future term cut off by the lessor. See Wm. Filene Sons Co. v. Chas. F. Weed at al., Receivers (C. C. A. 1st Circuit, December 9, 1915) 230 Fed. 31, — C. C. A. —.

It is evident that the declaration states no cause of action for a breach of the covenant of indemnity. On the contrary, it appears both that it is uncertain that there will be such liability, and that, if liability shall arise in the future, its amount is now wholly conjectural.

The important question in the case seems to be whether the declaration states a cause of action under the covenant for indemnity against either the bank or the receiver. I am of the opinion that no count states a cause of action against either upon this covenant. I am also of the opinion that each and every count in the declaration is demurrable so far as it is based upon the covenant for indemnity.

As the date of termination of the lease is alleged differently in different counts, it may be that the plaintiff has a cause of action for rent due before the termination of the lease. It is obvious, however, that the case should not go to trial upon the present declaration.

The demurrers are sustained as to each count so far as the count is based upon the covenant for indemnity, but with liberty to the plaintiff to amend his declaration by filing, within 10 days, proper counts for rent due before the date of cancellation of the lease.

On Plaintiff's Motion to Remand.

[3] Under the decisions in International Trust Co. v. Weeks, 203 U. S. 364, 27 Sup. Ct. 69, 51 L. Ed. 224, Id. (C. C.) 116 Fed. 898, and Weeks v. International Trust Co., 125 Fed. 370, 60 C. C. A. 236, this court seems to have jurisdiction on the ground that the suit is one to wind up the affairs of the bank.

Motion to remand denied.

WAYNE COUNTY SECURITIES CO. v. HUGHITT et al.

(District Court, N. D. Illinois, E. D. May 1, 1915.)

No. 206.

1. JUDGMENT ⊜570—RES JUDICATA—JUDGMENTS OPERATIVE AS BAR—DISMISSAL.

The dismissal of an action for want of jurisdiction was not res judicata of anything, and left the parties as if no suit had ever been brought.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028–1034, 1036–1040, 1042–1045, 1165; Dec. Dig. ⊜570.]

2. ESTOPPEL ⊜68—JUDICIAL PROCEEDINGS—DEFENSES INCONSISTENT WITH PREVIOUS POSITION.

In an action on a foreign judgment and on the original cause of action, defendants' motion to strike out all evidence as to the original cause of

action, on the ground that such cause of action was merged in the judgment, did not preclude defendants from showing that the judgment was invalid.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165–169; Dec. Dig. ⇐68.]

3. ESTOPPEL ⇐68—ENJOINING DEFENSES AT LAW—ESTOPPEL.

In an action on a foreign judgment and on the original cause of action, the evidence in support of the original cause of action was stricken on defendants' motion, on the ground that such cause of action was merged in the judgment, and the action was then dismissed for want of jurisdiction. *Held*, that in a suit for an injunction defendants could not be enjoined from challenging the validity of the judgment in an action thereafter to be brought thereon on the ground that they had elected to affirm the validity of such judgment, there being no element of estoppel, as they forced no cause of action on plaintiff, but merely asked for a ruling of the court on the legal effect of plaintiff's own conduct.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165–169; Dec. Dig. ⇐68.]

In Equity. Suit by the Wayne County Securities Company against Marvin Hughitt, Jr., and others, partners, doing business as the Chicago Car Lumber Company. Bill dismissed, and case transferred on motion to the law side of the court.

Otto Gresham, Jennings & Fifer, and Orpheus A. Harding, all of Chicago, Ill., for plaintiff.

Harry A. Biossat, of Chicago, Ill., for defendants.

CARPENTER, District Judge. Bill filed for an injunction. The record shows that the plaintiff recovered a judgment in the circuit court of Edmondson county, Ky., at the March term, 1912, for $11,722.08. On December 7, 1912, the plaintiff brought action in the municipal court of Chicago against the defendants. In that cause the plaintiff, as it had a right to do, declared and counted both upon the original cause of action and upon the Kentucky judgment. The defendants, without challenging the jurisdiction of the municipal court, or joinder of the causes of action, joined issue thereon by filing an affidavit of merits, denying, among other things, the performance of the original contract with the plaintiff, and claiming that the Kentucky judgment was invalid because of improper service.

Afterwards, on October 18, 1915, the case was called for trial in the municipal court without a jury. Considerable oral and written testimony was adduced on behalf of the plaintiff tending to prove merits under the original contract with the defendants, upon which the judgment was secured in Kentucky. After the plaintiff had concluded its evidence on the merits, it introduced a transcript of the Kentucky judgment, and oral testimony tending to show its validity. All the evidence on plaintiff's part having been heard, except the examination of the defendants, as allowed under the Municipal Court Act (Hurd's Rev. St. 1913, c. 37), the defendants moved the court to strike out all the evidence offered on the merits of the original cause of action on the

ground that the same was merged in the Kentucky judgment, as evidenced by the transcript which had been introduced. The court did so, and thereupon the defendants moved the court to dismiss the suit for want of jurisdiction, which was done.

Plaintiff here claims that the defendants, by their conduct in the municipal court, have elected to and did affirm the validitv of the Kentucky judgment, and that in good conscienҫe and equity they ought to be enjoined from challenging that position in some appropriate action hereafter to be brought. In the opinion of the court there are two reasons why the contention of the plaintiff here must fail:

[1] First. Because, the municipal court having dismissed the cause of action for want of jurisdiction, the parties are as if no suit had ever been brought. It is not res adjudicata of anything.

[2, 3] Second. The plaintiff took its own course in modeling its pleadings in the municipal court. No motion was made by the defendants to force the plaintiff to elect on which cause of action it would proceed. When the plaintiff had finished its proof, the defendants moved to strike out the evidence on the merits as inconsistent with the existence of a valid judgment. That motion prevailed. The defendants, then, were not precluded from proceeding with their defense and showing that the judgment was in fact an invalid judgment. In other words, after all the testimony was in, the plaintiff was forced, by its original action, to elect in what manner it would proceed. It could, at the time the motion to strike was made, have withdrawn its evidence as to the judgment, had it seen fit; but clearly the defendants did not deprive themselves of making their defense on the judgment by moving to strike out all evidence on the merits. The introduction in evidence of the judgment on the part of the plaintiff indicated an election to proceed on the basis of the judgment.

Much reliance is placed by the plaintiff upon the case of Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578. That case is very different from the one now under consideration. There the party enjoined was forced to give up a motion to prevent the discharge of the bankrupt, by the insistence of the bankrupt that certain judgments recovered in California were valid judgments. The bankrupt secured his discharge, and afterwards, when an attempt was made to enforce the judgments (they being of the kind that were not discharged in bankruptcy) the defendant attempted to show them invalid, but the court held that it was inequitable for such a defense to prevail. In the present case there is no element of estoppel. The municipal court, in passing on defendants' motion, merely determined that the plaintiff by its own action had elected to proceed on the judgment, because it is well known that in such cases the contract relation is merged in the judgment. The defendants did not force the cause of action on the plaintiff; they asked for a ruling of the court on the legal effect of the plaintiff's own conduct, which certainly does not involve any element of estoppel. Moreover, as was stated at the outset, the municipal court having held that it was without jurisdiction to entertain a suit upon a foreign judgment, the cause was dismissed without prejudice, and the plaintiff may still bring its

action in a proper forum, and the defendants may still make any proper defense.

The bill will be dismissed for want of equity, at the plaintiff's costs.

NOTE.—On a subsequent day the plaintiff moved to transfer its case to the law side of the court, which was allowed.

In re HASKELL.

(District Court, D. Massachusetts. August 5, 1915.)

No. 16996.

1. PARENT AND CHILD ⟸6—RIGHT TO CHILD'S SERVICES AND EARNINGS—EVIDENCE.

The presumption is that a father is entitled to the wages of a minor child, but the presumption is easily overcome by evidence that the child has been emancipated or given the earnings in question.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 77–85; Dec. Dig. ⟸6.]

2. BANKRUPTCY ⟸331—PROOFS OF CLAIMS—PERSONS BY WHOM MADE.

Proof of a claim against a bankrupt estate for labor performed by a minor was properly made by the minor's father, where there was no evidence that the minor had been emancipated or given the earnings in question.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 520; Dec. Dig. ⟸331.]

3. BANKRUPTCY ⟸328—PROOFS OF CLAIMS—TIME FOR FILING—CORRECTION.

Where a claim against a bankrupt estate was seasonably delivered to the referee, but lacked a statement of the official character of the officer signing the jurat, and the referee therefore returned it to the creditor's attorney for correction, and it was not redelivered to the referee for about two years, the claim was properly allowed, as it was sufficient as originally filed to form the foundation for a good proof of claim by perfecting amendments, and the referee had no right to refuse to receive and file it when first tendered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. ⟸328.]

4. BANKRUPTCY ⟸330—PROOFS OF CLAIMS—SUFFICIENCY.

Where the proof of a claim against a bankrupt estate on a judgment for labor performed incorporated a copy of the judgment, which showed all facts necessary to ascertain the true character of the claim, and also made a statement as to the date of the services, it was largely for the referee to determine what further particularity of details should be required; and where neither the trustee nor other creditors were misled or hindered by lack of information as to the precise nature of the claim, the referee did not exceed his powers in treating the proof as adequate, though it was claimed that it was not properly itemized.

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

5. BANKRUPTCY ⟸348—PRIORITY OF CLAIMS—EFFECT OF JUDGMENT.

The priority given a claim for wages earned within three months by Bankr. Act July 1, 1898, c. 541, § 64, 30 Stat. 563 (Comp. St. 1913, § 9648), is not lost by reducing the claim to judgment before the institution of bankruptcy proceedings.

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

In Bankruptcy. In the matter of Elbert L. Haskell, bankrupt. On review of orders of the referee. Orders affirmed.

Edward Ellis, of Bourne, Mass., for creditor.
Charles F. M. Fuller, of Boston, Mass., pro se.

MORTON, District Judge. The questions presented by the trustee's petition for review concern orders of Mr. Referee Stetson allowing two claims for wages. The proofs were made by Emory P. Gibbs, who claims payment for labor performed by his minor son, William C. Gibbs. The first claim for $120.94 was reduced to judgment against the bankrupt before the filing of the bankruptcy petition; the second claim, for $18, is on an open account.

[1, 2] The trustee objects to both claims upon the ground that the proof should have been made by the son and not by his father. The presumption is that a father is entitled to the wages of his minor child. It is easily overcome by evidence that the child had been emancipated or had been given the earnings in question. There was, however, no such evidence in this case, nor any controversy between the father and the son. It seems to me that the proof was correctly made in the father's name. As this was the only objection to the smaller claim, the allowance thereof is affirmed.

As to the larger claim, the trustee further objects: (1) That it was not seasonably filed; (2) that it was not properly itemized; and (3) that the claim for wages had been merged in the judgment and was not entitled to priority.

[3] As to (1): The claim was seasonably delivered to the referee. At that time it lacked the statement of the official character of the officer signing the jurat. The referee returned it to the creditor's attorney for correction in that respect. It was not redelivered to the referee for about two years, nor until long after the time for filing claims had expired. The return of the proof by the referee was not requested by the creditor; it was done on the referee's own motion in order to assist the creditor in making the necessary correction. In this the case differs essentially from In re Thompson's Sons (D. C.) 123 Fed. 174, 10 Am. Bankr. Rep. 581, where the proof was "withdrawn" by the creditor. The proof as originally filed was sufficient to form the foundation for a good proof by perfecting amendments. In re Mertens, 147 Fed. 177, 77 C. C. A. 473, 16 Am. Bankr. Rep. 825 (C. C. A. N. Y.); In re Roeber, 127 Fed. 122, 62 C. C. A. 122 (C. C. A. N. Y.). The referee had no right to refuse to receive and file it when first tendered; and I do not understand that he intended to do so. He has marked the claim filed as of the later date, after the year had expired; but he reports that the claim was seasonably presented and was returned by him "for correction." It is not found that the creditor intended to abandon the claim. The referee's filing record seems to me erroneous. The claim should appear to have been filed on the date when first presented.

[4] As to (2): The proof incorporates a copy of the judgment, which shows all facts necessary to ascertain the true character of the

claim, and also makes a statement as to the date of the services. It was sufficient in form to be acted upon. Beyond that, it was largely for the referee to determine what particularity of details should be required. Neither the trustee nor other creditors seem to have been misled or hindered by lack of information as to the precise nature of the claim. The referee considered the proof adequate for the purpose in hand, and in so treating it I do not think that he exceeded his powers.

[5] As to (3): Whether the priority given to claims for wages by section 64 of the Bankruptcy Act is lost by taking judgment on the claim before the institution of bankruptcy proceedings is still unsettled. The only decision upon the point which has come to my notice, In re Anson, 101 Fed. 698, 4 Am. Bankr. Rep. 231 (Dist. Ct. Cal.), holds that priority is not lost. The tendency is also to hold, under section 17 of the act, that "liabilities for obtaining property by false pretenses" are not discharged, although reduced to judgment, and that the bankruptcy court will look behind the judgment and determine on what it was founded. Mackel v. Rochester (D. C.) 135 Fed. 904, 14 Am. Bankr. Rep. 429; Thompson v. Judy, 169 Fed. 553, 95 C. C. A. 51, 22 Am. Bankr. Rep. 154; Packer v. Whittier (law of 1867) 91 Fed. 511, 33 C. C. A. 658, 1 Am. Bankr. Rep. 621 (C. C. A. Mass.). This is also done, under somewhat broader wording in the act, as to judgments for breach of fiduciary obligations. Knott v. Putnam, 107 Fed. 907 (D. Ct. Vt.). Priority is not lost by assignment of the claim (Woodliff & Co. v. Bush, 204 U. S. 186, 27 Sup. Ct. 178, 51 L. Ed. 436), nor in Massachusetts by taking a note for it (In re Worcester Co., 102 Fed. 808, 42 C. C. A. 637 [C. C. A., Mass.]; Remington on Bankruptcy [2d Ed.] §§ 2135, 2182). The principle being established that a judgment is not an impenetrable curtain, but that the court may in certain cases look at what is behind it, the weightier considerations seem to me to favor doing so as to the judgment here in question. There is no denial that it was obtained for wages earned within three months before bankruptcy. It follows that this objection also fails.

The orders of the referee allowing the claims are affirmed.

FEISTER v. HULICK.

(District Court, E. D. Pennsylvania. January 19, 1916.)

No. 3824.

1. REMOVAL OF CAUSES ⇐112—PROCEEDINGS AFTER REMOVAL—WAIVER OF OBJECTIONS.

While it would seem that a petition for removal of a cause from a state to a federal court might be deemed an admission of service of process, or a waiver of such a defense, it is settled that such is not the case, and that defendant may raise any question which might have been raised, had the writ issued from the court to which the cause is removed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 238; Dec. Dig. ⇐112.]

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

2. REMOVAL OF CAUSES ⊂⊃114—PROCEEDINGS AFTER REMOVAL—EFFECT OF PROCEEDINGS BEFORE REMOVAL.

The right to immunity from the service of process in a cause removed from a state to a federal court must be determined independently of any view which the state court might entertain.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 241-244; Dec. Dig. ⊂⊃114.]

3. PROCESS ⊂⊃118—IMMUNITIES—ATTENDANCE AT COURT.

A nonresident of the city of Philadelphia was arrested in that city and held to answer before a coroner's jury of inquest, by which he was discharged. As he left the building in which the inquest was held, he was served with a summons in a civil case. *Held*, that the circumstances were such as to render him immune from service, and the service should be set aside.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 146; Dec. Dig. ⊂⊃118.]

At Law. Trespass by Mary R. Feister against George C. Hulick. On rule to set aside service of summons. Rule made absolute.

A. W. Sanson, of Philadelphia, Pa., for plaintiff.

W. Heyward Myers, Jr., and Morgan, Lewis & Bockius, all of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. An outline statement of the facts necessary to an understanding of the questions involved in the case as presented under the present rule is this. The defendant, who is a nonresident of the city of Philadelphia, was the driver of an automobile which struck and killed the husband of the plaintiff. The defendant was arrested and held to answer before a coroner's jury of inquest. He attended the inquest and was discharged. After he had left the building in which the inquest was held he was served with a summons in the present case, which had issued out of one of the courts of common pleas in and for the county of Philadelphia. The cause being within the removal acts of Congress was duly removed into this court. The rule to set aside the service was here entered. The practical condition which confronts us is this: Each of the parties, as is to be expected, seeks to secure the advantage of having the cause tried within his home jurisdiction, and to avoid the inconveniences at least, and the possible disadvantages, of having it tried in what is to him a foreign jurisdiction. The question is therefore to be determined as one of strict right.

It is clear that a court issuing a writ cannot try the cause unless it has jurisdiction of the person of the defendant. As the process was served upon the defendant within the territorial limits of such jurisdiction, the court has jurisdiction of the person of the defendant unless his presence within the county was under circumstances which made him immune from the service of process. The defendant asserts this latter conclusion to follow the facts. Immunity from arrest, or service of process, does not, in cases of this kind, flow from any privilege of the defendant. It is the consequence of the application of a legal principle, the benefit of which a particular defendant happens to get. The principle is founded upon a policy of the law and the

recognition of a legal doctrine. It is part of the policy of the courts to brook no interference with their efforts to administer justice. It is the policy of the law that each court shall render to every other court the at least negative aid of not interfering with its administration of justice. Out of the enforcement of this policy has sprung the doctrine of comity. No court will direct its process to be served upon litigants before another court where it would protect its own litigants from a like service. Every court will aid every other court by permitting attendance upon one free from the danger of service of process by another. All courts recognize this principle of immunity involved. They do not, however, give it the same application. Some apply it under circumstances where others do not. Out of this arises a secondary question.

We have, therefore, in this case three questions. One is whether the service here was permissible under the principle as applied by the courts of the United States. The second is whether the service would be held to be a good service by the courts of Pennsylvania. The third is: If the service would be upheld by the court issuing the writ, will this court set it aside after removal proceedings?

[1] The motive behind the constitutional provision giving the courts of the United States jurisdiction of controversies between citizens of different states and removing such controversies from the state courts is to assure a trial free from any local prejudices which may possibly exist. It would therefore seem out of place to remove a cause for the purpose of assuring a fair trial and then deny the right of trial. The causes which may be removed are causes which might have been tried in the state court. This assumes the cause to be a pending one. If there has been no service of process, the cause is not pending in the trial sense. The petition for removal might therefore be deemed an admission of service or a waiver of such a defense. The point, however, has been flatly ruled, and such a question is not now an open one. The defendant may raise any question which might have been raised, had the writ issued from that court to which the cause has been removed. Wabash v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431.

[2, 3] It follows from this that the question of service must be determined independently of any view which the state court may entertain. This resolves the whole question into the one of whether the courts of the United States will uphold a service made under the circumstances of this case. We feel constrained under the authority of the following cases to hold that the service as made should be set aside, and as no question of a general appearance is raised, and the principle, as applied in the courts of the United States, is seemingly admitted, the rule to set aside the service is made absolute. Dwelle v. Allen (D. C.) 193 Fed. 546; Kauffman v. Kennedy (C. C.) 25 Fed. 785; Stratton v. Hughes (D. C.) 211 Fed. 557; Roschynialski v. Hale (D. C.) 201 Fed. 1017; Kauffman v. Garner (C. C.) 173 Fed. 550; Skinner v. Waite (C. C.) 155 Fed. 828; Hale v. Wharton (C. C.) 73 Fed. 740.

The distinction recognized in Pennsylvania and in some of the other state jurisdictions, under which service of process upon persons

in custody upon criminal charges is upheld, is repudiated by the courts of the United States. It would seem to have a basis which they do not allow. Cases in which attendance is absolutely compulsory, as in arrest cases, can well be said to be outside of the reasons for granting immunity. The rule in the United States courts is, however, too firmly established to be disregarded, and the cases cited dispose of the questions raised.

FEISTER v. MILLS.

(District Court, E. D. Pennsylvania. January 19, 1916.)

No. 3826.

At Law. Trespass by Mary R. Feister against J. W. Mills. On rule to set aside service of writ of summons. Rule made absolute.

A. W. Sanson, of Philadelphia, Pa., for plaintiff.

W. Heyward Myers, Jr., and Morgan, Lewis & Bockius, all of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The question involved in this case is discussed and ruled in the case of Feister v. Hulick (D. C.) 228 Fed. 821.

The rule is made absolute.

TRANA et ux. v. CHICAGO, M. & P. S. RY. CO. et al.

MARSTON v. SAME.

(District Court, W. D. Washington, N. D. December, 1915.)

Nos. 3087, 3088.

1. REMOVAL OF CAUSES ⟸61—DETERMINATION OF RIGHT OF REMOVAL.

In determining whether a suit is removable to a federal court, the cause of action is the subject of the controversy, and is whatever plaintiff declares it to be in his complaint; but where fraudulent joinder is charged, and issue is taken upon the charge made in the petition, the issues thus raised form the basis for determining the removability of the suit.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. ⟸61.]

2. REMOVAL OF CAUSES ⟸107—DETERMINATION OF RIGHT OF REMOVAL.

When, in a suit sought to be removed to a federal court, fraudulent joinder of defendants is charged, and issue is taken upon the charge made in the petition, the issue must be determined by the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225–232, 234; Dec. Dig. ⟸107.]

3. REMOVAL OF CAUSES ⟸49—SEPARABLE CONTROVERSIES—JOINT OR SEVERAL CAUSES OF ACTION.

Rem. & Bal. Code Wash. § 296, provides that plaintiff may unite several causes of action when they all arise out of contract, express or implied, or injuries, with or without force, to the person, etc. Rev. St. § 914 (Comp. St. 1913, § 1537), provides that the practice, pleadings, and forms and modes of proceeding in civil causes shall conform as near as may be to the practice, etc., in the state courts. In an action against a Washington railroad corporation for the death of a person to whom such corporation sustained no contractual relation, plaintiff joined as defendant

a foreign corporation which, more than six months after the death, as part of a transfer of the Washington corporation's properties to the foreign corporation, assumed and agreed to pay all existing valid claims and demands against the Washington corporation. *Held*, that the liability of the foreign corporation was ex contractu, while the liability of the domestic corporation, if any, was ex delicto, and the liability of the two corporations did not raise out of the same transaction, and the two causes of action therefore could not be joined.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95–99; Dec. Dig. ⟸49.]

At Law. Two actions, by T. C. Trana and wife and by W. D. Marston, as administrator of Alice Jessie Marston, deceased, against the Chicago, Milwaukee & Puget Sound Railway Company and another. On petition for rehearing of motion to remand. Motion to remand denied.

Arthur E. Griffin, Arthur R. Griffin, and William W. Montgomery, all of Seattle, Wash., for plaintiffs.

George W. Korte and C. H. Hanford, both of Seattle, Wash., for defendant.

NETERER, District Judge. The issues presented in these cases on the motion to remand to the state court rest upon the same facts. The plaintiff in each case has elected to sue the defendant jointly for a tort resulting in injury and death. Upon the face of the complaint, which was the only pleading on file at the time the petition for removal was filed, there is no separable controversy, and the causes not removable upon that ground, under C., B. & Q. Ry. Co. v. Willard, 200 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521, and Bradshaw v. Bowden (D. C.) 226 Fed. 323. The Washington corporation did not appear in the state court. The Chicago, Milwaukee & St. Paul Railway Company, in its petition for removal, alleges fraudulent joinder in this: That it neither owned any part of the lines nor had control of any of the employés, and had no connection whatever with the road, and that such fact was known to the plaintiff. The plaintiff, replying to this petition in its motion to remand, contends there is no fraudulent joinder, and supports this by affidavit in which reference is made to a transfer by deed by the defendant Chicago, Milwaukee & Puget Sound Railway Company to the Chicago, Milwaukee & St. Paul Railway Company of its properties, including the right of way in question, and that in this conveyance, and as a part of the consideration of it, the Chicago, Milwaukee & St. Paul Railway Company agreed to pay all existing valid claims and demands against the local road. An order to remand was directed. A petition for rehearing has been presented, in which it is strongly urged that the liability of the petitioner is contractual, while the complaint is predicated upon tort, and that the two cannot be joined.

[1, 2] The cause of action is the subject of the controversy, and that is whatever the plaintiff declares it to be in his complaint and is the basis for order of removal. But where it is charged in the petition for removal that persons are fraudulently joined as parties defendant for the purpose of denying to the petitioner the right of re-

moval to the federal forum, and issue is taken upon this charge, the issue thus raised forms the basis which determines the forum in which the cause should be tried. If no issue is taken of the charge made, then the allegations stand as confessed. Bradshaw v. Bowden et al., supra. If issue is taken, then that issue must be determined by this court.

[3] The petitioner, replying to the affidavit of the plaintiff with relation to the assumption of all existing valid claims and demands against the local road, sets out a complete copy of the transfer, in which appears the following:

"The party of the second part [petitioner] hereby further covenants and agrees, by its proper officers hereunto duly authorized, to execute and cause to be recorded an indenture with the trustees of such indenture of mortgage and deed of trust, satisfactory to said trustees, whereby the party of the second part shall effectually assume the due and punctual payment of the principal of and interest upon said bonds, and the performance of all of the covenants and conditions of said indenture of mortgage and deed of trust. The party of the second part hereby assumes and agrees to pay all other existing valid claims and demands against the party of the first part, by whomsoever held, except claims and demands incurred for and on account of any of the purposes specified in said indenture of mortgage and deed of trust for which bonds may be issued, certified, and delivered thereunder, and except such claims and demands as the party of the second part now has or may hereafter have against the party of the first part on account of money loaned or advanced or hereafter loaned or advanced by the party of the second part to the party of the first part and by it used or expended for or on account of any of the purposes specified in said indenture of mortgage and deed of trust for which bonds may be issued, certified, and delivered hereunder; the party of the second part hereby reserving the right to be reimbursed in bonds issued or to be issued under such indenture of mortgage and deed of trust for the amounts so advanced and expended."

A careful analysis of the issue which has been raised leads to the conclusion that the direction to remand was erroneous. The contention of the plaintiffs that the several causes of action arise out of the same transaction and may be united, Harding v. Ostrander Timber Co., 64 Wash. 224, 116 Pac. 635, cannot be sustained. While the complaint discloses but one cause of action, a joint tort, the proofs taken upon the issue raised by the petition for removal, charging fraudulent joinder, show that the charge against the local defendant is for injury occasioned on July 10, 1912, causing death, and the liability, if any, of the petitioning defendant because of assumption of "valid claims" against the local defendant is because of the provisions of the deed of transfer, excerpts of which are set out, which deed is dated December 24, 1912, more than six months after the liability, if any, from the local defendant to the plaintiff, had been created, and there is no contractual relation, implied or otherwise, shown to have existed between the local defendant and deceased. Clearly, the liability of the nonresident petitioning defendant, if any, did not arise out of the same transaction as the alleged liability of the local defendant, and the cause of action against the local defendant, if any, is ex delicto, whereas the liability, if any, of the foreign petitioning defendant is ex contractu. That being so, under the Washington statute (section 296, Rem. & Bal.), the two actions cannot be joined (Clark v. Great Northern Ry. Co., 31 Wash. 658, 72 Pac. 477; Sanders v.

Stimson Mill Co., 34 Wash. 357, 75 Pac. 974); and under section 914 of the Revised Statutes, in actions of this character, the rules of pleading observed in the courts of the state are followed (O'Connell v. Reed, 56 Fed. 531, 5 C. C. A. 586; Magee v. Ore. Ry. & Nav. Co. [C. C.] 46 Fed. 734).

The motion to remand is denied.

GERMAN-AMERICAN MERCANTILE BANK v. GAS SERVICE CORP. OF AMERICA et al.

(District Court, W. D. Washington, N. D. December 3, 1915.)

No. 3132.

1. ACTION ⇐50—JOINDER OF CAUSES—PARTIES AND INTERESTS INVOLVED.

Under Rem. & Bal. Code Wash. § 192, providing that persons severally liable upon the same obligations or instruments, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of plaintiff, parties involved in the same transaction as maker of a note and guarantor under a separate instrument may be sued jointly.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511–547; Dec. Dig. ⇐50.]

2. REMOVAL OF CAUSES ⇐49—SEPARABLE CONTROVERSIES—JOINT OR SEVERAL CAUSES OF ACTION.

Rem. & Bal. Code Wash. § 192, authorizes plaintiff to sue all or any of the persons severally liable upon the same obligation or instrument in the same action. Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1913, § 1010), provides that when, in any suit mentioned in that section, there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, any defendant actually interested in such controversy may remove such suit into the District Court of the United States. Plaintiff loaned money to a gas company on its note, and a surety company by separate instrument guaranteed payment of the note. *Held*, that an action against both companies to recover the amount due on the note involved no separable controversy and was not removable, as the complaint stated but a single cause of action, and though the defendants may have had separate defenses, this did not create a separable controversy.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95–99; Dec. Dig. ⇐49.]

3. REMOVAL OF CAUSES ⇐49—SEPARABLE CONTROVERSIES—JOINT OR SEVERAL CAUSES OF ACTION.

Where plaintiff elects to sue defendants jointly, the fact that he might have sued them separately does not give a defendant the right to say that the action shall be several for the purposes of removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95–99; Dec. Dig. ⇐49.]

At Law. Action by the German-American Mercantile Bank against the Gas Service Corporation of America and another. On motion to remand. Motion granted.

C. H. Winders and E. H. Flick, both of Seattle, Wash., for plaintiff.

Piles, Howe & Carey, of Seattle, Wash., for defendant Illinois Surety Co.

NETERER, District Judge. This is an action to recover $25,000, with interest, evidenced by promissory note executed on June 8, 1915, by the Gas Service Corporation of America, due September 6, 1915; guaranty of the payment thereof being made by the Illinois Surety Company by written guaranty executed on the 8th day of June, 1915. It is alleged, in substance, that the plaintiff is a corporation of the state of Washington; that the defendant Gas Service Corporation of America is a corporation organized under the laws of Washington, and that the Illinois Surety Company is a corporation duly organized and existing under the laws of the state of Illinois, with its main office in Chicago, in the state of Illinois, having complied with the laws of the state of Washington, authorizing it to do a general surety business within the state of Washington, maintaining an office in the city of Seattle, and doing a general surety business within said state; that the defendant Gas Company made application to plaintiff for a loan of $25,000; that plaintiff agreed to make the loan provided sufficient and ample security was given; that the Surety Company agreed to become surety for said loan and to guarantee the payment thereof at maturity; that the loan was negotiated for the sum of $25,000; that the Gas Company executed its promissory note on the date named, and at the same time the Surety Company undertook and agreed to promptly pay any note or notes, not exceeding $25,000, executed by the Gas Service Corporation of America to the plaintiff during a period of six months from June 8, 1915, together with interest, attorney's fees, etc., in the event suit was prosecuted to collect the same.

The action was removed upon petition to this court, and motion to remand is now made. It is contended by the Surety Company that the controversy is "wholly separable," and removal was properly made.

[1-3] Under the Washington law (section 192, Remington & Ballinger's Codes of Washington) the maker and indorser or guarantor may be sued separately or jointly. It is also proper to unite in the same action causes arising out of the same transaction. Harding v. Ostrander Timber Co., 64 Wash. 224, 116 Pac. 635. And by the same logic parties involved in the same transaction, as maker of a note and guaranty under a separate instrument may be jointly sued. Bank of California v. Union Packing Co., 60 Wash. 456, 111 Pac. 573. There is in the complaint but a single cause of action. There is but a single controversy, and that is the alleged indebtedness due the plaintiff. Each of the defendants may have a separate defense, but that does not create separable controversies within the meaning of the Removal Act. Louisville & Nashville Ry. Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; Putnam v. Ingraham, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. Ed. 65; Pirie et al. v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; Starin v. N. Y., 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388. The main purpose of the action is to recover the money loaned to the defendant Gas Service Company upon the faith and credit of the Surety Company, it "being interested in the project for which the money to be loaned as aforesaid is to be used," and "admits that all money advanced to said parties upon their promissory note is advanced upon the strength of this contract of

guaranty, and * * * further acknowledges that it is interested in the making of said loan, and will receive a valuable consideration for the execution of this agreement." The controversy, the contract of loan, is indivisible. The fact that the evidence of the relation of the parties to this contract of loan is on separate sheets of paper, instead of one paper, does not change the relation or the rights of the parties to the controversy; and because of the fact that the plaintiff might have sued the parties separately, but elects to sue them jointly, the defendant is not given the right to say that the action shall be several. Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528; Starin v. N. Y., supra. A separate defense may defeat a joint recovery; but that it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way has been many times repeated by the United States Supreme Court. Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121.

The plaintiff having elected to bring a joint action, no charge of fraudulent joinder being made, and no "controversy which is wholly separable" (section 28, Judicial Code), appearing on the face of the complaint (Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147), the cause was improperly removed, and the motion to remand is therefore granted.

VAN ZILE et al. v. NORUB MFG. CO.

(District Court, E. D. New York. January 8, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⟸3—NAMES SUBJECT TO APPROPRIATION —DESCRIPTIVE WORDS.

Such words as "norub" or "nodust" cannot be registered as a trade-mark, when merely descriptive, and not constituting a fanciful title.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4–7; Dec. Dig. ⟸3.]

2. TRADE-MARKS AND TRADE-NAMES ⟸60, 70—UNFAIR COMPETITION—ACTS CONSTITUTING.

Plaintiffs sold a laundry washing aid known as "Norub" under a registered trade-mark consisting of a shield inclosing certain words, the name of the article being outside the shield. Defendant sold a powder used as a germicide and cleanser in sweeping in cans bearing the word "Nodust" and other words inclosed in a shield similar to plaintiffs' shield, the word "Nodust" being made prominent. The shield was with difficulty distinguished from the general lines or rulings upon the design of the can itself. *Held* that, while there was no infringement of the registered trade-mark, the association of a shield of the particular shape with the name of defendant's article was unfair competition, and would be enjoined, in view of the fact that both articles were for household use and intended for the same general class of customers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 73, 74, 81; Dec. Dig. ⟸60, 70.]

In Equity. Suit by Cornelius W. Van Zile and another, copartners doing business as the Van Zile Company, against the Norub Manufacturing Company. Decree for plaintiffs.

Wetmore & Jenner, of New York City (Oscar W. Jeffery, of New York City, of counsel), for plaintiffs.

Otto Munk, of New York City, for defendant.

CHATFIELD, District Judge. This cause of action is based upon the alleged infringement of a registered trade-mark and also an allegation of unfair competition. The defendant uses the word "Nodust" with the word "Lee's" inclosed in a shield and bearing the word "trade-mark" (although this is not a registered trade-mark) as part of the design and reading matter, on a cylindrical shaped can, containing a green powder to be used as a germicide and cleanser in sweeping.

The plaintiffs' articles as marketed at present consist of pasteboard boxes bearing the registered trade-mark of a shield inclosing the words:

"Guarantees
"VAN'S
"Satisfaction."

The boxes containing an aid in the washing of clothes, bear the word "Norub," while those containing an article to assist in the starching of clothes to be ironed, bear the word "Addit."

[1] The plaintiffs limit their charge of unfair competition to the use of the shield alone, and it is evident that a word of the "Nodust" or "Norub" formation, aside from the fact that such words may be used by the public generally (Van Zile v. Norub Mfg. Co. [1910] no written opinion) could not be registered, as a trade-mark, when merely descriptive and not constituting a fanciful title. John T. Dyer Quarry Co. v. Schuylkill Stone Co. (C. C.) 185 Fed. 557; Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73, 101 C. C. A. 565; Rice-Stix Dry Goods Co. v. J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475.

[2] The defendant includes the word "Nodust" within the shield. The general display of the defendant's shield and the words inclosed make the "Nodust" prominent, rather than the "Lee's," while in the plaintiffs' articles the word "Norub" is outside of the shield and the trade-mark is confined to the manufacturer's name. Upon the present form of defendant's product the shield is with difficulty distinguished from the general lines or rulings upon the design of the can itself, and it is impossible for the court to hold that the defendant's package, as now placed upon the market, is of itself likely to mislead the public, or that it is an infringement of the registered trade-mark in which the name of the plaintiffs, surrounded by a shield, is featured.

The plaintiffs' trade-mark was registered in the class of laundry starching and chemical laundry washing compounds, while the defendant's word "Nodust," in the shield, is used as a label upon a green powder for sweeping.

It would seem that a registered trade-mark (in the class of laundry starching and chemical laundry washing compounds) could not be properly used as the trade label of a package containing a germicide sweeping powder; yet the court feels that the choice of such words as "Nodust" and "Norub" limits the individuals placing such products

upon the market to a very narrow field. Florence Mfg. Co. v. J. C. Dowd & Co., supra.

Similarity in the words and the general suggestion that such articles are for kitchen or household work make it evident that any one who places such a product upon the market is attempting to sell it for related or analogous purposes and to satisfy the same trade which would purchase other products of the sort. The court thinks, therefore, that general property rights in a line of articles for household use, identified by a shield (and for a part of which the shield has been registered as a trade-mark), does furnish sufficient basis for a decree that, within the same field, no other person should use, as a distinctive feature, any similar device.

The shields in this case are similar. The very fact that the "No-dust" is put inside of the shield, whereas in the plaintiffs' article the word "Norub" is outside of the shield, indicates a purpose on the part of the defendant to have the shield bear some relation to the title placed upon the article.

The case, even though it does not seem to involve infringement of the registered trade-mark, shows sufficient possible and probable injury to direct the defendant not to use a shield of the same design as that of the plaintiff. The possibility of extending the use of the device by the defendant to other articles of the same general class, or the possibility of the use by the plaintiff of the registered trade-mark upon other articles, that would be recognized by the trade as being sold to the same general class of customers, would seem to make it proper for a court of equity to grant relief to the extent of directing the defendant to avoid what comes within the realm of unfair competition, in associating the title of his product with the distinctive device of a shield.

While there can be no decree based upon the registered trade-mark itself, there should be a decree directing the defendant not to associate a shield of this particular shape with his name and the title of the article, as that seems to involve unfair competition.

In re MT. WINANS LUMBER CO.

(District Court, D. Maryland. July 29, 1915.)

No. 2618.

BANKRUPTCY ⊂=350—LIENS—DISTRESS LEVY.

Before the filing of a petition in bankruptcy against a corporation, it was placed by a state court in the hands of a receiver, and on petition of the corporation's landlord the claim for rent was made a preferred lien on the distrainable property on the leased premises. *Held*, that such claim should be allowed as a preferred claim against the funds in the hands of the trustees in bankruptcy realized from a sale of the distrainable property on the leased premises at the date of the state court's order, since under the law of Maryland the lien acquired by a distress validly levied prior to bankruptcy would not be disturbed by the subsequent

petition and adjudication in bankruptcy, and the order of the state court was equivalent to the levy of a distress.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⟸350.]

In Bankruptcy. In the matter of the Mt. Winans Lumber Company, bankrupt. On review of an order of the referee granting the petition of Joseph Thomas & Son. Order affirmed.

Charles Lee Merriken, of Baltimore, Md., for trustee.
H. Webster Smith, of Baltimore, Md., for Jospeh Thomas & Sons.

ROSE, District Judge. Before the filing of the petition in bankruptcy the bankrupt was placed in the hands of a receiver appointed by a Maryland state court. After the appointment of a receiver, and before the filing of the bankruptcy petition, Joseph Thomas & Son filed a petition in the state court alleging that rent was due them from the bankrupt, that there was distrainable property in the leased premises in value greater than the rent due them, and asking that their claim be made a preferred lien on such property. The state court, still before the filing of the petition in bankruptcy, made the order asked for. Now Joseph Thomas & Son ask this court to direct that the rent due them at the time of the filing of their petition in the state court be declared preferred upon the funds in the hands of the trustee realized from the sale of the distrainable property of the bankrupt upon the leased premises at the date of the state court order. The referee has so done. The trustee has brought the question here by certificate of review.

The referee is right. If distress had been validly levied before the institution of bankruptcy proceedings, the lien thereby acquired by the landlord would not in this state have been disturbed by a subsequent petition and adjudication in bankruptcy, for such a lien is not one acquired by legal proceedings within the meaning of the bankrupt law. The state court could have permitted such distress to be levied. It did not see any occasion to do so when its order would accomplish the same result with much less trouble and expense. The passage of such order by it must be regarded by the bankrupt court as the equivalent of the levy of a distress, the property subject to such levy being then within its control.

The order of the referee must therefore be affirmed, with costs.

EL DIA INS. CO. v. SINCLAIR.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 36.

1. INSURANCE ⟸136—DELIVERY OF POLICY—NECESSITY OF DELIVERY.
If there is a binding contract of insurance, the fact that the policy is not delivered until after a loss occurred does not defeat insured's right to recover under the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219–230; Dec. Dig. ⟸136.]

2. EVIDENCE ⟸441—PAROL EVIDENCE TO VARY WRITING.
A policy of insurance, issued by the insurance company and accepted by insured, is in law the final contract between the parties, and supersedes all preliminary agreements in respect to the insurance, in the absence of fraud or mistake.

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

3. EVIDENCE ⟸434—PAROL EVIDENCE—EVIDENCE OF FRAUD.
Extrinsic evidence is always admissible to show, for the purpose of invalidating a written instrument, that its existence was procured by fraud, or that by reason of fraud it does not express the true intention of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005–2020; Dec. Dig. ⟸434.]

4. EVIDENCE ⟸433—PAROL EVIDENCE—EVIDENCE OF MISTAKE.
Extrinsic evidence may be received for the purpose of showing that by reason of a mistake a written instrument does not truly express the intention of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1990–2004; Dec. Dig. ⟸433.]

5. INSURANCE ⟸262—VALIDITY OF POLICY—FRAUD—FAILURE TO DISCLOSE LOSS.
Pursuant to negotiations between brokers representing the D. Co. and the agent of an insurance company, the agent on April 28th wired the broker "binding $15,000" and asking the brokers to send forms. The D. Co.'s general manager was informed of this telegram. On April 29th the brokers wrote the agent, inclosing forms, but on April 30th wired the agent not to use such forms, and sent new forms. On April 29th a fire took place. The brokers did not know of this fire, and the company's general manager did not know of the substitution of the forms. *Held*, that the failure of the D. Co. and the brokers to give the insurance company notice of the loss before the subsequent issuance of the policy did not amount to fraud affecting the policy, as insured, knowing that the risk had attached and not knowing of the substitution of forms, was not called upon to say anything, while no fraud could be attributed to the broker because of his failure to give notice of that of which he had no knowledge.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 557; Dec. Dig. ⟸262.]

6. INSURANCE ⟸127—EXISTENCE OF SUBJECT-MATTER—ANTEDATING POLICY.
The rule that, if parties contract regarding a thing which, unknown to them, does not exist at the time, there is no contract, because of the lack of a subject-matter, did not apply where an insurance policy was antedated, and the property insured was in existence at the date as of which the policy was issued, but had been destroyed by fire prior to its issuance; and the fact that the property was not in existence did not inval-

idate the policy, as, by antedating the policy, the insurer assumed the restrospective risk for which it provided, in the same manner as if it had been issued on the day it bore date.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 186, 187; Dec. Dig. ⊂⊃127.]

7. INSURANCE ⊂⊃132—REQUISITES OF CONTRACT—BINDING SLIPS.

A contract of insurance is ordinarily complete and closed when a binder is signed and delivered.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 210; Dec. Dig. ⊂⊃132.]

8. INSURANCE ⊂⊃646—ACTIONS ON POLICIES—PRESUMPTIONS AND BURDEN OF PROOF.

In an action on a fire insurance policy, the burden was on defendant to prove by a fair preponderance of the evidence that fraud was practiced on it or its adjuster in misrepresenting the value of the property destroyed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645–1668; Dec. Dig. ⊂⊃646.]

9. APPEAL AND ERROR ⊂⊃1003—REVIEW—QUESTIONS OF FACT.

The verdict of a jury on a question of fact fairly presented to them is not to be disturbed, unless clearly against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938–3943; Dec. Dig. ⊂⊃1003.]

10. APPEAL AND ERROR ⊂⊃959—REVIEW—DISCRETIONARY MATTERS—AMENDMENTS.

In an action on a fire insurance policy, defendant pleaded that the contract of insurance in force at the time of the loss contained terms and conditions different from those alleged in the complaint, and that insured misrepresented to its adjuster the amount and value of the property, with intent to deceive and defraud it and create a liability on its part greater than was warranted by the facts. *Held*, that a motion to amend the answer, so as to plead fraud in the execution of the policy, was addressed to the discretion of the trial judge, and its denial presented no question which could be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825–3831; Dec. Dig. ⊂⊃959.]

Lacombe, Circuit Judge, dissenting.

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

The plaintiff below is a citizen of the state of New York, and brings this action as assignee of the Duluth Log Company, a corporation organized and existing under the laws of the state of Minnesota. The El Dia Insurance Company is a corporation organized and existing under the laws of the kingdom of Spain, having its principal office in the city of Madrid. It has no branch office in the United States, but transacted its business in this country through John L. Dudley, Jr., a New York corporation residing in New York City. The facts of the case are stated in the opinion.

Van Iderstine, Duncan & Barker, of New York City (Wendell P. Barker, of New York City, of counsel), for plaintiff in error.

William Otis Badger, Jr., of New York City (Louis J. Wolff, of Brooklyn, N. Y., of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This action is brought to recover under a contract or policy of insurance. The complaint alleges that the Duluth Log Company, hereinafter referred to as the insured, applied to the El Dia Insurance Company, hereinafter referred to as defendant, for insurance against loss or damage by fire upon certain of its property consisting of lumber and timber products located in the state of Minnesota; that on April 28, 1913, the defendant insured the said property for the term of one year from said April 28, 1913, at noon to April 28, 1914, at noon, in the sum of $15,000; that pursuant to this agreement the defendant issued its policy on May 10, 1913; that on April 29, 1913, a fire occurred which damaged the insured's property to the extent of $33,183.04; that thereafter the defendant, through its adjuster, adjusted the loss and fixed the amount at $33,183.04; that the proportionate share of the loss chargeable to the defendants under the policy was $11,483.33.

The answer admits that a contract of insurance was entered into on April 28, 1913, and that defendant agreed to issue a policy expressing the terms and conditions agreed upon in the contract of April 28th. It admits that it issued its policy on May 10, 1913. It admits that it insured the property to an amount not exceeding $15,000, and that it designated and appointed an adjuster for the purpose of adjusting the loss. That the fire occurred is not denied. It alleges that the insured misrepresented to its adjuster the amount and value of the property with the intent to deceive and defraud it and create a liability on the part of the defendant greater than was warranted by the facts. It also alleges that its contract of insurance of April 28th was made upon the following terms and conditions: (1) That the maximum liability of the defendant during the term of the contract of insurance should not exceed $15,000. (2) That the defendant's liability for loss resulting from any one fire should not exceed 30 per cent. of such maximum liability. (3) That the said insurance should be subject in case of loss to what is commonly known as the 80 per cent. coinsurance clause. The policy as issued does not contain any coinsurance clause. It provides insurance to an amount not exceeding $15,000. It does not contain any clause limiting the defendant's liability for loss so that it should not exceed 30 per cent. of the maximum liability, thus increasing the defendant's apparent maximum liability by reason of one fire from $4,500 to $15,000. The answer also avers that by reason of fraud and deceit practiced upon defendant the contract of insurance entered into on April 28, 1913, has become and is void.

At the trial the counsel for defendant undertook to show that the policy as issued on May 10th did not conform to the contract of insurance as agreed upon on April 28th. This the trial judge refused to allow, and his refusal is assigned as error; and this alleged error we shall first consider.

The historical sequence of events is this:

On April 21, 1913, the Duluth brokers, acting for the insured, telegraphed the agent of the defendant in New York and asked the latter to place $50,000 insurance (a floater policy) on behalf of the Duluth Log Company and the Bradley Timber & Railway Supply Company on their

timber products in Northern Minnesota; rate "not to exceed two fifty net." To this came by telegraph the reply on April 22d:

"Message twenty-first received forward immediately copy of forms to be used showing limit by reason any one fire also coinsurance conditions."

The same day the broker at New York addressed a letter to the Minnesota brokers which reads as follows:

"Replying to your message of April 21st, and confirming our reply of even date, would state that it is impossible for us to advise definitely whether we can handle this proposition or not until we have before us a copy of the form. The company will require a coinsurance clause equal to at least 90 per cent. They will also require a limit by reason of any one fire. As soon as we have full information before us, we will promptly advise you."

On the same day the brokers for the insured telegraphed a night letter to the defendant's agent in New York which reads:

"Limit any one fire thirty per cent. of face of policy will use eighty per cent. clause as soon as the assured are able to check up value of their property sending forms by mail to-day."

On April 23d, the insured's brokers wrote and mailed a long letter to the defendant's agent in which the telegram of April 21st was confirmed. It said:

"We hope you may be able to cover this order or a part of it at the rate indicated, gross rate of 3 per cent., and as soon as the owners are able to arrive at the exact value of their property they will use the 80 per cent. coinsurance clause."

On April 28th the defendant's agent telegraphed:

"Binding fifteen thousand each lumber Bradley, Duluth Log. Send forms."

On April 29th the fire took place at about 4 p. m. and the president of the Duluth Log Company was informed of the fact by telegraph about 9:30 p. m. of the same day. Prior to the fire he had been informed of the telegram of April 28th. He did not inform his brokers of the fact of the fire. On April 29th the insured's brokers wrote the defendant's agent a letter as follows:

"Following your telegram of the 28th instant in which you state you have bound $15,000 under each schedule, the Duluth Log Company and the Bradley Timber & Railway Company, at a rate of 3 per cent., we are inclosing you herewith forms, and trust you will let policies come forward as soon as possible. If you succeed in placing any additional, kindly wire us."

The letter was written without knowledge of the fire, and perhaps before the fire had occurred, as the fire broke out late in the afternoon of the same day. It is certain the letter did not reach the defendant's broker until after the loss had been incurred. The record does not disclose what the "forms" were which were forwarded. They were not so far as the record discloses put in evidence.

The next day, April 30th, the agent of the insured telegraphed the agent of the defendant: "Do not use forms sent you yesterday new forms sent you to-day." At that time the insured's broker was still without knowledge of the fire. We do not find these "new forms" in the record. But on May 1st the insured's agent wrote the defendant's agent saying the "amended forms were sent yesterday," adding:

"The forms should have stated the gross amount liable in any one fire, instead of the percentage. That is the only change."

The reason the broker gave at the trial for this change of "forms" was as follows:

"Because in my conversation with Mr. Bradley (the officer of the Duluth Log Company who applied for the insurance) there was nothing said about percentages. In going over the placing of the order with me, the question arose as to what the liability should be under the insurance, taking into account that he was getting $50,000, the amount that might be sustained by the various companies, on their knowing one location. He fixed the amount at $15,000. There was nothing said about percentages. That was not the conversation. So that how I discovered this I cannot tell you; but, when I did discover it, I meant to fill out the contract as entered into between Mr. Bradley and myself."

On May 10th the policy was issued. On May 26th the agent of the insured wrote and mailed a letter to defendant's agent, informing the latter of the fire and asking to have an adjuster sent out to spur No. 318 on the Soo Line, where the fire occurred, and adjust the loss. The letter also stated:

"The Duluth Log Company were unable to report the loss any sooner because of the fact that their woodsman was away and the loss was reported as soon as they were able to ascertain the facts."

At the trial the agent of the insured testified that the first he heard of the fire was a few days prior to the time when the Duluth Log Company notified him; and the testimony was that that notification was given about May 20th.

The policy issued was accepted and retained by the insured as conforming to the contract. On July 7, 1913, long after defendant had notice of the loss, it accepted and retained the premium, amounting to $405. The testimony shows that, if there had been a coinsurance clause in the policy, the premium would have been less. For weeks after the defendant received information of the loss no objection was raised by it that the policy in any way failed to express the contract between the parties. On August 23, 1913, the representative of the company in the United States, with whom all the negotiations leading up to the issuance of the policy were had, wrote the agent of the insured as follows:

"The form under which the insurance was written was drafted with the intention of carrying $50,000 insurance and an order was placed for $50,000. The $50,000 insurance was not secured before the loss occurred, and it then developed that only $15,000 insurance had been secured and all in one company. While we are frank to admit that under a strict application of the conditions of the policy which the assured holds, in my opinion, the company would have little or no grounds on which to contest (and we do not think it is their intention to contest), at the same time the company never anticipated, when writing the policy, to be called upon to contribute the whole amount on a partial loss under such circumstances, and the company do feel that there are reasonable grounds for asking or expecting some compromise."

And on September 20, 1913, in answer to a letter complaining of the delay in paying the loss, the defendant's representative wrote:

"The claim up to date, we think you will agree with us, is not an old one, and in accordance with the usual understanding of the policy form the com-

pany has 60 days from the date of the filing of the proof in which to make settlement. According to the records in our office, the 60 days have not as yet elapsed, and we assure you that there is no reason, so far as we know, for the assured and yourselves to be apprehensive. We anticipate the policy obligation in this instance will be discharged with the same courtesy and promptness that the company adopted during the early part of its existence, which custom has been continued."

At the trial, however, the claim was advanced that the policy did not conform to the contract as it existed when the loss occurred, and that defendant proposed to show that this was so by introducing in evidence the letters and telegrams written prior to the loss. The plaintiff's counsel objected on the ground that, where there is a written formal contract of insurance in evidence, parol evidence cannot be received to vary its terms. The trial judge agreed with this view of the matter, and struck out the telegrams and letters by which it was sought to contradict the policy, and instructed the jury that the contract was to be found only in the policy. It is conceded that this rule would have applied if the fire had not occurred prior to the issuance of the policy, or prior to the changes, if any, which were made after the telegram of April 28th:

"Binding fifteen thousand each lumber Bradley, Duluth Log. Send forms."

But it is claimed the rule is inapplicable, because the policy actually differs in certain particulars from the contract as it existed when the loss occurred.

[1] The policy, as before stated, is dated May 10, 1913, but is antedated, and insures the Duluth Log Company for the term of one year from the 28th day of April, 1913, at noon, to the 28th day of April, 1914, at noon. It was signed in Madrid, Spain, and it provided that it was not to be valid unless countersigned by John L. Dudley Company, New York, the representative of the company in the United States. It does not appear when it was countersigned, or when it was delivered to the insured; but it is not questioned that it was countersigned and was delivered. If there is a binding contract of insurance, the fact that the policy is not delivered until after the loss has occurred does not defeat the insured's right to a recovery under it. Michigan Pipe Co. v. Michigan F. & M. Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; Commercial Ins. Co. v. Hallock, 27 N. J. Law, 645, 72 Am. Dec. 379. Indeed, the courts have held that a policy drawn up and signed by the proper officers wants no further delivery. It is a valid policy as soon as signed, and becomes then the property of the insured, and is held by the insurer for his use.

[2] The policy of insurance which the company issued and the insured accepted is in law the final contract between the parties, and supersedes all preliminary agreements in respect to the insurance. Whatever may have been said previously, whatever negotiations may have taken place, all are presumed to have been merged in the written contract. In Merchants' Mutual Ins. Co. v. Lyman, 15 Wall. 664, 21 L. Ed. 246, the law is declared to be that after a policy has been issued and accepted the prior agreement becomes merged in it. In Insurance

Company v. Mowry, 96 U. S. 544, 547, 24 L. Ed. 674, the Supreme Court, speaking of a policy, declared that:

"The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But until thus corrected the policy must be taken as expressing the final understanding of the assured and of the insurance company."

So the Supreme Court in a more recent case (Hartford Fire Ins. Co. v. Wilson, 187 U. S. 467, 478, 23 Sup. Ct. 189, 47 L. Ed. 261) quotes approvingly a statement from Harnickell v. New York Life Ins. Co., 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150, to the effect that all negotiations and agreements had prior to the issuance of the policy are to be deemed merged in the policy. The Court of Appeals of New York in Walton v. Agricultural Ins. Co., 116 N. Y. 317, 322, 22 N. E. 443, 5 L. R. A. 677, declared that "a policy of insurance is presumed to embrace the entire agreement of the parties." In 16 Am. & Eng. Encyc. L. (2d Ed.) p. 856, the rule is stated as follows:

"The policy of insurance is the final contract between the parties, and the effect of its acceptance is to supersede all preliminary agreements in respect to insurance."

[3] The rule that the written contract, in this case the policy, cannot be contradicted by extrinsic evidence, is subject to certain exceptions as well recognized as the rule itself. As fraud vitiates whatever it touches, extrinsic evidence is, of course, always admissible to show, for the purpose of invalidating a written instrument, that its existence was procured by fraud, or that by reason of fraud it does not express the true intention of the parties.

[4] Extrinsic evidence may be also received for the purpose of showing that by reason of a mistake a written instrument does not truly express the intention of the parties. Many authorities declare that evidence of mistake is admissible only in equity, and not at law, while many others assert that no such distinction exists. See 17 Cyc. 703. But the circumstances of this case do not make it important to determine whether such a distinction exists or does not exist. In Richards on Insurance (3d Ed.) p. 105 (1910), the rule is stated as follows:

"In absence of fraud or mutual mistake the written contract, if there be one, is the best and only admissible evidence of what the contract is as to all matters which it purports to cover."

[5] The policy in the case at bar is not shown to be in any way affected by fraud. Neither the insured nor the insurer's brokers have practiced any fraud whatever upon the insurer or its agents. It is true that after the fire occurred and prior to the issuance of the policy the insured gave no notice of the loss. But the failure to do so is explained. The general manager of the insured said that prior to the fire he had been informed by his brokers that the insurance had been secured, and that he was waiting to get the policy, which had not been

issued. Surely, under the circumstances, he was not called upon to say anything. In Joyce on Insurance, vol. 1, § 108 (1897), it is said that:

"There is no legal nor moral obligation resting on the assured to voluntarily notify the company of a loss occurring after the risk has attached, although the policy has not been delivered nor the premium paid."

The author cites Keim v. Home Mutual Fire Ins. Co., 42 Mo. 38, 97 Am. Dec. 291; American Home Ins. Co. v. Patterson, 28 Ind. 17. The insured knew the risk had attached, and he knew nothing of the communication relating to the substitution of one set of forms for another; and the broker who forwarded that communication had at the time no knowledge of the loss. No fraud can be attributed to him, because he failed to give notice of what he had no knowledge of until many days afterward. The insured at no time made any misrepresentations, and at no time withheld any facts which it was under either a legal or a moral obligation to make known.

[6] It is equally true that there was no mistake made which in any way affected the policy. In Pollock on Contracts, 383, it is said that mistake does not of itself affect the validity of contracts at all. And Anson in his Law of Contracts (Huffcut's Ed. 1906) § 178, declares that:

"The cases in which mistake affects contract are the rare exceptions to an almost universal rule that a man is bound by an agreement to which he has expressed a clear assent, uninfluenced by falsehood, violence, or oppression."

Nevertheless mistake may be such as to prevent any real agreement from being formed, in which case the agreement is not merely voidable, as in the case of fraud, but is absolutely void, both at law and in equity. In the case at bar, however, there was no mistake as to the party contracted with, and no mistake as to any of the terms of the contract. The contract made was in all respects the identical contract each of the parties intended it to be. It is conceded, however, that every agreement must have a subject-matter to operate upon. There is a general rule that, if the parties agree in regard to a thing which unknown to them does not exist at the time, there is no contract, for there is no subject-matter. If parties agree to sell a picture or a building, and at the time of the sale the picture or the building is not in existence, that fact being unknown at the time to the parties to the agreement, there is no contract. And so in the law of fire insurance, if at the time the risk attaches the property insured is not in existence, the parties being ignorant of the fact at the time, the rule is that there is no valid insurance. But that principle had no application to a case where the policy issued was antedated to a period prior to the fire. In that case the fact that the property insured was not in existence does not invalidate the policy. Thus in Hallock v. Commercial Ins. Co., 26 N. J. Law, 268 (1857), the facts were as follows: The policy was signed at Jersey City, N. J., on March 13, 1855. It insured property at Bath, N. Y., from March 10, 1855, noon, for a period of one year. It was mailed to the agent of the insurance company at Bath, with instructions to deliver it. The agent did not in fact receive it until March 16th. It

turned out that the property insured had been burned in the early morning of March 13th, which was before the policy had been signed, although the policy was signed later on the same day, so that the property did not exist when the policy was signed, that fact being unknown to the company. When the company discovered the fact it telegraphed its agent at Bath not to deliver the policy, and it was never delivered. The telegram read: "Risk not taken when burnt, return policy when received." The court held the company liable and said:

"They intentionally made the year's risk commence from the 10th. If the fire had occurred on the 13th March, 1856, instead of 1855, under this policy the defendants could not have been held liable. When they filled up the policy, they elected to take the premium from the 10th. They took their pay for the very time during which the fire occurred, and thus say now, in effect, this is a very good policy from the 10th to the 13th, if no fire occurs, but a void one if there does. The question, therefore, really is: Is a contract to insure against fire from a time past void in law? No decision or authority or principle sustaining such a doctrine has been referred to before us. It is every day's practice in both marine and fire insurance. A contract is good, unless shown to be against good morals or sound policy. I do not see how this contract contravenes either, or what difference in principle there can be between insuring from a time past and a time to come. Many cases will be found recognizing the validity of such contracts. Lightbody v. N. American Ins. Co., 23 Wend. (N. Y.) 18; Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645; Kohne v. Ins. Co. of N. America, Fed. Cas. No. 7,920; General Interest Ins. Co. v. Ruggles, 12 Wheat. 408, 6 L. Ed. 674; New York Cent. Ins. Co. v. Nat. Protection Ins. Co., 20 Barb. (N. Y.) 475."

In the case at bar the policy took effect by relation from the day of its date. Lightbody v. N. Am. Ins. Co., 23 Wend. (N. Y.) 18 (1840). By antedating the policy the defendant assumed the retrospective risk for which it provided, in the same manner as if it had been issued on the day it bore date. Hughes v. Mercantile Mutual Ins. Co., 44 How. Prac. (N. Y.) 351, 355. It is therefore wholly immaterial in the case at bar that at the time the policy issued or the risk attached the property insured was not in existence; it having been in existence within the period covered by the terms of the policy.

The changes in the policy suggested by the agent of the insured in the telegram sent on April 29th were forwarded without the knowledge of the insured, and were to correct the agent's own mistake of the previous day and make the policy conform to the original instructions given to the agent by the insured. As the agent had no knowledge of the loss, he was under no obligation to impart what he did not possess; and as the insured understood that the insurance had been secured according to his instructions and did not know of this telegram of April 29th he was not at fault; and as the loss occurred within the period covered by the policy, neither the insured nor its agent being in any way at fault, the company cannot escape the liability it assumed when it antedated its policy, unless there is some other ground than the fact that the contract as expressed in the policy was not in all of its terms agreed upon until after the fire.

[7] A contract of insurance is ordinarily complete and closed when the binder is signed and delivered. Van Tassel v. Greenwich Ins. Co., 151 N. Y. 130, 45 N. E. 365. In the remarkable case cited, in which there were six trials and ten hearings on appeal, the binder was sus-

tained as equivalent to a standard one-year policy and subject to the standard five-day cancellation clause, though the binder specified no rate, and though no policy was ever delivered or premium paid. And see Smith & Co. v. Prussian Nat. Ins. Co., 68 N. J. Law, 674, 54 Atl. 458; British American Ins. Co. v. Wilson, 77 Conn. 559, 60 Atl. 293. In Richards on Insurance (3d Ed., 1910) it is said:

"The regular binder is the same thing in effect as the usual policy, for which it stands as a convenient, temporary substitute, and, whether it so states or not, embraces by inference all the clauses of the policy."

If the defendant had never issued a policy, and the proposition of the Duluth Log Company had been correctly transmitted by its agent to the defendant's agent, and accepted by it by the delivery of the "binder," there could be no question but that defendant would have been bound. But the fact seems to have escaped the attention of counsel on both sides that on April 28th the minds of the insured and the insurer had not met. That they had not met is shown by the testimony of the agent of the insured, and already mentioned, that in sending on the first "forms" he had not conformed to his instructions, and that on April 29th he sent forward the second "forms" in order to rectify his previous mistake. If this is the fact, we do not see that any contract existed on April 28th. But that fact is immaterial in view of the subsequent issue of the policy, which merged all prior negotiations and was antedated to make the risk attach on April 28th; both the insured and its agent being blameless in respect thereto.

[8, 9] This brings us to inquire whether any fraud was practiced upon the adjuster, or upon the defendant, in misrepresenting the value of the property. The defendant claims that such fraud was practiced. The burden was on the defendant to prove the fact by a fair preponderance of the evidence. The question was one of fact for the jury. It was fairly presented to them, and they have decided it, as their verdict shows, adversely to the defendant. Their verdict is not to be disturbed, unless clearly against the weight of evidence, which assuredly it is not.

[10] The denial of defendant's motion to amend its answer so as to plead fraud in the execution of the policy presents no question which we can review. The matter was discretionary with the trial judge.

Courts must take due care to see that parties are not held to contracts they do not make. But they must also exercise due care to see that contracts which the parties do make are performed in good faith according to their terms. It is particularly important that insurance companies, which issue policies of insurance to applicants blameless throughout the negotiations, should not be permitted to avoid those policies, or the contracts into which they entered, unless good and valid reasons are shown which justify invalidating the contracts. In the case at bar we are unable to find that a meritorious defense to the action exists.

Judgment affirmed.

LACOMBE, Circuit Judge (dissenting). I am unable to concur with the majority of the court. This action is not brought on the policy of

insurance issued on May 10th. Originally the complaint averred that a policy was issued and delivered to the insured on April 28th, and that the property covered thereby was destroyed by fire on April 29th. Upon the filing of answer to this original complaint plaintiff filed an amended complaint, in which he averred that on or about April 28th insured made application to underwriter for insurance, and that on said day the underwriter promised and agreed to insure its property, and that defendant would execute and deliver policy in the usual form; also that on May 10th it did issue the policy. The answer to this amended complaint admitted that a contract of insurance was entered into on April 28th. It averred that among the terms and conditions were these: (1) Maximum liability not to exceed $15,000. (2) Underwriters liability for loss resulting from any one fire not to exceed 30 per cent. of such maximum liability. (This was a floater policy, covering lumber in different localities.) (3) That insurance should be subject to 80 per cent. coinsurance clause. The answer further admits the issuance on May 10th of the policy attached to complaint.

It is manifest that the main issue which the parties came into court to try was this: "What contract was entered into on April 28th?" Upon that question proof was introduced, written proof, which stands upon the record wholly uncontradicted. To my mind that proof establishes conclusively what were the terms of the contract. On April 21st the Duluth Company asks for a floater policy on timber products in Minnesota, covering $50,000 at a rate "not to exceed two fifty net." The next day the insurance company replies by telegram and mail asking that forms be forwarded, stating that it could not advise definitely as to acceptance of the proposition until it had a copy of the form; also that it would require a coinsurance clause equal to 90 per cent. and a limit of loss by any one fire—a plain statement that the whole amount of the floater insurance was not to be absorbed by fire at a single place. By telegram and letter of April 22d and 23d the Duluth Company replied, stating that it was willing to pay gross rate of 3 per cent. premium; also that it would agree to an 80 per cent. clause, instead of the 90 per cent. suggested; also that it would agree to limit loss by any one fire to 30 per cent. of the face of the policy. All these negotiations, of course, included the making of a policy in the standard form, with the usual provisions as to care of property, date of notification, proofs of loss, etc.

Such, then, was the proposition before the insurance company; its terms specifically covering the matter in controversy here, viz., the limitation of loss by a single fire. The total amount asked for was $50,000. This proposition the insurance company accepted, with the single modification of the total amount to $15,000. That this acceptance made a binding contract is conceded. If no binding contract was made before the fire occurred, plaintiff under the pleadings would have no case at all. Of course, it was in the power of the parties, who had made this binding contract in express terms, subsequently by agreement to modify any one of those terms. But no such modification was made, or even attempted to be made, until after the occurrence of the fire while the contract was in force, which crystallized the rights and

obligations of both parties. The telegram of May 1st, two days after the fire, would not change it.

It does not seem to me that the well-settled rule that prior negotiations are merged in a subsequent written contract applies here, where it is asserted and must be shown as a condition of plaintiff's recovery that there was a complete contract on April 28th, and where the event which the contract provided for occurred the next day. The agent of the insurance company, who had power to make the contract and agree to its terms, had also power to modify or alter those terms at any time before the fire had created mutual rights and obligations; his agency would not, without proof of special authority, give him the power to give up rights of his principal which had become fixed and determined.

Nor do I think that there is any force in the proposition that the telegram of May 1st sent by the insured and the testimony of its agent as to correcting a mistake in the forms sent changes the situation. To the defendant's contention that the policy should be made to conform to the agreement, it is objected that this could be done only in a direct proceeding to reform the policy. The same objection may with equal force be urged against an attempt by plaintiff to reform the contract on the ground of mistake.

INGERSOLL ENGINEERING & CONSTRUCTING CO. v. CROCKER.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1915.)

No. 2614.

1. COURTS ⟸367—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.
   Upon the question of the sufficiency of a title to real estate, the decisions of the Supreme Court of the state fix a rule of property which the federal courts will follow.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. ⟸367.]

2. VENDOR AND PURCHASER ⟸102—RIGHTS OF PARTIES TO CONTRACT—RESCISSION BY VENDOR.
   Where by reason of an outstanding mortgage a vendor could not make the clear title required by his contract and the purchaser refused to make payment, an immediate declaration of forfeiture by the vendor, on discharging the mortgage, without previous notice to the purchaser, was ineffective; but the commencement of an action for damages by the purchaser for breach of contract operated as an acceptance of the tendered forfeiture and rendered it effective from that date.
   [Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 175–177; Dec. Dig. ⟸102.]

3. VENDOR AND PURCHASER ⟸130—TITLE OF VENDOR—EFFECT OF CONDITION SUBSEQUENT IN PRIOR CONVEYANCE—"INCUMBRANCE"—"MARKETABLE TITLE."
   A deed containing an express condition that "said premises shall never be occupied or used by or in any trade or business such as, if launched or started in localities in cities already thickly populated and devoted to first-class residences, are held to be nuisances," upon violation of which the title should revert, creates a condition subsequent, which under the

law of Michigan constitutes an apparent or prima facie incumbrance, and renders the title of the grantee nonmarketable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245–247; Dec. Dig. ⊂⊃130.

For other definitions, see Words and Phrases, First and Second Series, Incumbrance; Marketable Title.]

4. VENDOR AND PURCHASER ⊂⊃130—TITLE OF VENDOR—EFFECT OF CONDITION SUBSEQUENT IN PRIOR CONVEYANCE.

Such condition, if in force, would clearly render the title nonmarketable as between a vendor and a purchaser who desired the property, as was known to the vendor, for a use which would constitute a nuisance in a locality "devoted to first-class residences."

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245–247; Dec. Dig. ⊂⊃130.]

5. DEEDS ⊂⊃166—CONDITIONS SUBSEQUENT—DISCHARGE BY SUBSEQUENT CONVEYANCE BY GRANTEE.

The rule that the right of re-entry for breach of a condition subsequent is extinguished, if the grantor afterward and before the breach conveys to another, has relation only to a conveyance of the very property transferred by the deed carrying the condition.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 522–525; Dec. Dig. ⊂⊃166.]

6. DEEDS ⊂⊃156—CONDITIONS SUBSEQUENT—PERSONS ENTITLED TO ENFORCE —"CONDITION MERELY NOMINAL."

Where the owner of a tract of land subdivided it into blocks and lots, a large number of which he sold and conveyed by deeds containing a condition subsequent, the grantees acquired the right to enforce the condition as to any other lot in their vicinity, and the fact that the original grantor disposed of all his interest did not render the condition "merely nominal," within the meaning of Comp. Laws Mich. 1897, § 8828, which provides that such conditions may be disregarded.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 496–499; Dec. Dig. ⊂⊃156.]

7. DEEDS ⊂⊃166—CONDITIONS SUBSEQUENT—RELEASE OR WAIVER—QUESTIONS OF FACT.

Whether a use of property was in violation of a condition subsequent in a prior deed, and whether, if so, the continuance of such use for the statutory period would bar all persons entitled to enforce such condition, as well as whether the condition had been waived and abandoned by everybody concerned, all *held* questions of fact, not to be determined as matter of law.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 522–525; Dec. Dig. ⊂⊃166.]

8. DEEDS ⊂⊃166—CONDITIONS SUBSEQUENT—DISCHARGE OR LOSS OF RIGHTS.

A grantee, who accepts a deed carrying a condition subsequent, cannot free the estate by omitting the condition when he deeds it away, although its omission from so many subsequent deeds as to be general or common may have a bearing on the question of fact whether there has been an abandonment of the condition by those interested in its benefits.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 522–525; Dec. Dig. ⊂⊃166.]

9. DEEDS ⊂⊃149—CONDITIONS SUBSEQUENT—VALIDITY.

A state statute against perpetuities does not affect the validity of a condition subsequent in a deed as to the use of the premises, which runs

with the land, but which can be released at any time by the joinder of all persons entitled to its benefits.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 451, 479; Dec. Dig. ⊂⊃149.]

10. COURTS ⊂⊃493—PRIORITY OF JURISDICTION—LEGAL AND EQUITABLE JURISDICTION.

Complainant contracted to sell to defendants certain real estate, for which defendants refused to complete payment on the ground that the title was not such as required by the contract. Complainant declared a forfeiture and re-entered, whereupon defendants brought an action at law for damages for breach of the contract by failure of complainant to furnish good title. Pending such action, complainant brought suit in equity to cancel the contract, which was of record, as a cloud upon his title. The rights of the parties depended upon whether complainant had tendered a marketable title, which involved questions of both law and fact. *Held* that, while the court of equity acquired jurisdiction so far as related to the cancellation of the contract, such jurisdiction extended only to an incident of the main controversy which involved questions of title and damages proper to be tried by a jury, and that it should have awaited the trial of such issues in the court of law which first acquired jurisdiction, instead of assuming to determine the entire controversy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1346–1352; Dec. Dig. ⊂⊃493.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by Martin Crocker against the Ingersoll Engineering & Constructing Company. Decree for complainant (205 Fed. 99), and defendant appeals. Reversed.

G. K. Wright, of Pittsburgh, Pa., for appellant.

Martin Crocker, of Mt. Clemens, Mich., and F. D. Eaman, of Detroit, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The appellee filed a bill in equity in one of the state courts in Michigan, making the Ingersoll Company defendant, and alleging that Mr. Crocker, as vendor, had made in 1898 an executory contract of sale to the Ingersoll Company, as vendee, covering part of block 1, Dickinson's addition to the city of Mt. Clemens; that the vendee had failed to perform the conditions and thereupon the vendor had forfeited the contract and re-entered; that the contract had been placed upon record and constituted a cloud on vendor's title. The bill prayed that this cloud might be removed and the vendee enjoined from interfering with vendor's possession. The Ingersoll Company removed the case to the court below, in which, after some interlocutory proceedings, the company answered, claiming that the vendor's title proved to be bad, and that defendant had therefore been justified in refusing to pay the remainder of the price. The answer also set up that, before the bill in equity was filed, the Ingersoll Company, as plaintiff, had begun a case at law in the court below against Mr. Crocker to recover damages because he had been unable to make a

good title, and claiming, as such damages, the portion of the purchase price which had been paid and the value of the structures which defendant had erected on the premises and which had been taken over by the vendor when he retook possession. The answer insisted that the prior suit at law involved the whole controversy, and that the equity case ought to be stayed until the suit at law was determined; but the District Court declined to do so, and a final hearing was had upon proofs taken. This resulted in a decree finding that the vendor's title was sufficient, and that the vendee and not the vendor had broken the contract, and adjudging that unless within 30 days the vendee paid the remainder of the purchase price all the vendee's rights under the contract should be treated as forfeited and that the recorded contract, as a cloud upon Mr. Crocker's title, should be canceled. From this decree, defendant brought this appeal.

The meritorious questions involved are two: (1) Was Mr. Crocker's title good enough, so that his deed would have satisfied his agreement to convey a "good and sufficient title"? (2) Should the question of title and the dependent question of who broke the contract have been left to the law case for determination? Although we conclude, for reasons hereafter stated, that the second question should be answered in the affirmative, yet, since the court of equity had some measure of jurisdiction, and the legal questions have been fully argued, and sending the subject-matter back to be tried at law would only result in bringing the same questions here again, we think it proper on this appeal to consider those matters which have been thus presented, and which, clearly, must upon the further trial be treated as questions of law.

[1] 1. The case involves title to real estate in Michigan, and it has often been held by this court that upon such a matter the decisions of the Supreme Court of the state fix a rule of property which the federal courts will follow. In Michigan, the rule has long been established that such a covenant as was contained in the contract here involved—viz. to execute and deliver a good and sufficient conveyance in fee simple, free and clear of all liens and incumbrances—imposes on the vendor an obligation only to convey a marketable, and not a perfect, title (Barnard v. Brown, 112 Mich. 452, 70 N. W. 1038, 67 Am. St. Rep. 432); and in the same case it is held that a title acquired by adverse possession is, or may be, a marketable title. All alleged defects in Mr. Crocker's title, not hereafter specially mentioned, we think are clearly either too inconsiderable to make it less than marketable or else are sufficiently cured by the long possession which concededly had been held by the vendor and his grantors.

[2] 2. A controversy between the parties as to whether the title was good came to a sharp issue in October, 1911. At that time there was an undischarged mortgage against the property, and we assume that this made the title then nonmarketable. On December 14th Mr. Crocker discharged the mortgage; but without notifying the vendee of this act he declared a forfeiture and took possession. We cannot think this forfeiture was effective, or at least that it should be so regarded in a suit in equity brought by the vendor. Fair dealing re-

quired notice that the mortgage had been paid, and reasonable opportunity for the vendee to reconsider its determination not to pay. Hence the vendor's action amounted only to a declaration of his intention and desire to forfeit, and it continued to have only this force until, on March 30th, the vendee commenced the suit for damages because the vendor had no marketable title to convey. This was clearly an acceptance of the tendered forfeiture, which must take complete effect from that date. The mortgage had then been paid, and the vendee knew it, and could not thereafter, in that suit or in this, rely upon a defect which had then ceased to exist.

[3] 3. The next alleged defect is the most serious, and to appreciate its force further facts must be stated. In 1881 Mt. Clemens was a town of considerable size, lying mainly along the outside or convex side of a sharp curve of the Clinton river, a stream which is narrow, but navigable for the intervening few miles to Lake St. Clair. The chief business and residence districts of the town were immediately along and opposite this bow, while upon the other side, and separated only by the width of the river, was a low-lying district having the river practically upon three sides. At the time named, the greater part of this parcel which was so surrounded by the river and projected into the thickly-settled part of the city, but which was itself vacant, was owned by Mr. Don M. Dickinson, and was by him platted into blocks and lots, as Dickinson's addition. Block 1 was situated at the center of the bow, and so was nearest to the business district; and at both ends of the block, bridges crossed the river. Judging by the map, this block extends to within about 200 feet of the main part of the main business street. The deed from Mr. Dickinson to Mr. Crocker's grantor contained this provision:

"It is made an express condition of this conveyance that said premises shall never be occupied or used by or in any trade or business such as if launched or started in localities in cities already thickly populated and devoted to first-class residences are held to be nuisances; and upon violation of this condition, the said premises, and the title thereof, with all improvements thereon, shall revert to party of the first part, their heirs, representatives and assigns."

No one doubts the prima facie validity of this stipulation, or that it would at once be effective as a condition subsequent, a breach of which would give the right of re-entry; and obviously such a condition would affect the title in the hands of all subsequent grantees, without regard to whether the condition was repeated in the deeds in the intervening chain of title. Blanchard v. R. R., 31 Mich. 43, 18 Am. Rep. 142; Batley v. Foerderer, 162 Pa. 460, 29 Atl. 868. The Michigan decisions adopt the general rule that a title is not marketable, if there is any outstanding incumbrance or claim—and a condition subsequent is an incumbrance—which would make a purchaser of ordinary business prudence unwilling to accept the title. Allen v. Atkinson, 21 Mich. 351, 361; Barnard v. Brown, supra. Clearly, this condition in this deed creates an apparent or prima facie incumbrance which seems to make the title nonmarketable; and we come to a consideration of the special reasons why the condition is thought either never to have been, or to have ceased to be, thus operative.

[4] 4. It is said that a condition which forbids the maintenance of a nuisance is only a declaration of a burden already imposed by law, and so does not constitute an incumbrance. This position is based upon three New York cases, Clement v. Burtis, 121 N. Y. 708, 24 N. E. 1013, Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182, and Floyd v. Clark, 7 Abb. N. C. 136. Even if these cases may be accepted as sustaining the proposition as applicable to a condition as well as to a covenant, the condition now involved is essentially different. What is and what is not a nuisance depends largely upon the character of the neighborhood, and, if we except certain things which are nuisances always and everywhere, the question whether a particular use constitutes a nuisance depends on the surroundings. The draftsman of this condition clearly intended to eliminate any such question of doubt. He made the restriction apply, not to nuisances generally, but to any business which would be considered a nuisance if started in a city and in a locality "already thickly populated and devoted to first-class residences." The obvious intention was to fix for this locality, not the changing standard which might be appropriate to the vagaries of city growth, but the hard and fast standard of a first-class residence district.

It might be argued that restrictions intended to maintain a high-class residential neighborhood would increase rather than diminish the value of the property so long as the neighborhood maintained that character, and hence that such a restriction would not injuriously affect the marketability of the title; but even that argument will not reach the present case. It appears without dispute that this district did not develop as was planned; that the residences built thereon were of a medium class; that for many years a factory, coal and lumber yard, boarding houses, and places of public entertainment had been maintained on block 1, or within the district covered by restrictions like that in this deed, and that just outside the district and closely adjacent to this parcel were large factories of different kinds. It is not to be doubted that, when the Crocker-Ingersoll contract was made, block 1 was better adapted to business purposes than to first-class residences; and this is emphasized by the fact that Ingersoll contracted to purchase the property for the purpose of building upon it a roller coaster or switchback railroad, and using it as a public amusement park. This, certainly, would not be, by law, a nuisance if in a suitable location; it surely—or at least probably—would be, among "first-class residences." If the restrictive condition was in force, it is clear enough that the property could not be appropriated to the lawful use which the purchaser intended, and hence that the condition was an incumbrance which made the title insufficient.

[5] 5. Appellee invokes the rule that the right of re-entry for breach of condition subsequent is extinguished, if the grantor afterwards, and before the breach, conveys to another. Rice v. Boston, etc., R. R., 12 Allen (Mass.) 141; Hooper v. Cummings, 45 Me. 359. It is doubtful whether this rule survived its reason, which was largely destroyed by the statutes making rights of action assignable (Underhill v. Saratoga, etc., R. R., 20 Barb. [N. Y.] 455, 461); but it has relation only

to a later conveyance of the very property transferred by the deed carrying the condition, whereby the grantor loses that interest which bears some analogy to a reversion, and there does not appear to have been any later deed by Mr. Dickinson covering the parcel now in question.

[6] 6. It was made to appear that Mr. Dickinson, the grantor, had sold all the property which, at the time of the deed, he owned adjoining or anywhere in the vicinity, and hence it is said that neither the grantor nor his heirs had any interest in enforcing the condition, and that, if there is no person competent to enforce the condition, it no longer constitutes a substantial burden. This contention perhaps confuses the difference between a condition and a covenant, but it rests on the supposed application of the Michigan statute (section 8828, C. L. 1897) providing that a failure to perform "merely nominal" conditions not of "substantial benefit" shall not work a forfeiture.[1] In Barrie v. Smith, 47 Mich. 131, 10 N. W. 168, and Smith v. Barrie, 56 Mich. 314, 22 N. W. 816, 56 Am. Rep. 391, it was held that the grantor, at the time of the deed, must own other lands to be benefited by such a condition, or else it is "merely nominal," but that his subsequent grantees of adjacent lands would or might have a right to insist on the condition (see full discussion by Judge Cooley in 56 Mich.). In the present case it is made to appear that this deed was one of a series of similar ones. Dickinson's addition was platted in 1881, and contained 14 blocks, divided into about 260 lots. It also contained three larger tracts, not subdivided, but called outlots. As we understand the present record, it should be inferred that every deed made by Mr. Dickinson from 1881 until 1895 contained this identical restriction, and that such deeds conveyed about 135 lots. Such restrictions thus became fixed, not only upon the entire of block 1, but upon the entire of block 2, and upon those portions of block 9 nearest block 1. It resulted that block 1 was bounded on the north by the river, on the west (300 feet) by nonrestricted territory not a part of Dickinson's addition, but on the south (600 feet) and on the east (300 feet) by restricted territory. In addition, about half of all the lots to the south and the east within a quarter of a mile were likewise restricted.

By these deeds, the adjacent and nearby lot owners acquired rights to benefits from the condition imposed upon block 1. It is quite clear under the two Smith-Barrie Cases not only that the condition, when imposed, was substantial, not nominal, but also that conveyances of the adjoining land as described did not change the character of the condition and render it "merely nominal."

[7] 7. It is next urged that the condition has become barred by the statute of limitations. This is because this part of block 1 had been used for a lumber and coal yard with docks on the river front for

[1] "When any conditions annexed to a grant or conveyance of land are merely nominal and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform the same shall in no case operate as a forfeiture of the land conveyed subject thereto."

15 years or more before the date of the contract. We see no reason to doubt that such a use of the property as was clearly inconsistent with the restriction, if sufficiently open and notorious, and if continued for the period of the Michigan statute, would operate to bar the right of re-entry and all dependent rights, as against all persons who would be bound by adverse possession; but whether the use here was of such a character as to set the statute in motion is or may be a question of fact, and if the statute would otherwise have run, the inquiry whether there are persons adversely interested who, for specific reasons, are not bound, is not covered by this record. The burden is on the one refusing the title to show that it is not marketable (Baxter v. Aubrey, 41 Mich. 13, 1 N. W. 897); and, on the other hand, acceptance of a title cannot be compelled, if its validity depends upon the uncertain verdict of a future jury regarding a disputed question of fact (Brokaw v. Duffy, 165 N. Y. 391, 59 N. E. 196). If we undertook to determine finally these questions on the present record, only imperfectly shaped for this purpose, we might be doing great injustice. They should be tried out in the suit at law, and if any equitable relief is needed, it may be that, under the present statute (Judicial Code, § 274 (b) [Act March 3, 1915, c. 90, 38 Stat. 956]), it could be given in that suit.

8. It is said that the condition has been waived and abandoned by everybody concerned. This contention is based on the fact that in 1894 outlot 3 was subdivided into lots, and in 1895 a large part of the original addition remaining unsold was partitioned by Mr. Dickinson among the owners, for whom he was trustee, and that after these dates this restriction was omitted from all further deeds made by the proprietors of the original addition or of lot 3. We infer that, at the time of the partition, there remained unsold about 124 of the small lots on the original addition, and that, as these were afterwards sold by the proprietors who had succeeded Mr. Dickinson, no condition was imposed. Further, considerable portions of the property sold under restriction had been used for years for purposes which might be considered forbidden by the condition, and no lot owner had ever made any objection. Upon this question of abandonment and waiver, as upon that of adverse possession, we think no decision should now be made. The proofs have by no means been exhausted, and the questions are proper for decision in the suit at law. We do not intend to intimate that each of these two questions may not now be upon this record, and may not turn out to be upon the final record, one of law and not of fact.

[8] 9. Block 1, and many other restricted parcels, have been, by the grantees, conveyed by deeds which contained no similar condition and no reference to the condition in the Dickinson deed; and this fact is urged as having, in some way, cured the defect in the title. We do not see how it can have this effect. Obviously a grantee who accepts a deed carrying a condition subsequent cannot free the estate by omitting the condition when he deeds it away. The omission of the condition in so many subsequent deeds as to be general or common may have a bearing on the question of fact whether there has been an

effective abandonment of the condition by those interested in its benefits; but this is the only pertinence the fact has.

[9] 10. It is urged that to enforce the condition permanently is to violate the Michigan statute against perpetuities, which forbids suspension of the power of alienation for more than two lives in being. This contention is based upon a misapprehension of the statute. It does not prohibit the granting of an easement, or the reservation of an analogous interest, for a term without stated limit; the power of alienation is not here suspended, since, if all persons interested join in a deed, a perfect title can be conveyed at any time. Whether or not the result of such a condition as this should be classified as a negative easement existing in connection with a dominant estate in the adjoining lots, certain it is that the right grantors could release all incumbrances.

Several other points are made against the effectiveness of the condition to constitute an incumbrance, but we think the others do not require discussion. It cannot be important whether the Ingersoll Company was really anxious to carry out the contract, if in fact the title was one which it was not bound to accept.

The Ingersoll Company relied upon another supposed defect in the title: It appeared that the city of Mt. Clemens had once received a grant of a right to lay water pipes across block 1, and this right never was formally released by the city until after the status of the parties hereto was fixed by the forfeiture and its acceptance. Whether this apparently outstanding right was really a burden or a benefit, whether it had been in fact abandoned by the city, and whether the benefit or the abandonment was clear enough to make unsubstantial any complaint based on this objection, are questions for the suit at law.

[10] We have said that the equity court had some measure of jurisdiction of this controversy. Ordinarily questions of title are for courts of law, and this court has repeatedly denied the jurisdiction of a court of equity to consider merely legal questions of title. Here, however, is an executory contract of sale which had been placed on record; until it was removed from the record, it constituted a cloud, and this furnished jurisdiction in equity to remove the cloud. We think the court should not have gone further. It is true that under some conditions the jurisdiction of equity, once attached, extends to the whole controversy; but here a suit at law had been first commenced. The questions of marketable title, of adverse possession, and particularly the question of damages were proper for a jury trial. It is not easy to see why the Ingersoll Company was not entitled of right to a jury trial; and in such a situation to permit a bill later filed and based upon a comparatively trifling incident of the situation to oust the jurisdiction of the law court and prevent trial by jury was, we think, an undue expansion of equity powers. Orderly administration required that the main controversy, legal in its nature, should be tried out in the court of law, which had first taken hold of it. Certain objections made against the sufficiency of the title were so clearly untenable that we have thought proper to say so in this case, and in so far end the controversy; but as to others this cannot be said, and they

must be left to the appropriate tribunal. This court cannot apply to this situation section 274 (a) of the Judicial Code.

The decree below is reversed, and the case remanded for further proceedings consistent herewith.

SOUTHERN RY. CO. v. PEPLE.

In re STANTON TANNING CO., Inc.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1915. Rehearing Denied December 11, 1915.)

No. 1354.

1. LANDLORD AND TENANT ⇐86—LEASES—COVENANTS FOR RENEWAL—CONDITIONS PRECEDENT—WAIVER.

A railway company leased land to C. for 10 years, with the right of renewal; the lease requiring the lessee to erect a two-story brick warehouse on the land, and providing that, as a condition precedent to a renewal, the lessee should serve notice of his election to renew 90 days prior to the expiration of the term. C. sublet the premises, with the railway company's consent, for a period extending 14 months beyond the 10-year term, and organized a corporation to take over his business, which corporation executed a mortgage on the leasehold interest to secure an issue of bonds when the lease had only 2 years to run. The railway company's consent to the sublease and to the assignment and execution of the mortgage, however, was expressly made subject to the terms and provisions of the lease. By inadvertence, notice of the lessee's election to renew was not given until 60 days before the expiration of the 10 years. The railway company delayed answering for about 5 weeks, and then replied, explicitly promising to renew the lease upon the lessee writing a more formal letter on the subject to its vice president and general manager, which letter was written. *Held* that, the railway company's consent having been expressly made subject to the terms of the lease, the subletting and the assignment to the corporation and execution by it of the mortgage and the erection by the lessee of the warehouse contemplated by the lease were not sufficient in themselves to constitute evidence of waiver of the provision requiring notice of the election to renew to be given 90 days before the expiration of the term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270–275; Dec. Dig. ⇐86.]

2. LANDLORD AND TENANT ⇐86—LEASES—COVENANTS FOR RENEWAL—CONDITIONS PRECEDENT—WAIVER.

That the railway company allowed the lessee to remain in possession and pay rent and taxes after the expiration of the term pending negotiations for an adjustment of the differences between the parties was not in itself evidence of waiver, since, while continuance in possession by a tenant with the payment of rent will usually be regarded as a renewal of the lease, the acceptance of the rent being considered a waiver of any right to notice of intention to renew, this rule does not apply where the possession is retained and the rent paid pending negotiations with respect to a renewal of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270–275; Dec. Dig. ⇐86.]

3. LANDLORD AND TENANT ⇐86—LEASES—COVENANTS FOR RENEWAL—CONDITIONS PRECEDENT—WAIVER.

The sublease running beyond the term of the original lease, the formation of the corporation, the assignment of the lease to it, and the mortgage

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of the leasehold indicated to the lessor the intention of the lessee to renew the lease, and in view of the embarrassing business situation which would be brought about by the loss through inadvertence of the premises, equity and good conscience required the lessor to promptly reject the notice of the lessee's election to renew, if it intended to stand on its right to 90 days' notice.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270–275; Dec. Dig. ⊂⊃86.]

4. LANDLORD AND TENANT ⊂⊃86—LEASES—COVENANTS FOR RENEWAL—CONDITIONS PRECEDENT—WAIVER.

The promise by the railway company to renew the lease, having become effective by the writing of the formal letter requested, amounted to a waiver of the 90 days' notice, and acceptance of the 60 days' notice as sufficient, and an agreement to renew on the notice given.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270–275; Dec. Dig. ⊂⊃86.]

5. LANDLORD AND TENANT ⊂⊃86—LEASES—COVENANTS FOR RENEWAL—CONDITIONS PRECEDENT—WAIVER.

Where the letter from the corporation containing the promise to renew specifically referred to the contracts between the parties, setting out the dates showing that the officer who wrote it had the lease before him, it could not be inferred that the promise to renew was made inadvertently, and that the officer writing it had lost sight of the condition contained in the lease merely because in a subsequent letter from the vice president of the railway company it was stated that he had discovered such condition on examination of the lease; the railway company and all of its officers concerned with the matter having presumptive knowledge of the contract to which it was a party and which was in its possession.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270–275; Dec. Dig. ⊂⊃86.]

6. LANDLORD AND TENANT ⊂⊃86—LEASES—COVENANTS FOR RENEWAL—CONDITIONS PRECEDENT—WAIVER.

Assuming that the railway company's agreement to renew was due to inadvertence, such company had no equity to ask that it be relieved from its promise, as the lessee's failure to give 90 days' notice was also an inadvertence, and the denial of a renewal would result in great loss and hardship to it, while the railway company had suffered no loss or detriment from the failure to give the notice earlier.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270–275; Dec. Dig. ⊂⊃86.]

7. LANDLORD AND TENANT ⊂⊃86—LEASES—COVENANTS FOR RENEWAL—CONDITIONS PRECEDENT—WAIVER.

Negotiations between the railway company and the lessee subsequent to the letter containing the promise to renew, in which the lessee assented to the statement that it had lost the right to a renewal by failure to give the 90 days' notice, and agreed to make a new lease on different terms, was not conclusive that there was no waiver of the 90 days' notice; no new lease having in fact been made.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270–275; Dec. Dig. ⊂⊃86.]

8. WORDS AND PHRASES—"WAIVER."

"Waiver" is the intentional relinquishment of a known right, with both knowledge of its existence and intention to relinquish it.

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

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9. LANDLORD AND TENANT ⇐S6—LEASES—COVENANTS FOR RENEWAL—CONDITIONS PRECEDENT—WAIVER.

In a proceeding involving a question as to a lessee's right to a renewal of a lease, providing that, as a condition precedent to a renewal, the lessee should give 90 days' notice of its election to renew, whether the lessor relinquished its right to refuse to renew, where such notice was not given, was a question of fact.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270–275; Dec. Dig. ⇐S6.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond, in Bankruptcy; Edmund Waddill, Judge.

In the matter of the Stanton Tanning Company, Incorporated, bankrupt. From a judgment dismissing the petition of the Southern Railway Company, opposed by Gustavus A. Peple, trustee, the Railway Company appeals. Affirmed.

Thomas B. Gay, of Richmond, Va. (Eppa Hunton, Jr., of Richmond, Va., on the brief), for appellant.

George Bryan and Henry C. Riely, both of Richmond, Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. By a written contract dated November 1, 1900, Southern Railway Company leased to Marion H. Chalkley a vacant lot, now in the limits of the city of Richmond, for the term of 10 years beginning October 1, 1898, with the right of renewal for two other successive terms of 10 years. The lessee agreed to pay $35 a year rent and to erect a two-story brick warehouse on the lot. The contract provided, "as a condition precedent" to renewal, that the lessee "should first serve upon the railway company ninety (90) days' notice in writing of his election of such renewal prior to the expiration of any existing term of renewal thereof."

By a contract dated October 1, 1904, the railway company consented to a sublease of part of the lot to the Gus Kohn Company for 5 years from December 1, 1904; and on April 11, 1906, consented that Chalkley should assign all his rights under the lease to Stanton Tanning Company, a corporation formed to take over and operate the lessee's business, and that the Stanton Tanning Company should include the leasehold interest in a mortgage or deed of trust to secure an issue of bonds. These consents were given with the stipulation that the transactions made should be subject to the terms and conditions of the lease to Chalkley.

On August 1, 1908, 60 days before the expiration of the first lease term of 10 years, the Stanton Tanning Company, by letter, formally notified the railway company of its election to renew the lease for another period of 10 years. The failure to give the notice 90 days before the expiration of the lease term of 10 years, as required by contract, was due to the inadvertence of Chalkley, the president of the tanning company.

The tanning company, with the consent of the railway company, remained in possession, paying rents and taxes, about 4 years after the expiration of the first lease period. Before the expiration of that period, however, the railway company had asserted its claim of failure to meet the condition precedent to renewal and there were extended negotiations looking to a settlement of the differences between the lessor and the lessee. In January, 1912, the tanning company was adjudged a bankrupt, and its rights became vested in G. A. Peple, trustee. On October 18, 1912, the railway company filed its petition in the bankruptcy proceeding, setting out the lease, and alleging that the right to renew the lease had not been exercised since notice of the election to renew had not been given by the lessee 90 days before its termination as stipulated in the contract. On this ground the railway company asked immediate possession of the lot and the houses situated thereon, and compensation for the use since October 1, 1912. The District Court dismissed the petition, holding that the railway company had not clearly proved the forfeiture contended for, that it had waived the requirement of 90 days' notice, and that the tanning company had exercised the right of renewal. The question before us is whether the evidence affords sufficient support for the conclusion of the District Court.

[1-3] It is to be observed that the railway company is not in a strict sense setting up a forfeiture, for the lease was for 10 years, with the right of renewal made by the parties themselves to depend upon the 90 days' notice as a condition precedent. Yet, under the circumstances, the lessee's claim to relief appeals as strongly to a court of equity as if a technical forfeiture were involved. By the lease the lessee had contracted to erect a two-story brick warehouse 90 by 100 feet on the lot. He had incurred this expense with the knowledge that the warehouse would be forfeited unless he renewed the lease. Afterwards, when the original term had only 4 years to run, he had sublet the premises for a period extending 14 months beyond the 10-year term. He had organized a corporation to take over and continue the business a little over 2 years before the first term of 10 years had expired, and this corporation had executed a mortgage to secure its bonds.

We do not think, however, that these facts, standing alone, are sufficient in themselves to constitute evidence of waiver; for the consent of the lessor to the sublease and to the assignment and execution of the mortgage was expressly made subject to all the terms and provisions of the lease, and one of the provisions was that notice of 90 days should be a condition precedent to the renewal of the lease. Nor do we think that allowing the lessee to remain in possession and pay rent and taxes, pending the negotiation for adjustment of the differences between the parties, should be taken as in itself evidence of waiver. Continuance in possession by a tenant, with the payment of rent, will usually be regarded as renewal of the lease; the acceptance of the rent by the lessor being considered a waiver of any right to notice of intention to renew. Probst v. Rochester Steam Laundry Co., 171 N. Y. 584, 64 N. E. 504; Long v. Stafford, 103

N. Y. 274, 8 N. E. 522; Stone v. St. Louis Stamping Co., 155 Mass. 267, 29 N. E. 623; Benne v. Miller, 149 Mo. 228, 50 S. W. 824; Hotel Allen Co. v. Allen's Estate, 117 Minn. 333, 135 N. W. 812. But this rule does not apply where the possession is retained and the rent paid pending negotiations with respect to the renewal of the lease. Williamson v. Paxton, 18 Grat. (Va.) 475; Peirce v. Grice, 92 Va. 767, 24 S. E. 392; Grant v. White, 42 Mo. 285; Waring v. L. & N. R. Co. (C. C.) 19 Fed. 863; 24 Cyc. 1014.

But the sublease, running 14 months beyond the first lease period, the formation of a corporation to take over the business, Chalkley's assignment of the lease to that corporation, and the mortgage of the leasehold when the first lease period had only 2 years to run, indicated to the lessor the intention of the lessee to renew the lease. These transactions placed the parties in a relation to each other different from that which would have existed, had there been a mere option to lease upon acceptance of an offer within 90 days without an intervening lease period; and they have an important bearing on the inference to be drawn from the conduct of the lessor when the notice was given by the lessee 60 days before the expiration of the lease. Expense and labor had been incurred and plans had been laid out for the future which the lessor could hardly fail to know would not have been incurred and entered upon if the lessee had not been relying on a renewal of the lease. It seems, therefore, reasonable to infer that, if the lessor intended to stand on its right to 90 days' formal notice of the election to renew, it would have promptly rejected as insufficient the notice given 60 days before the expiration of the first lease period. Indeed, equity and good conscience required prompt rejection of the notice, so that the lessee might have immediate opportunity to relieve itself as far as possible from the embarrassing business situation which would have been brought about by the loss, through inadvertence, of a very important property right.

[4] The case, then, is narrowed down to the inquiry whether, under these circumstances and in these relations of the parties, the conduct of the lessor, after receiving the 60 days' notice, indicated an intentional acceptance of that notice as sufficient. Upon receiving the notice of August 1, 1908, 60 days before the termination of the first lease period, the lessor did not reply for 5 weeks. After that delay it responded to the notice on September 8, 1908, with an explicit promise to renew the lease upon the lessee writing a more formal letter on the subject to the vice president and general manager. The letter was written as requested, and the conclusion is inevitable that the promise became effective; for it was without other condition or qualification. The promise was given with knowledge of the arrangements which the lessee had before made for a continuance of its business, and in the full view which the lease contract presented of the right of the lessor to insist on 90 days' notice. Had nothing more appeared, there could be no doubt that the case would be this: A lease for 10 years, with the right to renew for 10 years on notice of election to renew 90 days before the expiration of the first lease period; transactions between lessor and lessee indicating plainly a purpose to re-

new; notice of election to renew 60 days before expiration of first lease period; waiver of 90 days' notice by acceptance of 60 days' notice as sufficient, and agreement to renew on the notice given.

[5] But it is said that the officer who agreed on behalf of the company to renew was not advertent to the condition of 90 days' notice required by the contract, and that the company should be relieved from the mistake. In the first place, it does not appear that the mind of the officer who wrote the letter did not advert to the condition required by the contract. It cannot be inferred that he had lost sight of the condition merely because the vice president, in a letter of September 16, 1908, said that he had discovered the condition on examination of the contract. The railway company, and all of its officers concerned with the matter, were under the presumption of knowledge of the contract to which the corporation was a party and which was in its possession. Surely this presumption is not rebutted as to other officers of the company by a letter of one officer, not sworn as a witness, to the effect that on examination he had found the provision of the contract. On the contrary, the letter of September 8, 1908, agreeing to renew, shows on its face that the officer who wrote it had before him the lease contract, for the letter refers specifically to all the contracts relating to the matter and sets out the dates.

The position that the officer who agreed to renew did so under the supposition that another notice had been given 90 days before the termination of the first lease period is untenable. The notice of August 1, 1908, on its face plainly indicated that it was intended as the formal notice of election to renew. The natural inference is that the railway company, having been already advised by its transactions with the tanning company that it would desire to renew the lease and having suffered no detriment from the lessee's failure to give 90 days' notice, agreed to renew the lease with knowledge of the condition of 90 days' notice, or that, without concerning itself with the condition it intended to waive it, whatever it might be.

[6] But let it be assumed that the agreement to renew was due to inadvertence; what equity has the railway company to be relieved against its agreement or the waiver implied by the promise? The lessee's failure to give 90 days' notice was also an inadvertence. It had made arrangements, and had had transactions with the lessor, which gave the lessor notice that denial of a renewal would result in great loss and hardship. The lessor had suffered no loss nor detriment from the failure to give the notice earlier. It had delayed 5 weeks an answer to a request for renewal, and had then given an unequivocal promise to renew. Plainly, under these circumstances, the lessor has no equity to ask that it be relieved from its promise. On the other hand, the lessee presents a very strong case for the enforcement of the new promise or the waiver implied by it.

[7-9] It is true there was uncontradicted oral evidence that after the letter of September 8, 1908, Chalkley, on behalf of the tanning company, made efforts to come to terms with the railway company on a new lease, and assented to the statement that he had lost the

right of renewal by failure to give the 90 days' notice. The voluminous correspondence on the subject also indicates that he thought his company's rights had been lost, and he agreed to make a new lease on terms different from the original. But the proposed new lease was never executed, and the railway company does not claim that there was a new contract. On the contrary, its claim to possession rests on the position that none was ever made, and that there is now no outstanding contract of any kind. The expression of opinion by Chalkley and his inference at the time that his company's rights had been lost is not conclusive. Since no new agreement was alleged or proved, the court must go back to the last binding transaction between the parties; that is, to the request or offer to renew the lease and the acceptance of the offer by the railway company. "Waiver is the intentional relinquishment of a known right, with both knowledge of its existence and intention to relinquish it." So. Ry. Co. v. Gregg, 101 Va. 308, 43 S. E. 570. Whether there was a relinquishment is a question of fact, and the evidence affords strong support for the finding that the railway company, with full knowledge of its right, intended to relinquish it, and did relinquish it by an agreement to renew the lease notwithstanding the failure of the lessee to comply strictly with the condition precedent.

It would be mere affectation to analyze and discuss the numerous and somewhat conflicting cases on the length to which the courts will go in relieving against strict compliance with the time requirement for the renewal of a lease or other contract. Every case depends upon the particular words used in the contract and the circumstances surrounding the transaction. Assuming the right of the lessor in this case to stand on strict compliance with the condition precedent that notice of election to renew be given 90 days before expiration of the first lease term, we affirm the judgment on the strong evidence leading to the conclusion that the lessor waived the requirement and agreed to renew without respect to whether the notice was in time or not.

Affirmed.

COURTNEY v. GEORGER.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 95.

1. CORPORATIONS ⇐175—LIABILITY OF STOCKHOLDERS—UNPAID SUBSCRIPTIONS.

An agreement by a corporation that no more than $10 need be paid for stock of the par value of $100, and that on the payment of that amount the stock was to be nonassessable, was binding on the corporation, whether the stockholder subscribed for the stock or purchased it from the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 654–656; Dec. Dig. ⇐175.]

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2. BANKRUPTCY ⊜145—LIABILITY OF STOCKHOLDERS—UNPAID SUBSCRIPTIONS.

Gen. St. Minn. 1913, § 6193, provides that, save as otherwise specially limited or provided, no corporation shall issue any share of stock for a less amount to be actually paid in than the par value of those first issued. Defendant purchased stock in a Minnesota corporation of the par value of $100 from the corporation under an agreement that upon payment of $10 a share, the stock would be fully paid up and nonassessable, and this amount was paid. *Held* that, under such statute as construed by the Minnesota Supreme Court, a trustee in bankruptcy could not recover from defendant the unpaid balance of the par value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 205, 230–232, 234; Dec. Dig. ⊜145.]

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

The Huron Iron Mining Company is a corporation organized and existing under the laws of the state of Minnesota and is a citizen of that state. It has its principal place of business in the Western district of Michigan. The defendant is a citizen of the state of New York and resides in the Western district.

The Huron Iron Mining Company was organized on August 24, 1906, and carried on its operations until about October 20, 1913, when it became unable to meet its obligations as they became due. On December 19, 1913, it filed a voluntary petition in bankruptcy in the District Court of the United States for the Western District of Michigan, Northern Division. On December 20, 1913, it was duly adjudged a bankrupt in that court. On January 24, 1914, the plaintiff was duly elected trustee of the estate of the bankrupt, was confirmed, and duly qualified. At the time of the adjudication of the corporation as a bankrupt its outstanding capital stock was $1,500,000, divided into 15,000 shares of $100 each. The defendant is the holder of 1,500 shares of the stock.

This action was brought by the trustee in bankruptcy against defendant as a stockholder to recover an assessment upon the stock which had been issued to him for less than its par value and as nonassessable. The parties stipulated in writing that a trial by jury was waived and that the case might be tried at Buffalo, N. Y. The case was accordingly tried at Buffalo on January 22, 1915. The court found the following facts:

That the stock was issued for the price of $10 per share, and that when that amount was paid the stock was to be nonassessable.

That defendant paid $10 per share and no more for his stock.

That the referee in bankruptcy had ordered and adjudged that the defendant be assessed $3 per share on his 1,500 shares.

That payment of the assessment was necessary in order that payment of the debts of the Huron Iron Mining Company might be made.

That defendant refused to pay the assessment.

The court dismissed the bill.

Judgment (221 Fed. 502, — C. C. A. —) affirmed.

Thompson, Hine & Flory, of Cleveland, Ohio, and Morey, Bosley & Morey, of Buffalo, N. Y., for plaintiff in error.

Strebel, Corey, Tubbs & Beals, of Buffalo, N. Y. (Warren Tubbs, of Buffalo, N. Y., on the brief), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question which this case presents is whether a trustee of a bankrupt

Minnesota corporation has a right to maintain an action against a stockholder who received his stock from the company without paying the full par value and under an agreement that it should be nonassessable. The stockholder has been assessed by the receiver in bankruptcy $3 a share on 1,500 shares, and this action has been brought by the trustee of the bankrupt to recover $4,500.

[1] This is not an action to recover the balance of an unpaid subscription to stock. The complaint alleged that the defendant was a subscriber for and the owner and holder of 1,500 shares of the capital stock of the par value of $100 per share, and that upon his subscription therefor he promised and agreed to pay $100 per share, and that he paid no part thereof except the sum of $5 per share. The District Judge, however, found as a fact that the defendant purchased his shares from the company under an express agreement between himself and the corporation that $10 per share should fully pay it for each such share and that the shares so sold should be nonassessable. He also found as a fact that in pursuance of the agreement the defendant paid the corporation $10 for each share. So long as there was an agreement with the corporation that no more than $10 need be paid for the stock, and that on the payment of that amount the stock was to be nonassessable, the agreement to that effect would be equally binding, as against the corporation, whether the defendant subscribed for the stock or purchased it. In neither event would the claim for the unpaid balance be an asset of the corporation. But if there had been a subscription for the stock, with no such understanding that on the payment of $10 per share the stock was to be nonassessable, then the claim for the unpaid balance would be an asset of the corporation. In the one case the trustee in bankruptcy might be able to maintain the action while in the other he might not. A contract entered into by a corporation with the unanimous consent of all the remaining stockholders that a particular stockholder need pay but a specified portion of the face value of the stock is binding on the corporation, although it may be declared void in favor of creditors who became such without notice of the agreement. It is to protect the right of such creditors that the present action was brought.

In Remington on Bankruptcy, § 976, the rule is stated to be that unpaid stock subscriptions in a bankrupt corporation pass to the trustee. This is undoubtedly true where the subscription is made without restriction. But it may not be everywhere true where the subscription is accompanied by an agreement similar to that which the corporation made with the defendant in the case at bar.

In re Jassoy Co., 178 Fed. 515, 101 C. C. A. 641 (1910) this court had before it the question of the right of a trustee in bankruptcy to maintain an action against stockholders to the extent of the amount unpaid on their stock. The trustee sued to enforce the payment of a balance of the par value of stock concededly issued as full-paid for property purchased, but which property had been found not to be worth the par value. In that case we held that as the bankrupt was a New York corporation the right to levy an assessment or to take other action to collect from its stockholders must be found in the statutes

of this state; that there was no such right at common law, where an original contract of subscription did not exist; and that in the federal courts the New York statute would be construed in strict conformity to the construction placed upon it by the New York Court of Appeals. We therefore held, in accordance with the decisions of that court, that no right of action passed to a trustee in bankruptcy of the corporation in behalf of its general creditors to enforce payments from stockholders to whom full-paid stock was issued for property the real value of which was less than the par value of the stock.

That case settled the law for this circuit, and we see no reason why it should be departed from in the case which is now presented to us. In the case at bar the bankrupt corporation was organized under the laws of the state of Minnesota. The defendant was a stockholder in a Minnesota corporation. The single question, therefore, is whether the Minnesota statute as interpreted by the Minnesota courts gives the receiver of the bankrupt corporation a right to maintain this action.

[2] The corporation was organized in 1906, and the Minnesota statute (Gen. St. 1913, § 6193) reads as follows:

"Save as otherwise specially limited or provided, no corporation shall issue any share of stock for a less amount to be actually paid in than the par value of those first issued."

This provision seems to have been enacted in 1866, and to have been retained in the various acts subsequently adopted and which regulate the corporations of that state.

In Minnesota Thresher M. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310 (1890), the Supreme Court held that a receiver could recover capital which had been withdrawn and refunded by the corporation as a gratuity to its stockholders. The property so withdrawn was assets of the corporation at the time of the withdrawal. Although the corporation could not recover back the moneys so paid out, the court said that everything became assets in the hands of the receiver which were assets as to creditors, and that the receiver might sue to recover them, not in the right of the corporation, but only in the right of the creditors. The reason for the decision, as explained in Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 443, 69 N. W. 331, 38 L. R. A. 415 (1896), was "because such was at one time the property of the corporation."

In Hospes v. Northwestern Mfg. Co., 48 Minn. 197, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637 (1892), the court had before it the liability of a stockholder on stock issued gratuitously as full-paid, no payment having ever been made, either in money or property. The company at the time the stock was issued was free from debt, but afterwards became insolvent. Its indebtedness amounted to about $3,000,000, and the corporate assets were not sufficient to pay any considerable part of it. The court elaborately considered the liability of one holding watered stock, and the opinion rendered has been frequently cited since by courts and text-writers. The "trust fund" doctrine announced by Justice Story in Wood v. Dummer, 3 Mason, 308, was subjected to a very discriminating criticism and rejected, as was that of an implied promise, and the liability of the stockholder was placed, where it undoubtedly should rest, upon the fraud practiced

upon the creditors. The court held that an agreement to issue, as full-paid and nonassessable, stock for which full payment was not to be made, was valid as between the company and the stockholder, but invalid as between the stockholder and creditors who became such after the stock was issued, and who could fairly be presumed to have relied on the fact that the stock had been paid for. And it was held that the right of the creditors against the stockholders in such cases was not derived through the corporation, but accrued directly to the creditors or for their benefit. In the case of In re People's Live Stock Insurance Co., 56 Minn. 180, 57 N. W. 468 (1894), the court held that the power of a receiver of an insolvent corporation to prosecute and defend actions had reference to such actions as the corporation might have prosecuted or defended, had its affairs not been taken out of its hands by the appointment of a receiver. It was declared in that case that, as the constitutional or statutory liability of the stockholders was directly to the creditors, it was no part of the assets of the corporation, and could not be enforced by the corporation. It was also held that the right to recover the balance due on a subscription for stock was an indebtedness, not to the creditors of the corporation, but to the corporation itself, and that it might be enforced by the receiver; the claim being an asset of the corporation.

In Basting v. Ankeny, 64 Minn. 133, 66 N. W. 266 (1896), the court held that the receiver of an insolvent corporation could maintain an action for an unpaid subscription for shares; that being a debt due to the corporation, and as such an asset of the corporation.

In Minneapolis Baseball Company v. City Bank, supra, the court held that a receiver of an insolvent corporation had no authority to enforce the individual liability of stockholders for the debts of the corporation. The court said:

"Everything which is still an asset of the corporation or debtor as to creditors becomes an asset in the hands of such a receiver. Among the rights which pass to him as the representative of creditors is the right to recover property of the corporation conveyed in fraud of creditors, or capital refunded without consideration to stockholders; that is, his powers and functions relate only to what is, or was at some previous time, and still is, as to creditors, the property or estate of the corporation."

We do not find in any subsequent Minnesota decisions any qualification of the doctrine announced in the above cases. Our attention has been directed to some of the later decisions, which counsel would have us believe depart from the doctrine laid down in the earlier cases; but we are unable to accept his view, and we think that all such cases are easily distinguishable, and by no means warrant the conclusion that in the state of Minnesota a receiver or trustee could maintain an action against an original holder of nonassessable stock issued for less than par to recover for the benefit of creditors the unpaid balance on the stock.

In view of our decision in the Jassoy Case and the decisions of the Minnesota courts, the District Court was right in holding that the plaintiff, as trustee in bankruptcy, has no cause of action.

Judgment affirmed.

RAMSDELL et al. v. GOUMIS.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 51.

1. MASTER AND SERVANT ⟸286, 289—ACTION FOR DEATH OF SERVANT—QUESTIONS FOR JURY.

The end of a gangway, composed of three planks, which rested upon a barge, dropped off owing to the rocking of the barge caused by passing vessels, and plaintiff's intestate, who was employing in wheeling a barrow load of bricks on board, fell in the river and was drowned. The planks extended three feet upon the barge, but were not fastened. They were long enough to have been extended further. The accident occurred during the lunch hour, when the rules of the employer required a cessation of work, but it did not appear that such rule was for the protection of the workman, or that deceased was ever personally notified of it, or that it was generally observed. *Held*, that the fact that it was not customary to fasten the ends of such ways, or that it was not shown that such accidents had occurred before, did not authorize the court to say as matter of law that the employers were not negligent, but that such question and the question of the contributory negligence of the deceased were properly 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, 1089, 1090, 1092–1132; Dec. Dig. ⟸286, 289.]

2. NEGLIGENCE ⟸136—ACTIONS FOR NEGLIGENCE—WHEN NEGLIGENCE IS QUESTION FOR JURY.

Whenever there may reasonably be difference of opinion which may fairly be drawn from the facts, the question of negligence is one of fact for the jury.

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

3. NEGLIGENCE ⟸136—ACTIONS FOR NEGLIGENCE—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

The question of contributory negligence is always for the jury, except where the exact standard of duty is fixed or the negligence is gross and inexcusable.

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

4. APPEAL AND ERROR ⟸1004—REVIEW—EXCESSIVE VERDICTS.

Appellate federal courts possess no revisory power as to excessive verdicts.

[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 Southern District of New York.

Action at law by Pantelis T. Goumis, administrator of the estate of Sarantos Andreas Vlemmas, deceased, against James A. Ramsdell, Henry P. Ramsdell, and Homer S. Ramsdell. Judgment for plaintiff, and defendants bring error. Affirmed.

Robert M. McCormick, of New York City (Joseph F. Murray, of New York City, of counsel), for plaintiffs in error.

Samuel F. Frank, of New York City, for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. [1] The plaintiff's intestate was employed by defendant as a laborer and while so employed and on July 26, 1913, accidentally met his death. The action is brought under the New York Employers' Liability Act, which imposes liability on employers causing workmen injury "by reason of any defect in the condition of the ways, works, machinery or plant. * * *" Chapter 352 of the Laws of 1910.

The plaintiff alleged in his complaint that defendants provided the deceased with an unsafe and improper place to work where he was exposed to great and needless danger; that the place was unsafe and dangerous, in that the only way to the barge was over a plank which was unsafe, defective, and improper for use as a passageway, and that it was too narrow and of old, splintered, and uneven wood so that it did not lie firmly and securely; that it was in no way secured, fastened, or attached at either end so as to prevent the same from rocking violently in any motion of the said scow, although defendants knew of the possibility of rocking owing to the oft-repeated and continual passage of large and heavy steamboats along the Hudson river at that point; that the said plank and scaffold was slippery and covered with clay and water, thereby rendering it unsafe to stand upon or walk across; and that the said plank had no side rails, guards, or protective devices of any kind whatsoever.

At the time of the accident the deceased was engaged in wheeling a barrow loaded with bricks from the shore at the brick works over upon a barge moored near the shore in the Hudson river. To provide a passage over which the bricks might be wheeled three planks had been laid between the dock and the barge making a passageway about 30 inches wide and 30 feet long. These planks were fastened together with a cleat on the bottom, but were in no way secured or fastened at either end. About 3 feet of the gang planks rested on the barge. While the man was on the planks and midway the barge and the dock and engaged in wheeling the bricks, the gangplanks fell, the end on the boat falling into the water, the other end remaining on the dock. The fall of the planks was occasioned by the barge having been rocked by a swell caused by a passing steamer. As the planks went down the man fell into the water and his barrow of bricks on top of him and he was drowned. This was on Saturday at about 12:20 p. m. The men engaged to wheel the bricks had been informed in the morning how many tiers of bricks they were to put on the barge, and that when they had put the indicated number on board they could stop work for the day. The rules provided for the cessation of work between 12 o'clock noon and 12:45 p. m. when the men ate their lunch. The rule was that during that period the men were not to work. The rule to that effect was never posted, and the plaintiff's intestate was never individually informed that he was not to work at that time. The foreman said he "just told the whole bunch of them as they were there." Whether the deceased was in "the bunch" at the time the rule was thus announced does not appear. The rule does not appear to have been made for the protection of workers. The assistant foreman's testimony indicates that his duty was to keep his eyes on the

bricks that were being loaded on the wheelbarrows on the shore for the purpose of rejecting the bad bricks. He was asked specifically what objection there was to the man's going to work during the lunch hour, and he answered:

"Here is the harm. It is that they will go to work and they will put in any kind of brick, and I got found fault with letting them do so."

It is evident therefore that the object of the rule was not to make sure that some one in authority should be present to warn them if it became unsafe to use the gangplanks because of the rocking of the boat. But whatever the purpose of the rule may have been the evidence showed that it had been so generally disregarded that the jury might well have found that it had become a dead letter.

The foreman testified that he had never seen the end of the gangplanks fastened to a barge. A witness called for the defendant, who had been a boat captain for 35 years and had been running boats on the Hudson river for about 50 years and was familiar with the dock where the accident occurred, was asked whether it was customary for gangplanks to be made fast on a barge while it was being loaded with bricks, replied that it was not. He testified that he never had a man drowned in that way. He added on cross-examination that he had seen planks fastened on ferryboats. Another witness similarly called, who had had experience as a boat captain for 23 years and was familiar with the loading and unloading of bricks, testified that it was not customary to have the gangplanks made fast to the barge when the barge was at the dock. He stated also that he never had heard of a man being thrown off one of these planks. Did the manner in which these planks were allowed to rest on the barge show that defendants were negligent?

[2] The court instructed the jury that the burden of proof was on the plaintiff to satisfy them by a fair preponderance of the evidence that the defendant was guilty of negligence in furnishing neither a suitable place nor suitable material with which to do the work. He charged them that the plaintiff claimed that the planks ought to have been fastened so that when the boat rocked it could not have dropped off, and said that on that question the defendants claimed that they did as everybody else did, and that with that kind of a boat and under all the circumstances they were not required to do more than they did. We see no error in leaving that question to the jury to decide. This certainly is not a case where the court could say as a matter of law that the defendants were not negligent. Neither is it a case in which the court could say as a matter of law that the defendants were negligent. What is and what is not negligence in a particular case is generally a question for the jury, and we think it was a question for the jury in this case. Whenever there may reasonably be difference of opinion which may fairly be drawn from the facts the question of negligence is one of fact for the jury to determine. They have found against the defendant. Evidence was introduced for the purpose of showing that it was the universal practice on these brick barges to leave the gangplanks when placed in position unfastened. But irrespective

of whether it is or is not negligent for these planks to be used in this manner, we think the evidence showed conclusively that the planks fell because not placed far enough on the barge to meet the play which might be expected at that place, where defendants knew that the passage of large boats frequently rocked any barges which might be lying at the dock. The planks rested only three feet on the barge; they were long enough to have been given six feet on the barge. It was a fair question for the jury to say whether it was not careless management to place the gangplanks so that they did not have bearing surface enough to meet a sway which might reasonably be expected. The fact that it was not customary to fasten the gangplanks to the brick barges and that injuries had not before happened because of the omission to do so did not constitute an answer as a matter of law to the charge of negligence. See Fletcher v. Baltimore & Potomac R. R., 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411 (1897).

[3] It is claimed in this court that the negligence of the plaintiff's intestate contributed to, if it was not the sole proximate cause of, his death. The question of whether the death was occasioned by the man's own negligence was for the jury, and they have answered it by finding against the defendant. The question of contributory negligence is always for the jury except where the exact standard of duty is fixed, or the negligence is gross and inexcusable. And the facts of this case do not bring it within either exception. Moreover, no claim was made in the court below that the court should have decided as matter of law that the negligence of the man caused his death.

[4] The jury rendered a verdict in favor of the plaintiff for $1,500, and the court ordered judgment to be entered for that amount. It is now urged in this court that the amount of the damages for the loss resulting from the death of the plaintiff's intestate is excessive and a reversal is asked on that ground. Whatever the practice in the state courts may be, it is well settled that in the United States courts those of appellate jurisdiction are not possessed of revisory powers as to excessive verdicts but are limited to the inquiry whether the jury was properly directed as to the mode of assessing damages. It is not claimed that in this case any improper instruction was given. No requests to charge were made and refused, and no exception was taken to the charge given. We are unable therefore to consider whether an award of $1,500 for the death of a man only 25 years of age and earning $2.25 a day and leaving a wife and father surviving him was or was not excessive.

The question of whether the man assumed the risk which resulted in his death does not arise under the Employers' Liability Law of the state of New York. The act has abolished the defense of assumption of risk both as a matter of law and as a matter of fact. Thompson v. Levering, 155 App. Div. 554, 140 N. Y. Supp. 769.

We find the assignment of error to be without merit.

The judgment is affirmed.

JEUNG BOW v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 9.

1. ALIENS ⟸32—PROCEEDINGS FOR DEPORTATION OF CHINESE—RIGHT TO COUNSEL.

A proceeding before the immigration authorities for the deportation of a Chinese person is not a criminal prosecution, but the refusal of counsel to defendant in such proceeding, if shown, might be strong evidence that he was denied the fair hearing to which he is entitled.

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

2. ALIENS ⟸32—EXCLUSION—PERSON LIKELY TO BECOME PUBLIC CHARGE.

The testimony of a Chinese alien that he had but $7 in money and no other property and had no relatives or friends in the United States *held* sufficient to warrant his exclusion or deportation as a person likely to become a public charge under Immigration Act Feb. 20, 1907, c. 1134, § 2, as amended by Act March 26, 1910, c. 128, § 1, 36 Stat. 263 (Comp. St. 1913, § 4244).

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

3. ALIENS ⟸32—PROCEEDING FOR DEPORTATION OF CHINESE—PROCEDURE—OATH OF INTERPRETER.

Where the official interpreter, acting under his oath of office, interprets the testimony in a Chinese exclusion proceeding, there is no necessity of his being specially sworn.

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

4. ALIENS ⟸32—PROCEEDINGS FOR DEPORTATION OF CHINESE—WARRANT OF ARREST.

Although the rules of the department provide that a Chinese person arrested for deportation shall be permitted to inspect the warrant, where the defendant is unable to read English and is fully informed of the charge against him, it is immaterial that the warrant on which he was arrested was in cipher.

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

5. ALIENS ⟸32—DEPORTATION OF CHINESE—PLACE TO WHICH DEPORTATION MAY BE ORDERED.

Under Act Feb. 20, 1907, c. 1134, § 35, 34 Stat. 908 (Comp. St. 1913, § 4284), providing that the deportation of aliens found after entry to be illegally within the United States "shall be to the transatlantic or transpacific ports from which said aliens embarked for the United States, or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked," a Chinese alien who came from China to Canada with the intention of being smuggled into the United States, and was so smuggled, may properly be deported to China instead of to Canada.

[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 Western District of New York.

Habeas corpus by Jeung Bow against the United States. From an order dismissing the writ, petitioner appeals. Affirmed.

This cause comes here on an appeal from the District Court of the United States for the Western District of New York, dismissing a writ of habeas corpus.

Dilworth M. Silver, of Buffalo, N. Y., for appellant.

John D. Lynn, U. S. Atty., of Rochester, N. Y., and Donald Bain, Asst. U. S. Atty., of Buffalo, N. Y.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The appellant has been ordered by the Secretary of Labor to be deported to China on the ground that under the Chinese Exclusion Laws (Act May 6, 1882, c. 126, 22 Stat. 58) he belongs to the excluded classes, and on the farther ground that he is a person liable to become a public charge. He presented to the District Court of the United States for the Western District of New York his petition for a writ of habeas corpus upon the ground that he was in custody in violation of law for the following reasons:

1. That he is not an alien but a citizen of the United States by reason of having been born within this country.

2. That he had not had a fair hearing in that the government interpreter and prosecutor was one and the same person.

3. Because the interpreter was not sworn truthfully to interpret.

4. That the Secretary of Labor had no authority in law or jurisdiction to issue the warrant for his deportation as there is no proof to show that he embarked from an Asiatic port.

Return to the writ was duly made and upon the evidence submitted the writ was dismissed.

The testimony given by Jeung Bow at the hearing disposes of the objection that he is a citizen of the United States. He testified that he is a citizen of China; that his father and mother are both of Chinese parentage; that he himself was born in that country; that he had always been a laborer; that he left China in March or April, 1913, and went directly to San Francisco; that he had never been in the United States before; that he lived in San Francisco a few months over a year but did not know the name of any street in the city or of any person there; that he had no papers showing his right to enter or remain although he claimed to have had such a paper and to have lost it.

There is nothing in the record which shows that this man did not have a fair hearing. On the contrary, it appears affirmatively that he did have such a hearing. He testified that he had been fairly treated since his apprehension, and that he did not wish his hearing adjourned to enable him to communicate with friends. The nature of the proceedings were fully explained to him and he was informed as to his rights.

[1] It is objected, however, that there is nothing in the case to show that the man had counsel, or that he could have had counsel at the hearing before the inspector, and it is claimed that this fact invalidated the whole proceeding.

The sixth amendment of the Constitution reads as follows:

"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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The proceeding under review is not a criminal prosecution, but an administrative hearing before the immigration authorities, and it need not be conducted in accordance with the procedure and rules of evidence which are observed in the courts of law.

Whether a Chinaman arrested and brought before an administrative board or immigration officials conducting an investigation into his right to be in this country has or has not a constitutional right to have the assistance of counsel for his defense is a matter we need not now consider. If in the case at bar Jeung Bow had asked for counsel and been refused, it would at least be strong evidence to show that he had been denied the fair hearing to which he is entitled under the statute, even though it should be held that it involved no violation of any constitutional right. But even that question does not arise in this case. For the record shows that the appellant was expressly informed that he had a right to be represented by counsel, and was asked whether he wished to be so represented, and stated that he did not. He was then asked whether he waived all rights of attorney and was ready to proceed with the hearing, and he replied that he was.

[2] The act of Congress of February 20, 1907, amended March 26, 1910, and entitled "An act to regulate the immigration of aliens into the United States," provides for the exclusion among others of paupers and persons likely to become a public charge. U. S. Stat. at Large, vol. 36, p. 263. At the hearing the appellant testified that he had at that time on his person about $7; that he had no baggage and no other property or money; that he had no friends or relations in the United States who could come to his aid in case of distress.

[3] The objection that the interpreter was not sworn to interpret truthfully is without merit. He was the official interpreter acting under his oath of office, and there is no more reason for putting him under a special oath in each separate case where his services are employed than there is for swearing a judge anew at each trial over which he presides. We have ruled on this question before and see no reason for altering the opinion heretofore expressed. Lee Sim v. United States, 218 Fed. 432, 134 C. C. A. 232 (1914).

[4] It appears that Jeung Bow was taken into custody upon a code telegraphic warrant which reads:

"Arrow Lum Chin Yuk Ho Jung Lay and Jeung Bow Liken Ethical Erudite Relay Ten Each."

The translation follows:

"Arrest Lum Chin Yuk, Ho Jung Lay and Jeung Bow and bring before yourself for hearing forwarding record of proceedings to the department; persons likely to become public charges at time of entry; entered the United States without inspection; entered in violation of section 36 of the Immigra-

tion Act of February 20, 1907 [Comp. St. 1913, § 4285]; authority granted for release from custody under bond in the sum of ten hundred dollars each."

The telegram was signed by the immigrant inspector in charge. The rules of the immigration department provide that a person taken into custody shall be permitted to inspect the warrant, and that if, as in this case, he is allowed to be tried upon a warrant which must necessarily be unintelligible to all except those who are familiar with the code of the Department of Labor, that would be a useless proceeding. As a matter of fact, Jeung Bow was unable to read English, and it made little difference whether the telegraphic warrant was in code or not. He was fully informed as to the charge against him and that was the essential thing he needed to know. Whether the telegram was in cipher or not is unimportant.

[5] The act to regulate the immigration of aliens into the United States (U. S. Stat. at Large, vol. 34, p. 898) provides, in section 35, as follows:

"The deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the transatlantic or transpacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

The appellant's counsel claims that there is no proof to justify the conclusion that this man embarked from an Asiatic port of China, and therefore there is no right to order his deportation to China. But at his hearing he admitted that he left Hong Kong in March or April, 1913, and landed in San Francisco coming on one of the Canadian Pacific boats; that that was the first time he had ever been in the United States, and he denied positively that he had ever been at any time in Canada. The immigrant inspector, however, found as a fact that he entered the United States surreptitiously and without inspection at Buffalo on May 16, 1914, and was in the United States in violation of the Chinese Exclusion Act. We had occasion to construe this provision of the statute in Lee Sim v. United States, supra, and we there held that a person can be properly deported to China instead of to Canada if he comes from China to Canada with the intention of being smuggled into the United States. So that whether he came from China into the United States at San Francisco as he claims, or through Canada as the inspector believed, makes no difference in the final result.

It sufficiently appears that this man was born in China, has always been a laborer, entered the country without inspection, has no papers in his possession entitling him to remain, is without means and liable to become a public charge, and that he has had a fair hearing. Under the Chinese Exclusion Laws he has no right to remain in the United States.

The appeal is dismissed.

CARTWRIGHT v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1915.)

No. 4341.

1. MASTER AND SERVANT ⊜107—LIABILITY FOR INJURIES—UNSAFE PLACE TO WORK—TEMPORARY STRUCTURES.

Plaintiff, an experienced railway shop machinist, was directed to put a fire door frame on a locomotive standing over a pit, and for that purpose constructed a temporary platform upon which to stand, by laying boards across the framework of the cab of the locomotive. *Held* that, if this temporary structure was defective, it was plaintiff's own fault, and his employer owed him no duty to make such place safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199–202, 212, 254, 255; Dec. Dig. ⊜107.]

2. MASTER AND SERVANT ⊜278—ACTIONS FOR INJURIES—EVIDENCE.

In an action by a railway shop machinist, injured while putting a fire door frame on a locomotive, evidence that he went to the tool room to obtain a block and fall, but was told by the keeper that there was no block and fall there, and that they were all in the roundhouse, about 50 feet away, without evidence that he could not have gotten the appliance if he had gone to the roundhouse, was insufficient to show that the employer did not furnish such appliance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. ⊜278.]

3. MASTER AND SERVANT ⊜217—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

An experienced railway shop machinist, while putting a fire door frame weighing 150 pounds on a locomotive standing over a pit, fell into the pit and was injured. He had previously lifted the frame to its place at least three times for the purpose of seeing what alterations were needed. *Held* that, if there was any danger in attempting to do the work without a block and fall to raise the frame, he must have known the danger, and by going on with the work without such appliance he assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. ⊜217.]

4. MASTER AND SERVANT ⊜217—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

An employé, who knew the necessity of having a helper as well as his employer, but went forward with the work without a helper when told to do so, assumed the risk, especially where he did not apparently regard a helper as necessary for the safe doing of the work, but rather as a matter of convenience.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. ⊜217.]

5. MASTER AND SERVANT ⊜97—LIABILITY FOR INJURIES—UNANTICIPATED ACCIDENT.

Plaintiff, an experienced railway shop machinist, was directed to put a fire door frame weighing 150 pounds on a locomotive standing over a pit, and for that purpose constructed a temporary platform upon which to stand in doing the work, by laying boards across the framework of the cab of the locomotive. After boring certain holes and making certain alterations, he attempted to place the frame in position to see how it would fit, and was pushing the frame up against the face of the boiler with his hands and stomach, when his foot slipped, or a board slipped, and he lost his balance and fell into the pit. *Held*, that the injury was

apparently the result of a pure accident, and there was no reason for the employer to anticipate injury to any one from doing the work under the circumstances disclosed, and hence there was no negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. ⊂⊃97.]

In Error to the District Court of the United States for the District of New Mexico; Wm. H. Pope, Judge.

Action by David L. Cartwright against the Atchison, Topeka & Santa Fé Railway Company. From a judgment on a directed verdict for defendant, plaintiff brings error. Affirmed.

Elmer E. Studley, of Raton, N. M., for plaintiff in error.

W. C. Reid, of Roswell, N. M. (Gardiner Lathrop and Robert Dunlap, both of Chicago, Ill., and R. E. Twitchell, of Santa Fé, N. M., on the brief), for defendant in error.

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

AMIDON, District Judge. This case turns upon uncontroverted questions of fact and well established principles of law. It hardly justifies an opinion. The plaintiff, an experienced machinist 24 years of age, was employed in defendant's shops at Raton, N. M. On September 15, 1913, he was directed by the foreman to put a fire door frame on a locomotive, which stood over a pit to enable workmen to get at it from all sides. The boiler was tilted so that the door frame when placed against it was supported by the slant of the surface. Plaintiff had constructed a temporary platform upon which to stand in doing the work, by laying boards across the framework of the cab of the locomotive. When he was directed to do the work, he asked for a helper. The foreman told him that he had no helper, and directed the plaintiff to do the work himself. The frame weighed about 150 pounds, and had already been lifted onto the platform by other employés. Plaintiff began work on the job on the 15th. Holes had to be bored in the frame to receive the studs by which it was to be bolted to the front of the boiler. Its surface also needed to be chipped, so as to obtain a substantially airtight fit. Plaintiff raised it to place, and marked with chalk the points for the holes and where chipping seemed necessary. To do this the frame had to be lifted not to exceed 9 inches from the platform, and the drawing would indicate that it possibly did not require to be raised more than 2 or 3 inches. After the holes were bored in the frame, plaintiff, without any helper, placed it twice upon the bolts to see where it needed chipping, and then returned it again to the platform. On the morning of the 16th he started to do some other work, but was directed by the foreman to complete the attaching of the door frame. He again asked for a helper, and received substantially the same direction as on the day previous. When he was first told to do the work without a helper, he went to the tool room to obtain a block and fall, but the keeper told him that there was no block and fall there; that they were all in the roundhouse, about 50 feet away. The evidence fails to show

whether plaintiff could have gotten the appliance if he had gone to the roundhouse. As to the need of a helper plaintiff testified as follows:

"Q. You were very pronounced in your request for a helper were you?
"A. Well, I asked him for a helper. I needed a helper to do it a little better —easier—easier to do it.
"Q. That was your reason for wanting a helper, it was easier to adjust the frame, was it?
"A. Yes, sir."

On the morning of the 16th the plaintiff attempted to place the frame on the bolts, so as to see how it would fit the boiler front. He had the holes in the bottom of the frame over the bolts, and was pushing the frame up against the face of the boiler with his hands and stomach. As to what then occurred he testified as follows:

"I raised the door up, and got it partly hung on two of the bottom studs; part of the deck slipped, or something slipped, I don't know just what now, and the next thing I knew I was in the pit.
"Q. Then your fall, according to your judgment, was on account of the deck slipping; is that right?
"A. Well, and the door overbalanced me at the same time. I would not have went in the pit if the door had not overbalanced me.
"Q. And you had got the frame partly adjusted onto these lower studs?
"A. Yes, sir.
"Q. And your foot slipped, or the platform slipped, and the next thing you knew you were down in the pit; is that right?
"A. Yes sir."

Again:

"Q. And your foot slipped, and the frame came out and struck you. That is about the size of it, isn't it?
"A. I don't know whether my foot slipped, or whether the door slipped off the studs.
"Q. Either your foot slipped, then, or the door frame slipped off of the studs; is that right?
"A. Yes, sir."

Plaintiff fell from the platform into the pit, and the door frame fell on him, causing the injuries for which he seeks to recover.

Plaintiff bases his right to damages upon three grounds.

[1] First. Failure of the defendant to furnish him a safe place. It is manifest that he cannot recover upon that ground. The platform was a temporary structure, which he made himself as a part of the work which he was attempting to do. If it was defective, that was his own fault. It is elementary law that as to such temporary structures made by workmen themselves from material furnished by the master, structures about which the judgment of the workmen is as good as that of the master, the master owes no duty to make such a place safe. That is the duty of the workman himself. American Bridge Co. v. Seeds, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041.

[2, 3] Second. Failure to furnish block and fall. There are two answers to this claim. First, the evidence is insufficient to show that the master did not furnish such an appliance. The evidence, in so far as we have any, tends to show that there was a supply of such arti-

cles; that they were not in the toolhouse, but were in the roundhouse near by. There is no evidence whatever that the plaintiff could not have obtained the appliance, if he had gone there to get it. Surely in a repair plant, such as that in which the plaintiff was employed, the master is not obliged to keep such an appliance as a block and fall in stock in a particular room. Workmen have not done their part unless they have at least endeavored to find out whether the appliance can be obtained from other workmen, if it happens to be out of the toolhouse. Again, the character of the work was well known to the plaintiff. He had handled the frame at least three times the day previous. As an experienced machinist he must have known the danger, if there was any danger, in attempting to do the work without a block and fall. When he went forward with the work without the appliance, he assumed the risk. That is clearly established by the recent decision of the Supreme Court in Seaboard Air Line Railway v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

[4, 5] Third. Failure to furnish a helper. The same observations apply to this ground of recovery. Plaintiff himself does not seem to regard a helper as necessary for the safe doing of the work, but rather as a matter of convenience. If a helper was necessary, he knew the necessity as well as the master, and when he went forward with the work without the helper he assumed the risk, under the case just cited. We prefer to place the decision, however, upon the ground that there was no evidence of defendant's negligence. The injury, under the testimony, seems to have been the result of a pure accident. Either the plaintiff's foot slipped, or a board slipped, and he lost his balance and fell. We do not think that there was any reason for the master to anticipate injury to any one from doing the work under the circumstances disclosed by the evidence. That being so, the charge of negligence fails. Motey v. Pickle Marble Co., 74 Fed. 155, 20 C. C. A. 366.

The trial court, at the conclusion of plaintiff's case, on motion of the defendant, directed a verdict in its favor. We think the ruling was clearly right, and the judgment is affirmed.

CENTRAL VERMONT RY. CO. v. CAUBLE.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 27.

1. CARRIERS ⊂=320—PASSENGER'S ACTION FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries, where it appeared that plaintiff was a passenger on a train of defendant which collided with another train, and there was evidence that she sustained injuries of a permanent nature, a motion by defendant to dismiss the complaint was properly denied.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325; Dec. Dig. ⊂=320.]

2. APPEAL AND ERROR ⊂=1004—SCOPE OF REVIEW—EXCESSIVENESS OF DAMAGES.

In an action for personal injuries, the alleged excessiveness of the damages cannot be reviewed by a federal appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. ⊂=1004.]

3. TRIAL ⊂=296—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In a passenger's action for injuries alleged to have been sustained in a collision, the court charged that, as defendant offered no explanation of the collision which it admitted took place, and as there was no evidence of contributory negligence, plaintiff was entitled to a verdict. It further charged, however, that if the jury found that plaintiff was entitled to any damages because of defendant's negligence, they might give her reasonable compensation, and that the question came down to a question of the extent of her injuries, whether she suffered any injuries of a serious character, or whether she did or did not exaggerate her injuries. *Held* that, if the instruction first mentioned was not strictly correct, standing alone, it was cured by what followed, as the charge, as a whole, could not have misled the jury into thinking that plaintiff could recover unless she sustained some injury, and where the charge, as a whole, presents the question fully and fairly to the jury, so as not to mislead them, exceptions to detached portions of the charge will not be sustained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. ⊂=296.]

4. APPEAL AND ERROR ⊂=1050—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for injuries, in which plaintiff's case rested largely upon the testimony of D., a physician, another physician was allowed to testify that D.'s reputation was very good, and that he was one of the most capable men in New York City. D.'s reputation had not been attacked, and neither his profession nor general character had been assailed on cross-examination. *Held* that, while the admission of this testimony was a doubtful propriety, since evidence is not admissible, as a general rule, to sustain the credibility of an unimpeached witness, its admission was not sufficient to justify a reversal, as it was not probable that the jury, who saw and observed D. while under direct and cross examination, attached undue weight to the opinion of the other physician as to his standing and ability.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⊂=1050.]

5. APPEAL AND ERROR ⊂=1048—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for injuries, though no damages to plaintiff's eyesight were claimed in the complaint, the admission of a question to plaintiff as

to whether anything was the matter with her eyes after the accident was harmless, where she answered that she did not know.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158, 4160; Dec. Dig. ⊂⊃1048.]

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

Action by Laura A. Cauble against the Central Vermont Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 216 Fed. 712.

Martin S. Lynch, of New York City, for plaintiff in error.

Bassett, Thompson & Gilpatric, of New York City (W. W. Thompson, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges

ROGERS, Circuit Judge. This is an action brought to recover for personal injuries alleged to have been caused to the defendant in error, hereinafter called the plaintiff, by the negligence of the plaintiff in error, hereinafter called the defendant. The action has been twice tried. On the first trial the plaintiff obtained a verdict for $10,000. On the second trial she recovered a verdict for $16,356.

[1] On September 12, 1912, the plaintiff was a passenger riding in a Pullman car attached to a passenger train belonging to and operated by the defendant on its railroad in the state of Vermont. She was on her way to Middlebury, Vt., and just before Essex Junction was reached the collision occurred between the train upon which she was traveling and a local train which had pulled out from the Junction. The collision was caused by a misunderstanding of signals. The defendant is charged with negligence and want of care in the management and operation of its trains, and the injuries the plaintiff suffered are attributed to this negligence of the defendant. It is claimed that as a result of the collision the plaintiff was thrown from her chair in the Pullman against the chair in front of her, and struck her breast bone and lower left ribs, and that severe bruises and contusions resulted; that the jar of the accident and being thrown against the chair caused the plaintiff's spine and back to be twisted and strained; that the plaintiff suffered a severe shock to her nervous system, and had not recovered therefrom at the time of the trial in December, 1914, 2 years and 3 months after the accident; and that her injuries were of a permanent nature.

The plaintiff's physician testified that, when he made a physical examination of her after the accident, he found that the largest and most prominent vertebra of the spinal column was displaced; that when a joint had been once dislocated it was much easier for the same joint to become dislocated again; that since his first examination he had found her spine displaced perhaps a dozen times; that he did not think she would ever permanently recover from the effects of the accident; that prior to the accident he thought her a woman exceptionally well poised both physically and mentally; that since the accident

she had more or less nervous disturbance all the time, sometimes more severe, and sometimes less severe, but never entirely absent; that tears were very plentiful on slight provocation, or no provocation; that she was able to accomplish about one-half the work that she was able to accomplish before the accident. There was testimony of other witnesses as to her excellent physical condition before the accident, and the great suffering she had endured since, and her exceedingly nervous condition.

The defendant put on the stand an expert; whose testimony tended to destroy the effect of the testimony of the plaintiff's physician if the jury believed it. The counsel for the defense at the close of the plaintiff's case moved that the complaint be dismissed. The motion was very properly denied. To have taken the case from the jury would have been manifest error.

[2] This court cannot consider the question whether the amount of the damages is excessive. In the federal courts the appellate courts do not review the action of the jury in that particular. But we may be permitted to say that if the testimony of the plaintiff and of her witnesses is believed, and the jury did believe it, we cannot see how it can be seriously claimed that the amount of the verdict is excessive.

[3] Complaint is made in respect to the charge to the jury, in that the jury was instructed that since the defendant offered no explanation of the collision, which it admitted took place, and there was no evidence of contributory negligence, the plaintiff was entitled to a verdict. But, conceding that that portion of the charge was not strictly correct, standing alone, the error of it was corrected by what followed. For the jury was instructed that:

"If you find she is entitled to any damages because of defendant's negligence, you may give her reasonable compensation."

And in speaking of the collision the jury was told that, if it was found that the collision occurred negligently, the question—

"comes down to the question of the extent of her injuries, whether she suffered any injuries of a serious character, whether she does or does not exaggerate her injuries."

Of course it was necessary that the jury should be satisfied that the plaintiff did sustain some injury in consequence of the collision. And we think the charge as a whole could not have misled the jury on that point. The rule is that, if a charge as a whole presents the questions fully and fairly to the jury, so as not to mislead them, exceptions to detached portions of it will not be effectual for the support of error. Hickenbottom v. D., L. & W. R. R. Co., 122 N. Y. 91, 100, 25 N. E. 279.

[4] It is assigned as error that the court permitted, over an objection and an exception, a witness who was a physician and called by the plaintiff, to testify as to the reputation and standing of the plaintiff's medical expert. He was allowed to answer the question, "Do you know Dr. De Forest's reputation in his profession?" And, having answered that he did, was asked, "Is that reputation good?" To which he replied, "It is very good; I think he is one of the most capable men

in New York City." The reputation of Dr. De Forest had not been attacked on the trial. No impeaching witnesses had been called, and neither his professional or general character had been assailed upon cross-examination. At the time of these questions Dr. De Forest had given no testimony and had not even been sworn. The case rests largely upon the testimony of Dr. De Forest. He is the only person who ever saw the dislocation of the vertebra. He alone testified that the vertebra was liable to become dislocated at any moment, and would require reducing from time to time, and constituted a permanent injury.

As a general rule evidence is not admissible to sustain the credibility of a witness who has not been impeached. Woey Ho v. United States, 109 Fed. 888, 48 C. C. A. 705 (1901); Adams v. Greenwich Ins. Co., 70 N. Y. 166 (1877); Bryant v. Tidgewell, 133 Mass. 86 (1882). And if the court had sustained the objection, and declined to allow the questions to be answered, no error would have been committed. The reception of the testimony was of doubtful propriety, but we cannot believe that the error, if one was committed, is of sufficient gravity to justify us in reversing the judgment and sending the case back for a retrial. The jury saw the physician on the stand, and observed him during his direct and cross examination, and it is not probable that the opinion of another physician as to his standing and ability could have had any undue weight with the jury in considering the testimony.

[5] We do not find it necessary to pass upon the other exceptions taken to rulings of the court below upon minor questions. If some of the rulings were erroneous, they were of so trivial a nature as to render the errors, if any there were, negligible. For example, no damage to eyesight was claimed in the complaint, nevertheless plaintiff was asked on direct examination if "anything was the matter with her eyes after the accident." This was excepted to; but, as the answer was, "I don't know," no possible harm was done, and the exception is simply academic.

Judgment affirmed.

KLUCHNIK et al. v. LEHIGH VALLEY COAL CO.

(Circuit Court of Appeals, Second Circuit, December 14, 1915.)

No. 32.

1. DEATH ⇐29—ACTION FOR WRONGFUL DEATH—ABATEMENT AND REVIVAL—DEATH OF PARTY.

Act Pa. April 26, 1855 (Stewart's Purd. Dig. [13th Ed.] pp. 3241, 3243), provides that the persons entitled to recover damages for any injury causing death shall be the husband, widow, children, or parents of the deceased, and no other relative. This has been construed by the Pennsylvania courts as meaning that, if both parents are living, the action must be brought in the names of both. *Held* that, where an action for death occurring in Pennsylvania was brought by the father alone, and the defect of parties was not remedied during his life, there was no valid action pending after his death, and none could be revived in the name of the mother.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 33; Dec. Dig. ⇐29.]

2. DEATH ⇐29—ACTION FOR WRONGFUL DEATH—ABATEMENT AND REVIVAL—DEATH OF PARTY.

The father's administrator could not be substituted to carry on the suit, because no cause of action passed to him.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 33; Dec. Dig. ⇐29.]

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

Action by George Kluchnik against the Lehigh Valley Coal Company. On the death of plaintiff, Mary Kluchnik and Robert C. Lipman separately moved to revive the action, which motions were denied. Orders affirmed.

This cause comes here upon writ of error to review orders made respectively on November 11, 1914, December 30 and 31, 1914, and March 17, 1915, which resulted in a refusal on the part of the District Court to permit the revival and prosecution of an action to recover damages for the death of John Kluchnik which it is alleged was occasioned by the negligence of the defendant, in whose colliery at Pittston Junction, Pa., the said John Kluchnik was employed.

Rufus M. Overlander, of New York City (Herbert C. Smyth, of New York City, of counsel), for plaintiffs in error.

Allan McCulloh, of New York City (Clifton P. Williamson, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The chronology of the important events here involved is as follows: John Kluchnik was the son of George and Mary Kluchnik and on June 24, 1913, being then 16 years of age, was in the employ of the defendant as a nipper and while so employed was killed by the alleged negligence of the defendant.

On August 1, 1913, George Kluchnik, the father of the deceased John Kluchnik, commenced a suit in the District Court for the Southern District of New York to recover damages in the sum of $25,000.

The complaint in this action alleged that John Kluchnik died intestate and left surviving the plaintiff, George Kluchnik, his father, Mary Kluchnik, his mother, and five brothers and two sisters. Issue was joined in this suit and the case was placed on the calendar for the October term of that year.

On June 4, 1914 George Kluchnik, the father and sole plaintiff in the action, died and the District Court granted an ex parte order substituting the widow, Mary Kluchnik, as plaintiff and directing that the action proceed in her name. Subsequently, after full hearing, the court vacated this order and directed that the cause be stricken from the trial calendar of the court. A motion was then made for an order reviving the action in the name of Mary Kluchnik, the surviving parent of John Kluchnik, deceased. This motion was also denied. A rehearing was denied.

A motion was then made for an order substituting Robert C. Lipman as administrator of the goods and chattels of George Kluchnik, deceased, as plaintiff and permitting him to serve an amended complaint and continue the action. This was also denied.

[1, 2] The question thus presented is whether a single parent of a person killed by negligence, the other parent being alive, may maintain alone an action against the person guilty of such negligence under the statutes of Pennsylvania. So far as applicable to this controversy the law, Act April 26, 1855 (Stewart's Purd. Dig. [13th Ed.] pp. 3241, 3243), is as follows:

"4. The persons entitled to recover damages for any injury causing death shall be the husband, widow, children or parents of the deceased and no other relative; * * * the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy without liability to creditors.

"5. The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death and not thereafter."

We are not permitted to interpret these provisions as permitting either the father or the mother to commence the action because the Pennsylvania courts have construed the statute to mean that if both parents are living the action must be brought in the names of both. George Kluchnik, the sole plaintiff, died June 4, 1915. It was then sought to revive the action in the name of the mother. This was opposed on the following grounds, inter alia: First, that the action abated on the death of George Kluchnik, the father; second, that Mary Kluchnik was not entitled to be substituted as plaintiff. The motion to revive was denied and the action was dismissed on the ground that it had abated, the conditions upon which the statute permitted a revival not having been carried out. If the objection had been taken during the life of George Kluchnik, it might have been remedied, but when he died the action abated. There was no valid action then pending and none could be revived—it was dead. The father's administrator has no right to be substituted to carry on the suit because no cause of action passed to him. Waltz v. Penna. R. R. Co., 216 Pa. 165, 65 Atl. 401; Penna. R. R. Co. v. Zebe, 37 Pa. 420.

Controlled as we think we are by the decisions of the Pennsylvania courts construing one of their own statutes, we see no escape from the proposition that the action in the name of the father, George Kluchnik, alone could not be maintained. No effort was made to correct the situation until after George's death; it was then too late, all rights under the statute were forfeited.

Our attention has been called to Reardon v. Balaklala Copper Co. (C. C.) 193 Fed. 189, but we do not consider it controlling for the reason that it deals with an entirely different statute. It was an action to recover of an employer for the death of an employé under section 1970 of the Civil Code of California which provides that such an action may be maintained in the name of the legal representatives of the deceased employé for the benefit of the next of kin in a prescribed order of precedence. The father brought the suit in his own name, within the time limited by law. The court held that he should have brought it as administrator and, having been appointed administrator in the meantime, the court permitted him to file an amended complaint as administrator, holding that a change in the capacity in which the plaintiff sued was not the commencement of a new suit and that the amendment might properly be allowed. These facts are not analogous to the present situation. Here George Kluchnik, the sole plaintiff died; the statute did not permit him to bring the action alone and when he died nothing was left to revive. In the California case the court permitted a party to change the capacity in which he sued, but did not permit the revival of a cause of action which had expired by operation of law.

The orders are affirmed.

WELLMAN v. BETHEA, Clerk of Court.

(Circuit Court of Appeals, Fourth Circuit. December 21, 1915.)

No. 1383.

JUDGMENT ⊂=90—OPENING OR VACATING—GROUNDS—MISTAKE OF LAW.

An administrator, sued for the wrongful death of a person killed by his intestate, failed to set up the plea of plene administravit, the failure to plead which, under the laws of South Carolina, makes the administrator personally liable. The total assets collected by him amounted to about $2,200, and he produced a statement of his receipts and disbursements, showing a balance of $380.40, and offered to allow judgment for that amount. Plaintiff rejected this offer, and after some further negotiations a consent verdict for $4,000 and a judgment for that amount were entered. Plaintiff refused to accept judgment for the small balance reported, because of a belief that a proper accounting would show a much greater sum applicable to the payment of her claim; but neither party had in mind the consequences which might follow from the failure to set up a formal plea of plene administravit. *Held* that, as the minds of the opposing counsel did not meet as to the effect of the consent judgment, the rule that equity will not grant relief against a pure mistake of law

did not apply, and equity would set aside the verdict and judgment, in order that the administrator might set up such plea.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 148, 149; Dec. Dig. ⊂=90.]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry G. Connor, Judge.

Suit by John C. Bethea, Clerk of Court, as administrator of John H. Bethea, deceased, against Sarah S. Wellman, in her own right and as widow of Ora E. Wellman, deceased. Decree for complainant, and defendant appeals. Affirmed.

William Ewin Bonn, of Baltimore, Md. (Mitchell & Smith, of Charleston, S. C., and Carrington & Carrington, of Baltimore, Md., on the brief), for appellant.

W. H. Muller, of Dillon, S. C., and Henry E. Davis, of Florence, S. C. (Gibson & Muller, of Dillon, S. C., and Willcox & Willcox, of Florence, S. C., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. In March, 1910, the appellant's husband was shot and killed by one John H. Bethea on a railroad train in the state of Delaware. About a year later, John H. Bethea having died in the meantime and her cause of action surviving under the laws of Delaware, Mrs. Wellman brought suit against the administrator of his estate, the appellee herein, to recover damages in the sum of $25,000 for the death of her husband. The administrator filed a demurrer, which seems to have been abandoned, and also made answer to the complaint. When the case came on for trial a motion to strike out certain allegations of the answer was made in open court and granted. This left the cause without any substantial defense pleaded, and apparently there was no defense on the merits. Some negotiations between counsel thereupon took place, which resulted in a consent verdict for $4,000, on which judgment was entered against the administrator. Failing to collect this judgment by execution or otherwise, Mrs. Wellman brought a second suit to enforce it against the administrator personally, on the ground (1) that he had dissipated the assets of the estate, and particularly in that he had suffered another judgment to be taken without proper defense, and had paid the same, while the suit of Mrs. Wellman was pending, and (2) that he had not set up the plea of plene administravit in the original action.

It appears that under the laws of South Carolina an administrator becomes personally liable if he fails to interpose this plea when he is sued. In this second suit the administrator set up the plea which he had neglected to interpose in the first action. A motion was thereupon made by the plaintiff to strike out this plea, and that motion is still pending. The administrator also moved in the original suit to open the judgment and for leave to file in that suit the plea mentioned. This motion was denied for want of power to grant it, as we understand, because the term of court at which the judgment was entered had expired. Shortly afterwards this bill in equity was filed

to set aside the judgment entered upon the consent verdict, and to permit complainant to answer over in the cause in which that judgment was rendered, and especially to set up therein the defense of plene administravit and such other defenses as he might be advised. The trial court sustained the bill by a decree which granted the relief sought, and from that decree Mrs. Wellman has appealed to this court.

It is earnestly contended in her behalf that the predicament in which the appellee found himself resulted solely from a mistake of law, namely, the failure to interpose the defense of plene administravit, and that on well-settled principles a court of equity will not grant relief from such a mistake. This argument is based generally upon the evidence given at the trial, and also upon the finding of the learned District Judge to the effect that there was no mutual mistake, nor "any element of fraud, misrepresentation, or suppression of facts by defendant or her counsel." The answer to the contention brings in review certain incidents that occurred when the consent verdict was rendered. Apparently what happened was this: The appellee had in court a statement of his receipts and disbursements as administrator, which showed a balance then in his hands of only $380.40. He offered to allow judgment for that amount, but the offer was declined. Negotiations followed, as before stated, which resulted in the consent verdict and judgment. Counsel for Mrs. Wellman appear to have been surprised at the great shrinkage of the estate, as one of them states in his affidavit, and they evidently then had in mind holding the administrator personally liable, not because there was no plea of plene administravit in his answer, but because he had mismanaged the estate and dissipated its assets. They refused to accept judgment for the small balance which he reported, and insisted upon the larger judgment obtained by consent, apparently on the theory that a proper accounting would show a much greater sum applicable to the payment of Mrs. Wellman's claim.

As we see the matter, the only reasonable inference is that the consent verdict was allowed by the administrator and agreed to by counsel for Mrs. Wellman without either of them understanding at the time that defendant would be personally liable, except for such sum as he might have on hand or be chargeable with upon a proper accounting. And so the learned District Judge says, "I cannot think that, in consenting to the amount of the judgment, either party understood or contemplated that result," meaning the result of making the administrator personally liable for the full amount of the judgment without reference to the assets which were or ought to be in his hands. This seems to us the crux of the case. Strictly speaking, as the court below found, there was no mutual mistake, or fraud, or misrepresentation; but it does not follow, and we are not convinced, that appellee's situation resulted wholly from a mistake of law. All the circumstances must be taken into account, and it is quite evident that neither party had in mind the consequences which might follow, under South Carolina law, from failure to set up the formal plea of plene administravit. In other words, the record shows that the minds of opposing counsel did not meet as to the effect of the judgment to which

they both consented. We think this sufficient to take the case out of the general rule that equity will not grant relief from a pure mistake of law, and therefore sufficient to justify equitable interference.

This view is supported in our judgment by facts which are undisputed. The total assets which the administrator had collected were little more than $2,200, and there is no claim that the estate was of greater value. To hold the administrator personally liable for the entire judgment of $4,000 obtained by Mrs. Wellman would seem obviously unjust, and we think the court below was right in deciding that this judgment should be opened, and the administrator allowed to set up the defense which in the first instance he failed to interpose. So far as Mrs. Wellman's second action is based upon the negligence of the administrator in the management of the estate, or the improvident payment of another judgment which he might have prevented, the decree in no wise limits her opportunity to call the administrator to full account. As respects that basis of her action it may be that the administrator does not come into court with clean hands, but it does not appear to us that he has done anything in connection with the consent judgment which should bar him from equitable relief.

Affirmed.

WESTERN UNION TELEGRAPH CO. v. HUGHES.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1915.)

No. 1375.

1. MASTER AND SERVANT ⇐78—BENEFIT FUNDS—LIABILITY—"CLAIMS ARISING FROM OR GROWING OUT OF DEATH OF EMPLOYÉ."

A telegraph company adopted a plan for the payment of accident benefits to employés and life insurance to their beneficiaries, which provided that the acceptance of any benefits should operate as a release of all claims against the company, and that in case of death no part of the benefits should be due or payable unless a release should be delivered of all claims against the benefit fund and against the company "arising from or growing out of the death of the employé," and that should claim otherwise than thereunder be presented or suit brought against the company, or against any other corporation which might be associated with the company in the administration of the fund, the employé or his beneficiaries should not be entitled to any payment from the fund unless such claim should be withdrawn or such suit discontinued. It further appeared from the plan that this reference to other corporations referred to other allied telegraph and telephone companies. The company had agreed to indemnify a railroad company against all loss or damage arising from injuries to the telegraph company's employés while being carried free or at half rates by the railroad company, but it did not appear that a telegraph employé killed in a railroad accident knew of this agreement or was chargeable with knowledge thereof. *Held*, that the telegraph company could not require a release of the railroad company as a condition of the payment of the insurance, as its liability to the railroad company was not a "claim arising from or growing out of the death of the employé," while the ref-

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

erence to other corporations against which claims might not be made or suit brought excluded corporations not so specified.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊂⊃78.]

2. MASTER AND SERVANT ⊂⊃77—BENEFIT FUNDS—CONSTRUCTION OF AGREEMENTS.

The plan, having been prepared and put into effect by the telegraph company, should be strictly construed against it, under the rule that the words of an insurance policy should be taken most strongly against the insurance company, and that that interpretation should be adopted which is most favorable to the insured if not inconsistent with the language used.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 105, 106; Dec. Dig. ⊂⊃77.]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Florence; Henry A. Middleton Smith, Judge.

Action by Mrs. Sophia Hughes against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. L. Willcox, of Florence, S. C. (Geo. H. Fearons, of New York City, on the brief), for plaintiff in error.

R. E. Whiting, of Florence, S. C. (Whiting & Baker, of Florence, S. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. [1] On January 1, 1913, the plaintiff in error, defendant below, adopted and put into effect a "Plan," as it is called, for the payment of pensions and accident and sickness disability benefits to employés, and of life insurance to their beneficiaries in case of death. This plan contained the following provision:

"The acceptance of any benefits from the Employés' Benefit Fund by an employé or his beneficiary or beneficiaries on account of injury or death, shall operate as a release and satisfaction of all claims against the company for damages arising from or growing out of such injury or death, and further, in the event of the death of an employé no part of the death benefit or unpaid disability shall be due or payable unless and until good and sufficient release shall be delivered to the committee, of all claims against the Employés' Benefit Fund as well as against the company, arising from or growing out of the death of the employé, said release having been duly executed by all who might legally assert such claims."

In February, 1914, J. W. Hughes, the plaintiff's husband, a lineman in the employ of defendant, was killed in an accident on the Atlantic Coast Line Railroad. The plaintiff was his beneficiary under the plan, and it is conceded that defendant is liable to her, if liable at all, in the sum of $2,160 and interest, for which she had judgment in the court below. The only defense set up was her refusal to release the Atlantic Coast Line. It appears that there was a contract between defendant and the railroad company, under which the former agreed to indemnify the latter "against all loss or damage of any kind arising from any injury to persons in the employ of the telegraph company, while being carried free or at half rates over said railroads un-

der this agreement." Mrs. Hughes offered to release all claims against the benefit fund and the defendant, but declined to release the Atlantic Coast Line; her contention being that she could recover from defendant the amount to which she was entitled under the plan without surrendering any right of action she might have against the railroad company. The trial court upheld this contention, sustained her demurrer to the defense interposed, and she had judgment accordingly.

We are of opinion that the question presented was correctly decided and deem it sufficient to merely outline our reasons for affirming the judgment. In the first place, it does not appear that Hughes was ever aware of this contract that defendant had with the Coast Line, or was chargeable with knowledge of any agreement between the two companies which related to or affected the rights of employés under the provisions of the benefit plan. The language of the section above quoted calls for a release against the benefit fund and telegraph company only, and carries no suggestion that the release of a third party could in any case be required. The fact that defendant might be liable to a third party, in this case the Coast Line, under a contract of indemnity unknown to the insured, did not serve to make such liability a claim against the defendant "arising from or growing out of the death of the employé," within the meaning of that phrase as used in the plan, and the defendant therefore could not exact a release of the Coast Line as the condition of paying the amount to which the plaintiff was otherwise entitled. In other words, the release of the benefit fund and the defendant company, which the plaintiff concededly offered, was the only release that the plaintiff could be required to give. This is the more apparent when the entire plan is examined. The ninth section contains this provision:

"Should claim otherwise than hereunder be presented or suit brought against the company, or against any other corporation, which may be at the time associated therewith in administration of the Employés' Benefit Fund, in accordance with the terms set forth in section 10, for damages on account of injury or death of any employé, such employé or his beneficiaries shall not be entitled to any payment from the Employés' Benefit Fund on account of such injury or death, unless such claim shall be withdrawn or such suit shall be discontinued before trial thereof or decision rendered therein."

When we look to see what is meant by "any other corporation, which may be at the time associated therewith in administration of the Employés' Benefit Fund," it plainly appears that the phrase refers to the American Telephone & Telegraph Company and its associated and allied companies, and there is no sustainable basis for extending its application. Under a familiar maxim of the law, the express mention of certain corporations against which claims might be made or suit brought operates to exclude corporations which are not specified. Not only was Hughes without notice of the private contract between defendant and the Coast Line, but the provisions of the plan itself warranted the inference that there were no outstanding contracts affecting his rights as an employé except those therein mentioned.

[2] Moreover, this seems clearly a case for the application of the rule that the words of an insurance policy, being those of the insur-

ance company itself, should be taken most strongly against it, and that interpretation adopted which is most favorable to the insured, if such interpretation be not inconsistent with the language used. National Bank v. Insurance Co., 95 U. S. 673, 24 L. Ed. 563; Liverpool Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460; Royal Ins. Co. v. Martin, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385.

The plan in question was prepared and put into effect by the defendant company, and upon the authority of these decisions it cannot justly complain of a strict construction against it of this agreement with its employés.

The conclusion we have reached renders it unnecessary to decide whether the defense sought to be interposed was barred by the provisions of section 2808 of the South Carolina Code.

Affirmed.

ARONIN v. SECURITY BANK OF NEW YORK.

In re DRAPKIN.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 39.

1. BANKRUPTCY ⟸303—VOIDABLE PREFERENCES—SUFFICIENCY OF EVIDENCE.
In an action by a trustee in bankruptcy to recover accounts transferred by the bankrupt to defendant to apply on a pre-existing indebtedness, evidence *held* to support a finding that, when defendant acquired the accounts, it had notice that a preference was intended.

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

2. BANKRUPTCY ⟸166—VOIDABLE PREFERENCES—TRANSFERS CONSTITUTING.
Where defendant, within four months before the filing of a petition in bankruptcy and while the bankrupt was insolvent, received from the bankrupt to apply on a pre-existing debt accounts due the bankrupt under circumstances such as naturally would have caused an ordinary person to believe that a preference would thereby be effected, the trustee could recover for the benefit of the bankrupt estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⟸166.]

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

In the matter of Moses Drapkin, bankrupt. Suit by Max Aronin, trustee in bankruptcy, against the Security Bank of New York. Decree for complainant, made and entered March 8, 1915, and defendant appeals. Affirmed.

Herman B. Goodstein, of New York City (Herman B. Goodstein and Thomas J. Kavanagh, both of New York City, of counsel), for appellant.

Rosenthal & Heermance, of New York City (Clayton J. Heermance and S. Michael Cohen, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. [1] The question which this case presents is whether the defendant obtained a preference as respects two accounts which were transferred to it at a time when it is alleged to have had knowledge that the transferor, Moses Drapkin, was without sufficient funds to pay his debts. The trustee in bankruptcy of Drapkin has brought suit against the defendant to recover these two accounts—one with the Commercial Trades Company in the sum of $519.65, and the other with S. Weiner, Son & Co. in the sum of $598.25. The court held that the bank had notice that preference was intended, and that the trustee was therefore entitled to a decree directing the return of the accounts, as the defendant received the accounts within four months prior to the adjudication in bankruptcy.

The bankruptcy proceedings were voluntary, and the petition was filed on March 21, 1914. In September 1913, an involuntary petition in bankruptcy had been filed against Drapkin, who had been doing business under the trade name of M. Handin & Drapkin. The proceedings in 1913 resulted in a settlement upon a basis of 25 per cent. in cash and notes for 10 per cent. of the claims. The appellant bank then had a claim against the bankrupt and did not participate in the involuntary proceedings, but effected the sale of its claim to one Chester for $428.75 in cash, taking notes for the balance indorsed by the bankrupt. The bankrupt had been a depositor in the defendant bank, but that relationship terminated subsequent to the first bankruptcy proceedings and prior to the assignment of the accounts.

The plaintiff called as a witness one Holleb, who was in the employ of the bankrupt at the time the accounts in question were transferred to the defendant. He was thoroughly conversant with the bankrupt's business, and one of his duties was to examine from time to time the books to see that the bookkeeper made no mistakes. It was with him that the bank was accustomed to confer about the financial condition of Drapkin and his indebtedness to the bank. He was called to the bank in February, 1914, and asked by its credit man for a check to discharge Drapkin's indebtedness. He testified that he informed Mr. Heidelberg, the credit man of the bank, that "we were not in a position to do it," that "we had no cash on hand at the present time," that "we might manage to raise possibly a little over $100, and would give him a note for the balance." Later in February he was again called to the bank on the same subject and asked whether the notes would be paid. He testified he told Heidelberg that he "would have to see Mr. Drapkin about it," and that he called a few days later and gave Heidelberg the two accounts, adding, "I told him that we wouldn't have sufficient funds to meet everything we owed, and for that reason we gave him those two accounts to secure part of his money," and at the same time told him that "Mr. Drapkin will have to get out of business; we might be able to offer a 10 per cent. settlement." At that time the bank held two notes, which had been protested in December, upon which Drapkin was an indorser, and which still remained unpaid, although the bank had been pressing for some time for payment.

There was some testimony which tended to throw doubt upon Holleb's testimony, but we have not been impressed by it, and it did not impress the trial judge, who saw and heard the witnesses and stated in his opinion that "I observed closely each witness as he testified, and believe Holleb was correct in his evidence." We think the conclusions of the District Judge, who saw the witnesses, and heard them give their testimony, and came to the conclusion that the bank, at the time it acquired those accounts, had notice that a preference was intended, should not be disturbed.

[2] At the time the bank received these accounts it received them as a creditor and for a pre-existing debt. The testimony shows that Drapkin at the time was insolvent. It also shows, in the opinion of the trial judge, and in our opinion, that the bank received the accounts under such circumstances as naturally would have caused an ordinary person, had he been the creditor receiving the preference, to have believed that thereby a preference would be effected. And it appears that the bank received the accounts within four months before the filing of the petition. Property received under such circumstances constitutes a voidable preference and the trustee can recover for the benefit of the bankrupt estate.

Decree affirmed.

UNTEREINER v. CAMORS et al. (two cases). In re A. LE MORE & CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 19, 1916. Rehearing Denied February 21, 1916.)

Nos. 2790, 2863.

1. BANKRUPTCY ⟸265—SALES OF PROPERTY—RIGHTS OF BIDDERS.

Trustees in bankruptcy petitioned for and were granted by the referee authority to offer real estate at auction, adjudications to be made at such prices as they might determine, not less than three-fourths of the appraised value. The advertisement of sale referred to the order and stated that the sale was subject to confirmation by the referee, and the auctioneer read the advertisement including such provision before offering the property. A bid of more than three-fourths of the appraised value, but less than the amount which the trustees had told the auctioneer they would accept, was made, and the auctioneer made no adjudication, and refused to accept a deposit, but had the bidder sign an agreement to make such deposit, in order that he might be held if the trustees decided to accept the bid. They, however, declined to do so. *Held*, that the bidder acquired no legal rights in the bid, as no adjudication was made, and the trustees were vested with ample discretion to reject the bid as a private offer, and hence the referee acted within his authority and discretion in declining to compel a transfer of the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 367; Dec. Dig. ⟸265.]

2. BANKRUPTCY ⟸440—REVIEW OF PROCEEDINGS—PROPER MODE OF REVIEW.

Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (Comp. St. 1913, § 9609), provides that appeals as in equity cases may be taken in bankruptcy proceedings from judgments adjudging or refusing to adjudge the defendant a bankrupt, granting or denying a discharge, or allowing or

rejecting a debt or claim of $500 or over. A rule to compel trustees to convey real estate to the highest bidder at an auction sale was dismissed by the referee, and his action was sustained by an order of the District Court. *Held*, that no appeal lay from this order, as the matters sought to be reviewed were ordinary steps in bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⇐440.]

Appeal from, and Petition to Superintend and Revise Order of, the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

In the matter of A. Le More & Co. and others, bankrupts. The dismissal of a rule to compel Frederic Camors and others, trustees, to convey real estate to George J. Untereiner, the highest bidder at an auction sale, was sustained by an order of the District Court, and said Untereiner appeals and files a petition to revise. Appeal dismissed, and petition to revise denied.

Geo. J. Untereiner, of New Orleans, La., for appellant.

J. Blanc Monroe, Monte M. Lemann, and D. B. H. Chaffe, all of New Orleans, La., for appellees.

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

PER CURIAM. No. 2790 is an appeal from an order of the District Court sustaining the referee in a certain sale of bankrupt estate, and No. 2863 is a petition to revise in matters of law the same order of the District Court.

[1] The facts as found in the written opinion by the District Judge are as follows:

"In this matter it appears that the trustees filed a petition with the referee, asking the authority to have certain real estate offered at public auction by Robert G. Guerard, adjudications to be made at such prices as they might determine, not less than three-fourths of the appraised value, and authority to do so was granted. In accordance therewith a number of pieces of property were then advertised for sale. The advertisement referred to the order and stated plainly that the sale was subject to confirmation by Hon. William A. Bell, referee in bankruptcy. Before offering any of the property the auctioneer read the advertisement in full, and particularly the clause above referred to. The trustees had previously advised the auctioneer of the minimum prices they could accept. When the particular property here in controversy was offered, there was no bid equaling the price fixed by the trustees; but mover in rule, Mr. Untereiner, was the last and highest bidder, at a price exceeding three-fourths of the appraised value. The trustees declined to make title, and a rule to compel them to do so was dismissed by the referee. Mr. Untereiner contends that the property was adjudicated to him, and, as the price exceeded three-fourths of the appraised value, title vested.

"Conceding that this would be so under ordinary circumstances, and that the referee could only withhold his approval because of gross inadequacy of price, which does not appear from the record, in this case there was no adjudication. There is evidence that the auctioneer cried the property in the usual way, and it may have appeared to the disinterested onlookers that an adjudication was made, but the auctioneer testifies that he made no adjudication, and Mr. Untereiner, being a lawyer, could not have been mistaken with regard to this, as the auctioneer declined to receive any deposit on account of the sale, and Mr. Untereiner signed a card of the following tenor:

"'I have this day bid $12,250 for the property No. 1304 Carrollton avenue, and will immediately deposit with the auctioneer 10 per cent. on account of the purchase price, all in accordance with judicial advertisement in Times-Picayune this date. [Signed] George J. Untereiner.'

"The object of this card was to hold Mr. Untereiner to the bid in case the trustees decided to accept it. When they declined, the matter was ended. In my opinion, Mr. Untereiner acquired no legal rights by his bid, as no adjudication was made, and the trustees were vested with ample discretion to reject the bid as a private offer. The referee has acted well within his authority and with sound discretion in declining to order the transfer.

"The point was made in argument that the referee declined to admit evidence of other and better offers after the property was offered at auction. The evidence should have been admitted as the court, in preparing to exercise its discretion, was entitled to all the light on the subject that was obtainable. However, in this instance, it has had no effect upon the outcome of the case.

"The order appealed from will be affirmed."

[2] The matters sought to be reviewed here are clearly ordinary steps in bankruptcy proceedings, and no appeal lies therefrom. See section 25a, Bankruptcy Law 1898.

In considering the petition to revise, we are concluded by the facts in the case, and on the facts and for the reasons given by the District Judge there was no error of law.

It follows that the appeal, No. 2790, must be dismissed, and the petition to revise, No. 2863, denied; and it is so ordered.

HUFF et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 17, 1916. Rehearing Denied February 1, 1916.)

No. 2805.

1. CRIMINAL LAW ⟸371—EVIDENCE—OTHER OFFENSES.

On a trial for conspiring to forcibly arrest W. for the purpose and with the intent to hold him in a condition of peonage, the government offered evidence tending strongly to prove concerted action by defendants in arresting, whipping, and returning W. to an employer, whose employment he had deserted. Defendants offered evidence attacking the character and reputation of the prosecuting witness, evidence tending to prove an alibi for some of the defendants, and evidence of the good character and standing of all of the defendants. *Held* that, in rebuttal, evidence that, about the time laid for the conspiracy, the defendants were acting in confederacy and concert in arresting without warrant, whipping, and forcibly returning other laborers to the custody and service of employers whom they had deserted, was admissible for the purpose of showing the accord and combination of the alleged conspirators and their intent in committing the acts charged, and it was immaterial that this also tended to prove other offenses and had a bearing on the question of defendants' good character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. ⟸371.]

2. CONSPIRACY ⟸48—VERDICT—SUFFICIENCY.

On a trial for combining, conspiring, etc., to commit an offense against the United States, a verdict finding defendants "guilty of conspiracy"

was a general and not a special verdict, and to be understood as referring to the conspiracy charged in the indictment, and was sufficient.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 108–111; Dec. Dig. ⟸48.]

In Error to the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Franklin Huff and others were convicted of an offense, and they bring error. Affirmed.

Marion Smith, of Atlanta, Ga., for plaintiffs in error.

Hooper Alexander, U. S. Atty., of Atlanta, Ga.

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

PER CURIAM. The plaintiffs in error and others were indicted for combining, confederating, conspiring, and agreeing together to commit an offense against the United States; i. e., to forcibly arrest one John Westmoreland for the purpose and with the intent to hold the said John Westmoreland in a condition of peonage, and with the intent and purpose of forcibly compelling him against his will to work for one of the plaintiffs in error to pay a debt of $57, claimed to be due and owing.

[1] The government offered evidence tending strongly to prove concerted action of the defendants in arresting, whipping, and returning John Westmoreland to the employer whose employment he had deserted. On the trial the plaintiffs in error put in evidence attacking the character and reputation of the prosecuting witness John Westmoreland, evidence tending to prove an alibi for some of the accused on trial and the good character and standing of all the defendants as a defense to the indictment.

It was therefore not error on the part of the trial judge to admit in rebuttal the evidence of Maggie Miller and others to prove that about the same time laid for the conspiracy the defendants were acting in confederacy and concert in kindred actions and enterprises of a like nature as that charged in the indictment, to wit, the arresting without warrant, the whipping, and forcibly returning other laborers to the custody and service of employers whom they had deserted, for the purpose of showing the accord and combination of the alleged conspirators and their intent in confederating and combining and in committing the acts charged in the indictment. That such evidence tended to prove other offenses than that charged in the indictment, and also had a bearing upon the defense of good character invoked by the defendants and was otherwise prejudicial, did not affect its admissibility. See Wood v. United States, 16 Pet. 342, 10 L. Ed. 987; Olson v. United States, 133 Fed. 849, 67 C. C. A. 21; Van Gisner v. United States, 153 Fed. 47; Thomas v. United States, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; Sapir v. United States, 174 Fed. 219; Lueders v. United States, 210 Fed. 419, 127 C. C. A. 151; Stern v. United States, 223 Fed. 762, —— C. C. A. ——; Farmer v. United States, 223 Fed. 903–911, —— C. C. A. ——.

[2] The verdict found in the case, "Guilty of conspiracy," was a general and not a special verdict, and is to be understood as referring to the conspiracy charged in the indictment, and is sufficient. See Statler v. United States, 157 U. S. 277–279, 15 Sup. Ct. 616, 39 L. Ed. 700, and cases there cited. We find none of the assignments of error in this case well taken.

The judgment of the District Court is affirmed.

CITY OF COLORADO, TEX., v. HARRISON.

(Circuit Court of Appeals, Fifth Circuit. December 13, 1915. Rehearing Denied February 1, 1916.)

No. 2737.

APPEAL AND ERROR ⊂=866, 1010—REVIEW—MOTION BY BOTH PARTIES FOR DIRECTED VERDICT.

Where both parties asked the court to instruct a verdict, they necessarily requested the court to find the facts, and were concluded by its finding upon which the resulting instruction of law was given, and a reviewing court was limited to a consideration of the correctness of the finding on the law, and must affirm, if there was any evidence in support thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467–3475, 3979–3982, 4024; Dec. Dig. ⊂=866, 1010.]

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by Clarisse M. Harrison against the City of Colorado, Tex. Judgment for plaintiff, and defendant brings error. Affirmed.

Royall G. Smith, of Colorado, Tex., for plaintiff in error.

William D. Tatlow, of Springfield, Mo., for defendant in error.

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

PER CURIAM. "As * * * both parties asked the court to instruct the verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. 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." Beuttell v. Magone, 157 U. S. 154, 157, 15 Sup. Ct. 566, 567 (39 L. Ed. 654); Sena v. American Turquoise Co., 220 U. S. 497, 598, 31 Sup. Ct. 488, 55 L. Ed. 559.

The evidence offered by the plaintiff as shown in the bill of exceptions not only makes a prima facie case in his favor, but fully supports the finding of the court. See Presidio County v. Noel etc.,

212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402; Quinlan v. Green County, 205 U. S. 410, 419, 27 Sup. Ct. 505, 51 L. Ed. 860; Provident Trust Co. v. Mercer County, 170 U. S. 593, 601, 18 Sup. Ct. 788, 42 L. Ed. 1156; City of Evansville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; City of Lampasas v. Talcott, 94 Fed. 457, 36 C. C. A. 318; Young v. City of Colorado (Tex. Civ. App.) 174 S. W. 986.

The judgment of the District Court is affirmed.

BALDWIN (JOHN SIMMONS CO., Intervener) v. ABERCROMBIE & FITCH CO. (JUSTRITE MFG. CO., Intervener).

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 26.

1. PATENTS ⊜327—SUITS FOR INFRINGEMENT—FOLLOWING DECISIONS IN OTHER CIRCUITS.

A Circuit Court of Appeals, in doubtful cases involving the validity of patents, will conform to a decision in another circuit; but where it is convinced that the conclusion reached was wrong, it is not at liberty to surrender its own judgment for the purpose of securing uniformity of decision.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. ⊜327.]

2. PATENTS ⊜328—VALIDITY OF REISSUE—INFRINGEMENT—MINER'S ACETYLENE GAS LAMP.

The Baldwin reissue patent, No. 13,542 (original No. 821,580), for an acetylene gas generating lamp, principally for miner's use, claim 4, was not anticipated and is not invalid, as broadening the same claim in the original patent, but discloses patentable invention and is valid; also *held* infringed.

3. PATENTS ⊜324—SUIT FOR INFRINGEMENT—RECORD ON APPEAL—PRINTING EXHIBITS.

To render effective a stipulation in an infringement suit that prior art patents introduced in evidence need not be printed in the record on appeal, but that the original exhibits may be used, the approval of the Circuit Court of Appeals is necessary.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600–606; Dec. Dig. ⊜324.]

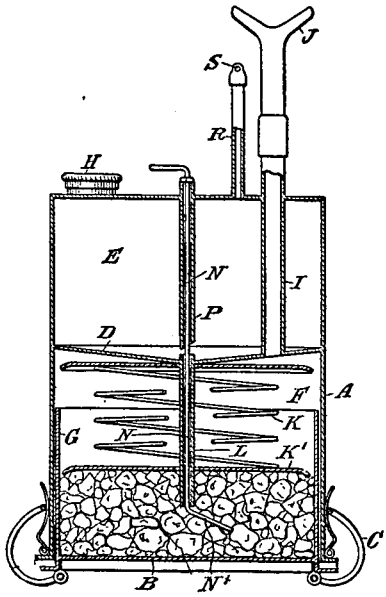
Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Frederick E. Baldwin, in which the John Simmons Company intervenes, against the Abercrombie & Fitch Company, in which the Justrite Manufacturing Company intervened. Decree for complainants, and defendants appeal. Affirmed.

For opinion below, see 227 Fed. 455.

This cause comes here on appeal from the decree of the United States District Court for the Southern District of New York, entered on February 10, 1915, holding valid and infringed claim 4 of the reissue patent No. 13,542, issued to Frederick E. Baldwin on March 11, 1913. The invention covered by this patent is for a lamp designed to generate and burn acetylene or similar gas. It is intended for use as a bicycle, automobile, yacht, or miner's lamp,

but its commercial utility has been principally in connection with miner's cap lamps. The invention is shown in the following drawing:



The specification describes the lamp as follows: "Generally considered, the lamp is one comprising a metallic or other receptacle *A*, preferably provided with a bottom *B*, which may be readily detached and which when the lamp is in use is held firmly in position by suitable clamps *C*, so as to make a water and gas tight closure. The receptacle is divided, preferably horizontally, by a partition *D* into two compartments, the upper one, *E*, designed to serve as a water chamber or reservoir, the lower, *F*, as a gas-generating chamber adapted to contain a receptacle *G* for calcium carbid, which is generally attached to or forms the detachable bottom. In the top of the lamp is an orifice closed by a screw cap *H* or similar device for the introduction of water to the reservoir, and from the gas-generating chamber *F* through the water reservoir *E* and out through the top of the lamp extends a tube *I*, which conducts the gas to the burner *J*."

The complainants relied solely upon claim four, which reads as follows: "In a lamp of the kind described, the combination with a water reservoir, and a receptacle for calcium carbid, of a water tube extending from the former a considerable distance into the latter and adapted to be embedded in the mass of carbid in the receptacle, and a rod extending through the water tube, and constituting a stirrer to break up slaked carbid around the outlet of the water tube, the rod operating to restrict and thus control the flow of water to the carbid, as set forth."

The John Simmons Company intervened in the suit, became a complainant, and alleged that it was a corporation organized and existing under the laws of the state of New York; that it had its principal place of business in the borough of Manhattan in said state; that it was the only manufacturer of the inventions of the plaintiff, Baldwin, and that unless it was allowed to intervene it would necessitate the beginning of a new action for the recovery of damages and profits; that in 1908 an arrangement was made between it and Baldwin whereby the former manufactured the lamps while both parties sold them; that in 1911 a new contract was made, under which it acquired the exclusive right to manufacture and sell the lamps.

The Abercrombie & Fitch Company, of the borough of Manhattan and state of New York, was the original defendant and sold the lamps alleged to infringe. The Justrite Manufacturing Company of Chicago, Ill., was the manufacturer of the lamps sold by the Abercrombie & Fitch Company, and intervened under federal equity rule No. 37, which provides that any person may be made defendant who has or claims an interest adverse to the plaintiff.

The amended answer of the Justrite Manufacturing Company denied that the plaintiff, Baldwin, was the original, sole, and first inventor of the alleged improvement claimed by him in his letters patent; averred that the said improvement was null and void for want of utility, as well as for want of invention on the part of Baldwin; denied that the same had been in public use or on sale for more than two years prior to the application for the patent; denied the fact of infringement; averred that the principle of the alleged invention was not new, but had been fully described in letters patent, both of the United States and of foreign countries, long prior to the applica-

tion made by the plaintiff, Baldwin, for his patent, and averred that the reissue patent No. 13,542 was invalid.

The testimony was taken in open court, and a decree entered holding reissue letters patent No. 13,542 to be valid as to claim 4, that defendants had infringed, that plaintiff recover the profits which defendants derived from their infringement, that a perpetual injunction issue, and that the injunction granted be suspended pending appeal if appeal be promptly taken. It was also decreed that plaintiffs recover their costs and disbursements.

James R. Offield and Charles K. Offield, both of Chicago, Ill., for appellants.

James Q. Rice, of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). United States patent No. 656,874 was issued to Frederick E. Baldwin on August 28, 1900, for an acetylene gas generating lamp; and letters patent No. 821,580 was issued to him on May 22, 1906, for an improvement on the form described in No. 656,874; and reissued letters patent No. 13,542 was issued to him on March 11, 1913, and is the patent in suit.

Patents No. 656,874 and No. 821,580 came before the Circuit Court for the Southern District of Illinois in a suit brought by Baldwin, who claimed his patents were infringed by the lamp of the Bleser patent, No. 949,349. The court sustained Baldwin's claims, and the case was appealed to the Circuit Court of Appeals for the Seventh Circuit, which affirmed in part and reversed in part. The court, decided that patent No. 656,874 was valid, and claim 1 infringed by the Bleser patent, but held claims 2, 3, 4, 5, 6, and 10 not infringed. Patent No. 821,580 was held valid, but not infringed. It declared that in view of the prior art patent No. 656,874 was not entitled to a broad construction with reference to equivalents. Bleser v. Baldwin, 199 Fed. 133, 117 C. C. A. 615 (1912).

The above decision was handed down on April 23, 1912, and Baldwin on February 3, 1913, filed his application for the reissued patent No. 13,342. The latter patent then came before the District Court for the Western District of Pennsylvania, and was held valid and infringed. Baldwin v. Grier Bros., 215 Fed. 735. The case was then taken on appeal to the Circuit Court of Appeals for the Third Circuit, and that court held claim 4 of the reissued patent void. The court thought claim 4 of the reissue patent broader than that of the original patent, and said that a reissue patent could not be allowed to broaden an original patent after the lapse of so long a time as seven years, and after the original patent had been limited by final adjudication. Grier Bros. Co. v. Baldwin, 219 Fed. 735, 135 C. C. A. 433.

In the suit now before us this same claim 4 of the reissue patent is the claim involved. The court below has held it valid and infringed. Its opinion conflicts with the decision in the Third Circuit.

[1] This court appreciates that uniformity is desirable in decisions respecting the validity of patents, and is disposed in all doubtful cases to conform to a decision rendered in another circuit. But in a case in which this court is convinced that the conclusion reached was wrong,

it is not at liberty to surrender its own judgment upon the issue involved in order that uniformity may be secured. In Mast, Foos & Co. v. Stover Manufacturing Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856 (1900), Mr. Justice Brown said:

"Comity persuades; but it does not command. It declares, not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views, that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts."

The plaintiff, Baldwin, first began to market an acetylene miner's cap lamp in January, 1906. At that time there was no other acetylene cap lamp on the market. Prior to the introduction of the Baldwin lamp, miners used oil lamps, with a wick, or candles. In an oil lamp the mining law required the use of a high grade of oil, which cost the miners from 28 to 40 cents a gallon, and a gallon lasted for a week. The Baldwin acetylene lamp resulted in quite a saving to the miners, for it could be used for a week at a cost not to exceed 8 cents. The oil lamps, too, gave off a great deal of smoke, which contributed largely to miner's asthma and also consumed a great deal of the oxygen of the air. The Baldwin lamp gave off no smoke, and only consumed one-eighth of the oxygen that the oil lamps consumed. Then, too, the oil lamps had a very large wick, an inch in diameter and rough on the top, and in going through windy places with them sparks were often blown off into the timber, which was oil-soaked, and therefore dangerous. And miners were sometimes careless, and would throw partly consumed wicks away without putting their foot on them to extinguish them. In preparing powder to blast with, the miners often would keep the lamps on their hats, although the law prohibited their doing so, and sometimes a spark would fall on the powder and ignite it. It was not an uncommon occurrence for miners to be injured in this way. So that the invention of the plaintiffs' acetylene lamp involved a considerable saving of money to the miners, as well as an improvement in their health through better air, and gave them protection against explosions and the dangers arising from conflagrations within the mines. It is not surprising, therefore, to find that over 1,000,000 of the acetylene lamps of the patent have been sold in the market in the short time that has elapsed since the patent was granted. The Baldwin lamp had merit in it, and the inventor accomplished something that was well worth while.

[2] We come now to consider the questions involved. The Circuit Court of Appeals in the Seventh Circuit held, as before stated, that the original patent was valid, including claim 4, and the Third Circuit held that claim 4 was invalidated by the fact that in the reissue it had been broadened. The patentee had amended his specifica-

tion in two particulars: (1) He described the tube as always embedded in the carbid. (2) He added the following statement:

"It will be understood from what has been said that the function of the stirrer is to break up, pierce, or disturb the particles of the slaked carbid mass, which, when the lamp is in use, forms at the delivery end of the tube. This slaked carbid mass tends to solidify, and either shuts the water off altogether or restricts it so that less water is delivered from the water tube than the lamp demands for efficient operation. As it is sufficient, under certain circumstances, to insure the requisite flow of water by so manipulating the stirrer as to pierce, break up, or loosen the slaked carbid mass immediately around or at the mouth of the tube, it is obvious that the stirrer need not always be formed with a bent end, or so as to extend radially from the mouth of the tube."

He then amended claim 4 so as to read:

"In a lamp of the kind described, the combination with a water reservoir, and a receptacle for calcium carbid, of a water tube extending from the former a considerable distance into the latter and adapted to be embedded in the mass of carbid in the receptacle, and a rod extending through the water tube, and constituting a stirrer to break up slaked carbid around the outlet of the water tube, *the rod operating to restrict and thus control the flow of water to the carbid, as set forth*" (the italicized words being the clause inserted).

It will be at once conceded that amendment 1 is not of importance. The objection to amendment 2, as the Third Circuit thought, was that it eliminated the need of a bent arm at the end of the rod used as a stirrer. The Seventh Circuit had held that a rod without a bent arm did not infringe claim 4, and if that decision was right the Third Circuit was right in regarding the amendment made in the reissue patent as broadening the patent and therefore void. But we are unable to concur in the view taken of the matter in the Seventh Circuit, and, not concurring in that view, we are unable to concur in the view taken in the Third Circuit.

The decision in the Seventh Circuit confined the patentee to a substantially right-angled stirrer, while the original claim merely said "constituting a stirrer." The material thing was to stir the sludge, and one can stir such a substance as carbid sludge by an up and down motion of a straight rod, though perhaps not as thoroughly as he can by the rotary motion of a bent part. Claim 1 covers "end formed as a stirrer," which might properly call for something more than a straight end. Claim 2 covers "end bent to form a stirrer." Claim 4 has no limitation, but speaks merely of the rod as "constituting a stirrer," which, especially in view of the phrasing of the other two claims, may properly be construed as covering a rod, of whatever shape (straight or bent), which penetrated into the carbid sufficiently to allow of its being used to stir the same. In that respect it differed from the prior art. It seems to us that the court in the Third Circuit erred in not holding that the "rod extending through the water tube * * * as set forth" was the sort of rod to which the patentee had devoted a whole column of description dealing with prior art, defects, and his improvement to avoid them; that is to say, a rod of thickness sufficient to regulate flow of water through the tube. It does not follow that, because the original patent shows a stirrer having a bent

end, it is limited to such a stirrer, notwithstanding that the patent defines the function the stirrer is to discharge, and notwithstanding that, in the lamps in suit, a stirrer having a straight end discharges precisely that function.

The Supreme Court laid down the rule in Machine Company v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935 (1877), as follows:

"Except where form is of the essence of the invention, it has but little weight in the decision of such an issue; the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions, or in a different way, or produce a substantially different result. Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained. * * * Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself, so that, if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape. Curtis, Patents (4th Ed.) § 310."

And see Winans v. Denmead, 15 How. 330, 14 L. Ed. 717 (1853).

The straight rod idea was an alternative form, which the patentee was entitled to use instead of a rod with a bent form. Baldwin filed his original application in July, 1903, and the patent was not granted until May, 1906, and between the time of the application and the time of the grant Baldwin had made lamps in which he had used both a straight rod and the rod with the bent arm. So that it is incorrect to say that the straight rod was suggested to him by the litigation in Baldwin v. Bleser.

As a stirrer having a straight end accomplishes in a miner's cap lamp the exact function which one accomplishes with a bent end, the reissue did not, in the opinion of this court, broaden the patent, and a rod with a straight end infringes the patent in suit, assuming the patent to be valid. And that the patent now before the court is valid we have no doubt.

In discussing the prior art appellants in their brief refer to the Mosher patent, No. 644,439, and they assert that the broad principle of restricting the control of the flow of the water by a restricting rod in the water tube is clearly shown in that patent. The appellees in their brief refer to the same patent, and claim that it is clear that it has no restricting rod, such as that of the patent in suit. They say that the Mosher patent has no water tube imbedded in the carbid, and has nothing which has the function of, or which corresponds to, the stirrer of the complainant's device. The experts on each side refer to the patent and undertake to quote from it. We find, however, no such patent in the record and the experience of this court inclines us

to give little weight to the statement of a witness as to what a patent states, when we are not furnished with the patent, so that we can see for ourselves exactly what it does and does not disclose.

[3] Examination of the record shows that, subsequent to the time when allowance of appeal had brought the cause into this court, counsel entered into a stipulation that the prior art patents need not be printed in the record, but might be taken to this court as physical exhibits. To this stipulation they obtained the indorsement by a District Judge of the words, "So ordered." Attention of the bar is called to the fact that this court is the one to determine whether or not exhibits marked in evidence in the trial court and sent up here shall or shall not be printed in the record upon which argument is to be had and decision to be asked for. The court is composed of three judges, who necessarily have to study the records on appeal, not in banc, but individually; they cannot do so properly and expeditiously, if there are only single copies of patents, which counsel think of sufficient importance to refer to in their briefs. It is most embarrassing, when one is considering an argument based on such reference, to have to suspend such consideration until he can, perhaps on some subsequent day, obtain the patent from one or the other of his associates. Hereafter the clerk of this court, whenever a stipulation such as this is found in any record filed here, will at once notify counsel that an approval by this court is necessary to its validity.

We may say, however, that we do not find in the Mosher patent, assuming the quotations to be accurately given by the experts, anything which negatives Baldwin's invention.

The appellants strongly rely on the Schmitt British patent, No. 15,688, dated July 18, 1898. They assert that in it is to be found the most complete anticipation of the patent in suit, and they see in it a complete and accurate embodiment of all that is called for in claim 4 of the reissue patent. It is true that in the Schmitt patent there is a water reservoir and a water tube. But there is no disclosure of the tube being imbedded in the carbid, nor is there a disclosure of a restricting rod or a stirrer such as is disclosed in the patent in suit. It is true there is a rod extending through the water tube, and that it is movable vertically within the tube. But it is described as a cleaning rod, and that clearly was its sole purpose, notwithstanding the fact that the expert of the appellants argued that it was a restricting rod. The expert on the other side squarely denied that this rod had any such functions, and we coincide in that opinion. The water feed in the Schmitt patent is not controlled by the rod, but is controlled in part by the valve and in part by the use of a wick in the tube, a device which is referred to in Baldwin's patent as prior art which had proved unsatisfactory.

It is sought to help out the Schmitt patent by an article taken from Dingler's Polytechniches Journal. But surely, if the disclosure of the Schmitt patent is insufficient, as we have found it is, it cannot be helped out by the publication referred to. It does not, however, aid appellants' case. The sieve tube, which it shows, makes it clear that in the lamp which it discloses the end of the water tube is not imbedded in

the carbid. In describing the filling of the lamp, the article states that "care should be taken during the filling operation not to let any carbid fall in to the center straining tube." We think this sieve tube makes it clear that in the lamp of the Dingler publication the end of the water tube is not imbedded in the carbid, and, not being so imbedded, it could not have been intended that it should be a stirrer. The language of the Dingler Journal is:

"For the regulating the water feed and to avert the clogging up of the water drop hole, a wire *o* is inserted in the tubular end of the water drop valve."

Reference to the drawing shows that the clogging was not from carbid, because the tube and wire all go into the center sieve tube, which is carefully kept free of carbid. There was nothing, therefore, to be stirred. The words "to regulate the water feed" are too vague to give any definite idea of how this is done; there is nothing to indicate that it is accomplished in the manner adopted in the patent in suit. Baldwin clearly sets forth the difficulties which he found in the lamps of the prior art, and he describes the manner in which he proposes to attain the end desired. He says:

"Various means have been employed to regulate or control the normal rate of flow of water through a water supply tube. For example, the bore of the tube has been made of small diameter; but this plan has not been found practical for various reasons. In the first place, the discharge outlet thereof is under pressure of several inches of water, and it is practically impossible to make the bore so minute that the water will issue in sufficiently small quantity. If the attempt is made to secure this small flow by making the tube very minute, it then becomes so easily clogged that the operation of the lamp is rendered extremely uncertain. The smallest particle of foreign matter in the water, or a bit of slaked carbid carried into the bore by back pressure of the gas, will stop the flow completely, and the lamp will go out. Such a tube is difficult—in fact, almost impossible—to clean. Another method which has been employed is to use a duct of comparatively larger bore, and fill the same with a wick of more or less loose texture, for the purpose of checking the supply. This for a time operates with some degree of success, though from the very nature of the material used the precise amount of the feed can never be exactly determined. A valve is generally necessary to regulate the supply. Furthermore, when the lamp has been used for a time, the wick, which, of course, must act as a strainer, becomes filled with solid matter—such as sand, dirt, and organic particles contained in the water—so that the feed is reduced. This necessitates frequent adjustment of the valve to restore the proper supply. In time the wick becomes completely choked, and the user, often unskillful in such matters, must tamper with the lamp and insert a new wick, which is at best a troublesome procedure. Again, if the lamp has not been used for some time, the wick dries out, and a very appreciable time is required to soak it up, so that the water will again flow through.

"The method which I have invented for securing the proper feed under all circumstances, without the above objectionable features, is to make the bore of the duct of comparatively large size, extend the tube which forms the duct downward, so that it is and will be always imbedded in the carbid, and then restrict the duct by means of a wire or rod, preferably centrally located therein, to leave a channel of the proper size. This arrangement is simple; but in a long experience it has been found to be entirely successful. It is possible to secure the drop-by-drop feed with a duct of considerable size, since the friction of the water on a large area of the tube wall and wire reduces its flow. This retarding friction may be regulated by varying the size of wire used. The duct does not become choked, since, if foreign particles are deposited therein, the water can take a zigzag course around it, without the supply being

appreciably affected. If it is at any time necessary to clean the tube, the wire is simply reciprocated and rotated a few times from the outside of the lamp, without disturbing the position of other parts. This nice regulation of the flow enables me to entirely dispense with the troublesome adjustment of the valve. If a valve is used at all, it is employed to shut off the flow entirely, and not to regulate it."

The appellants also rely on the Handshy patent, No. 591,132. In that patent it is claimed that the rod which extends through the water tube was intended to control the flow of water. There is nothing, however, in the specification, that indicates that the rod had any such function, and counsel cannot seriously claim that the rod in question restricted to any useful degree the flow of the water. The experts on both sides practically agreed that the rod in the Handshy patent was without effect in restricting and controlling the water flow, because it was too small. It is equally evident that the rod could not operate as a stirrer. The water tube could not be imbedded in the carbid, for the reason that, if it were, as the carbid slaked and the sludge formed, the expanding sludge would prevent the reciprocating movement of the tube on which the operation of the lamp depended.

The appellants rely chiefly upon the invalidity of the patent. It is true, however, that they assert that there is no infringement. They say there can be no infringement, for the reason that the lamp made by the Justrite Company has no stirrer within the meaning of the original patent. But, as we have shown, the language of the original patent was comprehensive enough to include the stirrer of the original patent. And defendants do not avoid infringement because their lamp contains a shut-off valve, which may be used to open or close the mouth of the water tube. It is not questioned that the flow of water through the water tube can be increased or diminished by turning this valve, but obviously that is not the purpose of the valve. It is clear that this valve was intended to be used simply as a shut-off valve, and not as a regulating valve. That being so, infringement is plain, for the lamp of the defendants is identical with the lamp of the plaintiffs. The lamp of defendants has the carbid container, the restricting and controlling rod, and the stirrer. The rod and tube of the lamp of the plaintiffs as embodied in the lamp of the defendants afford all the regulation of the flow of the water that is necessary.

The conclusions which we have reached are:

That the patent in suit is not invalid because of anything in the prior art.

That claim 4 of the original patent is valid, and was not broadened in the reissue patent.

That claim 4 of the reissue patent, being valid, is infringed by the defendants.

That no error was committed by the court below.

The decree is in all respects affirmed, with costs.

THOMA et al. v. PERRI et al.

(Circuit Court of Appeals, First Circuit. November 16, 1915.)

No. 1129.

PATENTS ⇐114—SUIT IN EQUITY TO OBTAIN PATENT—EVIDENCE.

Evidence *held* insufficient to overcome the presumption in favor of the decision of the Court of Appeals of the District of Columbia, awarding priority of invention to one of two applicants whose applications for patents were in interference. Brooks v. Sacks, 81 Fed. 403, 26 C. C. A. 456, applied.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. ⇐114.]

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

Suit in equity by Andrew Thoma and others against Angelo Perri and others to obtain the issuance of a patent, under Rev. St. § 4915 (Comp. St. 1913, § 9460). Decree for defendants and complainants appeal. Affirmed.

See, also, 205 Fed. 632.

Melville Church, of Washington, D. C., for appellants.

Harrison F. Lyman, of Boston, Mass. (Fish, Richardson, Herrick & Neave, of Boston, Mass., on the brief), for appellees.

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

PUTNAM, Circuit Judge. This is one of the cases which have been quite common in this circuit, wherein a patentee has in one way or another fixed a settled date for his invention, and some infringer undertakes to establish an earlier date. The courts in this circuit, in Brooks v. Sacks, 81 Fed. 403, 26 C. C. A. 456, decided on June 10, 1897, rejected any such attempt, based upon the unsupported recollections of witnesses, after any considerable length of time had expired, unless supported by concrete facts, and in several cases, some of which are of striking character, enforced that rule, the last case of that kind being Greenwood v. Dover, 194 Fed. 91, 114 C. C. A. 169, decided on December 12, 1911. In this latter case, the patent had also been sustained by a suit in the Court of Appeals in the District of Columbia, based upon section 4915 of Revised Statutes (Comp. St. 1913, § 9460). The appeal at bar, in all substantial respects, including the adjudication of the Circuit Court of Appeals in the District of Columbia, coincided with Greenwood v. Dover. It is impossible to establish any positive distinction between Greenwood v. Dover and the case at bar, and it is beyond doubt, therefore, that we must now affirm the decision of the District Court appealed from. We can see no reason for elaborating our conclusion.

The judgment of the District Court is affirmed, and the costs of appeal are awarded to the appellees.

THACHER v. TRANSIT CONST. CO.

(District Court, S. D. New York. January 8, 1916.)

No. 12-302.

1. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT—IMPROVEMENT IN CONCRETE ARCHES.

The Thacher patent, No. 617,615, for an improvement in concrete arches consisting of a combination, with abutments and a concrete arch spanning the intervening space, of a series of metal bars, in pairs, *held* limited by the prior art, the proceedings in the Patent Office, and the self-imposed limitations in the patent and the claims, to a combination in which the bars of each pair are physically and mechanically independent of each other, and, as so limited, not infringed.

2. PATENTS ⟸112—CONCLUSIVENESS OF PATENT.

As patents are procured ex parte the public is not bound by them, but the patentees are.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. ⟸112.]

3. PATENTS ⟸112—PROCEEDINGS IN PATENT OFFICE—CONCLUSIVENESS.

Where the Patent Office repeatedly rejected the claims in an application for a patent on the ground that they conflicted with a prior patent unless limited, and the applicant, instead of appealing from the decision of the examiner rejecting the application, amended the claims to contain the necessary limitation, he was bound by such decision, whether it was right or wrong.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. ⟸112.]

4. PATENTS ⟸165—LIMITATION OF CLAIMS—OPERATION AND EFFECT OF CLAIMS.

Self-imposed limitations in the claims of a patent preclude the patentee from showing that the invention is broader than his claims, and if it is broader he is deemed to have surrendered the surplus to the public.

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

In Equity. Suit by Edwin Thacher against the Transit Construction Company. Bill dismissed.

A. Alexander Thomas, of New York City, for plaintiff.
E. Clarkson Seward, of New York City, for defendant.

THOMAS, District Judge. This case arises on final hearing on pleadings and proofs, wherein the bill of complaint charges infringement of letters patent of the United States, No. 617,615, issued to Edwin Thacher on January 10, 1899, for new and useful improvements in concrete arches. The bill asks for an injunction and an accounting. The defense is that the patent, if construed broadly, so as to include the defendant's structure, lacks patentable novelty, in view of the prior art, and if strictly construed, as the defendant insists it should be by reason of the prior art, the proceedings in the Patent Office and the self-imposed limitations in the patent and the claims, it is not infringed.

[1] The invention, as stated in the specification, has for its object—

"an improved arch structure in which iron or steel bars are imbedded in concrete near the outer and inner surfaces of the arch in such a manner as to

assist the concrete in resisting the thrusts and bending moments to which the arch is subjected."

The specification then goes on to state that by the invention the patentee provides:

"First, for an effective connection between the bars and the concrete, employing lugs, dowels, bolts, or rivets, which pass through the bars and project into the concrete, in which they are imbedded, and thereby reinforce the adhesion between the metal and the concrete and prevent any end movement of the bar through the concrete, so that the complete crushing or shearing of the concrete must take place before a separation can be effected; second, I employ bars of such a form that they can be readily and cheaply spliced, if a greater length of bar is required than that which can be conveniently rolled or shipped; third, I provide bars that can be manufactured at a small cost and as a standard or stock article, and can be readily bent, when used, to the curve of the arch into which they are to enter."

The claims alleged to be infringed are the first and third, which are as follows:

"1. The combination with abutments, and a concrete arch spanning the intervening space, or a series of metal bars, in pairs, one bar of each pair above the other, near the intrados and extrados of the arch, and extending well into the abutments, each bar of a pair being independent of the other, substantially as described."

"3. The combination with abutments, and a concrete arch spanning the space between the abutments, of a series of metal bars in pairs, one bar of each pair above the other bar, near the extrados and intrados of the arch, each bar of the pair being independent of the other and one bar of each pair extending well into the abutment, substantially as described."

The third claim is distinguished from the first only in the fact that the latter requires that one bar of each pair shall extend into the abutments.

The prior art relied upon by the defendant is the Milliken patent, No. 545,301, issued August 27, 1895, the object of which is to provide in the construction of arches, partitions, floors, etc., a combination of cement and concrete with wrought or sheet iron which will develop the full strength of all the materials. The Milliken patent shows every element of the patent in suit, save that in the Milliken patent *the upper and lower bars are connected* by means of metal work, whereas in the patent in suit each bar of a pair is *independent of the other*. This independence clearly means a physical and mechanical independence of the bars, which are separate and disconnected with each other. Thus at line 94 of page 1 of the specification the patentee says:

"The use of the double bars enables me to not only bend them at the time they are required for use to any desired arc of a circle, but enables me to bend them so that the different members of each pair are differently arched, and, furthermore, it enables me to completely imbed the lowermost member of the pair before the uppermost member is placed."

[2, 3] Moreover, the proceedings in the Patent Office preceding the issue of the patent in suit confirmed the defendant's contention that it was the feature of physical and mechanical independence or severance which led the Patent Office to allow the patent. The claims presented in the original application, and subsequently in the prosecution of the claim, were repeatedly rejected by the Patent Office, and the Milliken

patent was cited as a reference, and the patent was finally allowed only when the claims were put in their present form with the limitation in each claim of "each bar of a pair being independent of the other." I cannot accede to the plaintiff's contention that this was a broadening of the claims. On the contrary, I hold that it was not. It was manifestly narrower, and was accepted by the patentee as a condition precedent to the grant of the patent.

The patentee now urges that, because of the incompetence of the solicitor who first attended to his application (not his present solicitor), he should not be bound by the conduct of the case in the Patent Office. The answer to that proposition is that, as patents are procured ex parte, the public is not bound by them, but the patentees are. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 279, 24 L. Ed. 344. The patentee had an opportunity to appeal from the decision of the examiner rejecting his application and his claims, but he did not. He is therefore bound by it, and must be held to have surrendered what he thus conceded, and it is immaterial whether the Patent Office was right or wrong in rejecting the original claims. Sargent v. Hall Safe & Lock Co., 114 U. S. 63, 86, 5 Sup. Ct. 1021, 29 L. Ed. 67; Shepard v. Carrigan, 116 U. S. 593, 598, 6 Sup. Ct. 493, 29 L. Ed. 723; Roemer v. Peddie, 132 U. S. 313, 317, 10 Sup. Ct. 98, 33 L. Ed. 382; Knapp v. Morss, 150 U. S. 221, 224, 14 Sup. Ct. 81, 37 L. Ed. 1059; Morgan Envelope Co. v. Albany Paper Co., 152 U. S. 425, 429, 14 Sup. Ct. 627, 38 L. Ed. 500.

[4] Furthermore, the patentee must be presumed to have meant what he said. He has described a particular construction and in his claim he has stated that it is this particular construction upon which he desired to secure a monopoly. Such self-imposed limitations are always recognized as precluding a patentee from showing that the invention is broader than his claims, and, if broader, he must be deemed to have surrendered the surplus to the public. Railroad Company v. Mellon, 104 U. S. 112, 119, 26 L. Ed. 639; White v. Dunbar, 119 U. S. 47, 51, 52, 7 Sup. Ct. 72, 30 L. Ed. 303; McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800. This proposition was clearly stated in White v. Dunbar, supra, where the court said:

"Some persons seem to suppose that a claim in a patent is like a nose of wax, which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. The context may undoubtedly be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim, but not for the purpose of changing it, and making it different from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms."

The meaning of the words "each bar of a pair being independent of the other" is not doubtful; and there is nothing in the case which justifies its being expunged from the claims. Brookfield v. Elmer Glass Works, 154 Fed. 197, 83 C. C. A. 180. Tested by these well-settled rules of construction, the ultimate question is, in the defendant's structure upon which the charge of infringement is predicated, are the bars

independent of each other? In my opinion, they are not, and, if they are not, the patent is not infringed.

In no sense are the upper and lower arch bars of the defendant's structure independent of each other. They are physically and mechanically connected to each other by exceedingly strong iron fasteners, and, as is shown in the diagram of the defendant's structure, the transverse fasteners of metallic construction which fasten the upper and lower arch bars appear to be considerably stronger and heavier than the arch bars themselves. The connections between the cross-frames and arch bars are direct; that is, the arch bars are directly bolted to the angle iron cross-frames by heavy bolts at the bottom and top, and these bolts are drawn up very tightly, so that the upper bars cannot move perceptibly without producing a corresponding movement in the lower bar, the connection between each upper arch bar and its corresponding lower bar being effected by several iron fasteners called "stirrups." These stirrups are fastened directly into the upper and lower cross-rods, so that the direct connection of the upper and lower cross-rods by means of these stirrups is a connection between the upper and lower arch bars, owing to the fastening of the cross-rods to the arch bars. The result of this arrangement is that each upper bar is firmly connected to the corresponding lower arch bar by angle iron frames at seven different points and by stirrups at ten more points.

That this distinction between dependence and independence must be regarded as material in determining the question of infringement cannot be doubted. The numerous authorities cited fully bear out this view. There is not a single suggestion in the patent itself, or in the history of its prosecution in the Patent Office, upon which a contrary view can be based.

Due consideration in reaching this result has been given to the opinion of Judge Rose in Thacher v. Mayor, etc., of Baltimore (D. C.) 219 Fed. 909, in which the claims in controversy were sustained. The question here involved was not before the court in that suit, as appears from the opinion. The question there involved was mainly one of patentability, and it was held that the patentee had done something which his predecessors in the art had not, and that the difference between the patent and the charged infringement (and which did not involve in any way the dependence or independence of the bars upon each other) was substantially the same as that of the patent in suit.

Let the bill of complaint be dismissed.

CENTRAL RY. SIGNAL CO. v. METALLIC SHELL & TUBE CO.

(District Court, D. Rhode Island. December 14, 1915.)

No. 31.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—TRACK—TORPEDO.
The Jackson patent, No. 824,019, for a track torpedo, claims 2 and 3, *held* void for lack of invention; also *held* not infringed.
2. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—RAILWAY TORPEDO.
The Beckwith reissue patent, No. 12,396 (original No. 790,879), for railway torpedo, claims 2, 8, and 9, *held* not infringed.

In Equity. Suit by the Central Railway Signal Company against the Metallic Shell & Tube Company. On final hearing. Decree for defendant.

James H. Thurston, of Providence, R. I., for complainant.
Horatio E. Bellows, of Providence, R. I., for respondent.

BROWN, District Judge. The bill charges infringement of letters patent to W. D. Jackson, No. 824,019, June 19, 1906, on application filed December 26, 1903, for track torpedo, and letters patent to C. E. Beckwith, No. 123,396, reissue November 7, 1905, on application of May 30, 1905, for reissue September 13, 1905, for railway torpedo.

Both patents relate to torpedoes used for railway signaling purposes. The prior patented art discloses a number of such devices:

Hickman	160,431	1875.
Hickman	173,291	1876.
Bevington	375,254	1887.
W. C. Beckwith	409,902	1889.
E. G. Beckwith	501,399	1893.
Bevington & Fisher	608,020	1898.
Dutcher	610,672	1898.
Broe	647,938	1900.

A track torpedo comprises, first, a torpedo; second, means for attaching the torpedo to the rail. The torpedo proper consists of detonating material in a suitable shell or container. Metal was sometimes used for the shell; but, in order to avoid danger from flying bits of hard metal, other material was commonly used.

The torpedo is secured to the rail by some means which must engage both the torpedo and the rail. Soft or flexible metal strips or securing straps, which can be bent readily over opposite sides of the head of the rail, were the ordinary means for engaging the rail. Leaden strips were commonly used. The prior patent to Beckwith, 501,399, speaks of "the ordinary soft metal securing strip."

As shown by the prior art, these strips were attached to the torpedo in various ways. In Hickman, 160,431, they are made integral with the container or shell of the torpedo; the container and straps being struck up from a single piece of soft or ductile sheet metal. It is obvious, of course, that when the straps and shell of the torpedo are made

of the same material and in a single piece they require no attachment other than that which results from continuity of the material. When, however, the strap and the torpedo shell are made in separate pieces and of different materials, it is necessary to attach the strap or straps to the torpedo, in order that the torpedo may be connected with the rail. This attachment is made by passing the strap over the top of the container, Hickman, 173,291; Broe, 647,938; by soldering, Bevington, 375,854; by the use of tacks, Beckwith, 501,399; by passing the strap between inner and outer layers of the shell and through slots in the outer layer of the shell, Dutcher, 610,672.

[1] The claims of the Jackson patent now in suit are 2 and 3:

"2. As a new article of manufacture, a track torpedo comprising a casing of paper having a filling of detonating material exploding under pressure, means for securing said torpedo to the head of a rail, and means encircling the body of said torpedo for retaining said securing means thereto.

"3. As a new article of manufacture, a track torpedo of tubular shape, having a filling of detonating material exploding under pressure, means for securing it to the head of a rail, and means encircling the body of the torpedo for retaining said securing means thereto."

Because Jackson makes his securing strap and his torpedo shell of different materials and in separate parts, he is compelled to furnish means for uniting them, in order to secure a connection between the track and the torpedo.

The defendant's device resembles that of Hickman, in that the straps and the shell of the torpedo are made integral, of the same material. The defendant places the explosive material in a paper envelope, which is folded up and placed within a tube of thin lead foil. The lead foil is pinched in on either side of its central portion to form the shell of the torpedo, while the end portions of the tube are folded up to form leaden strips of sufficient thickness and consistency to serve as straps for connection to the rail.

It is obvious that this track torpedo is of a very different type from the track torpedoes of the patents in suit, for the reason that the problem, if there be any problem, of attaching the straps to the shell, is solved by making all in a single piece. In this respect the defendant's device is of the Hickman type.

The means provided by Jackson for connecting his securing strap to the torpedo body was of the simplest and most obvious character. He uses the ordinary leaden strap, places it lengthwise of a tubular torpedo body, and unites the torpedo and strap by slipping over both an open-ended tube, or, as an alternative, tubular bands. The claims are drawn broadly to include—

"means encircling the body of said torpedo for retaining said securing means thereto."

By "securing means" he means simply a strip of lead which, properly speaking, is not in itself a securing means, for alone it has no provision for attachment to the torpedo. The Jackson invention is fully represented by passing a pair of rubber bands over the torpedo case and the lead strip, and thus holding them together, or it would be fully represented by tying the leaden strip to the tube by two pieces

of tape. Such devices are within the claims, and would infringe them if they are valid.

Nor can the claims be saved by limiting the encircling means to a complete tube; for they are specifically drawn to cover bands, as well as the tube, as appears by the specification. It is apparent that neither the bands, which leave exposed, not only the ends, but a portion of the side, of the torpedo shell, nor the tube which covers the sides, but not the ends, of the torpedo, can be considered as the shell of the torpedo, since neither form confines the explosive. In complainant's brief the tube or bands which retain the lead strip to the body of the torpedo are referred to as an "inclosing case." This is inaccurate.

It is then argued that the use of an inner case or explosive container in combination with an outer case is of marked utility, in that it enables the explosive charge to be practically measured in the inner receptacle, and when so measured in the inner receptacle to be readily placed within the encircling tube or member. It is argued that each of the patents of the prior art shows only a single case, and does not show a container in which the explosive is measured and placed, and this container placed within an outer tube or encircling means or member, as disclosed in the Jackson patent and in the defendant's torpedo. This is entirely an expert importation into the case, and has nothing to do with the patent in suit, which neither shows nor claims two complete cases for the explosive.

The complainant fallaciously attempts to find in the defendant's device the three elements of the Jackson patent. It first contends that an ordinary paper envelope containing the explosive charge, which is folded up and placed within the leaden tube, constitutes the defendant's torpedo. This is erroneous. The torpedo of the defendant consists, not only of the explosive charge in a paper envelope, but of the protecting shell of lead foil which completely incloses the paper envelope and explosive. The paper envelope of the defendant is not the shell of its torpedo, in the sense that Jackson's casing of paper, against which he puts the leaden strip, and about which he puts an open-ended tube or bands, is the casing of his torpedo.

Complainant next finds in the continuity of the defendant's shell and its straps an equivalent for the means of uniting the separate parts; but in this contention there is no merit.

It seems clear that the Jackson patent does not describe a patentable invention, unless it be said that it is a patentable invention to tie his leaden strip to his torpedo by two bands of tape. It also seems clear that there is no substantial resemblance between Jackson's track torpedo and the defendant's in any particular that was new with Jackson.

I find the claims of the Jackson patent in suit invalid. I find, also, that they are not infringed by the defendant's structure.

[2] The Beckwith patent in suit also relates to that type of torpedo in which the container or shell for the explosive and the straps to attach it to the rail are made of separate pieces and separate material, and therefore are required to be united by some separate means. Like Jackson, Beckwith has a problem which does not arise in devices of the Hickman type, to which the defendant's device corresponds in

having the container and straps made of the same material and of one piece.

It is a curious inversion of things, when the prior art discloses the making of shell and straps in one piece, for the complainant now to contend that complainant's means of uniting two different pieces together is infringed by a one-piece structure, wherein there was never any problem of devising means for uniting separate parts.

Beckwith uses the flexible metallic strip in conjunction with a metallic part called a "carrier," which engages the ends of the torpedo, though it does not fully encircle the torpedo. The claims of the Beckwith patent in suit are 2, 8, and 9.

The claims of this patent, if valid at all, have no application to a structure like the defendant's, which involves no problem of uniting a separate case to a separate leaden strip. It is doubtful if any feature of novelty appears in the Beckwith patent, except the clamping action of the ends of his carrier, so called, upon the ends of a tube, in order to hold them closed. Nothing corresponding to this is found in the defendant's device.

The argument that the closing down or twisting of portions of defendant's tube corresponds to the clamping action of the Beckwith device, whereby the carrier closes the turned-over ends of his tubular envelope, is far-fetched and unsound. In fact, it seems to me that the complainant's argument in this case is extremely sophistical, and is an attempt, through language and misleading abstractions, to prove the similarity of things which, from a practical point of view, are substantially different. The defendant's device seems to be a structure of entirely independent character, which borrows absolutely nothing from either Jackson or Beckwith. Though the idea that the inclosing case and the straps might be made of the same material, and integral, was not novel, the use of a tube of lead foil which should form a suitable non-flying shell for a torpedo, and which also, by manipulation of its ends, would afford suitable leaden strips for attachment to the track, seems a distinct invention for meeting the requirements of a track torpedo—that its shell shall be sufficient to protect the explosive, that it shall not be dangerous by reason of the flying of its material, and that it shall be readily attachable to the rail. Nothing disclosed in either the Jackson or Beckwith patents affords a reasonable justification for the charge of infringement.

The bill will be dismissed.

A draft decree may be presented accordingly.

BERNAYS v. FREDERIC LEYLAND & CO., Limited.
(District Court, D. Massachusetts. May 27, 1915.)
No. 3.

DISMISSAL AND NONSUIT ⟸60—WANT OF PROSECUTION—PLAINTIFF'S DUTY.

After an action against a steamship company for damages for its failure to receive and transport a shipment of grain in accordance with a contract made by it was at issue, and an auditor was appointed by consent of the parties, no action was taken therein for 15 years, except that it was continued from term to term by the clerk as a routine matter. In the meantime the leading counsel for each party had died. No reason was given for the failure to prosecute, except that the case was overlooked by counsel, and plaintiff's neglect to follow up his case was wholly unexplained. *Held* that, though there was no specific evidence that any of defendant's witnesses had died, or that its ability to maintain its defense had been impaired, this must necessarily be so, and the action would be dismissed, though, by reason of limitations having run, the dismissal would amount to a final judgment.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. ⟸60.]

At Law. Action by Ely Bernays against Frederic Leyland & Co., Limited. On motion to dismiss for want of prosecution. Motion granted.

Tyler, Corneau & Eames, of Boston, Mass., for plaintiff.
Frederic Cunningham, of Boston, Mass., for defendant.

MORTON, District Judge. This case was within the provisions of the docket-clearing order entered by this court on March 16, 1915. The plaintiff moves that it be excepted from the operation thereof and be retained on the docket. The defendant contends that it ought to be dismissed under said order, and has also filed a separate motion to dismiss for lack of prosecution and because no good cause has been shown to exempt it from the order referred to. The matter has been heard on statements by counsel and on affidavits filed by the parties. The following facts either are not in dispute or are established.

It is an action at law to recover damages for the alleged failure of the defendant, a common carrier by sea operating steamships between Boston and Liverpool, to receive and transport seasonably and promptly certain grain, in accordance with a contract alleged to have been entered into between it and the plaintiff on April 30, 1897. The case was originally brought in the Supreme Judicial Court of Massachusetts by a writ dated June 14, 1898. It was removed to the United States Circuit Court for this district in March, 1899, and has been pending ever since. The defendant's answer was filed in June, 1899. On February 12, 1900, an auditor was appointed by consent of parties. Since that date no action has been taken, except the present motion by the plaintiff to save it from dismissal, and that by the defendant to have it dismissed as above stated. There were no hearings before the auditor.

It thus appears that for over 15 years no action has been taken in this case, except that it has been continued from term to term by the

clerk as a routine matter. During that time the leading counsel for the defendant has died, and so has the leading counsel for the plaintiff. There is no specific evidence that any of the defendant's witnesses have died, or that its ability to maintain its defense has been impaired; but it is contended, correctly I think, that that must necessarily be so, and that the knowledge of such witnesses, as upon investigation prove to be still available for the defendant, upon the points in dispute, must have become less definite and complete because of the long delay. No reason is given for the failure to prosecute the case more diligently, except that it was overlooked by counsel. The plaintiff's own neglect in failing to follow up his case stands wholly unexplained.

The principles of law by which the question is to be determined appear to be fairly well settled.

> "It has been frequently held that the mere institution of a suit does not of itself relieve a person from the charge of laches, and that if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun." Fuller, C. J., citing authorities, in Johnston v. Standard Mining Co., 148 U. S. 360, 370, 13 Sup. Ct. 585, 37 L. Ed. 480.

See, too, Willard v. Wood, 164 U. S. 502, 525, 17 Sup. Ct. 176, 41 L. Ed. 531; Johnson v. West India Transfer Co., 156 U. S. 618, 648, 15 Sup. Ct. 520, 39 L. Ed. 556; Drees v. Waldron, 212 Fed. 93, 97, 128 C. C. A. 609.

These decisions were made on cases in equity and in bankruptcy; but I see no sufficient reason for making a distinction in this respect between such cases and actions at law. In two of those cited, the plaintiff's claim was founded on an alleged fraud, and in the case quoted from there had been a decision in his favor on the merits before the question of failure to prosecute was raised. It does not seem to me that a less stringent rule should be applied in this case than in those based on fraud. It devolves upon a plaintiff who brings an action to follow it up diligently, and if he fails to do so it is but right that his case should be dismissed. I do not think that a defendant, who has not induced, or caused, or contributed to the delay should be held responsible for it. When by reason of unnecessary and unreasonable delay on the part of the plaintiff in prosecuting a case, the defendant has been injuriously affected in a substantial degree, he is, it seems to me, entitled to have the case dismissed.

It is strongly urged that the dismissal of this action will work great hardship to the plaintiff, because, the statute of limitations having run, it amounts to final judgment against him; but in all the cases above referred to the dismissal was made against objection and was final action. Johnston v. Standard Mining Co. was, on the point of hardship, a much stronger case for the plaintiff than this one. The paramount consideration appears to be that the plaintiff shall not, by reason of his own neglect and unreasonable delay, gain an advantage over the defendant.

It follows that the motion to dismiss should be allowed. So ordered.

UNITED STATES v. BOSTON & M. R. R.

(District Court, D. Massachusetts. July 6, 1915.)

No. 528.

CARRIERS ⇐37—CONFINEMENT OF LIVE STOCK—EXCUSES.

Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 (Comp. St. 1913, § 8651), prohibits interstate carriers from confining live stock in cars, etc., for longer than 28 consecutive hours without unloading them for rest, water, and feeding, unless prevented by storm or other accidental or unavoidable causes, which cannot be anticipated or avoided by the exercise of due diligence and foresight. When four car loads of sheep were delivered to defendant, there remained over 16 hours in which to make delivery, and that time would ordinarily have been sufficient. When the shipment left G., 100 miles from its destination, at which place there were facilities for unloading one car load, there remained 5 hours and 30 minutes, and there was no unloading place between that point and the destination. It was then reasonably expected that the train would make the run within that time. A hot box developed on the engine tender, and another engine was procured, which developed leaks, and the failure of the two engines to work made delivery impossible within the time limit. The first engine had recently been overhauled, and there was no special reason for anticipating a hot box, and the second engine had worked well on its last previous trip; the defect which caused the delay first developing on the run in question. *Held*, that the delay was caused by accidental or unavoidable causes, which could not be anticipated or avoided by the exercise of due diligence and foresight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⇐37.]

Action for statutory penalties by the United States against the Boston & Maine Railroad. Judgment for defendant.

Charles S. Pierce, of Boston, Mass., for defendant.

MORTON, District Judge. The defendant confined the sheep without unloading for 6½ or 7 hours beyond the permitted time. The only question is whether it was prevented from unloading them by "accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." Act June 29, 1906, § 1. The shipment consisted of four cars, which were delivered to the defendant at Rotterdam Junction on February 11, 1914, at 11 a. m., and left there 20 minutes later for Boston with 16 hours and 10 minutes in which to make delivery, which would ordinarily be sufficient. There is no place between that point and Boston, where a shipment of this size can be unloaded at the same time. The only facilities are at Greenfield, and are capable of handling only one car load at a time.

The train passed Greenfield and arrived at East Deerfield that night at 8:30 p. m. It left that point, which is about 100 miles from Boston, at 10 p. m., with 5 hours and 30 minutes in which to make the delivery. It was reasonably expected by the railroad officials that the train would make the run within that time. Moreover, as there were no unloading facilities at that place, or between there and Boston, there

seems to have been nothing to do but to push the sheep forward as fast as possible.

After leaving East Deerfield a hot box developed on the engine tender. There was no special reason for anticipating such a contingency, as the engine was recently out of the shops, where it had been overhauled. Another engine was procured and substituted, and the train proceeded. This engine developed leaks in its boiler and had to be withdrawn at South Acton. On the last previous trip on which it had been used, it had operated well. The defect which necessitated laying it off first developed on this run. A third engine was substituted, which pulled the train to Boston. Undoubtedly one of the causes for the failure of the first and second engines was the extreme cold, about 20 degrees below zero, which occurred on the morning of February 12th.

South Acton is within the district covered by the suburban service of the defendant. The train in question had lost its place on the schedule, and from that point was worked along so as not to interfere with the suburban schedule, reaching Boston about 10 or half past 10 on the morning of February 12th. As the unloading time had expired before the train left South Acton, the defendant's liability is not affected by this last condition, which is relevant only upon the question of the amount of penalty.

No reason is suggested why the defendant should have foreseen that the first engine was likely to develop a hot box which would necessitate withdrawing it en route, still less why it should anticipate that the second engine, which had worked well on its previous run, should suddenly develop a leaky boiler. As I understand the facts, it was the failure of both of these engines, and not one of them alone, which delayed the train so that delivery was impossible within the time limit.

I therefore find that the defendant was prevented by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight from unloading the shipment of sheep in question. Chicago, B. & Q. R. R. Co. v. United States, 194 Fed. 342, 114 C. C. A. 334.

Judgment for the defendant.

In re PATTERSON LUMBER CO.

(District Court, E. D. Pennsylvania. January 15, 1916.)

No. 5688.

BANKRUPTCY ⊂=217—RESTRAINING PROCEEDINGS IN STATE COURTS—ANCILLARY PROCEEDINGS.

A corporation, adjudicated a bankrupt in the Southern district of New York, owned land in Tennessee covered by a mortgage. The trustee under the mortgage was within the Eastern district of Pennsylvania, and an ancillary proceeding was instituted there to restrain the trustee from foreclosing. The bondholders claimed the mortgaged premises were not

worth more than the amount of the mortgage, while the trustee claimed it had a much greater value, which would be lost if the property was sold under foreclosure. *Held*, that this question could be best passed upon by the court having control of the bankrupt estate, or the court within whose jurisdiction the property was situated, and the trustee would therefore be restrained from foreclosing until it applied for and obtained leave from the court having jurisdiction of the mortgaged premises to proceed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. ⊂=217.]

In Bankruptcy. Ancillary proceedings in the matter of the Patterson Lumber Company, bankrupt. On petition for an order on the Belmont Trust Company, mortgagee trustee. Order granted.

Rearick & Illoway, of Philadelphia, Pa., for petitioner.
Joseph W. Kenworthy, of Philadelphia, Pa., for Belmont Trust Co.

DICKINSON, District Judge. Bankruptcy proceedings in this estate are pending in the District Court for the Southern District of New York. It is a fact admitted at the argument, although not appearing in the record, that ancillary proceedings have been instituted in the District Court of the District of Tennessee, in which lands belonging to the bankrupt are situate. Neither of these courts has jurisdiction of the person of the Belmont Trust Company. This company holds as trustee for bondholders a mortgage against these lands in Tennessee to secure the payment of an issue of bonds. The title to these lands vested in the trustee in bankruptcy, subject to the lien of this mortgage. Foreclosure proceedings are about to be instituted on the mortgage. The trustee in bankruptcy wishes to have such proceedings stopped until the court having in its keeping the bankrupt estate has determined what shall be done with respect to its sale or other disposition. Application has been made to this court for a restraining order on the mortgagee who is within this jurisdiction.

The power to interfere is conferred by the act of June 25, 1910, in the amended clause 20 of section 2 of the Bankruptcy Act (Act June 25, 1910, c. 412, 36 Stat. 838 [Comp. St. 1913, § 9586]); as similar power, under section 21a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 551 [Comp. St. 1913, § 9605]) has been held to exist, and, indeed, general ancillary powers to be exercised in aid of proceedings before another court (In re Madson Steele Co., 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407, 23 Am. Bankr. Rep. 615). All the parties in interest have voluntarily appeared, and have joined in the prayer that this court exercise this power. The only questions, therefore, are the propriety of its exercise, and, if exercised, what the order should be. The merits of the practical situation here could be best and most conveniently met by the usual application to the court having control of the assets of the estate for leave to proceed on the mortgage. The Belmont Trust Company has no selfish interest to be served beyond what is involved in performing its full duty as trustee under the mortgage. The bondholders claim the mortgaged premises not to be worth the amount or more than the amount of the mortgage. If this is accepted as a fact, their right

to act promptly for the protection of their interests is conceded. The trustee, on the other hand, thinks the property may have a much greater value, which would be lost if the property is sold under foreclosure.

It is clear that the tribunal best situated to pass upon the question involved is the court having control of the assets of the bankrupt estate or the court within whose jurisdiction the property is situate. There is this very practical embarrassment which might arise out of another court passing upon the question. There might be a difference of judgment. If a court having jurisdiction of the subject-matter had passed upon the real question raised, the course of action of this court in aiding in the enforcement of that judgment would be plainly indicated. We do not know, however, what view such court may take. We are, in consequence, led to make this disposition of the present application:

Let an order issue restraining the mortgagee from proceeding to foreclose his mortgage and sell the property until it has first applied for and obtained leave from the court having jurisdiction of the mortgaged premises to proceed upon its mortgage, the order now made to be thereupon vacated.

UNITED STATES v. BUTIKOFER.

(District Court, D. Idaho, E. D. January 13, 1916.)

1. ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATE—GROUNDS.
   Under Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (Comp. St. 1913, § 4374), authorizing the cancellation of certificates of citizenship on the ground of fraud, or on the ground that such certificate was illegally procured, a certificate issued by a court having jurisdiction could not be canceled, on the ground that the applicant was under the age of 21, where it did not appear that he concealed or misrepresented the facts, or intended to or did mislead the court, or that the court was without knowledge of the correct date of his birth, as a final decree of naturalization cannot be overturned for a mere error of judgment committed by a court having jurisdiction.

2. ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATE—GROUNDS.
   In a proceeding for admission of citizenship, the age of the applicant was a question of fact to be determined by the court, and any error committed by it in determining such fact cannot be reviewed in a proceeding to cancel the certificate of citizenship.

3. ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATE—PRESUMPTIONS.
   In a proceeding to cancel a certificate of citizenship, it must be presumed that the court issuing such certificate, in finding that the applicant was of such age as to be entitled to naturalization, acted upon competent evidence.

Proceeding by the United States against Rudolph Butikofer to cancel a certificate of citizenship. Bill dismissed.

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

John R. Smead, Asst. U. S. Atty., of Silver City, Idaho.
Richards, Hart & Van Dam, of Salt Lake City, Utah, for defendant.

DIETRICH, District Judge. This is a proceeding brought under the provisions of section 15 of the Naturalization Act of June 29, 1906 (34 Stat. 596, c. 3592), to cancel a certificate of citizenship held by the defendant. The certificate was issued pursuant to a decree of naturalization entered by the district court of the Third judicial district in the territory of Utah April 11, 1889. The provision referred to authorizes such a proceeding only "for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured." Therefore it devolves upon the government to allege and prove either that the certificate was "illegally procured," or that it was obtained by fraud.

[1] By stipulation the cause has been submitted on complaint and answer. The gist of the complaint is that at the time the naturalization proceedings were had defendant lacked approximately two months of having attained his majority. This fact the answer admits. There is no charge that he or his witnesses concealed or misrepresented the facts touching his age, or intended to or did mislead the court, nor is there any averment that the court was without knowledge of the correct date of the applicant's birth. It may very well be that, having full knowledge of the facts, the conclusion was reached as a matter of law that he was qualified. It must be borne in mind that there is no provision of the statutes prescribing an age qualification for citizenship. The view that the right of naturalization extends only to those of the age of 21 years rests upon general principles which the court may have thought to be inapplicable. By section 15 of the Naturalization Act Congress surely did not intend to authorize the overturning of a final decree of naturalization for a mere error of judgment committed by a court having jurisdiction and proceeding in the manner prescribed by law. The exercise by one court of the power to overthrow the judgment of another court having co-ordinate jurisdiction, merely because differing views of the law are entertained, would result in intolerable uncertainty and confusion. In United States v. Albertini, 206 Fed. 133, it was held that the phrase "illegally procured" imports "a certificate issued by a court without jurisdiction or in violation of the law's procedure—without petition, or witnesses, or notice, or hearing, for example." The Utah court had jurisdiction, and in so far as appears its procedure was regular; no fraud was practiced. For these reasons alone the decree must be held to be unassailable.

[2, 3] But there is still another consideration equally conclusive. The age of the defendant was a question of fact, not of law. If it be assumed that the Utah court held the view that only applicants 21 years of age or over were entitled to citizenship, then its duty was to satisfy itself that, as a matter of fact, this defendant had the requisite qualification. Its finding upon that issue was a finding of fact,

and involved no question of law. In the absence of an averment to the contrary, it must be presumed that the court acted upon competent evidence, and any error which it may have committed cannot in this proceeding be brought under review; the statute does not, except in cases of fraud, authorize the cancellation of certificates for erroneous findings of fact.

A decree will be entered dismissing the bill, with prejudice.

In re MONDELLI.

(District Court, E. D. Kentucky. December 31, 1915.)

ALIENS ⇐68—NATURALIZATION—DECLARATION OF INTENTION—STATUTORY PROVISIONS.

Act June 25, 1910, c. 401, § 3, 36 Stat. 830 (Comp. St. 1913, § 4352), provides that any person qualified to become a citizen, who has resided constantly in the United States for five years next preceding May 1, 1910, and who because of misinformation in regard to his citizenship or the requirements of the law governing naturalization has labored and acted under the impression that he was, or could become, a citizen, and has in good faith exercised the rights or duties of a citizen, or intended citizen, because of such wrongful information and belief may receive a certificate of naturalization, without proof of a declaration of intention to become a citizen. *Held*, that under such section the applicant must have received such wrongful information from a source which, in the ordinary course of events, might be considered authentic, and an applicant who was ignorant of the laws governing naturalization, and made no particular attempt to discover their requirements, did not come within the law, though he claimed that he had the impression, because of his arrival in the United States at the early age of 15, that he was a citizen.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⇐68.]

Petition by John Mondelli for naturalization. Petition dismissed.

COCHRAN, District Judge. This petition for naturalization was filed under section 3 of the act of Congress of June 25, 1910 (36 Stat. pages 830, 831). The petitioner did not make a declaration of his intention to become a citizen previous to the date of the filing of his petition. He was 15 years of age on the date of his arrival in the United States, and has resided in this country for 23 years. In his testimony before the court, the petitioner stated that he had not been told by any one in particular that he was a citizen of the United States, but somehow had that impression because of his arrival at an early age. He stated that he first exercised the elective franchise about 4 or 5 years prior to the date of his petition; that during the 17 years of his residence in the United States, after he had attained his majority, until within the period of 4 or 5 years preceding the filing of his petition, he had not, at any time, exercised any of the rights or duties of a citizen. He stated that he knew his father, who also re-

sides in the United States, was not a citizen, for the reason that he "did not have his naturalization papers."

In order that an alien may be qualified to apply under the provisions of the act of June 25, 1910, he must have, "because of misinformation in regard to his citizenship, * * * in good faith, exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information." It is the opinion of the court that an applicant under this section must have received such wrongful information from a source which, in the ordinary course of events, might be considered authentic.

It is the opinion of the court that this petitioner lacked information, was ignorant of the laws relative to the naturalization of aliens, made no particular attempt to discover the requirements of the law in this regard, and does not therefore belong to the class of persons referred to in the above-mentioned act. The petition is therefore dismissed, without prejudice.

In re ROSENFELD-GOLDMAN CO.

(District Court, D. Massachusetts. July 16, 1915.)

No. 20795.

1. BANKRUPTCY ⟸127—REVIEW OF REFEREE'S ACTIONS.
The administration of bankrupt estates is left largely to referees, and their acts in administrative matters, such as the election of trustees, will not be disturbed, unless a plain and injurious error of law or abuse of discretion is shown.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 183; Dec. Dig. ⟸127.]

2. BANKRUPTCY ⟸231—CREDITORS' MEETINGS—CONTINUANCE—DISCRETION OF REFEREE.
An order continuing a meeting of creditors of a bankrupt estate was a matter of discretion with the referee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 541; Dec. Dig. ⟸231.]

3. BANKRUPTCY ⟸123—PROCEEDINGS BY REFEREE—DISCRETION.
At the first meeting of creditors of a bankrupt estate it became evident that a contest was imminent over the election of a trustee, and a continuance for a few hours was requested, in order that other claims might be presented and allowed. The postponement was granted over the protest of objecting creditors, whose counsel stated that objection would be made to the allowance of such claims, and asked for a continuance of the meeting in order that evidence might be taken respecting the allowance of such claims. The meeting was accordingly adjourned, and hearings were held, and one of such claims was allowed and voted at the adjourned meeting, resulting in a tie vote. *Held*, that the referee neither abused his discretion, nor erred, as a matter of law, in continuing the first meeting and proceeding with hearings on such claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179; Dec. Dig. ⟸123.]

4. BANKRUPTCY ⟸228—PROCEEDINGS BY REFEREE—DISCRETION.
Where, before the election of a trustee of a bankrupt estate, objections were made to a claim, it was for the referee to determine whether he

would disfranchise the claim upon the mere filing of objections, or go forward and ascertain in a summary manner whether or not the claim ought to be voted upon, and his decision would not be set aside, unless so plainly unjust as to amount to an abuse of discretion.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. ⟸228.]

5. BANKRUPTCY ⟸127—ELECTION OF TRUSTEE—PRACTICE ON OBJECTED CLAIMS—REVIEW OF ORDERS.

On review of an order of the referee appointing a trustee because of a tie vote, where a creditor, whose disputed claim was so voted as to cause a tie, was not a party to the proceeding, the court would not determine, as a strict matter of law and fact, whether such creditor had received a preference or not, but would merely determine whether the referee's decision was so plainly wrong as to render the election manifestly unfair.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 183; Dec. Dig. ⟸127.]

6. BANKRUPTCY ⟸123—ELECTION OF TRUSTEE—OBJECTIONS TO VOTING CLAIMS—DETERMINATION THEREOF.

The first meeting of creditors of a bankrupt estate was continued to permit the proof of certain claims, and two claims were presented, to which objection was made. The referee heard evidence as to these claims, and allowed one of them, which was so voted as to cause a tie. The other claim was not passed upon by him, and would have been so voted as not to affect the result. *Held* that, as a decision with respect to such claim was not essential, the referee was not called upon to pass upon it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179; Dec. Dig. ⟸123.]

In Bankruptcy. In the matter of the Rosenfeld-Goldman Company, bankrupt. On review of an order of the referee. Affirmed.

Philip Rubenstein, of Boston, Mass., for creditors.

Thayer, Smith & Gaskill and Webster Thayer, all of Worcester, Mass., for trustee.

MORTON, District Judge. This is a review taken by certain creditors from action by the referee in reference to the choice of a trustee.

At the first meeting on July 2, 1914, it became evident before the voting for the trustee began that a contest was imminent. Thereupon a request was made that the meeting stand continued for a few hours in order that proofs of claims of the Worcester Trust Company and of the Globe Manufacturing Company might be presented and allowed. The referee granted the postponement requested against the protest of these objecting creditors. Their counsel thereupon stated that objection would be made to the allowance of the claims referred to on the ground that preferences had been received by the claimants, and that he was unprepared to go on with evidence at that time, and he asked for a continuance of the meeting until July 30th, that hearings might be held in the meantime and evidence taken upon the question of the allowance of these claims. This was agreed to, and the meeting was adjourned accordingly. The claim of the Globe Manufacturing Company was filed on July 2d, and that of the Trust Company on July 14th. Hearings on them were held from time to time.

The referee treated these creditors as having the right to be heard upon their objections to the allowance of the claims in question, and postponed the choice of a trustee until the validity of the objections could be determined. He allowed the claim of the Trust Company, and did not find it necessary to pass on the claim of the Globe Manufacturing Company. Accordingly the claim of the Trust Company was voted at the adjourned meeting on July 30th. It created a tie, a majority in number of creditors voting for one Whiting, and a majority in value voting for one Tatman. The claim of the Globe Manufacturing Company would have been voted the same way as that of the Worcester Trust Company. The allowance of it would not, therefore, have affected the result; and this was the reason why no decision as to it was made by the referee. As the voting was a tie between number and amount, the referee appointed Mr. Tatman, who had previously been receiver, trustee.

The objecting creditors contend that the referee erred, first, in continuing the meeting in order to allow the claims of the Worcester Trust Company and of the Globe Manufacturing Company to be presented and allowed; second, in allowing the claim of the Trust Company to be voted; third, in not passing upon the claim of the Globe Manufacturing Company; fourth, in not declaring Whiting elected trustee; and, fifth, in not ruling that Mr. Tatman was disqualified, because he was controlled by the bankrupt, or by one Wolfson, as preferred creditor. As to the last objection: The referee reports that at one of the hearings before him counsel for these creditors stated that he had no criticism to make of the qualifications of Mr. Tatman for receivership or trusteeship; also reports that Mr. Tatman's conduct of the affairs of the company was satisfactory to the referee. It does not appear that Mr. Tatman is controlled by the bankrupt, or by Wolfson, or that he is in any way disqualified from acting as trustee.

[1-3] The actual administration of bankrupt estates is, under the present law, left largely to the referees. It is the settled practice of this court not to disturb their acts in administrative matters—of which the election of a trustee is a typical example—unless a plain and injurious error of law or abuse of discretion is shown. Nothing can be more a matter of discretion, or more largely within the referee's power, than an order continuing a meeting. It certainly does not appear that, in continuing the first meeting, and in proceeding with hearings on the Trust Company's claim, the referee either abused his discretion or erred as a matter of law.

[4] The claim of the Trust Company having been presented, and objections having been made, the referee had either to disfranchise the claim upon the mere filing of objections, or to go forward and ascertain in a summary manner whether or not the claim ought to be voted upon. Which course should be followed it was for the referee to determine; and his decision ought not to be set aside, unless so plainly unjust as to amount to an abuse of discretion. Considering the merely preliminary character of the question before him, he seems to have made an unusually thorough and careful investigation as to the validity of the claim. The transcript of evidence covers more than

200 pages, and numerous documentary exhibits were introduced. He concluded that it had not been shown that a preference had been received, and accordingly allowed the claim to be voted.

[5] The Trust Company is not a party to these review proceedings, which are between the objecting creditors and the successful candidate. The real question involved in this appeal is which of two competent and proper persons shall have the job of settling this estate. No decision that can now be made would preclude the Trust Company from insisting on the validity of its claim in future proceedings. The trustee has not passed upon the claim. No issue concerning it has been raised between the Trust Company and the bankrupt estate; and no such issue may ever be raised. Under these circumstances, the court ought not to undertake to determine, as a strict matter of fact and law, whether preferences had or had not been received. The real issue, as it seems to me, is not whether the claim of the Trust Company is valid, but whether the referee, in deciding, on an investigation, summary in character, made before the appointment of a trustee, and as an incident to the election of a trustee, that a claim could be voted on, was so plainly wrong that the election based on his decision was manifestly unfair and ought to be set aside. It is essential to the proper administration of bankrupt estates that a trustee shall be appointed as promptly as possible, and that an appointment once made shall not be lightly set aside on appeal. Rights of creditors in the selection of a trustee are important, but the decision as to them ought to rest largely with the referee. No case upon the exact point here presented has been called to my attention. It seems to me that the rule above stated sufficiently preserves the rights of creditors, and that a less flexible one would tend to cause harmful delays, and litigation of a peculiarly unprofitable character, in the settlement of bankrupt estates.

Under the rule of law above stated it is clear that sufficient ground for setting aside the election is not shown. I have not considered and do not pass upon the validity of the Trust Company's claim, nor whether it received preferences, beyond what is required in making a decision under the view of the law above stated.

[6] It is also objected that the referee did not decide the questions concerning the claim of the Globe Manufacturing Company. As before observed, however, he was called to decide only such matters as were necessary to a fair and proper election. Upon the facts stated, it is apparent that a decision of the claim last referred to was not essential. Indeed, there is no contention that his action on the Globe Manufacturing Company claim could have directly affected the result.

In re GRAT.

(District Court, D. Massachusetts. July 26, 1915.)

No. 21566.

1. BANKRUPTCY ⇐126—ELECTION OF TRUSTEES—REVIEW.
The election of trustees in bankruptcy is part of the administrative work which is left largely to the referees, and their decisions in reference thereto will not be set aside, unless an unjust and injurious abuse of discretion, or a clear mistake of law, is shown.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 182, 184, 187; Dec. Dig. ⇐126.]

2. BANKRUPTCY ⇐126—ELECTION OF TRUSTEES—REVIEW.
Where, at the stated time for the election of a trustee in bankruptcy, a majority in number of the creditors were ready to proceed with the election and opposed delay, and objecting creditors presented no good excuse for their failure to be ready, the referee did not abuse his discretion in refusing to postpone the election for an hour, in order that other claims favorable to the candidate of the objecting creditors might be presented and voted upon.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 182, 184, 187; Dec. Dig. ⇐126.]

In Bankruptcy. In the matter of Max Grat, bankrupt. On review of an order of the referee. Affirmed.

Frank F. Dresser, of Worcester, Mass., for creditors.
Webster Thayer and Maurice L. Katz, both of Worcester, Mass., for trustee.

MORTON, District Judge. When the business of electing a trustee was reached in due course, the objecting creditors, who favored Mr. Lewis, apparently recognized that they were in a minority in number of claims, and requested a postponement of an hour in order that the other claims favorable to their candidate might be presented and voted upon. The learned referee declined to grant the postponement desired and directed that the election go forward. It is urged that he erred in so doing.

[1] The conduct of the elections of trustees is part of the administrative work which is left largely with the referees. Their decisions in reference thereto will not, for reasons recently stated by me in Re Rosenfeld-Goldman Co. (D. C.) 228 Fed. 921, be set aside, unless an unjust and injurious abuse of discretion, or a clear mistake of law, is shown.

[2] In this case the learned referee made no disputed ruling of law. The question is whether he is shown to have abused his discretionary power in refusing to delay the election an hour as requested. As I said in the Rosenfeld-Goldman Case, nothing, it seems to me, can be more a matter of discretion than the allowance or refusal of a continuance. In the Massachusetts courts there is no appeal from such action by a trial court, although it not infrequently is of much practical importance. Barker v. Haskell, 9 Cush. 218–221. Probably a dis-

tinction should be made between decisions by referees usurping from all, or a majority in number and amount, of the creditors of an estate, their right to choose a trustee (of which Re Nice & Schreiber [D. C.] 123 Fed. 987, is typical), and decisions affecting the relative rights of contending groups of creditors. In the present instance the person appointed by the referee was the choice of a majority in number of the creditors. The learned referee evidently considered him an unusually efficient liquidator and thought that the objecting creditors were not acting for the best interests of the estate. The stated time for the election had arrived; a majority in number of the creditors were ready and opposed delay. It was the duty of the objecting creditors to be ready, or to present a good excuse for not being so. No such excuse was offered. Under the circumstances, the learned referee's refusal to postpone the election does not seem to me to have been an abuse of discretion.

Order affirmed.

In re MARKEL.

(District Court, N. D. California, First Division. September, 1915.)

BANKRUPTCY ⟸288—COLLECTION OF ASSETS—SUMMARY PROCEEDINGS.

The wife of a bankrupt claimed to own a motor truck, asserting that it was purchased by the bankrupt with money furnished by her before her marriage, and that instead of taking title in her name, as was agreed, the bankrupt took title in his own name. It appeared without contradiction that the truck was kept in a garage in the wife's name, and it also appeared that the wife did furnish the husband with a considerable sum of money for some purpose. *Held*, that the wife was entitled to retain possession until it was determined in a plenary action that she was not entitled thereto, and her claim, not being merely colorable, could not be determined in a summary proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⟸288.]

In Bankruptcy. In the matter of George Markel, bankrupt. On review of an order of the referee. Order reversed.

Clarence A. Shuey, of San Francisco, Cal., for trustee.
Frank W. Sawyer, of San Francisco, Cal., for bankrupt.

DOOLING, District Judge. This is a proceeding to review an order of the referee holding a certain motor truck to be the property of the bankrupt, George Markel, and to be properly in the possession of the trustee. Mildred Markel, wife of the bankrupt, claims to be the owner of the truck, and asserts that it was purchased by the bankrupt with money furnished by her before their marriage, and that, instead of taking the title in her name, as was agreed, the bankrupt took the title in his own name. It is certain that on September 25, 1914, the bankrupt did make, and there was recorded, a disclaimer of the ownership of said truck in favor of his wife, and a transfer to her of all his right, title, claim, or interest therein. It is also certain that the wife

did furnish the husband with a considerable sum of money, whether for the purpose claimed, or not, I do not now undertake to determine. But both husband and wife testified that the truck was in a garage in the wife's name. I have searched the record for any testimony contradicting this, and find none. This being so, I do not think her possession can be disturbed in this summary proceeding. Her claim as presented, accompanied by the possession of the truck, is not merely colorable, but may be very substantial. For this reason alone, and without in any way passing upon the merits of her claim, other than to determine that it is not under all the evidence merely colorable, particularly in view of the uncontradicted testimony that the truck is in the garage in her name, I am of the belief that she is entitled to retain such possession until it is determined in a plenary action that she is not entitled thereto.

The order of the referee is therefore reversed.

Ex parte WOO JAN.

(District Court, E. D. Kentucky. January 22, 1916.)

1. ALIENS ⊂=24—IMMIGRANTS EXCLUDED—STATUTORY PROVISIONS.

Act March 3, 1891, c. 551, § 1, 26 Stat. 1084, excluding certain classes of aliens from admission into the United States, and providing that they shall be so excluded "in accordance with the existing acts regulating immigration other than those concerning Chinese laborers," did not place Chinese laborers outside the excluded classes, but merely provided that the exclusion should be in the manner provided in the existing laws regulating immigration other than the Chinese Exclusion Acts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76–78; Dec. Dig. ⊂=24.]

2. ALIENS ⊂=32—EXCLUSION AND DEPORTATION OF CHINESE—STATUTORY PROVISIONS.

Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, § 1, 36 Stat. 263 (Comp. St. 1913, § 4244), provides that the classes of aliens therein specified shall be excluded from admission into the United States. Section 20 (section 4269) provides that any alien who shall enter the United States in violation of law shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years. Section 21 (section 4270) provides that in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of that act, or that an alien is subject to deportation under the provisions of that act "or of any law of the United States" he shall cause such alien, within three years after landing or entry, to be taken into custody and returned to the country whence he came. Section 43 (section 4289) repeals previous laws regarding immigration, but provides that that act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. *Held* that, considered in the light of prior legislation, the quoted clause of section 21 does not authorize the immigration authorities to deport a Chinese laborer in the United States in violation of the Chinese Exclusion Acts, and such laborers must be deported by the Judicial Department of the government, as provided in such Exclusion Laws, as such a construction of this clause would be out of harmony with

the spirit of the act, which has to do with all aliens alike, without regard to their specific alienage, and such clause refers to laws of the United States which, like the act of 1907, deal with all aliens, without regard to their specific alienage, and, moreover, section 20 has never been construed as authorizing such deportation of Chinese laborers, though such a laborer, entering the United States in violation of the Chinese Exclusion Laws, would be in the United States in violation of law within that section.

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

3. ALIENS ⟸32—EXCLUSION AND DEPORTATION OF CHINESE—STATUTORY PROVISIONS—"ALTER"—"AMEND."

To construe Act Feb. 20, 1907, § 21, as authorizing the deportation of Chinese laborers in the United States in violation of the Chinese Exclusion Laws by the immigration authorities, would bring such section into conflict with section 43, providing that that act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons, as the words "amend" and "alter" are each sufficiently broad to cover a mere addition to those laws, and such section, as so construed, would add to those laws a provision not contained in such laws.

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

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

4. ALIENS ⟸32—EXCLUSION AND DEPORTATION OF CHINESE—STATUTORY PROVISIONS.

The rule of construction that every sentence, clause, and word in a statute, if possible, must be given some effect, does not require that Act Feb. 20, 1907, § 21, be construed as authorizing the deportation by the immigration authorities of Chinese laborers in the United States in violation of the Chinese Exclusion Acts, as statutes cannot always be construed on the assumption that the language has been used logically and with discrimination, and the provision for such deportation of persons found in the United States in violation of any law of the United States may have been intended to apply to immigration laws, if any, omitted by inadvertence from the act of 1907, or may have been intended to apply to future immigration laws.

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

5. ALIENS ⟸32—EXCLUSION AND DEPORTATION OF CHINESE—STATUTORY PROVISIONS—"JUDICIAL HEARING."

Under Act Feb. 20, 1907, § 21, there is at least sufficient doubt as to the power of the immigration authorities to deport Chinese laborers in the United States in violation of the Chinese Exclusion Laws to require that such doubt should be resolved against the existence of such power, as the right to a judicial hearing provided by the Exclusion Laws is a valuable right, and an executive hearing is not its equivalent, and such judicial hearing should not be taken away by doubtful language.

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

Habeas corpus by Woo Jan. On demurrer to the petition. Demurrer overruled, and applicant discharged.

Thomas D. Slattery, of Covington, Ky., for the United States.

Proctor K. Malin, of Ashland, Ky., and Sims, Welch & Goodman, of Chicago, Ill., for defendant.

COCHRAN, District Judge. This is an application by Woo Jan, a Chinaman, for a writ of habeas corpus and discharge thereon from the custody of Thomas Thomas, an immigrant inspector of the United States, who holds him under a warrant issued by the Secretary of Labor. That officer claimed the right to issue it by virtue of the act of February 20, 1907. The warrant charges that Woo Jan is an alien; that he landed at the port of San Francisco, Cal., May 2, 1913; and that he has been found in the United States in violation of that act, in that he has been found therein in violation of the Chinese Exclusion Laws, and is therefore subject to deportation under the provisions of section 21 of that act.

The applicant denies that he is in this country in violation of the Chinese Exclusion Laws, and in support of this contention states these facts about himself in the petition filed by him on which he obtained the writ: He is 57 years old, was born in China, and has been a merchant domiciled in the United States since 1877. Since 1907 he has been a partner in the firm of Lick Sang Tong at San Francisco, which has a paid-in capital stock of $16,000 and does a yearly business of $30,000, and for many years he has owned and directed a mercantile business in the city of Ashland in this district. On February 15, 1894, he registered as a Chinese merchant at the office of the Collector of Internal Revenue at Lexington, Ky., and was given registration certificate No. 43202, which he still has. Since his residence in the United States he has thrice returned to China, and on each occasion his status as such merchant was investigated by the United States authorities, and such status was thereby established. On the last occasion, to wit, January 29, 1912, he applied at the port of San Francisco for a pre-investigation of his status preparatory to departing for China on a temporary visit. Such investigation was had, and on February 28, 1912, the Chinese inspector held that he was legally in the United States and was and had been a merchant for more than a year. Thereupon there was issued to him a returning merchant's certificate, entitling him, on presentation on his return, to enter the United States at the port from which he departed. On March 12, 1912, he departed for China, and remained upon a temporary visit until his return May 2, 1913. On that date he was admitted by the immigration and customs officers of the United States at San Francisco, together with his wife, and he has been in the United States continuously since then, and engaged in the conduct and prosecution of his business as a merchant.

But, though the applicant thus claims that he is not in this country in violation of the Chinese Exclusion Laws, he does not base his right to a discharge from the custody complained of on this ground. He bases it on the ground that the Immigrant Department—a part of the Executive Department of the government—has no authority to take him in custody upon the charge that he is here in violation thereof, and, if on investigation it determines that he is, to deport him. He claims that the Judicial Department alone has such authority. And so it is that in his petition he challenges the existence of such authority in the Immigration Department, and claims that because of the

want thereof he should be discharged from its custody. The case comes before me on a demurrer to the petition.

The sole question, then, which it presents for decision, is whether the Immigration Department is authorized to inquire into the matter whether the applicant, or any other Chinaman, is in this country in violation of the Chinese Exclusion Laws, and, if it finds that he is, to deport him because thereof. The sole basis on which such authority is claimed is the act of February 20, 1907, entitled "An act to regulate the immigration of aliens into the United States," and more particularly section 21 of that act. So the question for decision is narrowed to this; i. e., whether section 21 of that act confers such authority on that department. To decide it correctly, it should be approached from a general survey of the federal legislation on the subject of the immigration of aliens, of the act of February 20, 1907, and of section 21 thereof.

There are two lines of such legislation. The Chinese Exclusion Laws, which relate solely to Chinese aliens, constitute one line. Those laws provide for the exclusion and deportation of Chinese laborers. In case of deportation it is to be had through the judicial department of the government. No further statement as to this line need be made. The other consists of statutes and acts which relate to aliens generally, without regard to their specific alienage. The act of February 20, 1907, under section 21 of which the Immigration Department claims authority to investigate whether the applicant is in the United States in violation of the Chinese Exclusion Laws, constituting the first line of legislation referred to, and to deport him, if it determines that he is, belongs to the second line.

The statutes and acts constituting this line may be found referred to in the margin to the case of Lapina v. Williams, 232 U. S. 77, 86, 34 Sup. Ct. 196, 58 L. Ed. 515. Without copying this reference here, I will proceed as if it were copied. Mr. Justice Pitney in that case said that the acts of March 3, 1903 (32 Stat. 1213, c. 1012), and February 20, 1907, were "revisions or compilations (with some modifications) of previous acts pertaining to the same general subject-matter." Possibly it would be truer to say that the act of March 3, 1903, was a revision and compilation of such acts previous thereto, and that the act of February 20, 1907, was a revision thereof. In the case of Lewis v. Frick, 233 U. S. 289, 296, 34 Sup. Ct. 488, 58 L. Ed. 967, he said that "the material provisions of the 1907 act were taken" from the act of 1903. The latter act of the two, by section 43 thereof, expressly repeals the earlier one, except section 34 thereof (Comp. St. 1913, § 3391), prohibiting the sale of liquors within the limits of the Capitol Building of the United States—a strange provision to be found in an Immigration Act. The last act referred to, to wit, that of March 26, 1910, consists merely of amendments to sections 2 and 3 of the act of February 20, 1907 (Comp. St. 1913, § 4247). Possibly the act of February 20, 1907, as amended by that of March 26, 1910, is all of this line now in force.

The provisions of the Revised Statutes, the first of the statutes and acts referred to, related solely to the subjects of China, Japan, or of

any other Oriental country, known as coolies, and the first four sections of the act of March 3, 1875 (18 Stat. 477, c. 141 [Comp. St. 1913, §§ 4348–4350]), were amendatory thereof. These provisions and those sections may be set aside as not constituting a part of that line, and it be limited to the fifth section of that act and the other acts referred to. I know of no reason why it should be thought that the fifth section of the act of March 3, 1875, or any of the acts of August 3, 1882 (22 Stat. 214, c. 376), February 26, 1885 (23 Stat. 332, c. 164), February 23, 1887 (24 Stat. 414, c. 220), and March 3, 1891, did not relate to all aliens alike, without regard to their specific alienage, and therefore did not take in Chinese aliens. In the case of U. S. v. Johnson (C. C.) 7 Fed. 453, it was held that section 5 of the act of March 3, 1875, applied to all aliens, Oriental and others.

[1] A clause in section 1 of the act of March 3, 1891, may be thought to have excluded Chinese aliens from its operations, but I do not think it did. That section enumerates certain classes of aliens who are thereby excluded from admission into the United States, and it provides that they shall be so excluded "in accordance with existing acts regulating immigration other than those concerning Chinese laborers"; i. e., the Chinese Exclusion Laws, constituting the first line of legislation hereinbefore referred to. But this clause does not mean that Chinese, coming within the classes of aliens thus enumerated, are not thereby excluded, but only that they, as well as all other aliens coming within those classes, shall be excluded "in accordance with [i. e., in the manner provided in] the existing laws regulating immigration other than those concerning Chinese laborers." It could hardly have been intended that Chinese not laborers, and hence not excluded by the Chinese Exclusion Laws, coming within such classes, were not thereby excluded. The act of March 3, 1893 (27 Stat. 569, c. 206), however, did not relate to Chinese aliens. This was by virtue of the express provision of section 10 thereof, which provided that that act should "not apply to Chinese persons." This act is of a subordinate character, as a perusal of its provisions will disclose, and the statement in its title, that it was an "act to facilitate" the enforcement of the immigration and contract labor laws of the United States, so indicates. Possibly reflection will bring to mind some special reason for excluding Chinese persons from this particular act which would not operate to cause them to be excluded from other acts of this line of a more fundamental character.

The act of March 3, 1903, and that of February 20, 1907, amended by the act of March 26, 1910, under which the warrant in question issued, relate to all aliens alike, without regard to their specific alienage, and hence to Chinese aliens. Each, however, contains this provision, to wit:

"That all acts and parts of acts inconsistent with this act are hereby repealed: Provided that this act shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent."

It constitutes section 36 of the former act and a part of section 43 of the latter. It was held by the Supreme Court in the case of

United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354, that this provision did not make it so that the other provisions of the two acts did not relate to Chinese persons or persons of Chinese descent.

The result, then, of this consideration of the acts constituting the second line of such legislation is that we reach the conclusion that with the exception of the act of March 3, 1893, which, as noted, was of a subordinate character, they all have to do with all aliens alike, without regard to the specific character of their alienage, and hence with Chinese aliens.

[2] We come now to the act of February 20, 1907, as amended by the act of March 26, 1910, which, as stated, possibly constitutes all of the second line of legislation referred to which is now in force and effect. It provides for the taking by the Immigration Department of two particular actions, to wit, exclusion from admission and deportation. That of exclusion from admission, in the nature of things, can be taken only in case the alien presents himself for admission, and that at a place of entry where officials of that department are stationed to pass on the admission of aliens. The sole provision for exclusion from admission is contained in the second section of the act, and such action is to be taken if the alien comes within any of the classes of "undesirables" thereby specified. That it is thus provided that such aliens shall be excluded from admission, if they so present themselves for admission, involves that, if an excludable alien so presenting himself actually secures admission, either by the deception or mistake or connivance of the officials, or if he enters at such a place of entry without presenting himself for admission, or elsewhere, his entry is in violation of the act and his presence in this country unlawful. But, possibly, if there were nothing more than such provision, there would be no process by which he could be expelled from the country. Hence the occasion for an express provision for the deportation of such an alien. This the act contains. Indeed, it contains two such provisions. They are to be found in sections 20 and 21, the latter of which, it is claimed on behalf of respondent, confers authority on the Immigration Department also to deport the applicant, notwithstanding he was not excludable under section 2 as amended by the act of March 26, 1910, if it finds that he was excludable under the Chinese Exclusion Laws, and hence is here in violation thereof. The opening portion of section 20 is in these words:

"That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall upon the warrant of the Secretary of Commerce and Labor be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States." Comp. St. 1913, § 4269.

By the remaining portion thereof provision is made for the payment of the expenses of removal to the port of deportation and of deportation therefrom, and for the alien's giving bond, pending the final disposal of the case, for his appearance at the hearing, and for deportation, if he shall be found to be unlawfully in the United States.

The opening portion of section 21 is in these words:

"That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section 20 of this act." Comp. St. 1913, § 4270.

By the remaining portion thereof provision is made for the punishment of the representatives of the vessel by which the alien is ordered to be deported for failure or refusal to deport him, and for the employment of a suitable person to accompany the alien, if his mental or physical condition is such as to require it.

It is evident that the opening portions of the two sections are to a certain extent redundant. This the act itself recognizes; i. e., it recognizes that the two sections cover the same subject-matter, and the opening portions are the only portions which do. Section 36 (Comp. St. 1913, § 4285) provides for the deportation of aliens, whether excludable or not under section 2 as so amended, if they enter elsewhere than at a proper place of entry, and the provision is that they "shall be deported as provided by sections 20 and 21 of this act." Section 3, as amended by the act of March 26, 1910, provides for deportation for a cause "arising after lawful entry." Lewis v. Frick, supra. In the section, as it was originally, the provision is that the deportation shall be "as provided in sections 20 and 21"; and in it as it is as so amended the provision is that the deportation shall be "in the manner provided in sections 20 and 21," which change in phraseology Mr. Justice Holmes, in the case of Bugajewitz v. Adams, 228 U. S. 585, 591, 33 Sup. Ct. 607, 57 L. Ed. 978, said indicated "a narrowed purpose" in the reference to these two sections. And the decisions of the Supreme Court dealing with questions arising under the act of February 20, 1907, as amended by that of March 26, 1910, couple the two sections together. Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165; Bugajewitz v. Adams, supra; Lewis v. Frick, supra.

To what extent, then, are these portions of the two sections redundant? Their requirements as to what action shall be taken as to such aliens as come within their scope are identical. By section 20 he—i. e., the alien—"shall upon the warrant of the Secretary of Commerce and Labor be taken into custody and deported to the country whence he came"; and by section 21 he—i. e., the Secretary of Commerce and Labor—"shall cause such alien * * * to be taken into custody and returned to the country whence he came."

So are their requirements as to the time within which such action shall be taken. By section 20 it is "within three years after the date of his entry into the United States"; and by section 21 it is "within the period of three years after landing or entry therein." In the case of Lewis v. Frick, supra (page 303 of 233 U. S., page 488 of 34 Sup. Ct. [58 L. Ed. 967]), Mr. Justice Pitney characterized the phraseology of section 20 in this particular as "peculiar," in that it suggested the

question whether the "three-year period limits only the authority to deport," or affects merely "the determination of the country to which an alien is to be deported," and he seems to have thought that section 21 was affected with the same want of clearness, for he said:

"Respecting this matter, the sections are somewhat lacking in clearness."

He said, however, that it was clear that in each section the limit related solely to the authority to deport.

The opening portions of the two sections thus being identical as to the action required to be taken as to aliens coming within them and as to the time within which such action shall be taken, it follows that they are redundant in so far as they cover the same aliens. They differ, in that section 20 covers "such as become public charges from causes existing prior to landing," and section 21 does not. This clause of section 20 will be omitted from further consideration of that section, and it will be dealt with as if it did not contain such clause. So treating it, we find that section 20 contains but one clause describing the aliens covered by it, whereas section 21 contains three such clauses. This necessitates that, before comparing the two sections with each other, we should so compare the three clauses of section 21 to determine wherein, if at all, they differ. Such a comparison leads to the conclusion that this section, considered by itself, is redundant. The three clauses are: (1) "An alien * * * found in the United States in violation of this act;" (2) "an alien subject to deportation under the provisions of this act;" and (3) an alien subject to deportation under the provisions "of any law of the United States."

The first and second clauses, though differing in phraseology, would seem to be identical in effect. Clearly, an alien found in the United States in violation of the act is the same as one subject to deportation thereunder, for it makes provision for the deportation of every alien found therein in violation of the act. If there is want of identity in the two clauses, it can only be in this: That every alien subject to deportation under the provisions of the act cannot be said to be found in the United States in violation thereof. The aliens subject to deportation under the provisions of the act are such as are excludable, such as enter otherwise than at a proper place of entry, whether excludable or not, and such as are deportable because of conduct after lawful entry. Beyond question, the first two classes are found in the United States in violation of the act, for their entry was in violation thereof. Possibly this is true, also, of the last class, though their entry was not. This is on the idea that their continuance in the United States after such conduct is in violation of the act. If it is true, then the two clauses—i. e., first and second—are absolutely identical in effect.

How is it as between the first and second clauses, on the one hand, and the third clause, on the other? Do they overlap to any extent, and, if so, to what extent? Of course, the act of which they are a part is "a law of the United States," and is, therefore, covered by the letter of the third clause. But for the disposition to duplicate shown otherwise, there would hardly be any reason to claim that the third

clause was intended to cover the act of which it is a part, and which was already covered by the second clause. Possibly, notwithstanding this disposition, its true meaning is to be taken as if it were written "any other law of the United States." But certainly its meaning cannot be other than either as if it were written "any other law of the United States" or "this act and any other law of the United States." Whichever it is, it must be accepted that there is a lack of identity or real difference between the first and second clauses, on the one hand, and the third, on the other. They are limited to the legislation of which they are a part. It covers other legislation.

We come, then, to a comparison of the two sections in the particular under consideration. Section 20 describes the aliens covered by it as "any alien who shall enter the United States in violation of law." Its letter differs from that of section 21, in that, in describing the aliens covered by it, it views them as they enter the United States and refers to their entry in general terms, i. e., as being "in violation of law"; whereas, that section, in describing the aliens covered by it, views them after they have entered, and the first two clauses refer to their presence in this country in specific terms, i. e., as being "in violation of this act" and "subject to deportation under the provisions of this act."

It is certain that the two sections are redundant, in that both cover aliens who have entered in violation of the act and for this reason are subject to deportation. But they are not absolutely identical, in that section 20 covers aliens who become public charges from causes existing prior to landing, and section 21 covers aliens whose entry was lawful, but whose subsequent conduct under section 3 renders them subject to deportation. Whether the two sections are otherwise identical in this particular depends on whether the word "law" in section 20 is limited to the act of which it is a part and who are covered by the third clause of section 21.

To cover the ground completely, these two sections should be viewed in their origins, as well as they now stand. Section 20 is the oldest of the two. The first deportation provision in the line of immigrant legislation, to which the act of February 20, 1907, belongs, is to be found in a provision contained in the Deficiency Appropriation Act of October 19, 1888 (25 Stat. 565, c. 1210), which was in effect an amendment to the act of February 26, 1885, entitled "An act to prohibit the importation and immigration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories and the District of Columbia," as amended by the act of February 23, 1887. By section 5 of the act of March 3, 1875, entitled "An act supplementary to the acts in relation to immigration," the immigration of convicts and prostitutes was prohibited; and by the next succeeding act, and the act next preceding that of February 26, 1885, to wit, the act of August 3, 1882, entitled "An act to regulate immigration," the immigration of convicts, lunatics, idiots, and persons not able to take care of themselves without becoming a public charge was prohibited. But the legislation went no further than to provide that they should not be "allowed" or "permitted" to land; and by the act of February

26, 1885, as amended by the act of February 23, 1887, the sole provision as to aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia was that they should "not be permitted to land." By the provision of the Deficiency Appropriation Act of October 19, 1888, referred to supra, it was provided that, if such an immigrant, i. e., one under such contract or agreement, "had been permitted to land" contrary to the prohibition of that law, i. e., the act of February 26, 1885, as amended by that of February 23, 1887, the Secretary of the Treasury was authorized "to cause such immigrant within the period of one year after landing or entry to be taken into custody and returned to the country whence he came." This provision was broadened by the next act dealing with the subject, to wit, that of March 3, 1891, entitled "An act in amendment to the various acts relating to immigration and the importation of aliens under contract or agreement to perform labor." By section 11 thereof it was in part provided:

"That an alien who shall come into the United States in violation of law may be returned as by law provided, at any time within one year thereafter."

The act of which this provision was a part was not a comprehensive act, revising and compiling the previous acts pertaining to the same subject-matter, like the acts of March 3, 1903, and February 20, 1907; but it left all previous legislation on the subject, save as thereby amended, in force. Hence the aliens covered by the provision were described as "any alien who shall come into the United States in violation of law," without specifying any particular alien. In the case of U. S. v. Yamasaka, 100 Fed. 404, 40 C. C. A. 454, the words "as by law provided" were held to refer to the provision of the Deficiency Appropriation Act of October 19, 1888, heretofore referred to.

And so the law as to deportation in this line of legislation remained until the comprehensive act of March 3, 1903. That act contained no deportation provision similar to those contained in sections 3 and 36 of the act of February 20, 1907. It contained two deportation provisions in sections 20 and 21; i. e., in the same numbered sections as in the act of February 20, 1907. That in section 20 is substantially the same as that in section 20 of the later act, except as to the time of deportation. It was thereby provided:

"That any alien who shall come into the United States in violation of law * * * shall be deported as hereinafter provided to the country whence he came at any time within two years after arrival." 32 Stat. 1218.

This provision is substantially the same as section 11 of the act of March 3, 1891, save as to the time of deportation, that time being raised from one to two years, and evidently it came from there. And it would seem that it was sufficient to provide for the deportation of aliens made excludable by the act who might be found in the country. Though possibly there were no other excludable aliens, except those covered by the Chinese Exclusion Laws, the aliens covered by the section were not described as such as might come into the United States "in violation of the act," but such as might so come "in violation of law." The phraseology used was no doubt due to its origin.

The deportation provision in section 21 of this act is in these words:

"That in case the Secretary of the Treasury shall be satisfied that an alien has been found in the United States in violation of this act, he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided in section 20 of this act." 32 Stat. 1218.

It will be noted that in describing the aliens covered by it the section contains only the first of the three clauses in the same numbered section of the later act, which added the other two clauses. Seemingly the two sections covered the same aliens, and there would seem to have been no occasion for the two. Either one would have served the purpose; but, in that the one fixed the time in which deportation might be made as two years, and the other three, the two sections would seem to be repugnant.

There is but one possible way to get rid of such repugnancy. Section 2 of the act of March 3, 1903, in describing the aliens thereby made excludable, made no express mention of contract laborers. In the case of In re Ellis (C. C.) 124 Fed. 637, it was held that the previous legislation as to contract laborers was not repealed by the act of March 3, 1903, but was still in force. And in the case of Botis v. Davies (D. C.) 173 Fed. 996, it was held that section 20 had to do with the deportation of contract laborers and section 21 with aliens expressly made excludable by section 2. In this way the apparent repugnancy was removed. Judge Sanborn said:

"Since contract laborers are not referred to in the act of 1903, as has been already seen, it seems plain that the two-year provision applies to deportation under pre-existing statutes, and the three-year section to cases under the act of 1903; otherwise, the two sections would be repugnant."

In so construing section 20, a more limited significance was given it than it had in section 11 of the act of March 3, 1891, from which it was taken. Possibly, however, the true view of the matter is that, though contract laborers were not expressly mentioned in section 2 of the act of March 3, 1903, they were within its thought, and hence just as much covered by it as if they had been so mentioned, which, if so, would leave section 20 the same meaning as it had in section 11 of the act of March 3, 1891, and it and section 21 were in reality repugnant in this particular. Since, however, contract laborers are expressly mentioned in section 2 of the act of February 20, 1907, amongst the excludable aliens, and section 20 thereof has raised the limit from two to three years, the same as in section 21, thereby removing any repugnancy between them, there is now no ground for holding that the two sections do not cover the same aliens and are identical in the particular hereinbefore mentioned.

We come, then, directly to the question presented by this case. It is whether section 21 of the act of February 20, 1907, confers the authority herein claimed on behalf of the Immigration Department; i. e., is it the thought thereof that thereby that department is to have such authority? The claim that such is its thought is based on the third and last of the three clauses describing the aliens covered by it, and because of which it is made to provide for the deportation by the

Immigrant Department of an alien subject to deportation under the provisions "of any law of the United States." The argument is that, as a Chinese laborer is an alien and subject to deportation under the Chinese Exclusion Laws, which are laws of the United States, he comes within the very terms of the description, and he is the only alien who does, apart from those coming within the preceding clauses of the section. It can have application to no other alien than a Chinese laborer. Hence it must be taken that it is the thought of the section that a Chinese laborer shall be deportable by the Immigration Department. Otherwise, this clause of the section is without any effect. This, it must be conceded, is a plausible view of the matter. But it is only such. It is—and I would say this only very gently—a superficial view thereof.

As against it, it is to be noted, in the first place, that this view injects into the act a provision out of harmony with its spirit. The spirit of the act is that it has to do with all aliens alike, without regard to the specific alienage of any. Apart from this provision, deportability under the act depends on the person sought to be deported being an alien, and not upon his specific alienage. According to this view of this provision, deportability under it depends upon such person's specific alienage. He must be a Chinese alien in order to be covered by it. It has no application to any other alien. In other words, apart from this provision, the act applies to all aliens alike; whereas, this provision, according to this view of it, applies only to Chinese aliens.

Again, we have seen that the true meaning of this clause is to be taken as if it were written, not an alien subject to deportation under the provisions of "any law of the United States," but an alien subject to deportation under the provisions of "any other law of the United States." This is so because the second clause covers aliens subject to deportation under that law of the United States; i. e., the act of which they are a part. If it were so written, we would have a clear case for the application of the rule of ejusdem generis. That rule is thus stated by Mr. Justice Brewer in United States v. Mescall, 215 U. S. 31, 30 Sup. Ct. 19, 54 L. Ed. 77:

> "Where particular words of description are followed by general terms, the latter will be regarded as referring to things of like class with those particularly described—ejusdem generis."

Here the particular words of description would be "this act," and the general term "any other law of the United States." And, applying the rule, the meaning would be, any other law of the United States like this act; i. e., a law applicable to all aliens alike, without regard to their specific alienage, which, as there was then no other such law, could mean only such a law subsequently enacted, thus bringing the provision into harmony with the spirit of the act and its other provisions. But it may be said that some significance must be attached to the omission of the word "other." It indicates detachment from the spirit of the act and its other provisions in this particular. But, if so, the detachment was conscious, and because it was had in mind to provide thereby

for the deportation by the Immigration Department of such Chinese aliens as were laborers. And, if such was the case, it is strange that the words "Chinese Exclusion Laws," or other words expressly referring to them, were not used in place of "any law of the United States." It is not, however, essential to insert the word "other" here in order to detect the presence of the idea that the law of the United States to which reference is made is one like that, of which the provision was a part, in its relating to all aliens alike, without regard to their specific alienage. The law referred to is one under the provisions of which "an alien" is subject to deportation; i. e., an alien without regard to his specific alienage, and not a specific alien, to wit, a Chinese alien. We find the words "an alien" in each of the two first of the three clauses of the section describing the aliens covered by it. In each of those instances they mean an alien, without regard to his specific alienage. They should be given no other meaning in the third clause. If so, the Chinese Exclusion Laws do not come within that clause. By those laws an alien—i. e., an alien without regard to his specific alienage—is not made deportable. Only Chinese aliens are thereby so made.

Still further, we find in section 20 the general word "law" is used, and it is not now claimed, nor has it ever been claimed by any one, that under it Chinese laborers were deportable. It provides for the deportation of "any alien who shall enter the United States in violation of law." A Chinese laborer is an alien, and if he enters the United States he enters it in violation of law, in that the Chinese Exclusion Laws exclude him from admission. The origin of this provision we found to be section 11 of the act of March 3, 1891. The use of the general word "law" in that section may be attributed to the fact that that act was not a comprehensive one, revising the previous acts covering the same subject-matter and including them in it, but it contemplated their continued existence separately from it. But when this provision was carried into section 20 of the comprehensive act of March 3, 1903, its general form was not altered. If the view taken in the case of In re Ellis, supra, that, notwithstanding the character of that act, the previous legislation as to contract laborers was still in force, and in the case of Botis v. Davies that section 20 had to do with the deportation of laborers under such legislation, are sound, the retention of the general form is accounted for. But it is broad enough to cover Chinese laborers. If, however, they are not, and contract laborers were, covered by the act of March 3, 1903, though not expressly designated in section 2 thereof as excludable, it is not accounted for otherwise than on the ground that such was the form in the provision from which it was taken. And when in the revision of February 20, 1907, contract laborers were expressly named in section 2 as excludable, no reason for the retention of the general form existed. Section 20 might as well have been made specific, and provided for the deportation of any alien who should enter the United States in violation of that act. But this was not done. The period within which deportation might be made was raised from two to three years, thus removing any possible re-

pugnance between sections 20 and 21, and the second and third clauses were added to section 21. As left, section 20 provided for the deportation of any alien entering the United States "in violation of law," and section 21 provides for the deportation of an alien subject to deportation under the provisions "of any law of the United States." It is not unlikely that the addition of the general clause in section 21 was due to the general form of section 20. A Chinese laborer in the United States has entered in violation of law just as much as he is subject to deportation under the provisions of a law of the United States; yet since 1891 it has never been claimed that such an alien was subject to deportation by the Immigration Department by virtue of section 11 of the act of March 3, 1891, and section 20 of the acts of March 3, 1903, and February 20, 1907. In the one case, though such alien comes within the letter of the provision, he is not claimed to be within it; whereas, in the other, he is claimed to be within the provision because he comes within its letter.

[3] Yet again, the view that it is the thought of section 21 that the Immigration Department is to have authority to deport Chinese aliens in this country in violation of the Chinese Exclusion Laws and deportable thereunder brings it into conflict with that of the provision in section 43 that the act "shall not be construed to repeal, alter or amend existing laws relating to the immigation or exclusion of Chinese persons or persons of Chinese descent." The Attorney General, in construing the same provision in section 36 of the act of March 3, 1903, gave it as his opinion that the object thereof was to prevent a misinterpretation of the repealing clause in that section, which precedes it, and to forestall any attempt to secure the admission of Chinese, theretofore prohibited from entering the United States, under a claim that the act was intended to contain all provisions regulating the immigration of aliens, and that it expressly repealed the Chinese Exclusion Laws. 24 Op. Atty. Gen. 706.

Undoubtedly such was a part of its object. But it cannot be said that it was its entire object. If such had been its entire object, it would have been sufficient to provide that the act should not be construed to repeal the Chinese Exclusion Laws. It was unnecessary to go further and provide that it should not be construed to alter or amend them. The use of these additional words indicates the intent and thought, not only that these laws were to continue in full force and effect just as they then were, but that there was no addition to them thereby made. The word "amend" is sufficient to cover a mere addition to those laws. In 3 Enc. L. & P. p. 528, as to the meaning of the word "amend," it is said that it "means, in its most comprehensive sense, to better. It is so defined by all the leading lexicographers; to make better; to change from bad to better." Now, one of the ways of bettering a thing is merely to add something to it, leaving it otherwise as it is. Amongst the definitions given of the word "amend" in 2 C. J. 1316, 1317, is "to change," and in note 50a thereto it is said "by adding something," in support of which are cited the cases of Polk County Bd. of Pub. Inst. v. Polk County, 58

Fla. 391–394, 50 South. 574; Henderson v. Galveston, 102 Tex. 163, 169, 114 S. W. 108; Henderson v. Galveston (Tex. Civ. App.) 115 S. W. 1198. And amongst the definitions given of the word "amendment" in that work is "an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed," in support of which is cited the case of Livermore v. Waite, 102 Cal. 113, 118, 36 Pac. 424, 25 L. R. A. 312. In the case of Com. v. Atty. Gen., 13 Pa. Dist. Ct. 521, it was said:

"There is a distinction, although perhaps not always clear, between a supplement and an amendment. * * * But in a broad sense every amendatory statute is a supplement, and, at least generally speaking, every supplement is more or less amendatory. Our legislative practice, in entitling acts which have relation to existing legislation and supplement or modify it, is not uniform. Some are called 'supplements,' others 'supplements to amend,' and others still 'acts to amend.' But all belong to the same general class, and may be denominated, according to the point of view from which they are considered, either supplements or amendatory. The latter appears to be the generic term applied to them in other states, as well as in the text-books."

And in the case of Knights of Maccabees v. Cox, 25 Tex. Civ. App. 366, 60 S. W. 971, it was said:

"The object of an amendment is to add something to or withdraw something from that which has been previously pleaded, so as to perfect that which is or may be deficient, or correct that which has been incorrectly stated by the party making the amendment."

But the word "alter" is itself broad enough to cover a mere addition. In 3 Enc. L. & P. p. 333, it is defined to mean "to make a thing different from what it was." Now, a thing is made different from what it was when nothing more is done than to add something to it. So in 2 C. J. 1166, one of the definitions given of this word is "to add to," in support of which is cited Adams v. Shelbyville, 154 Ind. 467, 486, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484; Atty. Gen. v. Atty. Gen., 20 Ont. 222, 247. In Adams v. Shelbyville, the court said:

"'Alter' is to 'make otherwise.' Webster's Int. Dict. * * * From the power to alter is necessarily implied the power to add to or diminish."

And in Atty. Gen. v. Atty. Gen., Boyd, J., said:

"But even in rigorous construction 'to alter' would include 'to add.' Alteration may be by addition or subtraction."

By section 43, therefore, it is expressly provided that the act, and this includes every other provision in it, shall not be construed to add to the Chinese Exclusion Laws. But, if the construction of section 21 contended for is true, it does add to those laws. As those laws stood before the act of February 20, 1907, they provided for a deportation of Chinese aliens, thereby made excludable, by the Judicial Department of the government, and not otherwise. According to that construction there is thereby added to those laws the provision that within the three-year period they may also be deported by the Immigration Department, so that the department which is charged with the enforcement of those laws may, as it sees fit, resort to the Judi-

cial Department for deportation or take the matter in its own hands. Had Congress passed a special act conferring such power on the Immigration Department and doing nothing more, it would have been proper to entitle the act as an act to amend the Chinese Exclusion Laws. That such is the character of the provision in question cannot be concealed by including it in an act relating to all aliens alike, without regard to their specific alienage. So that what we have, according to the construction of section 21 contended for, is Congress amending those laws, by adding thereto another process for deporting Chinese laborers, whom they alone make deportable, and at the same time providing that what it is doing shall not amend them. This presents us with two ideas. One is that the Immigration Department is thereby empowered to deport Chinese laborers, and the other that no provision of the act adds to the Chinese Exclusion Laws. These two ideas are inconsistent. They cannot stand together. One or the other must give way, and it is the former one which must do this. There is no reason why the provision that the act shall not be construed to alter or amend the Chinese Exclusion Laws should be rendered of no effect in order that some effect be given to the third clause of section 21.

The decision of the Supreme Court in the case of United States v. Wong You, supra, is not against giving such effect to this provision of section 43. In that case a Chinese laborer had entered this country from Canada surreptitiously, and not at a proper place of entry, and the question was whether he was deportable under the act of February 20, 1907, by the Immigration Department, notwithstanding he was also deportable as a Chinese Laborer under the Chinese Exclusion Laws by the Judicial Department. It was held that he was, reversing the decision of the Circuit Court of Appeals for the Second Circuit, which held to the contrary. The position of the lower court was that that was a case for the application of this rule, to wit:

"A later general statute, which in its most comprehensive sense would include that which is embraced in an earlier particular enactment, does not, as a general rule, repeal the latter, but applies only to such cases within its general language as are not within the provisions of the particular act."

And it was thought that this was a—

"case especially for the application of the rule, because the Immigration Act expressly provides that it shall not be construed as repealing, altering, or amending the existing laws relating to the exclusion of Chinese persons."

The decision of that court was not based on section 43. It merely said that that section made the case especially one for the application of the rule.

But that was not a case for the application of the rule referred to, because it did not come within it. The later general statute did not include that which was embraced in the earlier particular enactment. The Chinese Exclusion Laws embraced Chinese laborers alone. The act of February 20, 1907, did not include Chinese laborers as such at all. It included the undesirable aliens designated therein and those entering at improper places of entry. Because such an alien might also be a Chinese laborer, it could not be said that the act included

Chinese laborers as such. And it was only in case it included them as such that it would have been true that both covered the same territory. The question presented, then, was simply this: Because a Chinese laborer was deportable by the Judicial Department under the Chinese Exclusion Laws, on the ground that he was a laborer, was that any reason why he should not be also deportable by the Immigration Department under the act of February 20, 1907, on the ground that his presence here was in violation thereof, in that he came within the list of undesirables thereby made, or had entered at an improper place of entry, if such were the case; that act exempting no aliens whatever from its provisions? In justifying the negative answer which the Supreme Court gave to this question, Mr. Justice Holmes said:

"By the language of the act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier more cumbrous proceeding which this partially overlaps. The existence of the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese. It is the very reverse of a reason for denying to the government a better remedy against them alone of all the world, now that one has been created in general terms."

As to the bearing of section 43 on the question he said:

"To allow the Immigration Act its literal effect does not repeal, alter, or amend the laws relating to the Chinese, as it is provided that it shall not, in section 43."

Does it follow, then, from the fact that the act of February 20, 1907, does not alter or amend the Chinese Exclusion Laws, in that it provides for the exclusion and deportation by the Immigration Department of all aliens alike, without regard to their specific alienage, if they come within the list of undesirables thereby prescribed, or enter at an improper place of entry, thus including Chinese aliens and such of them as may be laborers, it does not alter or amend them if it provides that Chinese laborers, who are excludable and deportable only under those laws, shall be deportable within the three-year period by the Immigration Department as well as by the Judicial Department? I think not, and it seems to me that the question answers itself. The latter provision is a pure addition to, and hence an amendment and alteration of the Chinese Exclusion Laws. It is nothing else than such an addition. It has no other scope. This is not true of the other provisions of the act of February 20, 1907, which cover all aliens alike, without regard to their specific alienage. It would be incorrect to entitle an act embracing them "An act to amend the Chinese Exclusion Laws." Besides, as we have seen, before the acts of March 3, 1903, and February 20, 1907, with their sections 36 and 43, the line of legislation as to immigration of aliens to which they belong, with the exception of the subordinate act of March 3, 1893, from its very beginning in the fifth section of the act of March 3, 1875, embraced Chinese aliens. Those acts made no change in this particular, save as to the provisions of the subordinate act of March 3, 1893, which they embraced within them. In including Chinese aliens within their scope,

therefore, they made no departure from the line of legislation to which they belong as it existed previously. And as it so existed it was separate and distinct from the Chinese Exclusion Laws. A continuation of this feature, then, in those acts, could not properly be viewed as having any relation to those laws by way of amendment or alteration.

[4] But what is to be said of the position that, unless the third of the three clauses of section 21 describing the aliens covered by it is construed to refer to aliens subject to deportation under the Chinese Exclusion Laws, it is without effect, and in order to give it effect it should be so construed? It is undoubtedly a rule of statutory construction that every sentence, clause, and word in a statute should, if possible, be given some effect. This rule is based on the idea that it is to be assumed that the Legislature, in using the sentence, clause, or word in question, was discriminating and logical. But, in interpreting another's language to ascertain his thought, it will not do in all cases to act absolutely upon the assumption that in using it he was discriminating and logical. One too easily falls into error or inconsistency, i. e., blunders in expressing himself, for him not to make use, as a factor in the work of interpretation, of the possibility that the author may have expressed himself incorrectly. Want of discrimination and logicality is to be found in the legislation before us. Mr. Justice Pitney, as heretofore noted, detected want of clearness therein. Sections 20 and 21 are redundant as to the aliens covered by them. The three clauses of section 21 are redundant in the same particular. Unless the position taken in the case of Botis v. Davis, supra, is sound, the two sections were repugnant as they stood in the act of March 3, 1903. Contract laborers were omitted from express mention in the list of undesirables set forth in section 2 of the act of March 3, 1903, inadvertently, or without realization of the confusion their omission would create. That they had been so omitted may have been the source of the third clause of section 21. It may have been intended thereby to make it so that if there was any other law than the act of February 20, 1907, applying to all aliens alike, without regard to their specific alienage, and rendering them deportable for other reasons than thereby provided, such aliens would still be deportable; and this, notwithstanding there was no such other law. But bringing the Chinese Exclusion Laws within the scope of the clause does not rid us entirely of the trouble. Those laws do not exhaust the clause. It does not refer specifically to those laws. It refers to "any law of the United States." This does not stop at those laws. And what other laws are had in mind? The only other laws which could possibly have been had in mind were laws subsequently enacted subjecting aliens to deportation. And this suggests a meaning to be given to the third clause, which exhausts it, makes it apply to all aliens alike, without regard to their specific alienage, and thereby brings it into harmony with the spirit of the act and its other provisions, and relieves it of any inconsistency with section 43. That meaning is any law of the United States relating to all aliens alike, without regard to their specific alienage, subsequently enacted. This gives full effect to the clause and is discriminating and logical. The only thing against it is the want of

likelihood that any provision would have been made to bring future laws within the scope of the section, which ordinarily might be left to look out for themselves. But it is certainly not inconceivable that such was the thought of Congress, and as it is the only reasonable position to take there should be no hesitancy in taking it.

[5] A single observation in support of the view of this case which I feel constrained to take remains to be made. That is that by this time this much at least must be accepted as true, to wit, that it is by no means clear—indeed, it is extremely doubtful—whether Congress intended to subject Chinese laborers to deportation by the Immigration Department; and, this being so, the doubt should be resolved against the existence of such power in that department. The right to a judicial hearing is a valuable right. An executive hearing is not its equivalent. No one relishes a trial by his prosecutor. The judicial hearing was given in the legislation enacted to carry into execution the treaty between this country and China, by which Chinese laborers were made excludable, and has been continued in force ever since, unless taken away by the act of February 20, 1907. Whilst there is nothing in the treaty in the way of Congress providing for the deportation of Chinese laborers by the Immigration Department, and Congress has absolute power to so provide, the fact that it has so provided should not be doubtful, or left to a strained construction of what it has said; but Congress should so say in unmistakable terms. I see, therefore, no escaping the conclusion that the Immigration Department does not have the power which it claims. It is to be noted that though, if the Immigration Department has the power here claimed, it acquired it in 1907, there is no indication that it attempted to use it until after the decision in the Wong You Case in 1912. If that decision was the cause of the attempt to use it such was the result of a misinterpretation thereof.

In so holding I run counter to the trend of federal judicial opinion on the subject. The contrary position has been taken by Judge Connor in the case of Ex parte Lam Pui (D. C.) 217 Fed. 456, 460; by Judge Rose in the case of Ex parte Wong Yee Toon (D. C.) 227 Fed. 247; by the Circuit Court of Appeals for the Third Circuit in the case of Sibray v. U. S. ex rel. Yee Yok Yee (C. C. A.) 227 Fed. 15; by Judge Dooling in the case of Ex parte Chun Woi San, 230 Fed. 538, in which he receded from the position he took in the case of Ex parte Wong Tuey Hing (D. C.) 213 Fed. 113; and by Judge Clarke in the case of Ex parte Woo Shing, 226 Fed. 141, which I understand is now pending in the Sixth Circuit Court of Appeals, 250 Fed. 598, —— C. C. A. ——. In none of these cases was the question fully developed, as the judges seemed to think that it was settled by the decision of the Supreme Court in the Wong You Case, which I have endeavored to show does not cover it. It is because of the fact that I have felt constrained to go against this trend of federal judicial opinion and of the importance of the question involved that I have gone into so much detail. I am much persuaded that the truth of a case is to be found in its details. Of course, in going much into detail, one runs the risk of not seeing the wood for the trees. But this depends entirely upon his perspec-

tive; i. e., whether he loses himself in the forest or stands back from it. In order to a proper perspective, one's treatment of details should be organic, and not atomistic. He should view

"The parts,
As parts, with a feeling of the whole."

The demurrer is overruled, and the applicant discharged.

THE KRONPRINZESSIN CECILIE.

(District Court, D. Massachusetts. February 1, 1916.)

No. 1069.

1. SHIPPING ⟸115—AUTHORITY AND DUTIES OF MASTER—NONDELIVERY OF SHIPMENT.

On July 28, 1914, a German steamship sailed from New York for Bremerhaven, Germany, via Plymouth, England. On the evening of July 31st, when about 1,000 miles from Plymouth it changed its course and returned to an American port. The master had knowledge of such historical facts, conceded to have preceded the outbreak of the European war, as occurred before the sailing of the steamer, and of facts thereafter occurring, indicating that his country was upon the verge of war with Russia, France, and England, and just before changing his course received a wireless message from the steamship company stating that war had broken out and directing him to return to New York. War had not in fact been declared at that time. *Held*, that he was justified, and acted with a due regard for the safety of his ship, passengers, and cargo, and his deviation from the direct course of his voyage was not a breach of the contract with a shipper, though it was claimed that the steamship could have reached Plymouth, to which the shipment was consigned, before war was declared.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec. Dig. ⟸115.]

2. SHIPPING ⟸115—AUTHORITY AND DUTIES OF MASTER—NONDELIVERY OF SHIPMENT.

As the master acted in accordance with the dictates of his own prudence and sagacity, the fact that what he did was with the approval of the shipowners and in concurrence with their views did not prejudice him or the ship.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec. Dig. ⟸115.]

3. SHIPPING ⟸115—AUTHORITY AND DUTIES OF MASTER.

So far as shippers and passengers are concerned, the master of a ship was bound to act upon his own judgment, to be exercised in good faith on their behalf, in determining whether to abandon a voyage because of information that war was imminent, and instructions from the shipowners would not protect him.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec. Dig. ⟸115.]

4. SHIPPING ⟸115—NONDELIVERY OF SHIPMENT—OUTBREAK OF WAR.

On July 31, 1914, the directors of a German steamship company learned that a declaration of a state of war would be made public at once, and later on the same day such declaration was brought to their knowledge. From information as to a steamship's supply of coal, it was considered necessary to decide that afternoon whether the steamship should be di-

rected to abandon its voyage from New York to Bremerhaven, and, though war had not actually been declared, a wireless message was sent to the master, informing him that war had broken out with England, France, and Russia, and directing him to return to New York. The message was sent in this form upon the idea that a mere statement announcing that a state of war had been proclaimed might not convey the full import of the actual imminence of war to the captain. *Held* that, under the circumstances, the message was not an untruthful one, or one calculated to deceive, or to cause the captain to take action which he ought not to have taken, and was justified.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec. Dig. ⟸115.]

In Admiralty. Libel by the Guaranty Trust Company of New York against the steamship Kronprinzessin Cecilie, claimed by the North German Lloyd. Libel dismissed.

Kirlin, Woolsey & Hickox, of New York City, and Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

Choate, Larocque & Mitchell, of New York City, Choate, Hall & Stewart, of Boston, Mass., Joseph Larocque and Walter C. Noyes, both of New York City, and Joseph D. Bedle, of Jersey City, N. J., for claimant.

HALE, District Judge. In this case, No. 1069, the Guaranty Trust Company of New York seeks to recover damages for breach of contract, by the steamship, in failing to carry a consignment of gold from the port of New York to the port of Plymouth, England. The libel alleges that on July 27, 1914, the steamship was lying in the port of New York, bound for Bremerhaven, Germany, by way of Plymouth, England; that on that date the libelant delivered to the steamship in good order and condition 93 kegs of gold bullion, of the agreed and declared value of $4,942,936.64, to be carried to Plymouth, England, thence to be forwarded to London, to be there delivered in like good order and condition to the order of the libelant, in consideration of $9,268, prepaid freight; that the steamship delivered to the libelant a bill of lading therefor; that, in violation of her contract, the steamship, when about 900 miles from Plymouth, abandoned her voyage and put back to Bar Harbor, Me., where, on or about August 8, 1914, the libelant accepted redelivery of the 93 kegs of gold from the steamship, under an agreement that such redelivery should not constitute a waiver of libelant's claim for breach of contract. By reason of such failure of the steamship to deliver the gold at Plymouth, the libelant says, it has suffered damage exceeding the sum of $1,104,467.43. The libel is subsequently amended, increasing the amount claimed as damages to $1,793,278.22; and the libelant says that no part of this sum has been paid.

The answer admits the receipt of the 93 kegs of gold bullion, and alleges that the carriage of the same was undertaken by the claimant subject to the conditions and exceptions contained in the bill of lading, which is made a part of the answer, subject also to the possibility of the ship being prevented from concluding her voyage and being forced to put back into a port of refuge, in case of outbreak, or threatened outbreak, of the European war. It admits that the steamship turned back on her course, and says that at the time of turning back she was

about 1,070 miles from Plymouth. It alleges that the decision of the master to return to a port in the United States was based upon credible information received by him from the North German Lloyd office at Bremen by wireless message that war had broken out, involving Germany and Russia, France, and England, and that this message, considered in conjunction with the information with respect to the European crisis received by him prior to sailing, furnished reasonable ground for him to apprehend that the steamship and cargo would be captured if she continued on her voyage, and required him, in the exercise of sound judgment and discretion, to put back to a port of refuge; that, though war had not actually broken out at the time of the receipt of this wireless message, still the master, in anticipation of an outbreak of hostilities, and the consequent danger of arrest of the members of his crew, the arrest or probable detention and discomfort of his passengers, and the capture of his ship and cargo, was fully justified in adopting the course which he did adopt.

The answer denies that the steamship violated any contract, or any other duty. It admits that, on or about August 8, 1914, the libelant accepted redelivery of the gold; it alleges that such redelivery was at the libelant's special request; it denies that by reason of the alleged failure of the steamship to deliver the gold at Plymouth the libelant has suffered any damage.

As a second defense, the answer details the facts in connection with the attachment of the gold, the incidents of the voyage, and the danger of capture, had the ship proceeded on her voyage. It alleges that the action of the captain in directing the return of the steamship to the United States was in concurrence with instructions from her owners; that such instructions and the action following them were fully justified by the circumstances, and were the exercise of a right given by the laws of the United States, as well as by the German Maritime Code. The answer further alleges that the course followed by the captain was successful; that his return to a port of refuge, and the delivery of the specie to the parties entitled to it, were accomplished without the capture or detention of a single passenger or member of the crew, and without loss or damage to any of the specie, or to any other part of the cargo.

As a third defense, the answer asserts an exception in the bill of lading against liability for the loss or damage "occasioned by arrest and restraint of princes, rulers, or people."

As a fourth defense, the answer alleges a provision in a bill of lading whereby neither the ship nor carrier should in any case be responsible for a value greater than that declared by the shippers in the margin. It sets out the value of the shipment as already stated; that all the gold representing the shipment, and the value thereof, was redelivered by the claimant to the libelant at Bar Harbor; that upon such redelivery all responsibility of the claimant, and of the ship, came to an end.

As a fifth defense, the answer alleges that it was agreed that time should not be of the essence of the contract; that the bill of lading expressly providing that the steamer should have "liberty to call at

intermediate ports, or any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo, passengers, and for any other purposes"; that it was also agreed that the steamer should have liberty to put into a port of refuge; and that neither the steamer nor carrier should be liable for "loss or damage by prolongation of the voyage."

Certain facts are stipulated with clearness and brevity: The libelant is a corporation organized under the laws of the state of New York, having its office in New York and a branch office in London. The claimant, North German Lloyd, is a corporation organized under the laws of Bremen, existing under said laws, and the laws of the German Empire, and is the owner of the Kronprinzessin Cecilie. The steamship was built in 1907 at a cost of about $4,500,000. On July 27, 1914, the libelant shipped on board the steamer 93 kegs, containing gold bars owned by the shipper, of the value, at the time and place, as set forth in the libel. By the terms of the contract the gold was to be carried by the steamer from New York to Plymouth, England, thence to be forwarded at the steamer's expense, but at the owner's risk, to London, unto the Guaranty Trust Company of New York, or its assigns, subject to the provisions and exceptions of the bill of lading, which I need not recite in full, but to which I may make further reference. This bill of lading was delivered to, and accepted by, the libelant as the contract of carriage, covering the shipment. The steamer was fully manned, outfitted, and equipped, and sailed on the voyage from New York on July 28, 1914, about 1 o'clock in the morning. She continued on the voyage until the night of July 31st at about 9 minutes past 10 o'clock in the evening, ship's time, when she turned back towards New York. At the time of turning back, the steamer was in the position of 46 degrees and 46 minutes north latitude, and 30 degrees 21 minutes west longitude from Greenwich, a distance of about 1,070 nautical miles from Plymouth. Just before turning back, about 10 o'clock in the evening, a wireless message was received on board of the steamer from the directors of the North German Lloyd at Bremerhaven, in private code. The translation of the message reads as follows:

"War has broken out with England, France and Russia. Return to New York."

It was signed by the managing directors of the North German Lloyd. This wireless message was sent out by the managing directors of the claimant company, after the publication of the decree of threatened danger of war, after having been informed of the intention of the government to dispatch on that day the notes to Russia and France which are referred to in the German White Paper, after a general warning by the admiralty to the German merchant marine, and after the directors had received reliable information that a declaration of a state of war had been perfected and would shortly be proclaimed.

After turning back, the steamer proceeded in a westerly direction towards the United States, and put into Bar Harbor, Me., on August 4, 1914, where she dropped anchor about 4 o'clock in the morning.

By arrangement between the parties and the Navy Department of the United States, the steamer was afterwards moved to Boston Harbor, where she now lies. On August 8, 1914, the claimant redelivered to the libelant, at Bar Harbor, Me., the 93 kegs of gold bars, being all the gold which the claimant had received from the libelant for carriage to England. On November 17, 1914, the claimant, without admitting liability, refunded to the libelant $1,544.67, being the proportion of the prepaid freight covering the inland transportation of the libelant's gold from Plymouth to London; the acceptance of this refund by the libelant being without prejudice to its claim against the steamship and her owners for their alleged failure to deliver the gold in accordance with the terms of the contract.

Certain historical facts are agreed upon, as part of the proofs. Those stipulated as having happened before the ship sailed from New York are as follows: On June 23, 1914, Archduke Francis Ferdinand, of Austria, and his wife, the Duchess of Hohenberg, were assassinated at Sarajevo, the capital of Bosnia. On July 23d Austria sent an ultimatum to Servia, the terms of which appear in the German White Paper and the British White Paper. On July 24th Russia urged that Austria abandon the time limit of her ultimatum—

"in order to prevent consequences equally incalculable and fatal to all the Powers which might result from the course of action followed by the Austro-Hungarian government."

The Russian government informed the other Powers that, if the Austro-Hungarian government should make war on Servia, Russia could not allow the conflict to be settled between those two countries alone. The French ambassador at St. Petersburg gave the English ambassador at St. Petersburg to understand—

"that France would fulfill all the obligations entailed by her alliance with Russia, if necessity arose, besides supporting Russia strongly in all diplomatic negotiations."

The German government emphasized to other Powers its opinion that there is only question of a matter to be settled exclusively between Austria-Hungary and Servia, and that other Powers ought to reserve it to those two, because interference of another Power, owing to different treaty obligations, would be followed by incalculable consequences. On July 25th Austria declined the Russian request for extension of time limit in ultimatum to Servia. Servia replied to the Austrian ultimatum at 6 p. m. The terms of the reply are shown in German and British White Papers. Austria advised Servia and the other Powers that she considered Servia's reply unsatisfactory. The Austrian minister left Belgrade at 6:30 p. m. The Servian government moved from Belgrade to Nish the same evening. Germany confined her Alsace-Lorraine garrisons to barracks, and placed the frontier works of Alsace-Lorraine in a complete state of defense. The populace in Berlin made demonstrations in favor of war; Servia ordered mobilization; Russia began to take military precautions; martial law was proclaimed in Austria. On July 26th Austria severed diplomatic relations with Servia, and sent passports to the Servian minister.

Austrian mobilization against Servia was decreed. Austria advised Russia that she sought no territory of Servia, and did not intend to impair the sovereignty of that country, but that, aside from that, she was prepared to go to the "furthest extremes" to obtain satisfaction of her demands. The Austrian ambassador at Washington instructed consuls in the United States to tell reservists to prepare to return home for service. The Servian army began mobilization. There was a panic in Belgrade as the people fled from the city. American tourists left Carlsbad and other resorts. Belgium increased her army to enforce neutrality. The German fleet was concentrated in the home waters. Germany indicated to her railroads the measures preparatory for concentration. Germany urged the other Powers not to interfere with Austro-Hungarian plans to discipline Servia. The German ambassador at St. Petersburg was directed to make the following declaration to the Russian government:

"Preparatory military measures by Russia will force us to counter measures which must consist in mobilizing the army. But mobilization means war. As we know the obligations of France towards Russia, this mobilization would be directed against both Russia and France. We cannot assume that Russia desires to unchain such a European war. Since Austria-Hungary will not touch the existence of the Servian kingdom, we are of the opinion that Russia can afford to assume an attitude of waiting. We can all the more support the desire of Russia to protect the integrity of Servia, as Austria-Hungary does not intend to question the latter. It will be easy in the further development of the affair to find a basis for an understanding."

The Russian Secretary of War gave the German military attaché his word of honor that no order to mobilize had been issued, merely preparations were being made, but not a horse mustered, nor reserves called in. If Austria-Hungary crossed the Servian frontier, such military districts as are directed toward Austria, namely Kiev, Odessa, Moscow, Kazan, would be mobilized; under no circumstances those on the German frontier, namely, St. Petersburg, Vilna, Warsaw. He added that peace with Germany was desired very much. The military attaché told the Secretary that Germany appreciated Russia's friendly intentions, but considered mobilization, even against Austria, as very menacing. Sir Edward Grey proposed to the Powers a conference in London between himself and the ambassadors of Germany, France, and Italy for the purpose of discovering an issue that would prevent complications. If agreed to, the representatives of these Powers were to request authorities at Belgrade, Vienna, and St. Petersburg to suspend active military operations pending results of conference. Russia asked Austria to take back her ultimatum, and modify its form, and, if this were done, offered to guarantee the result. Russia informed Italy that the Austrian-Servian conflict could not be localized. Austria notified the Powers that the refusal of Servia to accept the Austrian demands in full, without reservations, would compel Austria to force Servia by the most drastic measures to a complete submission. Russia announced that she could not be asked to allow Servia to be crushed. The German fleet in Norway put to sea, and Austria ordered partial military and naval mobilization. On July 27th, Germany completed requisitions, and placed her covering troops in posi-

tion in Alsace-Lorraine. Russia notified Austria that, if war broke out between Austria and Servia, Russia would not give way. The Vienna and Budapest bourses closed. A skirmish occurred on the Danube between Austrian and Servian forces. England stated to Germany that, if Austria, notwithstanding the terms of the Servian reply, should invade Servia, she would prove she wished to crush a small state. This would raise a European question, and a war would ensue in which all the Powers would take part. France, Italy, and Russia agreed to Sir Edward Grey's proposal of the 26th for a conference of ambassadors in London. State of war declared in Russian province of Kovno. Belgian army was mobilized. Shots were fired by a Cossack patrol on a German patrol at the Russian frontier. The Fourteenth corps of the French army discontinued maneuvers, and returned to its garrison. Information to this effect was received in Berlin. Germany refused Sir Edward Grey's proposal for a conference of ambassadors at London. The Czar informed the crown prince of Servia, if all efforts for peace failed, Russia would not disinterest herself in the fate of Servia. Russia proposed to Austria that desired modifications in latter's demands on Servia be the subject of direct conversations between St. Petersburg and Vienna.

The proofs show that a newspaper called the Ocean Gazette was printed on the steamship, and that on July 29th a copy of the paper contained a wireless dispatch from London announcing that:

"A formal declaration of war was made by Austria on Servia to-day and active hostilities between the two countries have already begun. Two Servian steamers were to-day attacked on the Danube, the Servian colors hauled down, and the Austrian colors hoisted.

"Germany has declined the proposal of Sir Edward Grey for a conference of ambassadors of the Powers in London; Austria also formally declined the proposals. Orders for the German fleet to concentrate in home waters have been issued, and the British first and second battle squadrons are in readiness for service.

"A dispatch from Berlin says a Russian force has occupied positions near the frontier of Russian Poland and that a squadron of German cavalry has also advanced to the frontier.

"Emperor Franz Josef has granted complete amnesty to all Austro-Hungarian subjects who have deserted from the army or who emigrated to other lands to avoid military duty."

The text of Austria's declaration of war was also printed. On July 31st, the Ocean Gazette published another wireless dispatch from London:

"Germany sent an ultimatum to Russia, demanding an explanation for the latter's mobilization. The answer is to be given within the next 24 hours.

"Fighting between Austrian and Servian forces is reported to-day at several points and the invading forces are meeting with stout resistance. Dispatches received at the Servian legation in London say that the Austrians were repulsed, while trying to cross the Danube 20 miles east of Belgrade and at Losnitza, west of Belgrade.

"The southern column of Austrians in Bosnia is reported to be watching the Montenegrin troops. In a severe battle at Fotcha, in Bosnia, the Austrians defeated the Servians with several hundred killed on each side.

"The gravity of the international situation is recognized in all European capitals.

"Russia proceeded with her mobilization of a large number of troops, while the French defensive forces took extensive precautions.

"Business was practically suspended on the London Stock Exchange to-day, pending the serious war situation. Dealers refused to make prices. The consols reached a record low price of 69½, the lowest in a century. Seven failures were reported to-day. St. Petersburg, Vienna, Budapest, and Brussels Exchanges also remained closed; two failures were announced on Glasgow Exchanges.

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"The Shinbum, a semiofficial newspaper of Japan, declares to-day that, if England is attacked, Japan will give assistance to the British arms.

"*Washington.* Administration officials are awaiting additional developments in European politics. If other nations than Austria and Servia are drawn into the conflict, probably a proclamation of neutrality covering the entire situation will be determined upon by the State Department."

Captain Polack, the master of the steamship, testified that he had followed the sea since 1875; he had been in the North German Lloyd service since 1886; he had been a master since 1900, and in command of this steamship since May, 1913. When he took command of the ship, he was given a sealed package, and was instructed to open the package at any time in the future in case he received a message, signed "Siegfried" and relating to some disease. On July 31st, at 10 o'clock in the evening, ship's time (11:45 Greenwich time), a wireless message was brought to him on the bridge by the chief officer. The message was in German, and it related that somebody had fallen sick; it was signed "Siegfried." Upon opening the sealed package, he found a code which enabled him to translate the wireless message as follows:

"War has broken out with England, France, and Russia. Return to New York." (It is in evidence that the translation from the German of the last clause is more literally "*Turn back* to New York.")

The name Siegfried meant "the board of directors of the North German Lloyd." After he had opened and read the message, the captain testifies, he immediately gave orders to turn the ship around toward the west; he had kept in touch with the situation before sailing, and knew in a general way how critically events had been developing; and, while on the water, he had felt anxiety as to receiving some message informing him of present conditions. He had discussed the matter with his chief officer the night of July 30th, and was very anxious to "get news from home about the political situation, and about this war," and had asked other ships about war news, so that, when he received the message, he assumed that the home office was fairly well informed as to the situation. He was then asked what appealed to his judgment upon receipt of the message as to the best course to pursue. He answered:

"Well, after receiving that message which read, 'War has broken out with England, France, and Russia,' there was only one way to do, to go back to the United States, to the west—not to run into any danger."

[1-3] 1. Was the master of the steamship justified in turning the ship about, deviating from his direct course, and proceeding westward?

The libelant alleges that he was not justified; that, in fact, he exercised no discretion about the matter, and acted merely under or-

ders from his managing directors; and that, under the maritime law, and under his contract, the conduct of the master and of the ship was unjustifiable. The answer raises the sharp contention that:

"The return of the Kronprinzessin Cecilie to a port of the United States was not only a justifiable precaution, but was based upon reasonable ground for apprehension of capture, and was the performance of an obvious duty which the master owed to his owners, to the passengers and crew and to the cargo owners, and was a measure adopted by him in good faith, in the exercise of his best judgment and discretion, for the benefit of all concerned."

I have already stated the facts which may fairly be held to be within the knowledge of the ship, and of the master, at the time of turning back on July 31st, at 10 o'clock in the evening. The master has testified that he kept in touch with the situation of affairs up to the time of sailing, and that on the voyage he had, from time to time, received information by way of the Sayville wireless station in regard to the progress of events; that this information was published in the Ocean Gazette; that he was awaiting information from the owners by wireless; and that, when he received his message on the evening of July 31st, he acted, not only in accordance with his instructions, but in accordance with the dictates of his own best judgment, which was to go back to the United States, "and not to run into any danger."

In The Styria, 186 U. S. 1, 19, 20, 22 Sup. Ct. 731, 738 [46 L. Ed. 1027], these facts were disclosed:

"The Styria, an Austrian steamship sailing from Trieste by way of Sicilian ports to New York, took on board at Port Empedocle, Sicily, a quantity of sulphur for New York. Before sailing the master learned that war had broken out between Spain and the United States, and as sulphur was an article contraband of war he had the sulphur all unloaded and warehoused at Port Empedocle before sailing. The court holds that the master of the Styria was justified in relanding and warehousing the contraband portion of the cargo, and that in so doing he had reasonable regard for the interests of both ship and cargo."

Speaking for the Supreme Court, Mr. Justice Shiras referred to the fact that a suggestion had been made by the District Court, and repeated in argument by the libelants, to the effect that the master was guided in his action in discharging the contraband cargo by a telegram from agents in London, "rather than by his own judgment on all the circumstances known to him at the time." In disposing of this contention, the learned Justice said:

"Without transcribing all of the master's testimony, but having read and weighed it, we are of the opinion that it clearly shows that, while he carried out the instructions of the agents, his judgment, on the facts confronting him, was that it was not safe for him to proceed with a contraband cargo, nor proper to wait indefinitely for the uncertain results pending negotiations between Italy and Spain. His conduct, as we have already said, had due regard to the interests of all concerned in the ship and in the cargo, both that which was contraband and that which was not so. So far as the shipowners were concerned, he had the approval of the managing agents; so far as the shippers and consignees were concerned, he acted upon his own judgment, exercised, apparently in good faith, on their behalf. * * * Without protracting the discussion, we are of the opinion that the master was justified in landing and storing the cargo that had become contraband by reason of the outbreak of the war between Spain and the United States, and by the Spanish proclamation of April 23d; that, having acted reasonably, with due regard to

the interest of all concerned in so doing, it was not made his duty, by the facts brought to his notice, to reship the sulphur on the Styria and further delay his voyage."

In Nobel's Explosives Co. v. Jenkins (1896) L. R. 2 Q. B. Div. 326, the case showed that a general cargo ship sailed from London to Yokohama with a cargo of dynamite, which was contraband of war. On arriving at Hongkong the master landed the cargo, after cabling for instruction from the owners of the vessel, for the reason that war had been declared on that day between China and Japan. It was held in the Queen's Bench Division that the probability of capture of the cargo steamer on the 1,000 miles of sea between Hongkong and Yokohama justified the shipper in refusing to carry the cargo beyond Hongkong. In giving the judgment of the court, Matthew, J., observed:

"Apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods intrusted to him. Whether he has discharged that duty must depend on the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiff confiscated. In the words of Willes, J., in Notara v. Henderson, L. R. 7 Q. B. 225, at page 234, 'a fair allowance ought to be made for the difficulty in which the master may be involved.' * * * It was said that the master was not an agent for the shippers, because they had protested against the discharge of the goods. But, even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo."

This case was cited and followed in The Styria, where, after quoting a considerable part of the opinion, Mr. Justice Shiras said:

"The master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods intrusted to him. The master, in either case, would have acted imprudently if he had not secured the approval of the shipowners, if it were possible to get it before the emergency was over; and all that can be said is that there was a concurrence of judgment between the ship agents and the master as to what was the proper course to pursue."

In The Teutonia, L. R. 4 P. C. 171, the case disclosed these facts:

A suit was brought in the admiralty by a Liverpool firm against a Prussian brig whose owner, master, and crew were all Prussians, for breach of a charter party entered into by the master and a branch of the Liverpool firm at Valparaiso, by which the master agreed to carry a full cargo of bags of nitrate of soda from Pisagua, South America, to Cork, Cowes, or Falmouth, as he might elect, and thence to such port as the Liverpool firm might order between Havre and Hamburg and there deliver the cargo.

The bill of lading contained an exception against the act of God, the queen's enemies, fire, and all and every other dangers and accidents of seas, rivers, and navigation of whatever nature and kind soever; but the decision of the case was not based on this exception.

The ship with her cargo arrived at Falmouth on July 10, 1870, and while there the master heard rumors that war was probable between France and Prussia.

On July 11th, the master received orders to proceed to the port of Dunkirk and there deliver the cargo, and at once set sail for Dunkirk, and arrived at a distance of about 14 miles off that port at 12 o'clock at night on July 16th, which was Saturday.

After lying to for about two hours, a pilot came on board, and the master asked him about the war as to which he had heard rumors at Falmouth. The pilot told him that war had been declared two days before. He then asked the pilot where he could bring him in safety, and the pilot offered to take him to Flushing, or the Downs, or wherever he liked.

The master thought it prudent to proceed to the Downs, and he anchored off there on Sunday morning, the 17th. He could get no advice or information on that day; and on Monday, the 18th, he went ashore at Deal, and was told by the German consul that war had broken out between France and Prussia. He then telegraphed to the owner, who was his father, and received an answer on Tuesday, the 19th, forbidding him to go to Dunkirk, and, on the same day, took his vessel into Dover, the nearest and safest port.

On July 19th the French declaration of war was delivered to the Prussian government at Berlin, which was known the same day by telegraph in England.

The Privy Council held that the master, when he was informed on his arrival off Dunkirk by the pilot, although incorrectly, that war had been actually declared two days before, was entitled to pause and to take a reasonable time to make further inquiries, and that he did not exceed the limits of a reasonable time in making inquiries.

In giving the judgment of the Privy Council, Lord Justice Mellish observed:

"If the master had entered Dunkirk, and it had turned out that war had been previously declared; he would have entered it with notice that he was entering an enemy's port, and this would have obviously exposed his ship to condemnation, and might have exposed himself to severe penalties when he returned to his own country. It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger. And their Lordships agree, if authority was wanting, that the case of Pole v. Cetcovich, 9 C. B. (N. S.) 430, is an authority in point."

See The San Roman, L. R. 5 P. C. 301; Embiricos v. Reid & Co., L. R. 3 K. B. 45; The Heinrich, L. R. 3 A. & E. 424; The Wilhelm Schmidt, 25 L. T. N. S. 34.

In the case at bar, Captain Polack, the master of the steamship, was examined before me at length, and was subjected to a very able and critical cross-examination. He impressed me as being a truthful man and a faithful, trustworthy shipmaster. He showed a clear appreciation of the trust imposed in him. The proofs lead me to the conclusion that, on the evening of July 31, 1914, as he stood upon the bridge of his ship, he had knowledge of the events, just referred to in detail, up to the time of the sailing of the ship from New York; that he had knowledge, also, of the important events which had happened after the ship left New York, and which were published in the newspaper printed on the steamship. He knew that Austria had declared war on Servia, and had commenced active hostilities; that Germany and Austria had declined the English proposal for a conference of the Powers in London. The facts within his knowledge tended to the conclusion that his country was upon the very edge of war with Russia, France, and England. In addition to this knowledge, he now receives information from the owners of the ship that war has broken

out between Germany, England, France, and Russia. He is within 1,070 miles of Plymouth, England. If he proceeds much further, there will not be sufficient coal left in his bunkers to return to the United States.

It is true, then, in the case at bar, as it was in the case of The Teutonia, that the shipmaster had received credible information that, if he continued in the direct course of his voyage, his ship would be exposed to an imminent peril. Upon the information which Captain Polack received, and the facts within his knowledge, he acted, I think, with a reasonable apprehension of impending danger. He was justified in deviating from his direct course eastward; and in doing this he was acting with a due regard for the safety of his ship, his passengers, and his cargo. In the light of what he knew, his clear duty was to turn about at the time he did. He was also instructed by the owners of the ship to turn about; and, if the case were one arising between him and the shipowners, those instructions might well be held, within certain limitations, to be conclusive. But, as between the parties to this controversy, those instructions were not decisive. They would not protect him if harm came to those who had intrusted their lives and property to his care and fidelity. They should not prejudice him now, in these proceedings. The message received by the captain did not consist of instructions alone; it contained a statement of an important fact. It is clear that the shipowners thought it necessary to give facts for their captain's guidance, as well as to give him instructions. By giving him such facts, they showed that they still relied upon his discretion; they recognized that he was captain of their steamship, and they did not expect a slavish following of arbitrary orders. But, whatever the communications between the master and the shipowners, the passengers and the shippers were not concluded by these communications. This libelant had the right, and is now seeking to enforce the right, to look to the ship and to its master. The master's instructions did not add anything to his duty in reference to the care of the ship, passengers, and cargo; they did not subtract anything from that duty. In an emergency, he must act for the protection of all interests committed to his care. Captain Polack was situated in this respect much as was the captain of the Styria. In what he did he had the approval of the shipowners; he acted in concurrence with their views. So far as the shippers and passengers were concerned, he was under the duty to act upon his own judgment, to be exercised in good faith on their behalf. In The Styria, Mr. Justice Shiras clearly defined the duties of the master of a ship at sea:

"The master of a ship is the person who is intrusted with the care and management of it, and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interests of his employers, the utmost fidelity and attention. Abbott on Shipping (7th Am. Ed.) 167. * * * 'All will agree that the master must act in good faith and exercise his best discretion for the benefit of all concerned.' New England Insurance Company v. The Sarah Ann, 13 Pet. 400 [10 L. Ed. 213]; The Amelia, 6 Wall. 27 [18 L. Ed. 806]."

In the Ancient Laws of the Sea it was said:

"When voyages are undertaken, the master is put in by the owners, and they ought to make good the master's fact and deed; and therefore as the whole care and charge of ship and goods are committed to the master, it is the prudence of the owners to be careful who they will admit commander of their ship."

It is argued by the learned proctors for the libelant that, in the progress of these later years, shipowners are able to communicate with their ships by wireless, and to control them; that, for this reason, there is a tendency in the courts to limit the great power of a master of a ship at sea. There was much interesting discussion touching this matter at the hearing of the cause. It is urged in behalf of the libelant that a shipmaster in command of a vessel operating as a common carrier, in the absence of immediate and compelling necessity, has no authority or discretion to vary the shipowner's contract of carriage, or to depart from his voyage. The Julia Blake, 107 U. S. 418, 2 Sup. Ct. 692, 27 L. Ed. 595, is brought to my attention as a leading authority. That case arose upon a suit by the holder of a bottomry bond against the ship, her cargo and freight. The Julia Blake had been damaged by stress of weather, and forced to put into St. Thomas for repairs, where her cargo was unloaded. It would have been possible to forward the cargo at reasonable expense by some other vessel to New York; instead of forwarding the cargo, the master hypothecated it and the freight, upon bottomry bond, to the Bank of St. Thomas; he did this without communicating with the cargo owners. Upon the arrival of the ship at New York, the bond was not paid. The Supreme Court held that the master of a ship cannot sell nor hypothecate the cargo, except in case of urgent necessity; that in the case of the Julia Blake, no such necessity appeared; and the cargo owners were not liable. In speaking for the court, Mr. Chief Justice Waite observed:

"He [the master] acts for the owner of the cargo because there is a necessity for some one to do so, and, like every agent whose authority arises by implication of law, he can only do what the owner, if present, ought to do. Necessity develops his authority and limits his powers. What he does must be directly or indirectly for the benefit of the cargo, considering the situation in which he has been placed by the acceptance of the voyage. * * * 'But at all events the necessity must be such as to connect the act with the success of the voyage, and not for the exclusive interests of the shipowner.' * * * 'All will agree that the master must act in good faith, exercise his best discretion for the benefit of all concerned, and that it can only be done upon the compulsion of necessity, to be determined in each case by an actual and impending peril to which the vessel is exposed.'"

Further in his opinion, after considering the circumstances of the case, the Chief Justice said:

"It must have been easy to see that to repair the vessel at the risk of the owner of the cargo would be to place his interests in jeopardy, without any urgent necessity on his account. No master who 'held the balance evenly between his two principals' could have believed himself justified, under the circumstances, in hypothecating the cargo for any such purpose, without notice to the owner."

So far as it goes, I think, the case of The Julia Blake states the law in substantial accordance with the law of The Styria, and of the

other cases to which I have called attention. In The Julia Blake, the court was not dealing with the case of a master in an unexpected emergency; and the court found that the circumstances of that case did not justify the master in hypothecating the cargo. The case does not take away from the captain his power to act under a reasonable discretion, or his power to exercise his judgment in case of emergency for the protection of all the interests committed to him. My attention is especially called, also, to the case of Brauer v. Compania Navigacion La Flecha (D. C.) 57 Fed. 403, where Judge Addison Brown held that the master was not justified in making a jettison in the absence of any compelling necessity, and upon mere apprehension of danger. Here, again, the court found that the circumstances did not warrant the act of the master, where he had sacrificed a deckload of cattle in bad weather without present necessity, solely from apprehension of further storms, and when there was "no reasonable or apparent necessity for this sacrifice." The case was affirmed by the Supreme Court. 168 U. S. 104, 18 Sup. Ct. 12, 42 L. Ed. 398. Other important and interesting cases have been brought to my attention, among others Codwise v. Hacker, 1 Caines, 526, and The Roebuck, 2 Asp. Mar. Law Cas. N. S. 387. Many cases to the same point are cited. Another class of cases is urged upon my consideration where the courts have held that mere fear of war does not justify a breach of a maritime contract. Among these cases are Atkinson v. Ritchie, 10 East, 530; Forster v. Christie, 11 East, 205; Richardson v. Maine Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; King v. Delaware Ins. Co., 6 Cranch, 71, 3 L. Ed. 155. In the case last cited, the Supreme Court adverted to the danger of holding that false intelligence, received on a voyage, might justify a captain in acting as if that intelligence were true. Upon a careful consideration of all the cases brought to my attention touching the subject, I am persuaded that the law is nowhere better declared than in the cases of The Styria, The Teutonia, and Nobel's Explosives Co. v. Jenkins. These cases state the rule clearly, I think, that, apart from the terms of any maritime contract of carriage, a shipmaster at sea is under a plain duty to take care of all interests intrusted to him; he is justified in deviating from his direct course, when in reasonable apprehension of imminent peril; and the courts are to apply the test whether, in any case, and under any emergency, the master has discharged his duty, under all the circumstances of each case. Upon this subject other courts have quoted the words of Willes, J., in Notara v. Henderson, cited by Matthew, J., in the case of The Nobel's Explosives Co. v. Jenkins:

"A fair allowance ought to be made for the difficulties in which a master may be involved. * * * The place, the season, the opportunity, and means at hand, the interests of other persons concerned in the adventure, and whom it might be unfair to delay for the sake of the cargo in peril, in short, all circumstances affecting risk, trouble, delay, and inconvenience, must be taken into account."

In that case the learned judge held that any information which had reached the master of the ship could not divest him of his original authority and discretion as agent, in an emergency, for the owners of

the ship, and owners of the cargo. The learned proctors for the libelant have in a most learned and interesting manner discussed the cases cited by them bearing upon this subject; but I think there is nothing further in the cases to which I need call attention.

In the case at bar there is clearly nothing to change the rule with reference to the duty of the master of this steamship at the time of the emergency in which he was called to act, when he turned the ship about and proceeded westward. The proofs show, I think, that he acted, not only with a due regard to his communication from the owners of the ship, but in accordance with the dictates of his own prudence and sagacity. His conduct is justified under the rules laid down in the cases to which I have referred. It is justified, too, by the test of "urgent necessity," and of the "compulsion of necessity," as those tests have been made by Chief Justice Waite and Judge Addison Brown, in the cases brought to my attention by the learned proctors for the libelant. If it be assumed, as urged in behalf of the libelant, that the parties made their contract of carriage, on July 27th, in contemplation of the possibility of war, it is clear that they did not make the contract with knowledge of the progress of events during the three days before the vessel was turned about; and it was upon all his knowledge upon July 31st, and all the information which he then obtained, that the master of the ship based his action.

As he steamed westward, the testimony discloses that he proceeded with care and discretion. He caused the side lights and the masthead lights to be extinguished, the portholes to be darkened, and the curtains to be drawn down on the promenade deck, to keep the light from shining out of the lounge and smoking room. He painted the tops of the smokestacks black, to make the ship appear to be a White Star boat. From intercepted wireless messages, he had reason to think he had acted wisely in turning about. On August 1st, at 9:40 in the evening, he received a wireless message, sent by way of Sayville, to all ships of the German Society for Wireless Telegraph. The dispatch was in the German code, and was thus translated:

"Threatening danger of war; do not touch at any port England, France, Russia."

On August 3d, at 1:30 in the afternoon, the English cruiser Essex was heard in connection with Halifax by wireless. As the click of the Essex became more distinct, indicating her approach towards the Cecilie, it became impossible to tell whether or not the British ship was patrolling the coast of Long Island; and it was thought that some other British war vessel might be cruising along the coast in the vicinity of Boston. It appeared to Captain Polack that to approach either New York or Boston might involve danger; he therefore called his officers together for a conference, and it was decided to change the ship's course, to proceed towards the Banks, then run for Frenchman's Bay, and put into Bar Harbor. This he did. The ship arrived safely at Bar Harbor on the morning of August 4th, at 6 o'clock.

[4] 2. Were the managing directors of the North German Lloyd justified in sending the wireless message to the ship:

"War has broken out with England, France, and Russia; return to New York"?

Upon this point, the proofs show the progress of events up to the time of turning westward. It is not necessary to refer in detail to all these events. The stipulation also gives the statement of the directors and officials of the claimant. It appears from that statement that the directors tried to decide what was the latest time the steamship would have to receive a message in regard to the continuation or interruption of her journey; the Lloyd's nautical department reached the conclusion that according to the supply of coal on hand, and the duration of the trip, the board of directors would have to come to a decision, at the latest, during the early hours of the afternoon of July 31st. It was thought that, owing to the congestion of the cable and wireless connections, some time would elapse from the sending of the wireless message to its reception on the ship. The imminence of war was fully in the minds of the directors. Accordingly they delegated Baron von Plettenberg, a member of their board, to go to Berlin for information. As late as July 30th there was apparently some hope indulged that war might be averted; but by the evening of that day a general warning was issued to the merchant marine through the admiralty staff. This warning was apparently the first official sign to the directors that war was inevitable; this caused them to begin to send telegraphic messages to their ships in regard to further procedure. Just before 2 o'clock, on July 31st, Baron von Plettenberg sent telegraphic information that the declaration of a state of war would at once be made public. Later in the afternoon "the declaration of a state of war for the German Empire, owing to the threatening danger of war," was brought to the knowledge of the directors. On the basis of this telegraphic advice, the wireless message was sent to Captain Polack. The decree of a state of war was designated as the decisive fact inducing the directors to send the message which they sent. It appears in the record that a "state of war" means that the country is put upon a war basis, but not that war has actually been declared. It is urged by the learned proctors for the libelant that the message announcing that war had broken out was an untruthful one; that it put a false color upon the matter, and caused the captain of the ship to deviate from his course, and break his contract, when there was no necessity for such action. The reasons assigned by the directors for saying "war has broken out," instead of "war is imminent," are given as follows:

"The reasons why we stated in our telegram to the Cecilie that the war had broken out, whereas, up to that time, as a matter of fact only the proclamation of a state of war, owing to the threatening danger of war, had been issued, are the following:

"First of all, according to the proclamation of the state of war, of which Baron von Plettenberg advised us, the breaking out of this threatened war within the next 24 hours could be expected with the greatest probability.

"Secondly, we stated ourselves, when sending off the telegram, that every other information in regard to the political situation, every statement that was not absolutely clear and comprehensive in regard thereto, was inadvisable, and could only lead to misunderstanding and unsafe resolutions.

"The sole information that the state of war had been proclaimed would

probably have been incomprehensible to the Captain, who, of course, would not have been familiar with the regulations of political law.

"Only the information that war had already broken out could show him the political situation in the same degree of distinctness and clearness with which we viewed it here, and told him to observe in the further guidance of the vessel the deportment and care which we considered absolutely necessary here, just as if the war had actually broken out here.

"Furthermore, we had to count on quite a long period of transmission for our telegrams, during which time, therefore, a further aggravation of the situation in the direction of war was to be expected, and we also had to take into consideration that, if the breaking out of war had actually occurred, it would most probably have been impossible for us to advise the vessel of this at that time on account of the isolation or interruption of the telegraphic connections.

"The wording of our telegram, therefore, occurred purposely in the form that we reported the war as already having broken out, and has nothing to do with the wording of our telegram code."

The proofs make it clear that the directors knew and realized that war was imminent, that the event would happen which did happen, and that the telegraphic information from Baron von Plettenberg had brought them to that conclusion. Their decision was, in my opinion, a reasonable one; they apparently proceeded upon the idea that a mere statement announcing a state of war to have been proclaimed might not convey the full import of the actual imminence of war to Captain Polack, more than 1,000 miles away upon the sea. Their conduct indicates that they recognized the necessity of giving the captain of their steamship something more than an arbitrary order; that they knew the responsibility of turning the ship about was upon him. They could not give him the history of the last three days, upon which their conclusion was based. And therefore these directors thought it necessary to translate their knowledge of the impossibility of escape from war into a statement that war had broken out. Under all the circumstances, I am persuaded that their message cannot be held to have been an untruthful one, in that it was calculated to deceive, or in that it tended to cause Captain Polack to take action which he ought not to have taken. Upon the whole evidence, I am of the opinion that the directors were justified in sending their wireless message. Before Captain Polack received it, the German Emperor had issued his proclamation declaring a state of war in the German Empire. That proclamation was:

"We, William, by the grace of God, German Emperor, King of Prussia, etc., decree by virtue of article 68 of the Constitution of the German Empire, in the name of the Empire the following the imperial territory, with the exception of the royal Bavarian territory, is hereby declared to be in a state of war. This decree goes into effect with its publication."

The general mobilization of the French army occurred on the following day, August 1st. On the same day, Germany declared war against Russia. The German ambassador, at St. Petersburg, by direction of his government, on July 26th, had said:

"But mobilization means war; as we know the obligations of France towards Russia, this mobilization would be directed against both Russia and France."

Germany's declaration of war against Russia might well be thought to be substantially equivalent to a declaration of war against France. On August 3d a state of war was declared to exist between Germany and France, and the French ambassador was handed his passports. On August 4th England declared war against Germany. On August 5th Austria declared war against Russia.

It is urged on the part of the libelant that, if the Cecilie had continued on her course, she could have arrived at Plymouth with her cargo of gold, and that the steamship was bound to complete the performance of her contract with the Guaranty Trust Company, even though such completion of the contract involved the certainty, or the overwhelming probability, of subsequent capture. The contention is not made that the steamship could have arrived at Bremerhaven until after the declaration of war against Russia, and after the declaration of war against France. In fact, I believe the learned proctors for the libelant admit the extreme improbability that the steamer could have arrived safely at Bremerhaven. The proofs clearly show that, whether or not the steamship could have arrived safely at Plymouth, it is clear that she could not have arrived at Bremerhaven until after war had been declared, and it would have been practically certain that she would have been seized by a hostile force. Under the general scope of his authority, the shipmaster is under the same duty to protect his ship, and the other interests intrusted to his care, as he is to protect his cargo. Those who have committed their interests to him must be presumed to have done so with the knowledge of such duty of the shipmaster, and of the ship. The Teutonia, L. R. 4 P. C. 171; The Styria, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027.

It is not necessary, however, to decide what would have happened if the steamship had proceeded on her voyage. It is sufficient to say that the claimant's directors acted with a reasonable apprehension of imminent peril, when they sent the wireless message to their captain. They must be judged by the information within their reach at the time of sending the message. When so judged, their conduct must be held to be reasonable and justifiable. In view of my conclusion, I need not consider other questions presented by the pleadings.

I have already found that, in turning his ship about, the master acted with due regard to the safety of all interests intrusted to him, and under a reasonable apprehension of imminent peril; that, in view of his knowledge, and of credible information received by him, he did as a prudent shipmaster should have done.

I come to this conclusion without considering the terms of the bill of lading, for the reason that the master was justified in his action by the duty imposed upon him under the maritime law.

The libel is dismissed, with costs.

THE KRONPRINZESSIN CECILIE.

(District Court, D. Massachusetts. February 1, 1916.)

No. 1070.

In Admiralty. Libel by Charles W. Rantoul, Jr., against the steamship Kronprinzessin Cecilie, claimed by the North German Lloyd. Libel dismissed.

Kirlin, Woolsey & Hickox, of New York City, and Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

Choate, Larocque & Mitchell, of New York City, Choate, Hall & Stewart, of Boston, Mass., Joseph Larocque and Walter C. Noyes, both of New York City, and Joseph D. Bedle, of Jersey City, N. J., for claimant.

HALE, District Judge. In this case the libelant seeks to recover $5,000 for alleged breach of contract in that the steamship failed to carry him to Plymouth, England, as it had agreed to do. The libel is essentially the same as that of the Guaranty Trust Company (228 Fed. 946), except that the cause of action is based on a contract of passage, instead of a bill of lading. But the libel contains nothing tending to show how the damage was sustained, or upon what basis the amount is demanded. The answer raises substantially the same questions raised by the answer in the Case of the Trust Company. What has been said in the Case of the Guaranty Trust Company applies to this case.

Libel is dismissed, with costs.

THE KRONPRINZESSIN CECILIE.

(District Court, D. Massachusetts. February 1, 1916.)

No. 1075.

In Admiralty. Libel by Maurice Hanssens against the steamship Kronprinzessin Cecilie, claimed by the North German Lloyd. Libel dismissed.

Kirlin, Woolsey & Hickox, of New York City, and Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

Choate, Larocque & Mitchell, of New York City, Choate, Hall & Stewart, of Boston, Mass., Joseph Larocque and Walter C. Noyes, both of New York City, and Joseph D. Bedle, of Jersey City, N. J., for claimant.

HALE, District Judge. This libel seeks to recover $200,000 for alleged breach of contract of the steamship company in failing to carry the libelant to Plymouth, England. The allegations are essentially the same as those in the Case of Rantoul (No. 1070) supra, except that this libelant sets up the following method of computing his damages:

"That if the steamship had continued on to Plymouth the libelant would have been enabled to reach his home in Brussels, Belgium, on August 4th, and that by reason of the breach of contract by the steamer he was prevented from going to Brussels before it was seized and occupied by the German military forces, in consequence whereof he has been deprived of his property and has sustained other damage."

The libelant has, however, subsequently filed certain amendments, alleging that, by reason of the breach of contract, he has sustained damages consisting of loss of his property, loss of passage money paid for himself and his wife, loss of time, inconvenience, and expense of maintenance. The answer is essentially similar to that in the Rantoul Case, with the addition that it sets up the fact that the libelant is a subject of the king of Belgium; that the claimant is a German corporation; that Belgium and Germany are at war; and that, therefore, this court, being a court of a neutral country, should decline to take jurisdiction. Without considering the last defense, it is suffi-

cient to say that what the court has said in the Case of the Guaranty Trust Company, 228 Fed. 946, is applicable to this case.

The libel is dismissed, with costs.

THE KRONPRINZESSIN CECILIE.

(District Court, D. Massachusetts. February 1, 1916.)

No. 1076.

In Admiralty. Libel by the National City Bank against the Kronprinzessin Cecilie, claimed by the North German Lloyd. Libel dismissed.

Shearman & Sterling, of New York City, for libelant.

Choate, Larocque & Mitchell, of New York City, Choate, Hall & Stewart, of Boston, Mass., and Walter C. Noyes, of New York City, for claimant.

HALE, District Judge. The libel in this case is the same in principle as that of the Guaranty Trust Company (No. 1069) 228 Fed. 946, the case just considered and decided.

In this Case of the National City Bank there are two alleged causes of action—one with reference to the shipment of 21 kegs of gold bullion, of the alleged value $1,061,718.89, to be carried to Plymouth, thence to be forwarded to London, and there delivered to the London City & Midland Bank, Limited, in consideration of $1,990.72, prepaid freight. The other cause of action is with reference to a shipment, made at the same time and on the same steamer, of 40 kegs of gold bullion, valued at $2,104,254.34, to be carried to Cherbourg, France, thence to be forwarded to Paris, and there delivered to Credit Lyonnais in consideration of $2,630.32, prepaid freight.

The libelant demands $404,150.06, damages for failure to deliver the London consignment, and $32,007.43, damages for failure to deliver the Paris consignment, making the damages claimed on this libel $436,157.49. The amended libel increases the claim for damages to $446,828.47. The answer sets up the same defense as in the case already considered. What I have said in the Case of the Guaranty Trust Company applies to this case.

The libel is dismissed, with costs.

TITUS v. WHITESIDE et al.

(District Court, N. D. California, Second Division. January 11, 1916.)

No. 15611.

1. CONTRACTS ⇐237—MODIFICATION—NECESSITY OF CONSIDERATION.

Under a contract between T., a cruiser and examiner of timber lands, and M., a dealer in timber and timber lands, T. was to examine and purchase timber lands in M.'s name, and have a one-fourth interest in the net profits, or at his option an undivided one-fourth interest in the lands and timber. The contract did not specify or limit the quantity or acreage of land contemplated to be acquired. *Held* that, as to each parcel of land purchased in accordance with the contract, the contract became on T.'s part an executed contract the moment title was acquired, and the contract was no longer executory, and could not be changed or modified as to T.'s rights without adequate consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1119–1122; Dec. Dig. ⇐237.]

2. CONTRACTS ⊜247 — CONSIDERATION — PRESUMPTIONS AND BURDEN OF PROOF.

Under a contract between T. and M., T. was to examine and purchase timber lands, for which M. was to pay, and was to receive a salary of $150 a month, and in addition a one-fourth interest in the net profits, or at his option a one-fourth interest in the lands and the timber. A subsequent contract purported to cancel the first contract, and, after reciting that M. was the owner of about 10,000 acres of land, provided that he agreed to give T. 5 per cent. of the actual amount received upon sales of the timber; that T. had no interest in the timber or the lands; that, if the profit from the sale of the timber should not amount to 25 per cent., the 5 per cent. to be received by T. should be reduced accordingly; that T. should have no interest in any other lands which had been or might be purchased by M.; and that T. should receive no salary, but only actual expenses in looking at timber and paying other parties for estimating such timber. *Held* that, while the writing imported a consideration, the disparity between the provisions of the two contracts as to T.'s compensation and the lack of any sufficient reason for T.'s execution of the second contract, by which he gave up a large interest in profits and a right to salary, and continued performing services for M. for which it was claimed that he was entitled to no compensation, overcame the presumption of consideration arising from the writing, and shifted to those relying on the second contract the burden of proving a consideration therefor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1139, 1787; Dec. Dig. ⊜247.]

3. CONTRACTS ⊜176—CONSTRUCTION—QUESTIONS OF LAW OR FACT.

T.'s right to compensation for services rendered by him under the second contract was not a question of fact, but one of law, dependent upon the construction to be put upon the terms of the contract.

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

In Equity. Bill by Mattie B. Titus, administratrix of W. H. Titus, deceased, against Robert B. Whiteside and another, executors of John McAlpine, deceased, and others. On report of a master. Exceptions to the report sustained, and cause recommitted to the master, with directions.

Charles A. Shurtleff, of San Francisco, Cal., for plaintiff.
Gillett & Cutler, of San Francisco, Cal., for defendants.

VAN FLEET, District Judge. The bill seeks to enforce the provisions of a contract entered into December 9, 1905, between plaintiff's testator, W. H. Titus, and John McAlpine, testator of defendants, and for an accounting thereunder. In substance, the contract provided that Titus, a resident of Beckwith, Cal., "a cruiser and examiner of timber and timber lands," was to examine and purchase timber lands in this state, the title to be taken in the name of McAlpine, a resident of Duluth, Minn., described in the contract as "a dealer in and handler of timber and timber lands," and who, the contract contemplated, should advance the necessary funds. McAlpine was to pay to Titus $150 per month, Titus to pay his own expenses, but to have in addition to his salary a one-quarter interest in the net profits resulting from the disposition of the lands to be purchased and the timber thereon, after deducting the purchase price, expenses of acquisition, taxes,

carrying charges, and interest at 5 per cent. on the moneys advanced by McAlpine, with an option in Titus, in lieu of his interest in the net profits, to receive title to an undivided one-quarter interest in the corpus of the lands and timber at any time he might elect to pay one-quarter of the purchase price, carrying charges, expenses, and interest as aforesaid. The contract provided that McAlpine could terminate it at any time he might see fit, and that thereupon the salary of Titus should cease at the end of the then current month and his services thereunder be at an end. It did not specify or limit the quantity or acreage of land contemplated to be acquired under its provisions. The bill alleges the performance of services by Titus in the acquisition of title to a large acreage of land—some 34,000 acres—in pursuance of the terms of the contract, down to the date of his death in October, 1911, and that the provisions of the contract in the acquisition of such lands had been fully kept and performed by him.

The answer admits the making of the contract sued on, but alleges that it "became annulled and canceled on the 19th day of February, 1908, by an agreement in writing," which is set out as an exhibit; alleges that Titus' services under the first contract ceased upon the execution of the second; denies that Titus "kept or performed all the conditions or stipulations" of the first contract, or that the lands described in the bill were acquired thereunder, or that Titus at the time of his death had any interest whatsoever therein. The contract set up in the answer purports by express terms to "take the place of" and cancel the prior contract of December 9, 1905. Its pertinent recitals and provisions are that McAlpine, the party of the first part, "being the owner of about ten thousand (10,000) acres of lands in townships 21 and 22 north, ranges 13 and 14 east, Plumas and Sierra counties, in the state of California, agrees to give to said second party five per cent. (5%) of the actual amount received when said first party sells the timber on the lands above referred to, and as soon as payment is received by first party, the said second party having no interest whatsoever in the timber or lands referred to and only to receive the five per cent. (5%) when the timber is sold by the party of the first part, providing, however, that the amount received by the first party from the sale of said timber shall amount to more than twenty-five per cent. (25%) net profit over and above the purchase price and all carrying charges thereto added, with interest at the rate of six per cent. (6%), including also taxes and all other necessary expenses, and if sold for less than twenty-five per cent. (25%) profit, the five per cent. (5%) above referred to, to be received by second party, shall be reduced accordingly. The said second party has no interest whatsoever of any kind or nature in the lands or timber referred to, said first party being the sole owner in fee simple of the lands and timber referred to above, and to any other lands which the party of the first part may purchase or may have purchased heretofore. The said second party shall have no interest whatsoever in the profits of same, having only purchased same as directed by the party of the first part, and all lands so purchased shall be in the name of the first party. The party of the second part shall receive no salary, only actual expenses in looking at timber

and paying other parties for estimating same." Then follow some provisions having no relation to present consideration.

By stipulation, the cause was sent to the master, "to take and report the evidence together with his findings of fact and conclusions of law thereon." On the case coming before him, the master determined, with the consent of the parties, that, in view of the issues raised by the pleadings as to whether the contract sued on still subsisted, he should first take the evidence and "report such matter as would furnish the basis for an interlocutory decree, that is to say, whether the second contract was ever in fact executed; that then, after the court had passed on this report, an accounting could be had," if deemed necessary. This course was pursued, and the master has filed such preliminary report, in which he finds that the contract set up in the answer was executed by Titus and supplanted the first, and this finding has given rise to the pending question. The materiality of the exception hereafter considered will be better appreciated by a brief statement of some of the peculiar features of the case as disclosed in the master's report.

The execution by Titus of the alleged second contract was sharply denied by plaintiff, and his purported signature thereto, which was unusual in character, was denounced as a forgery; the question of its genuineness affording the basis of a very decided conflict in the evidence, with a number of witnesses familiar with the handwriting of the deceased denying its genuineness, and the two experts examined on the subject being diametrically opposed in their opinions. In addition, there were a number of facts and circumstances appearing in evidence and discussed by the master of a more or less doubtful and discrediting character—alleged declarations of McAlpine after the date of the second contract at variance with its terms as to Titus' interest in the lands; his actions after the death of Titus, and representations to the latter's widow, with other matters—tending more or less strongly to disparage the genuineness of the instrument. Not the least potent of these facts in the consideration of the master was the peculiar terms of the second contract and the disparity between its provisions and those of the first as to the compensation or emolument going to Titus, with a want of any sufficient reason appearing to explain why the latter should have been ready to voluntarily forego the rights accruing to him under the first—rights which, as the master indicates, had become vested. On this subject the master says in his report:

"It is possible, of course, that Titus may have concluded to abate from the compensation which he had earned in order to continue friendly relations with McAlpine. His purpose in so doing, however, and his subsequent actions, are difficult to explain on the basis of the second agreement as the contract defining their relations after February, 1908. By the terms of the second agreement it is seen that Titus would get no additional compensation for any future service in McAlpine's behalf. For his own interest, he might as well have quit at once. On the contrary, however, he was active in McAlpine's behalf up to the time of his death, looking up further timber lands, procuring abstracts, having the timber cruised, negotiating purchases, etc. It cannot be told whether it took all of his time, but there is no question but that it took a substantial portion of his time, during those years. Why would

any reasonable man execute such a contract and give his services in this way? This question has not been completely answered."

And, after adverting to certain suggestions of the defendants' counsel, he says:

"When all of this is said, however, it must be acknowledged that, even if we believe that Titus executed the second contract, it is hard to give a satisfactory reason why he did so, and why he spent so much of his time thereafter in McAlpine's service. This must be left one of the unanswered questions in this case."

The master's conclusion, however, arrived at apparently with great reluctance, was that, notwithstanding these disparaging considerations, he was constrained by the positive evidence of the two subscribing witnesses, which he deemed controlling in effect, to find that the instrument had in fact been subscribed and executed by Titus. In this regard he says:

"The case is not easy to decide. It has been given very careful consideration by me. The burden of proving the second agreement, as hitherto stated, is on the defendants. If the agreement as presented bore simply the purported signatures of McAlpine and of Titus, I should say that the defendants had failed to maintain this burden of proof in this case. This means that the evidence as to handwriting and surrounding circumstances is at least no more than balanced. But with the additional, and to my mind the controlling, evidence of the subscribing witnesses as to execution, this balancing of the evidence operates to the detriment of the plaintiff. To my view, plaintiff's evidence is not sufficient to overcome the evidence of the subscribing witnesses."

While a number of exceptions to the report are assigned, but two are urged, and but one of those demands special notice. The master having failed in his draft report to find upon the question of the consideration moving Titus in the execution of the second contract, the report was excepted to by the plaintiff on that ground, and he was requested to make a specific finding on the subject. This he has failed to do, for what reason does not appear; his report as finally settled and filed being silent upon the subject. The plaintiff has now renewed the objection by an exception to the report on that ground; and I am of opinion that the exception should be sustained.

In its contrasting features with the contract sued on, the second contract is certainly rather remarkable in its terms, and it is difficult, as suggested by the master, to readily imagine why one in Titus' place should have been ready to abandon his rights under the first and adopt the second, in the absence of some adequate consideration moving him to such action. As aptly urged by plaintiff:

"Not only did Titus by signing the second contract give up an interest in profits worth more than $45,000 and a right to salary amounting to $2,100, but the evidence shows without contradiction—in fact, it is admitted—that Titus continued an unbroken course of buying for McAlpine, and after February 19, 1908, the date of the second contract, purchased approximately 24,000 acres of timber land, the title to which stood in McAlpine, making a total with the 10,000 acres purchased prior to February 19, 1908, of about 34,000 acres, for which services it is claimed he is not entitled to one cent, so by signing the second contract he not only gave up what we have heretofore set forth, but he gave up his time for three years and eight months thereafter, which we have seen was devoted to acquiring more than twice as much land

as he acquired prior to February 19, 1908, without salary, and waived all interest in the lands or in the profits therefrom."

This statement of the effect of the second contract accords substantially with the facts as recited in the master's report; and a consideration being as essential to the validity of a contract as its formal execution, it seems to me that the case is peculiarly one where some adequate consideration should have been shown and specifically found.

[1] The position taken by the defendants is:

"That, the contract being an executory agreement, the parties had the right, at any time before it became fully executed and complete, by mutual consent to change its terms, or rescind or modify it in any particular, and that no consideration other than their mutual promises was necessary."

And many authorities are cited in support of the doctrine. There is no question as to the general correctness of the principles stated, but they lack application. The contract of December 9, 1905, had ceased to be executory at the date of the second agreement. As we have seen, it did not undertake to specify the acreage or number of tracts of land to be acquired under its provisions, but merely stated the terms upon which any land acquired should be purchased. This being so, it necessarily results as matter of construction that, as to each parcel purchased in accordance with its terms, it became on the part of Titus an executed contract the moment the title to the particular parcel had been vested in McAlpine. All that remained for performance thereafter as to any such purchase were the stipulations and covenants of the latter. Under these circumstances, the contract was no longer executory as to Titus, and could not be competently changed or modified as to his rights thereunder without adequate consideration.

The rule is thus stated in Cyc. (9 Cyc. 594):

"While a contract remains executory on both sides, an agreement to annul on one side is a consideration for the agreement to annul on the other, and vice versa. On the other hand, if the contract has been executed on one side, an agreement without any new consideration that it shall not be binding is without consideration and void."

See, also, George v. Lane, 80 Kan. 94, 102 Pac. 55; Zerr v. Klug, 121 Mo. App. 286, 98 S. W. 822; Weed v. Spears, 193 N. Y. 289, 86 N. E. 10; Empire State Surety Co. v. Hanson, 184 Fed. 58, 107 C. C. A. 1; Wilson v. Wilson, 115 Mo. App. 641, 92 S. W. 145.

[2] Defendants further say in their brief:

"There was no evidence introduced at the hearing before the master as to what the consideration was, if any, for the second agreement. The contract, being in writing, presumes a consideration, and the burden of proof rests upon the party attacking the contract to show that no consideration existed."

It is perfectly true that the writing imports a consideration, but the effect of this implication is merely to support the validity of the writing and dispense with extraneous proof, where there are no facts or circumstances tending to negative the existence of an adequate consideration. Here, it is hardly necessary to suggest, the circumstances disclosed in the evidence and commented on by the master were more than adequate to overcome the presumption of consideration arising

from the writing itself, and to shift the burden of proof on that question to the shoulders of the defendants. Very slight evidence is sufficient to shift the burden of proof as to a negative fact. People v. Lundin, 120 Cal. 308, 52 Pac. 807; Joost v. Craig, 131 Cal. 504, 63 Pac. 840, 82 Am. St. Rep. 374. A want of consideration may appear or be shown from the circumstances surrounding the making of the contract. Thus:

"On an issue as to whether any real consideration for a written instrument passed between the parties, circumstantial evidence may be resorted to, such as the relative condition and circumstances of the parties, their means and revenues, their subsequent conduct, the influence of one over the other, the fact that the price was nominal, and generally such matters of fact as conduce to establish the charge of a want of consideration." 3 Encyclopedia of Evidence, p. 376.

It may be added that under the rule of decision in Minnesota, in which state the second contract was made and executed, and under which, therefore, its validity is to be tested, rather than by the law of the state of its performance, this contract is void without a new consideration appearing. Thus, in Little v. Rees, 34 Minn. 277, 26 N. W. 7, where the plaintiffs were to get commissions on a sale for introducing a purchaser, it was held that a promise, made after performance on their part, not to charge the commission, was void for want of consideration; the court saying:

"This promise or statement was made after the contract had been entered into, and the plaintiffs, as is found, 'had then done and completed all that was required of them under their contract with defendant.' So far as appears, the promise was a mere naked agreement, without consideration, and could have no legal effect."

See, also, Bryant v. Lord, 19 Minn. 396 (Gil. 342); King v. Duluth R. R. Co., 61 Minn. 482, 63 N. W. 1105.

[3] The other of the two exceptions urged by plaintiff, as to the want of a finding by the master on the question of plaintiff's right to compensation for services rendered by Titus under the second contract, is, in view of the conclusion reached on the exception above discussed, not now material. It will become material only in the event the second contract shall be finally sustained as based upon a valid consideration. But, moreover, should the question become material, it is not one of fact to be found by the master, but purely a question of law, dependent upon the construction to be put upon the terms of the second contract, which, if that contract be established, will be for the court in formulating its interlocutory decree and fixing the basis of an accounting between the parties thereunder.

These considerations require that the exception first considered be sustained; and as the omission to find on the question of consideration underlies the substantive conclusion reached by the master in his report, the order will be that the cause be recommitted, with directions to the master to take such evidence as either party may present upon the question of consideration moving the execution of the so-called second contract, and thereupon to recast his report accordingly.

WESTINGHOUSE ELECTRIC & MFG. CO. v. IDAHO RY., LIGHT & POWER CO.

(District Court, D. Idaho, S. D. November 10, 1915.)

No. 468.

1. RAILROADS ⟸169—MORTGAGES—LIEN ON INCOME—"REDUCE TO POSSESSION."

The income clause in a mortgage of railway property does not become effective until the trustee either actually or constructively reduces the property to its possession; and the premature commencement of a foreclosure suit, which was voluntarily dismissed, was not such a reduction to possession, although a receivership was extended to it, but was altogether nugatory.

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

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

2. RAILROADS ⟸169—MORTGAGES—INCOME CLAUSE—POSSESSION BY TRUSTEE.

Rev. Codes Idaho, § 4523, provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of such property without a foreclosure and sale." Other statutory provisions, however, authorize the appointment of a receiver in a foreclosure suit where the "property is probably insufficient to discharge the mortgage debt." *Held* that, on commencement of a suit to foreclose a railroad mortgage which contained an income clause, where the mortgagor was insolvent and the property insufficient, thus entitling the trustee to a receiver, the appointment of such receiver would give the trustee such possession as to make the income clause effective; that where the trustee, instead of applying for a receiver, filed a petition in a pending creditors' suit in which a receiver had been appointed, asking that the income be impounded for its benefit, the effect was the same, and gave the trustee a first lien on the subsequent net earnings of the receivership.

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

3. CORPORATIONS ⟸482—INSOLVENCY AND RECEIVERS—DISTRIBUTION OF ASSETS—STATUS OF MORTGAGEE.

Rev. Codes Idaho, § 4520, provides that there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage, which action in case of mortgage is defined as a foreclosure suit in which, after sale of the property, but not before, the plaintiff may have judgment, which he may satisfy by execution, but only for the amount of the debt remaining unpaid. *Held* that, in view of such statutory provisions, on distribution by a federal court of equity in Idaho of the assets of an insolvent corporation, the trustee of a mortgage of property in the state is entitled to share as a creditor in the unmortgaged assets in the hands of a receiver on the basis of the amount of his deficiency judgment only.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. ⟸482.]

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Idaho Railway, Light & Power Company. On claim of the Guaranty Trust Company of New York, mortgage trustee, to share in distribution of general assets of defendant. Claim allowed in part.

Perky & Crow, of Boise, Idaho, for plaintiff.

Wyman & Wyman, of Boise, Idaho, and Eldon Bisbee, of New York City, for trustee.

John F. MacLane, of Salt Lake City, Utah, for receiver.

Richards & Haga and Wood & Driscoll, both of Boise, Idaho, for creditors.

DIETRICH, District Judge. The present issues arise in this way: On December 23, 1913, the defendant company was engaged in the electric power and traction business, and was at that time indebted to both secured and unsecured creditors; the securities in the main consisting of a large issue of bonds secured by a trust deed, purporting to cover all of the properties of the company, including its income. Having become financially embarrassed, it was threatened with suits at law, and at least one action was commenced, in which an attachment was issued and levied upon certain of its available assets. On December 23d the plaintiff company, an unsecured creditor, filed a bill, on behalf of itself and all other creditors who might thereafter join in the prosecution of the suit, in which it was set forth that unless a court of equity interposed, and, through a receiver, took charge of and preserved the estate, and marshaled the assets of the defendant for the benefit of all creditors as their interests might appear, there was danger that, through a multiplicity of suits, the public interests would be prejudiced, and, by the dismemberment of the railway and power systems, the value of the assets would be greatly depreciated, to the detriment of the plaintiff and other creditors. The defendant appeared and admitted the averments of the bill, and assented to the appointment of a receiver. Thereupon a receiver was appointed and took charge of the properties.

A few days later the Guaranty Trust Company of New York, the trustee named in the trust deed referred to, commenced a suit to foreclose the trust deed, and thereupon, on its motion, and with the consent of all parties, the causes were consolidated for trial, and the receivership extended to the foreclosure suit. In due course, pursuant to orders made and notices given, numerous creditors intervened in the creditors' suit, and filed their claims; most, if not all, of them contending for a preference over the lien of the trust deed, upon the theory that the claims were for labor and supplies used by the railway company in the operation and maintenance of the property. Some of these were promptly allowed and paid; others were contested. To some of those which were contested a preference was denied, on the ground that they did not accrue within six months prior to the institution of the receivership, or that they did not represent expense of maintenance or operation. The denial of the preference was, however, without prejudice to the right of such claimants to share in the surplus income, if any, over necessary operating and maintenance expenses during the period of the receivership. Among others, the trustee itself filed a petition praying that it be deemed to be a creditor to the full extent of the outstanding issue of bonds, and that it be per-

mitted to share in the fund, if any there should prove to be, applicable to the payment of the general indebtedness of the railway company.

In the meantime, upon consideration, it was held that the foreclosure suit commenced in January, 1914, was prematurely brought, and, pursuant to the ruling, the plaintiff asked for and procured a dismissal of the bill in that suit. This was on the 17th day of December, 1914, and thereupon, namely, upon the same day, it filed a new bill in foreclosure, and caused process to be issued. The dismissal of the first bill was without prejudice to the creditors' suit, or to the receivership instituted therein, or to the status of any proceedings which had been taken or were pending. The trustee did not, upon the commencement of the second suit, seek an extension of the receivership or a consolidation of the new suit with the creditors' suit; but on the 19th day of December, 1914, it filed in the creditors' suit an application praying that the income during the receivership be impounded for its benefit. Except as it is now involved in this hearing, the application was never presented to the court, and no action was ever taken thereon.

On April 19, 1915, a decree of foreclosure was entered, in which it was found and decreed that there had been issued for value, and there were outstanding, bonds of the aggregate face value of $8,449,000, besides interest. Most of these bonds had been sold, and the title thereto had passed to the purchasers; but approximately $1,500,000 thereof had been put out and were held as collateral by divers creditors of the railway company. It was decreed that these bonds constituted a lien upon all the properties and assets of the defendant company, and a special master was appointed and authorized to make sale thereof, pursuant to the directions of the decree, for the purpose of satisfying the bonded indebtedness. The twentieth and final paragraph of the decree is as follows:

"None of the provisions of the decree shall be construed as establishing a lien in favor of the trustee or bondholders upon the income, including earnings uncollected, or any part of the income, earned during the receivership, or foreclosing the claims of general creditors to have such income distributed to them; and in harmony with the theory and understanding of the receiver and the court in applying and permitting to be applied from time to time portions of such income to the discharge of interest upon underlying bonds, indebtedness incurred for construction work, sinking fund, and other non-operating purposes, so much of the funds received upon a sale of the property as are necessary to restore to the receiver the amounts so expended shall be deemed to have the status of operating income arising during the receivership and in the hands of the receiver, the rights of all claimants, including the plaintiff trustee, thereto, to be determined in said cause No. 468."

At the ensuing master's sale the property was sold for $4,542,750 absolutely, and with the further obligation of the purchaser to pay in addition thereto such amount, if any, as the receiver might realize out of a claim which he was asserting to the proceeds of the foreclosure sale of the properties of the Idaho-Oregon Company, which claim was then, and still is, pending on appeal in the Circuit Court of Appeals of this circuit.

Under the provisions of the final paragraph of the decree above quoted the receiver is deemed to have on hand, as a surplus of income,

after discharging the necessary and ordinary current expense of maintenance and operation, $———, and the question submitted for decision is the proper distribution or application of this fund. In the first place, the trustee contends that it is entitled to all of it, by virtue of the provisions of its trust deed purporting to extend the lien thereof to the income of the railway company. It is further contended that, if any of the surplus is subject to distribution, it is only such amount as may have accrued prior to the order of January 19, 1914, extending the receivership to the first foreclosure suit, upon the theory that by the extension of the receivership the trustee is to be deemed to have come into possession of the income. It is still further contended that at most only such part of the surplus as was received prior to the commencement of the second foreclosure suit and the filing of the petition praying that the income be impounded for the benefit of the trustee is available for distribution, upon the ground that if the first suit was ineffective, because prematurely brought and voluntarily dismissed, the commencement of the second suit and the filing of the petition referred to operated to give the trustee constructive possession. And, finally, it is contended that, whatever may be the fund available for distribution, the trustee is entitled to share therein, not on the basis of the residue of the indebtedness remaining unpaid upon the bonds after applying the proceeds of the foreclosure sale, but upon the entire amount of the original indebtedness.

[1] The first general question is: To what extent, if at all, does the lien of the trust deed attach to the fund in the receiver's hands? It is a well-settled and familiar rule that the income clause in a mortgage or trust deed of this character does not become effective until the trustee either actually or constructively reduces the property to its possession. The usual method of acquiring such possession is through the institution of a foreclosure suit and the appointment of a receiver therein. Here the original foreclosure suit was premature, and therefore wrongful, and the extension of the receivership was without right. The voluntary dismissal rendered the whole proceeding nugatory, and the rights of the parties were the same as they would have been if the suit had never been commenced.

[2] Did the filing in the creditors' suit, on December 19, 1914, of the trustee's application to have the income thereafter accruing impounded for its benefit, operate to give it a lien thereon? The answer to this question depends largely upon the effect which we give to certain provisions of the Idaho statutes. If, but for the existence of the receivership in the creditors' suit, the trustee would have been entitled to a receiver in the foreclosure suit, the application referred to may be regarded as the equivalent of the appointment of a receiver in the latter case. Atlantic Trust Co. v. Dana, 120 Fed. 209, 62 C. C. A. 657. Upon the other hand, if under the statutes of the state the applicant was not entitled through a receiver to acquire possession of the mortgaged property, including the income, then manifestly the filing of the application was ineffective for any purpose. The modern rule that, whatever its form, an instrument of mortgage or trust deed given as security only does not transfer title or confer

upon the mortgagee or trustee the right of possession, prevails in this state. Section 4523 of the Idaho Revised Codes provides that:

"A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

There is much reason for the view that, whatever may be the agreement of the parties touching possession and the income of the property, the courts will not, in the face of such a statute, appoint a receiver for the purpose of enabling the mortgagee indirectly to acquire possession prior to foreclosure and sale. But it is to be noted that the Idaho statute above quoted does not purport to deal with the subject of receiverships, or to abrogate or modify the general rules of equity pertaining thereto. Upon the other hand, in the chapter of the Code upon that subject we find, not only the general provision that receivers may be appointed in all cases where they "have heretofore been appointed by the usages of courts of equity," but the specific provision that in foreclosure suits they may be appointed where the conditions of the mortgage have been broken, and the "property is probably insufficient to discharge the mortgage debt." Here it was shown that the mortgagor was insolvent, and that by reason of certain conditions already mentioned there was danger that the value of the property would be impaired, and further that the property was probably insufficient to discharge the bonded debt.

The question under consideration has never been decided by the Supreme Court of the state; but it is elementary that the several sections of the Code are to be construed together, and, if possible, all are to be given effect. Brandon v. Fremont County, 6 Idaho, 482, 56 Pac. 264. Applying that rule, I think it must be held that, but for the then-existing receivership, a receiver could and should have been appointed in the foreclosure suit. The view finds strong support in the case of Moncrieff v. Hare, 38 Colo. 221, 87 Pac. 1082, 7 L. R. A. (N. S.) 1001, decided by the Supreme Court of the state of Colorado, where also there are similar statutory provisions. The question there had full consideration, and a large number of cases are collated and commented upon. See also Scott v. Hotchkiss, 115 Cal. 89, 47 Pac. 45, and Schreiber v. Carey, 48 Wis. 208, 4 N. W. 124. It is not thought to be out of harmony with Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415, or Couper v. Shirley, 75 Fed. 168, 21 C. C. A. 288. In the latter case it is expressly pointed out that the receivership there under consideration rested upon no established principles of equity, and so far as I am able to discover it was not authorized by any statute of the state of Oregon, where the case arose. In the former, the question of the conditions under which a receiver may be appointed was not directly involved.

I do not hold that a receiver may be appointed for the purpose of giving effect to the provisions of a trust deed mortgaging the income. But when conditions are shown to exist which, under the statutes of the state, plainly authorize a receivership, no good reason is apparent why the possession thus rightfully acquired should not operate to

make effective the agreement of the parties expressly pledging the income. An apparently contrary conclusion, it must be conceded, was reached by the Supreme Court of the state of Washington in Norfor v. Busby, 19 Wash. 450, 53 Pac. 716. From the view I have taken it follows that the lien of the trust deed attached to the income arising after December 19, 1914, and the whole thereof being admitted to be insufficient to satisfy the mortgage indebtedness, general creditors have no interest therein.

[3] It remains to consider whether in the distribution of the income fund accruing prior to that date the whole of the trustee's original claim, or only the residue remaining after the application of the proceeds of the sale, shall be taken as the basis of apportionment. For the trustee it is said that, while the latter is the rule in bankruptcy proceedings, the former prevails in "equity" cases; and it must be conceded that, in so far as it concerns claims secured by collateral in national bank receiverships, the proposition has been authoritatively established. Merrill v. National Bank, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640; Aldrich v. Chemical National Bank, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611; s. c., Chemical Nat. Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231; Id., 65 Fed. 573, 13 C. C. A. 47, 28 L. R. A. 231. And upon principle possibly no substantial reason can be given why, if controlling in national bank cases, the rule should not be extended to other insolvent estates, and to mortgage claims as well, provided, of course, there are no opposing statutory provisions. Its designation as the "equity" rule I am inclined to think carries with it a misleading implication. The fields in which the two rules obtain are both of equitable cognizance, and upon the question of which is the more equitable in principle or effect there may be, and is, a wide difference of view. That judicial opinion is divided is amply evidenced by the vigorous dissent of four of the judges in the Merrill Case, above cited. And it is of significance, I think, that generally, if not universally, where there has been an expression of the nonjudicial view, through legislative enactment, the so-called bankruptcy rule has prevailed. It is embodied in the Bankruptcy Act of 1898, passed about the time of the rendition of the Merrill decision. It was the recognized rule in the state insolvency law of Idaho, which was superseded by the National Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544). It is likewise the principle upon which estates of deceased persons are administered in this state. There is, of course, no inherent reason why, in the judicial distribution of a debtor's property to his creditors, there should be one rule in a bankruptcy or probate proceeding and another where the estate is administered under the direction of a court of general equity jurisdiction. A more accurate characterization of the two rules would therefore seem to be to designate one as the legislative and the other as the court rule. Now it has been held upon high authority that neither the National Bankruptcy Act nor the state insolvency law is binding upon a federal court administering an estate through a receivership in the general course of equity (Commercial, etc., Bank v. Lumber Co. [C. C.] 194 Fed. 732, and cases therein cited), and the foregoing observations are made, not as furnishing sufficient ground in

themselves for following the legislative rule in this case, but as suggestive of considerations why I am inclined to restrict the application of the other rule to the limits within which it has been authoritatively established. Perhaps more fully than anywhere else the reasons for the court rule are set out in the opinion written by Judge Taft, in Chemical National Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231, to which approving reference is made by the Supreme Court in the Merrill Case, supra. As already stated, the Armstrong Case involved a national bank liquidation under the provisions of the National Banking Act. Of the claims against it some were secured by collateral, and others were wholly unsecured. The only pertinent provision of the Banking Act is that the Comptroller, who takes possession of a failing bank and through his receiver winds up its affairs, shall make "a ratable dividend" of the funds to the creditors. In the course of his opinion Judge Taft said:

"It is manifest that it would utterly defeat the object of the Banking Act if, after the suspension, the assets remained subject to levy, execution, or attachment, and therefore that the passing of the assets into the hands of the receiver removes all the property of the bank from liability to process to secure satisfaction of judgments. Bank v. Colby, 21 Wall. 609 [22 L. Ed. 687]. The right which a creditor of the bank had before suspension of levying an execution to satisfy his judgment is gone, and for it is substituted a fixed and definite interest in the assets as a security for the payment of his debt, which it is the purpose of the Banking Act to reduce to money, and apply on his debt, with all convenient speed. We see no reason why this does not apply as well to creditors who hold collateral as to those who are unsecured. It is well settled that the holding of collateral does not prevent a creditor from enforcing his claim in the ordinary way by judgment and execution against a debtor without any deduction for his collateral. Lewis v. U. S., 92 U. S. 618 [23 L. Ed. 513]. When the secured creditor is required by the transfer of the assets in trust for winding-up purposes to forego his right to satisfy his entire debt out of the property of the bank by levy and execution, why should there be substituted for that right anything less than that which the unsecured creditor gains by yielding up the same right? Take the case of two creditors of the bank for $1,000 each, one with collateral and the other unsecured. Before suspension, the one has two modes of collecting his debt—first, by levy and execution for $1,000; and, second, by reducing and applying the collateral. The other has but one—that of a levy and execution for $1,000. When the bank suspends, the unsecured creditor acquires, in exchange for his right to levy on the property of the bank to make $1,000, an undivided interest in the assets held by the receiver, after the circulating notes are paid, which bears the same ratio to the entire assets of the bank as $1,000 does to the entire indebtedness. If so, why should not the secured creditor, who, before the suspension, had also the right to make $1,000 by levy on the property of the bank, receive the same ratable interest in the assets held by the receiver? The suspension of the bank, and its seizure by order of the Comptroller, have no effect to change the rights of the creditor with reference to his collateral."

I have quoted at unusual length in order to disclose fully the basis and import of the reasoning by which the rule is supported. In substance it is that the appointment of a receiver should not operate to change the status of the two classes of creditors, one secured and the other unsecured, in their relation either to the estate or to each other; that but for the receivership the collateral holder would have had the right to sue and satisfy his debt by levy and execution against the en-

tire property, regardless of his collateral; and that he cannot justly be deprived of that right to his disadvantage, and to the advantage of the unsecured creditor, by the institution of a receivership. Now, if we adopt this course of reasoning in the instant case, what is the result? The trustee here held a claim secured by mortgage. The property mortgaged is situate in Idaho, and the mortgage contract is therefore to be adjudged by the local law. By section 4520 of the Revised Statutes of Idaho it is provided that:

"There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property."

And such action is defined to be a foreclosure suit. In such suit, after sale, but not until after sale, the plaintiff may have personal judgment, which, and which only, he may satisfy by levy and execution. Such being the law, to hold that the trustee here may receive a dividend upon its entire claim and hold its security in reserve for the satisfaction of the balance, if any, remaining unpaid, is manifestly to reverse the statutory order, and it would be to do just what in the Armstrong Case was held could not justly be done, for thus the receivership would operate to alter the relation of the two classes of creditors, to the advantage of the secured creditor and to the disadvantage of the unsecured. Had not the receiver been appointed, the unsecured creditor could have passed his claim to judgment and satisfied the same by levy and execution; but this the trustee could not have done, for it was without such remedy until it had exhausted its security, and then it could levy, not for the full amount of its original claim, but only for such deficit as remained unpaid. The equivalent of the remedy which was thus available to it without a receivership is, under the circumstances, the recognition of this deficit, and that only, as the basis of a ratable distribution, and this is the rule which will be followed.

For the trustee the further suggestion is made that it would be inequitable now to hold that so much of the income as has been applied by the receiver to new construction and to interest and sinking fund upon underlying divisional bonds is subject to distribution in this proceeding. But as shown by the paragraph hereinbefore quoted from the decree, which is binding upon the trustee, these funds are deemed to be on hand; they were permitted to be diverted with the express understanding that they would be restored. In theory, therefore, they never were disbursed, but have always remained, and are now, in the hands of the receiver. If it be said that, but for the receivership, the debtor might have expended them for the same purposes, to the benefit of the trustee, it may also be said that, but for the receivership, they might have been attached by the general creditors, and thus wholly lost to the trustee.

UNITED STATES v. LOMBARDO.

(District Court, W. D. Washington, N. D. November 10, 1915.)

No. 3117.

1. WITNESSES ⟸293—SELF-INCRIMINATION—EFFECT OF STATUTORY PROTECTION.

White Slave Traffic Act June 25, 1910, c. 395, § 6, 36 Stat. 826 (Comp. St. 1913, § 8817), requires every person keeping any alien woman or girl in any house or place for the purpose of prostitution, or for any other immoral purpose, to file with the Commissioner General of Immigration a statement in writing setting forth certain facts, and provides that any such person failing to file such statement shall be guilty of a misdemeanor, that no person shall be excused from furnishing the statement on the ground that it might tend to criminate him, but that no person shall be prosecuted "under any law of the United States" on account of anything truthfully reported in such statement. Rem. & Bal. Code Wash. §§ 2440, 2688, make it an offense to keep a house of prostitution, or to place a female therein with intent that she shall live a life of prostitution. *Held*, that section 6 violates Const. U. S. Amend. 5, providing that a party shall not be compelled in any criminal case to be a witness against himself, as a party harboring an alien for the purpose of prostitution is thereby required to furnish evidence which could be used against her in a prosecution for a violation of the state laws.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1009–1014; Dec. Dig. ⟸293.]

2. CRIMINAL LAW ⟸113—VENUE OF OFFENSES—OFFENSES AGAINST UNITED STATES—"FILE."

As Act March 3, 1891, c. 551, § 7, 26 Stat. 1085 (Comp. St. 1913, § 954) as amended by Act March 2, 1895, c. 177, 28 Stat. 780 (Comp. St. 1913, § 955), fixes the office of the Commissioner of Immigration at Washington, D. C., the offense of failing to file with such Commissioner the statement required to be filed by Act June 25, 1910, § 6, was committed at Washington, D. C., and the District Court for the Western District of Washington had no jurisdiction of a prosecution therefor, since the word "file" means to deliver to the office, and mailing the statement is not a filing thereof; a paper being filed when it is delivered to the proper official and by him received and filed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 190, 232; Dec. Dig. ⟸113.

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

Albino Lombardo was indicted for an offense. On demurrer to the indictment. Demurrer sustained.

Clay Allen, U. S. Atty., and Winter S. Martin, Asst. U. S. Atty., both of Seattle, Wash., for the United States.

Samuel A. Wright, of Seattle, Wash., and Frank H. Kelley, of Tacoma, Wash., for defendant.

NETERER, District Judge. [1] The indictment charges a violation of section 6 of the White Slave Traffic Act of June 25, 1910, 36 Stat. at Large, pages 826, 827. The sufficiency of the indictment is challenged by demurrer. The defendant contends that by section 6 of the act, supra, she is required by statements in writing to incrim-

inate herself under the criminal laws of Washington, and is deprived of her protection under the Fourth and Fifth Amendments, and that the saving provision of section 6, supra, granting immunity from prosecution under "any law of the United States," is not as broad as the provisions of the amendments, and therefore abridges her rights. In this connection it may be said that the laws of Washington make keeping a house of prostitution an offense punishable by fine and imprisonment. Sections 2688 and 2440, Rem. & Bal. Codes of Washington. If the defendant was harboring the party charged in the indictment for the purposes of prostitution, and she made the statement required by section 6, supra, she would be furnishing evidence which could be used against her in the prosecution for a violation of the laws of Washington.

Is the requirement a violation of the Fifth Amendment, which provides that a party "shall not be compelled in any criminal case to be a witness against himself" (herself)? The immunity granted by section 6 of the act is not as broad as the constitutional provision. Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110. In this case Justice Blatchford said that it was not possible that the meaning of this constitutional provision was limited to a case against the party himself. It seems that the Counselman Case applies directly to the issue here. Courts must jealously guard the rights guaranteed to accused persons, and save to them the constitutional protection. The Supreme Court, in Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, held the provisions of Revenue Act of June 22, 1874, c. 391, 18 Stat. 186, repugnant to the Fourth Amendment, which required a defendant to produce, on motion of the district attorney, his private books and papers in suits for penalties or forfeitures. In Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, the court held the protection of the Fourth Amendment to reach all alike, whether accused of crime or not, and that convictions by means of unlawful seizure or enforced confessions in violation of federal rights are not to be sanctioned by the courts, which are charged with guarding the constitutional rights, and directed the return of letters seized in violation of the protection given by the Fourth Amendment; application having been made for such return before trial. The same reason applies to the protection given by the Fifth Amendment, and to penalize the failure to give a statement which is self-incriminatory is beyond the power of the Congress.

The contention of the government that Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, is controlling, is not accepted. In the Brown Case the immunity granted by the act was held as broad as the Fifth Amendment by the majority of the Supreme Court, and this immunity amendment was passed by Congress after the decision in the Counselman Case, presumably for the purpose of meeting the objection urged in that case. The minority of the court by a dissenting opinion held the immunity provision not broad enough to meet the provisions of the Fifth Amendment. The immunity granted by this act is expressly limited to prosecutions "under the laws of the

United States," thus withdrawing the protection granted by the Fifth Amendment as to prosecutions under the state laws, and abridging the protection granted by section 9, art. 1, of the Constitution of Washington, which is not in harmony with the privileges and immunities granted to the citizens of the several states, and inhibitions placed upon the several states by the Constitution of the United States.

The Supreme Court of Missouri, in State of Missouri v. Simmons Hardware Co., 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676, considered a similar constitutional provision with relation to the act of the Legislature of 1889 "for the punishment of pools, trusts and conspiracies," which required an officer of every corporation to inform under oath the Secretary of State, under penalty of fine and imprisonment, concerning its business with relation to said act, which it held to be in conflict with the constitutional provision that "no person shall be compelled to testify against himself in a criminal case."

In People v. Rosenheimer, 70 Misc. Rep. 433, 128 N. Y. Supp. 1093, the court held unconstitutional a statute making it a felony for the owner of any motor vehicle, with knowledge that an injury had been occasioned by the operator's negligence or accident, to fail to stop and give his name and address and number of license to the injured person, or a police officer, etc., and at page 436 of 70 Misc. Rep., at page 1096 of 128 N. Y. Supp., the court said:

"A similar provision applicable to proceedings in the federal courts is found in the Fifth Amendment to the Constitution of the United States."

The state decisions are not controlling in federal courts, and are simply referred to for the purpose of showing the trend of thought of recognized legal minds upon a like issue as here presented. The manifest purpose of the constitutional provisions of the United States and the states is to place the stamp of silence upon parties or witnesses as to self-incriminating statements, and to keep inviolate the maxim "Nemo tenetur seipsum accusare." This section, I think is violative of the express provisions of the Fifth Amendment. Answering the suggestion of the district attorney that the privilege is personal and cannot be made by another, it is sufficient to say that the record discloses that the right is asserted by the defendant personally in her own behalf.

[2] The second contention of the defendant, that the court has not jurisdiction, must also be sustained. The gist of the offense is the failure "to file with the Commissioner General of Immigration" a statement, etc. By Act March 3, 1891, c. 551, § 7, 26 Stat. at Large, page 1085, as amended by Act March 2, 1895, c. 177, 28 Stat. page 780, the office of the Commissioner of Immigration was created and his office fixed at Washington, D. C. The government contends that the offense was a continuing one, and extended from this district to Washington, D. C., and that the filing of the statement need not be at the office in Washington, but may be deposited in the post office of the United States, addressed to the Commissioner General, and this forwarding through the usual course of mail should be considered as "filing," and that the failure to post within 30 days would commence

the offense, which would be continuous. This contention cannot be reconciled with the language employed in the act. The word "file" was not defined by Congress. No definition having been given, the etymology of the word must be considered, and ordinary meaning applied. The word "file" is derived from the Latin word "filum," and relates to the ancient practice of placing papers on a thread or wire for safe-keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. "Shall file" means to deliver to the office, and not send through the United States mails. Gates v. State, 128 N. Y. 221, 28 N. E. 373. A paper is filed when it is delivered to the proper official and by him received and filed. Bouvier, Law Dictionary; Hoyt v. Stark, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246; Wescott v. Eccles, 3 Utah, 258, 2 Pac. 525; In re Von Borcke (D. C.) 94 Fed. 352; Mutual Life Ins. Co. v. Phinney, 76 Fed. 618, 22 C. C. A. 425. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act.

The Interstate Commerce Act of February 4, 1887, c. 104, § 6, 24 Stat. 380 (Comp. St. 1913, § 8569), requires the filing of schedules of interstate rates with the Interstate Commerce Commission. The Elkins Act of February 19, 1903, c. 708, § 1, 32 Stat. 847 (Comp. St. 1913, § 8597), made the willful failure to "file" a misdemeanor, punishable in any federal court having jurisdiction within the district in which the offense was committed. Section 19 of the act (24 Stat. 386 [Comp. St. 1913, § 8590]) provides that the principal office of the Commission shall be in the city of Washington, D. C. The defendant was prosecuted in the Western district of New York, and the court, in New York Central & Hudson River Ry. Co. v. U. S., 166 Fed. 267, 92 C. C. A. 331, held that:

"The offense of failing to file the schedule with the Commission having been committed in Washington, in the District of Columbia, the * * * court of the Western district of New York had no jurisdiction."

This decision was accepted by the Department of Justice. It would seem as though this case was upon all fours with the case at bar; this being a stronger case, in view of the fact that under the provisions of the Interstate Commerce Act the Commission could hold sessions in places other than the place of its principal office.

The offense, if one was committed, was within the District of Columbia, and the defendant has the right, under the Sixth Amendment, to a public trial within that district.

The demurrer is sustained.

In re SAN ANTONIO LAND & IRRIGATION CO., Limited.

(District Court, S. D. New York. January 6, 1916.)

1. BANKRUPTCY ⟸51—VOLUNTARY PROCEEDINGS—VACATING ADJUDICATION.
In a voluntary proceeding, in which an adjudication immediately follows the filing of a petition, good on its face, without opportunity to any interested person to question the allegations of the petition, a petition to vacate on the ground that the court obtained no jurisdiction is the correct practice, where the residence, domicile, and principal place of business of the bankrupt are not as alleged, as these matters are jurisdictional.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 49; Dec. Dig. ⟸51.]

2. BANKRUPTCY ⟸51—VOLUNTARY PROCEEDINGS—VACATING ADJUDICATION.
Under Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560 (Comp. St. 1913, § 9641), providing for the proving of secured debts, mortgage bondholders of a corporation have standing to petition for the vacation of an adjudication on a voluntary petition on the ground that the bankrupt's principal place of business is in a different district.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 49; Dec. Dig. ⟸51.]

3. BANKRUPTCY ⟸51—VOLUNTARY PROCEEDINGS—VACATING ADJUDICATION.
A receiver of a corporation appointed by a state court had an interest in opposing a voluntary proceeding in bankruptcy, entitling him to file a petition to vacate the adjudication on the ground that the bankrupt's principal place of business was in a different district.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 49; Dec. Dig. ⟸51.]

4. BANKRUPTCY ⟸16 — PERSONS SUBJECT TO JURISDICTION — "PRINCIPAL PLACE OF BUSINESS."
The location of a corporation's principal place of business, within the meaning of the Bankruptcy Act, is determined purely by the facts, and not by the intention of the corporate authorities or the recitals in the charter.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. ⟸16.

For other definitions, see Words and Phrases, First and Second Series, Principal Place of Business.]

5. BANKRUPTCY ⟸16—PERSONS SUBJECT TO JURISDICTION—PLACE OF BUSINESS.
On a petition to vacate an adjudication in bankruptcy against a Canadian corporation organized to carry on the business of a land and irrigation company, evidence *held* to show that, while the corporation had attempted to do business in such a form as to avoid doing business in Texas, and though its business there was carried on through the medium of subsidiary corporations and passive trustees, its principal place of business was in fact in San Antonio, Tex.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. ⟸16.]

6. BANKRUPTCY ⟸16—PERSONS SUBJECT TO JURISDICTION—"PROPERTY WITHIN THE DISTRICT"—"BANKRUPTCY PROCEEDING."
Within the provision of the Bankruptcy Act giving jurisdiction to the court within whose district the alleged bankrupt has property, if it does not have its principal place of business, reside, or have its domicile within the United States, corporate stock and bond certificates pledged to a pledgee within a district, and the balance in an account with a trust

company therein, was "property within the district," as a "bankruptcy proceeding" is a kind of equitable attachment, which reaches whatever assets can be reached by any available judicial process, and the situs of property is not to be determined by general doctrines, such as "mobilia sequuntur personam."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. ⊂⊃16.

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

7. BANKRUPTCY ⊂⊃16—PERSONS SUBJECT TO JURISDICTION—PROPERTY WITHIN THE DISTRICT.

A deposit by a corporation to meet unpaid coupons on its bonds was not property belonging to the bankrupt within the district where it was deposited that would give jurisdiction of a bankruptcy proceeding, as the deposit was a trust deposit belonging to the holders of the coupons.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. ⊂⊃16.]

In Bankruptcy. In the matter of the San Antonio Land & Irrigation Company, Limited, bankrupt. On review of a master's report. Report modified and confirmed, and adjudication set aside.

Guggenheimer, Untermyer & Marshall, of New York City (Louis Marshall, of New York City, of counsel), for trustee in bankruptcy.

Gordon Auchincloss, of New York City, and F. C. Davis and Terrell, Walthall & Terrell, all of San Antonio, Tex., for receiver.

Gordon Auchincloss, of New York City, and Coke & Coke, of Dallas, Tex. (Alex. S. Coke, of Dallas, Tex., of counsel), for mortgage bondholders.

AUGUSTUS N. HAND, District Judge. The San Antonio Land & Irrigation Company, Limited, a Canadian Corporation, was adjudicated a bankrupt in this district on the ground that it did not have its principal place of business, reside, or have its domicile within the United States, but had property within the borough of Manhattan in the Southern district of New York. Prior to the filing of the petition in bankruptcy, a creditors' bill was filed in the courts of the state of Texas by certain mortgage bondholders, alleging the insolvency of the company, praying for a receiver, and impounding the assets of the corporation within that jurisdiction. The receiver appointed by that court and the creditors appearing in that litigation have petitioned this court to vacate the order of adjudication because the bankrupt did not have its principal place of business, residence, or domicile within this district, but had its principal place of business within the state of Texas. The court referred to John J. Townsend, Esq., as special master, the questions (1) whether the bankrupt had its principal place of business within this district; and (2) whether, if the bankrupt had no principal place of business within the United States it had property within this district. He reported that the bankrupt (1) had its principal place of business in Texas, and not in Canada or New York; and (2) it had certain property within this district. Upon the review of the master's report, counsel for the trustee makes two pre-

liminary objections: First, that the adjudication cannot be attacked collaterally, but only upon appeal; second, that the moving parties have no standing to institute the proceeding.

[1] In a voluntary proceeding, which this was, an adjudication in bankruptcy immediately follows the filing of a petition good on its face, without opportunity to any interested person to question the allegations of the petitioner. It seems to be entirely settled that allegations as to residence, domicile, and principal place of business are jurisdictional matters. A petition to vacate upon the ground that the court obtained no jurisdiction of the subject-matter, if these facts are not as alleged, is the correct practice. In re Garneau, 127 Fed. 677, 62 C. C. A. 403; In re Guanacevi Tunnel Co., 201 Fed. 317, 119 C. C. A. 554.

[2] The bondholders have an interest which gives them a proper standing. They have provable claims under section 57 of the Bankruptcy Act, which provides for the proving of secured debts. In re Sampter, 170 Fed. 938, 96 C. C. A. 98; United States Trust Co. v. Gordon, 216 Fed. 929, 133 C. C. A. 117.

[3] An adjudication in bankruptcy would vest the equitable title to the real estate in Texas in the trustee when appointed, unless the right of the state court receiver should prove to be superior. The latter, therefore, has an interest in attacking the bankruptcy proceeding, though it is difficult for me to reconcile some of the decisions in bankruptcy with the general rule that, to give a receiver standing in this court, an original bill must be filed and his appointment obtained in this jurisdiction. A receiver in equity, however, has been allowed to appear in bankruptcy and maintain his rights in the cases of In re Hudson River Electric Power Co. (D. C.) 173 Fed. 934 (which was affirmed by the Circuit Court of Appeals of this circuit 183 Fed. 701, 106 C. C. A. 139, 33 L. R. A. [N. S.] 454); In re Gold Run Mining & Tunnel Co. (D. C.) 200 Fed. 162; and Blackstone v. Everybody's Store, 207 Fed. 752, 125 C. C. A. 290. Upon the authority of these cases, I am of the opinion that the Texas receiver is a proper party to the proceeding.

[4] Having disposed of these preliminary objections to the proceeding, the main question must be considered as to where the principal place of business of the corporation was situated during six months prior to the filing of the petition. This, under the decisions, is determined purely by the facts, and not by intentions of the corporate authorities or recitals in the charter, which, in this case, stated "the chief place of business" was Toronto. Dressel v. North State Lumber Co. (D. C.) 107 Fed. 255; Tiffany v. La Plume Condensed Milk Co. (D. C.) 141 Fed. 444; Home Powder Co. v. Geis, 204 Fed. 568, 123 C. C. A. 94; In re Tennessee Const. Co. (D. C.) 207 Fed. 203.

[5] I can have no doubt that the officers and directors desired in this case to avoid doing business in Texas, and took various steps in an attempt to prevent their acts from having such a legal effect. They incorporated the Medina Valley Irrigation Company to build a dam for irrigation and own the dam site, and the Medina Townsite Company to purchase and sell town sites. If these companies, of

which the alleged bankrupt owned the stock, had been its only agencies of operation in the state of Texas, it would perhaps rightly be regarded as a mere holding company, coming within the doctrine laid down in Peterson v. Chicago, Rock Island & Pacific Ry. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841, and similar cases. It is perfectly true that, in the absence of fraud or violation of statutory prohibitions, the law will, as a rule, regard corporations as separate entities in every substantial sense, however intimately connected by stock control or common directors. Here, however, both according to the charter provisions of the bankrupt, the prospectus and interim report to the security holders, many letters and statements of its representatives, and the important fact that its bonds were the financial source of supply for all the work in Texas, the bankrupt was in fact in actual control of the business there. The Medina Companies were its creatures and agents. Under these circumstances, under the doctrine laid down in the case of In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530, it would seem to be reasonable to treat the business activities of the Medina Companies as those of the San Antonio Land & Irrigation Company, which directed their activities and held all of their stock. Palfrey was their common superintendent, and Dr. Pearson, the president of the Land Company, was the promoter and final director of the entire enterprise.

It is not necessary to regard the subsidiary corporations as nonexistent, or to disregard them in any way which would affect their separate creditors; but it is reasonable, I think, to treat them as agencies of the San Antonio Land & Irrigation Company, Limited. What impresses me most is the further circumstance that the three trustees, who held the lands and sold them for the San Antonio Land & Irrigation Company, Limited, were in reality and even in the most technical aspect mere passive trustees. They had no duties to perform, except to hold the title to the immense tract of land which was to be irrigated by the Medina Valley Irrigation Company, whose stock the San Antonio Company owned. Such a relation was no trust. There were no acts to be performed by the trustees, and no obligations, except to account for the proceeds of sales. Under the laws of most of our states, such a trust would execute itself, and the legal title would ipso facto vest in the beneficiary. No clearer case of a mere alter ego of the bankrupt, devised in the hope of avoiding the Texas law, can be imagined. The San Antonio Land & Irrigation Company, Limited, was authorized by its charter:

"To acquire by purchase or otherwise and hold lands, timber limits or licenses, water lots, water falls, water privileges or concessions and powers and rights and interests therein, and to build upon, develop, irrigate, cultivate, farm, settle, and otherwise improve and utilize the same, and to lease, sell, or otherwise deal with or dispose of the same, and generally to carry on the business of a land and land improvement and irrigation company."

In a letter written by Mr. Trueb, the secretary of the company, and included in the minutes, this company was said to have been—

"formed for the purpose of acquiring sixty thousand acres of land in the San Antonio District of Texas, and for irrigating and selling the same to settlers." Toronto Exhibit 2, p. 2.

In the interim report, Dr. F. S. Pearson, the company's president and the promoter of the whole enterprise, says this company—

"was created for the purpose of acquiring large areas of land in the vicinity of San Antonio, Tex., and developing an extensive irrigation system in connection therewith, with a view to reselling the lands with contracts to irrigate the same."

A corporation known as the Pacific Securities Company contracted to sell to the San Antonio Land & Irrigation Company, Limited, "approximately 60,000 acres of land" situated in Texas, the entire capital stock of the Medina Irrigation Company, and $1,600,000 bonds of the latter company, and was to receive in return $8,000,000 stock of the San Antonio Company and £1,200,000 bonds of the latter. The title to this large acreage was never in form in either the Pacific Securities Company or the San Antonio Land & Irrigation Company, Limited, but was purchased in the name of Cresson and was placed in the names of trustees, whose only duty was to hold it. This declaration of trust is of sufficient importance to quote:

"Whereas, the purchase money for all those tracts of land aggregating, approximately, 60,000 acres, located in the counties of Medina, Bexar, Atascosa, Frio, and Bandera in the said state of Texas, acquired and to be acquired in the names of William Aubrey, Franz C. Groos, and Leroy W. Baldwin, as trustees, has been and will be provided and paid by the Pacific Securities Company, Limited, of the Dominion of Canada, for the San Antonio Land & Irrigation Company, Limited, of said Dominion:

"Now, therefore, know all men by these presents that, at the request of said Pacific Securities Company, Limited, and said San Antonio Land & Irrigation Company, Limited, we, the said William Aubrey, Franz C. Groos, and Leroy W. Baldwin, as such trustees, do hereby declare that we stand and will hereafter stand seised of said lands, so acquired and to be acquired, in trust—

"First. For account of the Empire Trust Company of New York as trustee under the indenture of mortgage dated May 1, 1911, between said Land Company and said Trust Company, to secure an issue of said Land Company of one million six hundred thousand (1,600,000) pounds of its first mortgage bonds, and secured in trust for said San Antonio Land & Irrigation Company, Limited. That the said William Aubrey, Franz C. Groos, and Leroy W. Baldwin hereby covenant with said Pacific Securities Company, San Antonio Land & Irrigation Company, Limited, and said Empire Trust Company, and each of them, that we will hold and dispose of said lands as said indenture of mortgage directs, and, subject to said mortgage, as said San Antonio Land & Irrigation Company, Limited, may direct."

This transfer of the lands to these trustees was by virtue of a resolution of the San Antonio Company, directed to the Pacific Company, requesting such transfer. By a further resolution, H. I. Miller, vice president of the San Antonio Land & Irrigation Company, Limited (who lived in New York) was authorized to contract on behalf of that company for the sale of lands, and the trustees were "instructed to accept the directions and instructions of the said H. I. Miller." Page 53 of Minutes.

It is argued that the Pacific Securities Company, by a sale of the bonds of the San Antonio Land & Irrigation Company, Limited, which were transferred to the Pacific Securities Company in consideration for various securities belonging to that company and for the lands, was really the company that furnished the finances for the enterprise.

This is in a sense true; but the funds were procured from sales of the mortgage bonds of the San Antonio Land & Irrigation Company, Limited, and the latter company through its trustees owned the lands and sold a portion of them. The development and sale of these lands was the nature of its business and its ultimate corporate object. The Pacific Securities Company was a mere conduit for the issue and sale of securities. The purchase, development, and sale of lands was the essential business of the San Antonio Land & Irrigation Company, Limited, and that business, which was its only real business, was carried on in San Antonio, Tex. The title deeds and abstracts and all the detailed accounts were at San Antonio. The Pacific Securities Company, after the real business began, was a mere holding company. I cannot, under the circumstances, regard as determinative of the issue the fact that the book entries, the name of the corporation on the door, and other formal appearance in Texas, were so arranged as not to disclose the presence of the San Antonio Land & Irrigation Company, Limited, in that state, because the appearance was not the reality. The lands were purchased from the proceeds of the bonds of the San Antonio Land & Irrigation Company, Limited, and as a final result it owned those lands, subject to the bond issue above mentioned. The cost of the dam and its site, and also the cost of maintenance, were also furnished from the proceeds of these bonds. The Medina Valley Irrigation Company was wholly controlled by the San Antonio Land & Irrigation Company, Limited, through stock ownership.

It appears from the foregoing that the Pacific Securities Company was a holding company of the San Antonio Land & Irrigation Company, Limited; that the latter was an operating company, at least as regards the 60,000 acres, and a holding company of the Medina Valley Irrigation Company and the Medina Town Sites Company. The San Antonio Land & Irrigation Company, Limited, held its directors' and stockholders' meetings in Canada, but its essential operations were principally in San Antonio. There was its great property vested formally in trustees, but in all essential respects belonging to it and operated under its direction. Even though the Medina Companies be regarded as separate entities, and not mere corporate agencies, I think the legal mechanism of these trustees and the fact that accounts in Texas were in the names of the Medina Companies or the trustees does not outweigh the substantial essential fact that the San Antonio Land & Irrigation Company, at least in equity, and probably at law, owned the great acreage and absolutely directed the action of the trustees, whose only duty was to follow instructions and account. Mere forms and conduct of corporate meetings in Canada, and charter provisions as to where the principal place of business was situated, must yield to the foregoing facts, which clearly indicate that San Antonio was the principal place of business.

However careful the bankrupt may have been to avoid doing business in Texas, the attempt to secure such a result, in my opinion, was abortive. The belief that legal relations may be sufficiently established by mere technicalities is common enough, but is not often really true. Here the attempt to avoid doing business in Texas was based

upon form, but ignored substance. I am convinced that Texas was the place where all the business, except that of the most formal kind, was done, and that the principal place of business was San Antonio. This conclusion establishes that the adjudication in bankruptcy in this district was without warrant and must be set aside. I therefore overrule the exceptions to the master's report and hold that the principal place of business of the San Antonio Land & Irrigation Company was San Antonio.

[6, 7] In view of this, it is not necessary to consider whether there was property of the San Antonio Company within the Southern District of New York. For the purpose of making a record that may be available in case of an appeal, however, I will say that I think the meaning of the word "property" under the Bankruptcy Act should be much the same as that under judicial decisions relating to matters of taxation and attachment. In other words, a bankruptcy proceeding is a kind of equitable attachment, which should be held to reach whatever assets any available judicial process *can* reach. Consequently the situs of property is not to be determined by general doctrines, such as "mobilia sequuntur personam," which may well be applicable in matters like the law of inheritance, but by power of efficient control. Such a view is advantageous, in order to protect creditors and safeguard the taxing power. It is the real basis of the New York case of Simpson v. Jersey City Contracting Co., 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796, where the New York Court of Appeals held that stock of a nonresident in a foreign corporation, when pledged in New York, could be attached. I shall follow this case, and hold that the stock of the Medina Companies, belonging to the bankrupt and pledged to the Empire Trust Company, was property of the bankrupt within this district. The interim bond certificates of the Medina Valley Irrigation Company were pledged in the same way to the Empire Trust Company, and subject to this pledge the equity was properly regarded as property within this state. In the same way the balance of $8.06 in the account of the bankrupt with the Empire Trust Company was property within the district. The deposit to meet unpaid coupons was, however, a trust deposit belonging to the holders of the coupons, and not property within the district belonging to the bankrupt.

For the foregoing reasons, I modify the referee's report, so as to include the stock of the Medina Companies hypothecated to the Empire Trust Company and the $8.06 account as property of the bankrupt within the district, and, as so modified, confirm the report in all respects.

BRUNSWICK-BALKE-COLLANDER CO. v. EVANS et al.

(District Court, D. Oregon. January 3, 1916.)

No. 6940.

1. STATUTES ⇐118—TITLES AND SUBJECTS OF ACTS.
The title of Act Or. Oct. 19, 1864, entitled "An act to provide a Code of Criminal Procedure and to define crimes and their punishment" (Deady & Lane's Gen. Laws, p. 436, note), sufficiently expresses the subject-matter of such act, within Const. Or. art. 4, § 20, providing that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158–160; Dec. Dig. ⇐118.]

2. STATUTES ⇐118—TITLES AND SUBJECTS OF ACTS.
Const. Or. art. 4, § 20, requires the subject of every act to be expressed in the title. Section 22 provides that no act shall ever be revised or amended by mere reference to its title, but that the act revised or section amended shall be set forth and published at full length. Act Dec. 18, 1865, entitled "An act to amend an act entitled 'An Act to provide a Code of Criminal Procedure, and to define crimes and their punishments,' approved October 22, 1864" (Laws 1865, p. 34), amends section 653 of the Code to read as therein set forth. *Held*, that the title is sufficient, though it does not mention section 653, as reference to the body of the amendatory act removes any doubt as to the subject-matter involved.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158–160; Dec. Dig. ⇐118.]

3. STATUTES ⇐118—TITLES AND SUBJECTS OF ACTS.
Act Or. Dec. 18, 1865, the title of which recites that it is an act to amend an act to provide a Code of Criminal Procedure, provides that section 653 is thereby repealed, and "the following is enacted in place thereof"; such section as amended being then set out. *Held*, that this amounted to an amendment of the section, and the title was not insufficient because it failed to indicate that the purpose of the act was to repeal section 653.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158–160; Dec. Dig. ⇐118.]

4. STATUTES ⇐118—TITLES AND SUBJECTS OF ACTS.
That the title of Act Or. Dec. 18, 1865, amending Code Cr. Proc. § 653, incorrectly recites the date of the approval of the act enacting the Code, does not affect the sufficiency of such title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158–160; Dec. Dig. ⇐118.]

5. SUNDAY ⇐2—STATUTORY PROVISIONS—VALIDITY.
Statutes relating to the observance of Sunday are enacted in the legitimate exercise of the police power of the state.

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

6. CONSTITUTIONAL LAW ⇐240, 296—SUNDAY ⇐2—STATUTORY PROVISIONS—VALIDITY.
L. O. L. § 2125, provides for the punishment of any person keeping open any store, shop, etc., for the purpose of labor or traffic on Sunday, but provides that this shall not apply to the keepers of drug stores, doctor shops, undertakers, livery stable keepers, butchers, and bakers. *Held*, that this does not violate Const. U. S. Amend. 14, providing that no state shall deprive any person of life, liberty, or property without due process of law,

nor deny to any person within its jurisdiction the equal protection of the laws, as the Legislature did not go beyond its legitimate discretion, and arbitrarily set a classification upon certain occupations, without a reasonable basis for distinction between them and other occupations not included within the act, especially as any doubt should be resolved in favor of the validity of the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 692, 693, 697–699, 825–838, 840–846; Dec. Dig. ⊜240, 296; Sunday, Cent. Dig. § 2; Dec. Dig. ⊜2.]

7. CONSTITUTIONAL LAW ⊜84—RELIGIOUS LIBERTY—CONSTITUTIONAL PROVISIONS.

The United States Constitution makes no provision for protecting citizens of the respective states in their religious liberties, and imposes no inhibition on the states in this respect, and the matter is left exclusively to state Constitutions and laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 152–154; Dec. Dig. ⊜84.]

8. CONSTITUTIONAL LAW ⊜84—SUNDAY—STATUTORY PROVISIONS—VALIDITY.

L. O. L. § 2125, prohibiting the keeping open on Sunday of certain places of business, does not violate Const. Or. art. 1, § 3, providing that no law shall control the free exercise and enjoyment of religious opinions, or interfere with rights of conscience, as such laws are civil and not religious in character, and are not designed to restrain or coerce any religious observation of Sunday, but are enacted to protect all persons from the physical and moral debasement which comes from uninterrupted labor, and the fact that the law is sometimes called a "Sunday law," or that it is referred to in marginal notes by annotators as "profanation of Sunday," is immaterial.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 152–154; Dec. Dig. ⊜84.]

In Equity. Suit by the Brunswick-Balke-Collander Company against Walter H. Evans and others for an injunction. Injunction denied.

W. T. Hume, of Portland, Or., for complainant.

Walter H. Evans, Dist. Atty., and George Mowry, Deputy Dist. Atty., both of Portland, Or., and Joseph M. Devers, Dist. Atty., of Eugene, Or., for defendants.

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

WOLVERTON, District Judge. This is a suit to enjoin the enforcement of what is styled the Sunday closing law. The complainant represents itself as engaged in the manufacture and buying and selling of billiard tables and bowling alleys, and their furnishings and equipments, and alleges that its business within the state would be seriously and irreparably affected by an enforcement of the law. The defendants consist of divers prosecuting attorneys and sheriffs of the state of Oregon, who, it is further alleged, are enforcing and threatening to enforce the law. The law is claimed to be unconstitutional, and therefore void and inoperative, for several reasons, which will be discussed later.

First, let us take a survey of the history of the statute complained of. By an act of the Legislative Assembly of the state of Oregon,

approved October 19, 1864 (see footnote Deady and Lane's Code, p. 436), entitled "An act to provide a Code of Criminal Procedure, and to define crimes and their punishment," a Code of Criminal Procedure was adopted, consisting of 53 chapters and 731 sections. Among these was section 653, which reads:

"If any person shall keep open any store, shop, grocery, ball alley, billiard room, tippling house, or any place of amusement, or shall do any secular business or labor, other than works of necessity or mercy, on the first day of the week, commonly called Sunday, or the Lord's day, such person, upon conviction thereof, shall be punished by fine not less than five, nor more than fifty dollars. The following are deemed works of necessity:

"1. The buying and selling of meats, fish and milk at retail, before nine o'clock in the morning;

"2. The buying and selling drugs and medicines at retail or upon prescription;

"3. The selling of food, to be eaten on the premises where sold; and

"4. The keeping open of barber shops, and laboring at such trade until ten o'clock in the morning."

By an act approved December 18, 1865, entitled "An act to amend an act entitled 'An act to provide a Code of Criminal Procedure, and to define crimes and their punishment,' approved October 22, 1864," the Legislative Assembly made the following declaration:

"Be it enacted by the Legislative Assembly of the state of Oregon:

"Section 1. That section 653 of the above entitled act be and the same is hereby repealed and the following is enacted in place thereof:

" 'Sec. 653. If any person shall keep open any store, shop, grocery, ball alley, billiard room, or tippling house, for the purpose of labor or traffic, or any place of amusement, on the first day of the week, commonly called Sunday or the Lord's day, such person upon conviction thereof, shall be punished by a fine, not less than five, nor more than fifty dollars:

" 'Provided, that the above provision shall not apply to the keepers of drug stores, doctor shops, undertakers, livery stable keepers, barbers, butchers and bakers; and all circumstances of necessity and mercy may be pleaded in defense, which shall be treated as questions of fact for the jury to determine, when the offense is tried by jury.' "

Sess. Laws 1865, p. 34.

It will be noted that the words "or shall do any secular business or labor, other than works of necessity or mercy," contained in the original section, are omitted from the later enactment, and subsections 1, 2, 3 and 4 in the original act are superseded by the proviso in the later enactment. When Bellinger & Cotton's Code was compiled, section 653 became section 1968. By an act filed in the office of the secretary of state February 24, 1903, section 1968, B. & C. Comp. was amended, the amendment consisting in omitting the word "barbers" from the proviso and including "theaters" therein. This section as amended is now known as section 2125, Lord's Oregon Laws. This stands as the statute at the present time.

It is first urged with emphasis that the amendatory act of December 18, 1865, was adopted in violation of section 20, art. 4, of the Constitution of Oregon, in that the subject-matter of the act was not expressed in the title.

[1] It does not seem to be seriously questioned that the original title for the adoption of the Code of Criminal Procedure was sufficient,

as properly expressing the subject-matter of the act, although it dealt with practically the whole category of crimes, and the manner in which prosecution might be had and punishment enforced. True, the subject-matter in such a title would be expressed in a very general way, but nevertheless it would be described in the title. If it were held that such a title was insufficient for the purposes of the act, a needless amount of detail in legislation would be entailed, and to no practical purpose. But enactments of the kind are upheld by the courts, and, we think, properly. In re Donnellan, 49 Wash. 460, 95 Pac. 1085; Cook & Plunkett v. Marshall County, 119 Iowa, 384, 93 N. W. 372, 104 Am. St. Rep. 283.

[2] Now, the title being sufficient for an original act, it ought to be sufficient to amend by. As is said in State v. Phenline, 16 Or. 107, 109, 17 Pac. 572, 574:

"Amending a section of an existing act requires no new title; the same title applies as much to the act as amended as it did to the original one, and the title expresses the subject of it, unless there has been a clear departure and complete change of substance from the original."

See, also, Northern Pacific Express Co. v. Metschan (Circuit Court of Appeals, 9th Circuit) 90 Fed. 80, 32 C. C. A. 530.

It has become a practice of the Legislature to amend by mere reference to a section of the Compiled Laws of the state, then setting forth the section as amended, and this practice has been judicially approved, with the restriction only that the subject-matter of the amendment must be such as could have been included in the original act as matter properly connected therewith. Thus it was held in Ex parte Howe, 26 Or. 181, 184, 37 Pac. 536, 537, Mr. Justice Bean, now of this bench, writing the opinion, that a reference in the title of a legislative act to the particular section of a compilation sought to be amended—

"is a sufficient statement of the subject for a mere amendatory act, and if the provisions of the amendment could have been included in the original act without violating the Constitution, it is valid."

So it was held in a later case, Murphy v. Salem, 49 Or. 54, 58, 87 Pac. 532, 533:

"The title of an amendatory act is sufficient if it refers to the particular section it is intended to alter and is not violative of article 4, section 20, of the fundamental law of the state, unless the provisions of the amendment are such as could not have been included in the original act as matters properly connected therewith."

By section 22, art. 4, of the Constitution, no act can be amended by mere reference to its title, but "the act revised or section amended" is required to be set forth and published at full length. In determining the sufficiency of the title of an amendatory act, this section must be read in connection with section 20, art. 4, of the Constitution, and if it appears from the matter set forth in the body of the amendatory act that it is germane to the subject-matter of the original act, it would seem, applying the doctrine of the Phenline Case, that it is sufficient. That is to say, the intendment of both these constitutional

regulations is subserved if the title of the amendatory act is in effect to amend by the original title, or by section, and the section as amended is set forth and published in full, and the subject-matter thereof is germane to and is expressed in the original title.

The amendatory act of 1865 meets every requirement of these constitutional provisions as thus interpreted. True, the title would have been more definite and certain had it read "An act to amend section 653 of an act entitled an act," etc. But where reference is had to the body of the amendatory act, and we are apprised by section 22, art. 4, of the Constitution that the section as amended must be set forth in full, then, when read in connection with the title, there can be no further doubt touching the subject-matter involved, and, if that be germane to and is expressed in the title, the title is sufficient.

This much for the title of an amendatory act.

[3, 4] But it is further objected that section 1 of the act purports to repeal section 653, and that this provision for a repeal is nowhere expressed in the title. Reading the section further, however, we find it is declared in the same sentence that the "following" shall be "enacted in place thereof." This shows the method which the Legislature adopted for securing the amendment, which was to repeal and re-enact as amended, whereas the usual way is to declare that the law is amended to read "as follows"—setting out in full the law as amended. Both methods amount to the same thing. The true purpose was to amend, and the effect of the legislation was to amend. Knights Templars' Indemnity Co. v. Jarman, 187 U. S. 197, 205–257, 23 Sup. Ct. 108, 47 L. Ed. 139. So that, whether the Legislature adopted the one means or the other, the result was the same, and the title, therefore, is not objectionable for not stating that it was an act to repeal. It was sufficient that it stated the true intent, namely, that it was an act to amend. We think the subject-matter of the act was sufficiently expressed in the title, and therefore hold that the act is not void on account of the objections made to such title. Nor do we think that the mistake contained in the title respecting the date of the approval of the original act affects the question. State ex rel. v. Banfield, 43 Or. 287, 72 Pac. 1093.

This renders it unnecessary that we further discuss the later amendment of the section.

The next contention is that the act is void "as being in contravention of the Fourteenth Amendment of the Constitution of the United States, and section 20 of article 1 of the Constitution of the state of Oregon, in this: That the said amendment purports to make an arbitrary distinction between different businesses of the same general class, and to grant special privileges and immunities in this: That it provides a penalty for, and prohibits, the keeping open of any store, shop, grocery, ball alley, billiard room, or tippling house for the purpose of labor or traffic, or any place of amusement, on the day named, and exempts from the provisions of the act keepers of drug stores, doctor shops, undertakers, livery stable keepers, barber shops, and bakers."

This presents a question, as thus stated by counsel (for we have been quoting from counsel's brief), of both state and federal character, as to whether the law is in contravention, not only of the state, but of the

national, Constitution as well. The principle in controversy, however, is the same, whether we call it a state or a federal question. As a state question, the matter has been conclusively determined by the decisions of the Supreme Court of the state. Ex parte Northrup, 41 Or. 489, 69 Pac. 445; State v. Nicholls, 151 Pac. 473. In the latter case, a very recent one, the court dealt first with the police power and then with classification of the subjects of legislation. It was ascertained that the regulation of the pursuit of occupations on Sunday is referable to the police power of the state, and so, ascertaining as much, the court passed to the question of classification, and upheld the very law now assailed. By reason of the language of the learned judge, Mr. Justice Burnett, who announced the opinion, in passing to the question of classification, namely, "Granted the postulate that it is within the scope of the police power to suspend activity in certain vocations on Sunday," it is argued that the court did not decide the preceding question, nor intend to do so, but only assumed it to be the law, and therefore that the question is still open in the state court. The criticism is narrowly drawn, for the court was at pains, prior to proceeding at all with a discussion of the later question, clearly and specifically to decide the proposition which forms the basis of the postulate. Having conclusively and satisfactorily determined the law so to be, it became a postulate with the court—a thing properly assumed to be true; and that is the sense, no doubt, in which the language was used. The state question must be regarded as settled adversely to complainant's contention.

[5] But, were it at all questionable that the Sunday closing act relates to matter referable to the police power of the state under state adjudications, the subject has been put at rest by the Supreme Court of the United States, where it has been uniformly recognized that state laws of the kind here in controversy, relating to the observance of Sunday, are enacted in the legitimate exercise of the police power of the state. Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; Petit v. Minnesota, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716. It is unnecessary to pursue the particular subject further.

[6] We may now turn to the question whether the classification adopted by the Legislature, of occupations made amenable to the act, is obnoxious to the injunction of the Fourteenth Amendment to the federal Constitution. The clause of the amendment invoked by counsel is:

"Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The intendment of this clause is set out by Mr. Justice Field with his accustomed clearness in Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. 357, 359 (28 L. Ed. 923). Among other things, he says it was intended—

"not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; * * * that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under

like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. * * * But neither the amendment," he continues, "nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."

As it respects classification, it having been ascertained that the power to regulate the closing of business occupations on Sunday appropriately pertains to the police power of the state, the details of such regulation, and the exceptions proper to be made, very naturally rest with the discretion of the state Legislature, and—

"unless," says the court in Watson v. Maryland, 218 U. S. 173, 178, 30 Sup. Ct. 644, 646 (54 L. Ed. 987), "such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily, they are within the power of the state; and that the classification of the subjects of such legislation, so long as such classification has a reasonable basis, and is not merely arbitrary selection, without real difference between the subjects included and those omitted from the law, does not deny to the citizen the equal protection of the laws."

See also Griffith v. Connecticut, 218 U. S. 563, 569, 31 Sup. Ct. 132, 54 L. Ed. 1151, where the language above is quoted and the doctrine reaffirmed.

In a still later case (Mutual Loan Co. v. Martell, 222 U. S. 225, 235, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529), it was specifically held that, as to the classification, it "need not be scientific nor logically appropriate, and if not palpably arbitrary, and is uniform within the class," it is within the legislative discretion. And where the Legislature, under such discretion, has declared a particular policy, its action will not be disturbed by the federal courts as obnoxious to the Fourteenth Amendment, "unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." Missouri, Kansas & Texas Ry. Co. v. May, 194 U. S. 267, 269, 24 Sup. Ct. 638, 48 L. Ed. 971; Williams v. Arkansas, 217 U. S. 79, 90, 30 Sup. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865.

Now, applying these principles, it is very clear that the court cannot say that the Legislature of the state acted beyond its legitimate discretion and arbitrarily set a classification upon certain business occupations without reasonable basis for distinction between such occupations and other occupations not included within the act. If there were any doubt about the matter, it would be our duty to resolve the doubt in favor of the constitutionality and validity of the act. It follows that the act is not void as in contravention of the Fourteenth Amendment of the federal Constitution.

[7] The next contention is that the act interferes with the free exercise and enjoyment of religious opinion, in contravention of section 3, art. 1, of the state Constitution, which prescribes that:

"No law shall in any case whatever control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."

This is purely a state, not a federal, question. The Constitution of the United States makes no provision for protecting citizens of the re-

spective states in their religious liberties; nor does it impose any inhibition in this respect on the states. That is a matter left exclusively to the state Constitutions and laws enacted in pursuance thereof. Permoli v. First Municipality, 3 How. 589, 609, 11 L. Ed. 739.

[8] Laws setting aside Sunday as a day of rest, as usually adopted and promulgated, are generally upheld, not from any right of the government to legislate for the purpose of compelling any particular observance, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor.

"Such laws," says Mr. Justice Field, "have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities, and their validity has been sustained by the highest courts of the states." Soon Hing v. Crowley, 113 U. S. 703, 710, 5 Sup. Ct. 730 (28 L. Ed. 1145).

We need only look to the draft of the law in question to determine that it is not designed to restrain or coerce any religious observance of Sunday, but rather that the inhibition was imposed in the exercise of police regulation for the public welfare. It does not comprise all occupations and trades, but such only as the Legislature has, in its wisdom, thought to be detrimental to the health and morals of the community, if kept open on Sunday. If it were designed to promote Sunday observance as a religious rite, one would expect the law to be general, so as to affect all persons and individuals, whatever might be their occupations or pursuits, and not only the few occupations named and the persons engaged therein. The act, therefore, is essentially civil in character, and not religious; nor does it pertain to religious observance in any particular. The original act of 1864 was much broader in scope, forbidding any secular business or labor on Sunday. But, even viewed in its broadest sense, such an enactment is generally regarded as of civil import for the promotion of the health, peace, and good order of society, and not for the promotion of any religious observance. 37 Cyc. 541.

That the law is sometimes called a "Sunday law," or is referred to in marginal notes by annotators as "profanation of Sunday," does not alter the question. The interpretation must be had by a consideration of the act itself, and not by what it may be popularly called. Nor does the fact that the law has been but little enforced require its nullification now. The act is not in contravention of article 1, § 3, of the state Constitution.

It follows that the injunction prayed must be denied.

HAMMON v. HILL, Superintendent of Allegheny County Home and Hospital for Insane.

(District Court, W. D. Pennsylvania. October 29, 1915.)

No. 3.

CONSTITUTIONAL LAW ⊂=255—INSANE PERSONS ⊂=47—COMMITMENT TO ASYLUM—CONSTITUTIONALITY OF STATUTE.

Act Pa. May 8, 1883 (P. L. 21), which with prior acts provides a system adopted by the state for the care and treatment of insane persons, is not unconstitutional, as depriving persons of their liberty without due process of law, because it authorizes the confinement of insane persons without a previous trial, since it also provides that any person confined as insane shall be entitled to a judicial hearing on a writ of habeas corpus to determine the question of his sanity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 736–738, 740–745; Dec. Dig. ⊂=255; Insane Persons, Cent. Dig. § 74; Dec. Dig. ⊂=47.]

Petition for writ of habeas corpus by John Hammon, Sr., against D. R. Hill, Superintendent of the Allegheny County Home and Hospital for the Insane. Writ denied.

J. E. Little, of Pittsburgh, Pa., for petitioner.

Langfitt & McIntosh, of Pittsburgh, Pa., for respondent.

THOMSON, District Judge. The relator, John Hammon, Sr., asks for a writ of habeas corpus, alleging his illegal confinement in the Allegheny County Home and Hospital for the Insane, in violation of his rights under the Constitution of the United States. Whether the court should grant or refuse the writ, under section 755 of the Revised Statutes (Comp. St. 1913, § 1283), depends in this as in every other case upon the facts as set forth in the petition.

Turning to the petition, we find it alleges: That petitioner is confined and restrained of his liberty by virtue of a certain paper purporting to be a commitment committing relator to said asylum as an insane person, and that the sole authority by virtue of which relator is restrained and detained is the said commitment in writing, a copy of which is attached to and made part of the petition. That the said commitment was issued in a proceeding arising as follows:

On or about the 14th of August, 1913, one Anna M. Hammon, daughter of the relator, requested Dr. J. Lewis Srodes, the then superintendent of the said asylum, to receive relator, an insane person, as a patient in said hospital, expressing her belief that such attention was necessary for his benefit, which request was afterwards reduced to writing. That about the same time the relator was invited, while in Garrick, to take an automobile ride, which invitation he accepted, and that he was taken to the said asylum at Woodville, Allegheny county, Pa., where he has been since and is now forcibly restrained of his liberty. That according to the paper purporting to be a commitment on file in the office of the superintendent of said asylum, and under color of which he is restrained of his liberty, Drs. S. J. S. Fife and E. N. Husler, on the 14th and 15th days of August, 1913, respectively cer-

tified under oath that in their opinion the relator was insane; that the disease was of a character which required that he be placed in a hospital or other establishment where the insane are detained, for care and treatment. That thereupon one A. W. McMillen, a justice of the peace of the county of Allegheny, certified in the same paper, Exhibit A, that the said physicians had duly made oath to their certificate of insanity of the relator, and that their signatures thereto were genuine, and the signers physicians of good standing and repute, and that thereupon J. McB. Robb, a director of the poor of Allegheny county, ordered Dr. J. Lewis Srodes, superintendent of the said asylum, to admit relator as an insane person to the hospital.

He alleges that the act approved May 8, 1883 (P. L. 21), under which he was committed, violates the Fourteenth Amendment of the Constitution of the United States, in that he is restrained of his liberty without due process of law; that he was tricked into the asylum, examined without notice of the proceeding, and without a hearing or chance to defend, and has been incarcerated in the asylum for two years and upwards to the present time; that the said act is unconstitutional and void; that he is not committed or detained by virtue of any process of law known to the courts of the United States, or the several states, nor held in confinement by virtue of any final judgment or decree of any competent court or tribunal, or by virtue of any process issued upon such judgment, but is held without due process of law.

It thus appears that the relator is confined in an asylum for the insane, under the provisions of an act of assembly of Pennsylvania passed for the care and treatment of the insane. It is not averred in the petition that the relator was sane at the time of his commitment or at the time of the filing of the petition for the writ. On the contrary, the amendment to the petition avers that on August 27, 1913, one Chas. J. Speas, on behalf of petitioner, obtained a writ of habeas corpus under the said act of 1883 for the petitioner's discharge, and that on hearing the relator was found to be insane and remanded to the asylum. The petitioner, therefore, bases his right to discharge, notwithstanding his insanity, or presumptive insanity, on the unconstitutionality of the act under which he was committed, and that therefore he is restrained of his liberty without due process of law. A state would indeed be derelict of its duty if it failed to make adequate provision for the care and treatment of the insane. The state is the parens patriæ of the insane. In the case of Mormon Church v. United States, 136 U. S. 57, 10 Sup. Ct. 792, 34 L. Ed. 478, the Supreme Court, through Justice Bradley, quotes from Fontain v. Ravenel, 17 How. 369, 15 L. Ed. 80, as follows:

"When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states. And this power still remains with them, except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. The state, as a sovereign, is the parens patriæ."

The court then says:

"This prerogative of parens patriæ is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the Legisla-

ture, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves."

Nothing can be clearer than the duty of the state to restrain and confine the insane, not only for their own safety and protection, but for the safety and protection of the public. The relation between the two is that of guardian and ward. The confinement in an asylum is not of the same character as imprisonment for the punishment of an offense. It is a necessity growing out of the inability of the mentally afflicted to care for themselves or prevent injury to others. The state restrains the lunatic, not only for his own protection and the safety of the public, but its duty extends so far as to include every provision known to medical skill and science for the treatment of the diseased mind. Thus the work of the state in caring for the demented within her borders is at once protective in its character and highly humanitarian.

It is also true that, by reason of the character of the malady with which the insane is afflicted, the same course of procedure cannot be employed for their restraint, as in the case of those who are compos mentis. Notice or a hearing to the insane man is a vain thing, and frequently the exigency of the case is such as to call for immediate restraint to protect himself and others from his violent and unreasoning conduct. In 8 Cyc. 1093, the author says:

"A person's insanity justifies his arrest without legal process, but only where it is reasonably necessary; and an insane person may be confined, provided there are provisions for judicial investigations and determination of the question of sanity, with an opportunity given to him to be heard"—citing numerous cases.

Judge Cooley, in his work on Torts (page 179), says:

"An insane person, without any adjudication, may also lawfully be restrained of his liberty for his own benefit, either because it is necessary to protect him against a tendency to commit suicide, or to stray from those who would care for him, or because proper medical treatment requires it."

In Chevannes v. Priestly, 80 Iowa, 316, 45 N. W. 766, 9 L. R. A. 193, the court held that:

"The provision of the Constitution, that 'no person shall be deprived of life, liberty or property without due process of law,' does not require notice to a person, or his appearance, before he can be lawfully adjudged insane and restrained accordingly."

In this case the proceeding was under the act of May 8, 1883 (P. L. 21). There is no allegation that the course of procedure laid down in that act was not strictly complied with. This act is one of a number of acts forming part of the system adopted by the state for the care and treatment of the insane. Section 3 of the act of 1869 (P. L. 79), provides as follows:

"On a written statement, properly sworn or affirmed, being addressed by some respectable person to any law judge, that a certain person then confined in a hospital for the insane, is not insane, and is thus unjustly deprived of his liberty, the judge shall issue a writ of habeas corpus, commanding that the

said alleged lunatic be brought before him for a public hearing, where the question of his or her alleged lunacy may be determined, and where the onus of proving the said alleged lunatic to be insane shall rest upon such persons as are restraining him or her of his or her liberty."

This provision of the act is still in force. Section 11 of the same act provides:

"That nothing in this act shall be construed so as to deprive any alleged lunatic or habitual drunkard of the benefit of the writ of habeas corpus, or trial by jury, or any other remedy guaranteed to alleged lunatics or habitual drunkards by any existing laws or statutes of the commonwealth of Pennsylvania."

The act of 1883, above referred to, supplements the act of 1869, superseding certain of its sections, and it also gives judicial investigations and determination of the question of sanity, with a right to be heard. Section 31 provides:

"All persons that have been detained as insane (other than criminal insane, duly convicted and sentenced by a court) shall, as soon as they are restored to reason and are competent to act for themselves, in the opinion of the medical attendant of the house, be forthwith discharged; and any person so detained, shall, at all times, be entitled to a writ of habeas corpus for the determination of this question, and on the hearing, the respondent in that writ shall be required to pay the costs, and charges of the proceeding, unless the judge shall certify that there was sufficient ground, in his opinion, to warrant the detention, and put the petitioner to his writ; in case the discharged patient be in indigent circumstances, such person shall be furnished with necessary raiment, and with funds sufficient for sustenance and travel to his home, to be charged to the county from which such patient was committed."

Similar acts in other states have been sustained as constitutional. In re James Dowdell, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290; In re Le Donne, 173 Mass. 550, 54 N. E. 244; Ex parte Dagley, 35 Okl. 180, 128 Pac. 699, 44 L. R. A. (N. S.) 389; People ex rel. Peabody v. Chanler, 133 App. Div. 163, 117 N. Y. Supp. 322.

It appearing, therefore, that the petitioner is restrained and confined in an asylum for the care and treatment of the insane under and in accordance with the provisions of an act of assembly of the state of Pennsylvania; that this act is one of a number of acts constituting a system adopted by the state for the care of her insane; that the act under which relator was committed, or the act to which it is supplementary has not been declared unconstitutional, or in any respect illegal by the courts of Pennsylvania; that these acts provide a method by which the sanity of the relator can at any time be judicially determined on his application; that it is not even alleged that at the time of his commitment, or at the present time, he is sane, and it appearing that his insanity was adjudged by a court of competent jurisdiction upon a hearing upon a writ of habeas corpus sued out under the act of 1883, I conclude that the relator is not restrained in violation of any right guaranteed to him under the Constitution of the United States.

The writ of habeas corpus prayed for is therefore denied.

In re BOYD.

(District Court, E. D. Tennessee, S. D. June 8, 1915.)

No. 1868.

1. BANKRUPTCY ⟸229—CONTEMPTS—RESISTANCE OF ORDERS OF REFEREE—"RESIST."

Bankr. Act July 1, 1898, c. 541, § 41, 30 Stat. 556 (Comp. St. 1913, § 9625), provides that a person shall not, in proceedings before a referee, disobey or resist any lawful order, process, or writ, and that the referee shall certify the facts to the judge, if any person shall do any of the things thereby forbidden, and the judge shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if it warrants him in so doing, punish such person as for a contempt committed before the court of bankruptcy. *Held* that, where a referee orders the trustee to sell property at private sale, the act of inducing a person who has bid upon the property to withdraw his bid before the sale is closed for a secret consideration, in order that the property may be bid in at a lower price by another, is a resistance to such order, as distinguished from a direct disobedience, and is punishable as a contempt, since it defeats the order of the referee pro tanto, and frustrates its primary purpose of having the property sold to the highest bidder, and "resist" means to withstand; oppose, passively or actively; antagonize; act against; or exert physical or moral force in opposition to.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. ⟸229.

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

2. BANKRUPTCY ⟸229—CONTEMPTS—PURGING BY OATH.

Bankr. Act, § 41, providing that, upon a certificate by the referee that any person has done any of the things thereby forbidden, the judge shall in a summary manner hear the evidence as to the acts complained of, requires a hearing as to the facts, and by necessary implication excludes any inference that the alleged contemnor is to be purged merely by denial upon oath.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. ⟸229.]

3. BANKRUPTCY ⟸229—CONTEMPTS—PUNISHMENT.

Judicial Code (Act March 3, 1911, c. 231) § 268, 36 Stat. 1163 (Comp. St. 1913, § 1245), provides that courts of the United States have power to punish by fine or imprisonment contempts of their authority. A referee in bankruptcy having ordered a private sale of the bankrupt's property, the bankrupt and a member of a firm of creditors consciously and deliberately participated in the act of inducing a bidder to withdraw his bid, in consideration of $200 to be paid him, to enable such firm of creditors to buy the property at a lower price, primarily for the benefit of the bankrupt, and secondarily for the benefit of such creditors. *Held* that, in view of the lack of general knowledge in the community that conduct of this kind constituted contempt, the ends of justice would be sufficiently met by the imposition of a suitable fine, and the offenders would each be fined $100, together with all incidental costs.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. ⟸229.]

In Bankruptcy. In the matter of J. H. Boyd, bankrupt. On certificate of the referee charging the bankrupts and others with contempt.

Order entered discharging one of the defendants, fining two other defendants, and continuing the proceeding as to a fourth defendant.

The referee in bankruptcy filed a certificate in general accordance with section 41b of the Bankruptcy Act, setting forth an alleged contempt committed by Boyd, the bankrupt, Heard, his attorney, Dethridge, the trustee, and one Sawyer, in connection with inducing one Coplan, who had submitted a bid to the trustee on the property of the bankrupt estate, being sold at private sale under order of the referee, to withdraw his bid, upon the promise of a money consideration, in order that such property might be bought at a lower price by the firm of which said Sawyer was a member, a creditor of the bankrupt. Upon this certificate the District Judge entered a rule to show cause against the alleged contemnors, designating therein the United States Attorney to appear and conduct the proceedings against them. The several alleged contemnors appeared, filed sworn answers in denial, and before and after filing such answers entered severally various motions to dismiss the proceedings for want of jurisdiction and by reason of their sworn denials. Final ruling on these motions was reserved by the judge at the time; and oral testimony heard before him as to the merits of the controversy, except as to the defendant Heard, who was granted a continuance on account of illness.

Lewis M. Coleman, U. S. Atty., of Chattanooga, Tenn., for prosecution.

Thomas S. Myers, of Chattanooga, Tenn., for bankrupt.

Floyd Estill, of Winchester, Tenn., for alleged contemnors Heard and Dethridge.

Louis Leftwich, of Nashville, Tenn., for alleged contemnor Sawyer.

SANFORD, District Judge. After careful consideration, I have reached the following conclusions:

[1] 1. Where a referee in bankruptcy proceedings has ordered the trustee to sell property of the bankrupt estate at private sale, the act of inducing a person who has bid upon the property to withdraw his bid before the sale is closed, for a secret consideration, in order that the property may be bid in at a lower price by another, is a resistance of a lawful order of the referee in proceedings before him, within the meaning of section 41 of the Bankruptcy Act, providing that:

"A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ."

The effect of the order of the referee is that the trustee shall sell the property to the highest bidder. The buying off of one bidder in order that the property shall not realize the highest price, but shall be bid in at a lower price by another, to the prejudice of the bankrupt estate, is an act which pro tanto defeats the order of the referee and frustrates its primary purpose of having the property sold to the highest bidder. The first definition of the verb "resist," as given in the Century Dictionary, is:

"To withstand; oppose, passively or actively; antagonize; act against; exert physical or moral force in opposition to."

I am constrained to conclude that to secretly buy off an actual bidder at such trustee's sale is an act in opposition to the order of the referee directing the sale, which impedes the trustee in its execution and partially frustrates its primary purpose, and that hence it is properly to be regarded as a resistance thereto, as distinguished from a direct disobedience, coming within both the letter and the spirit of this inhibition of the Bankruptcy Act. And see, by analogy, Quidnick Co. v. Chafee, 13 R. I. 367, 422, 431, and 9 Cyc. 20, note 94, to the effect that withdrawing an offer to bid at a trustee's sale may constitute a contempt of court. The case of In re Probst (2d Circ.) 205 Fed. 512, 123 C. C. A. 580, in which no order had been made by the referee, is not in conflict with this conclusion, and is furthermore itself not in harmony with the earlier case of Clay v. Waters (8th Circ.) 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897; the effect of this section of the Bankruptcy Act, however, not having been called to the attention of the court or considered in either of these cases.

Clause "b" of this section of the act further provides that if any person shall do any of the things forbidden therein the referee shall certify the facts to the judge, who shall, after a hearing, if the evidence so warrants, "punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy."

I am hence of opinion that the motions of the several defendants to dismiss these proceedings on the ground, in effect, that the referee's certificate, which was duly filed under this clause, fails to show any acts on their part rendering them guilty of contempt or which can properly be certified to the judge under this section of the Act, are not well taken.

[2] 2. I am likewise of opinion that the alleged contemnors are not purged by their sworn answers in denial. To what extent the doctrine of purgation now applies in cases of criminal or civil contempt, or in common law or equitable proceedings, need not now be determined. See United States v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265; United States v. Anonymous (C. C.) 21 Fed. 761; United States v. Sweeney (C. C.) 95 Fed. 434; Employers' Co. v. Teamsters' Council (C. C.) 141 Fed. 679; In re Fellerman (D. C.) 149 Fed. 244; United States v. Debs (C. C.) 64 Fed. 724; Coleman v. State, 121 Tenn. 1, 113 S. W. 1045, and cases therein cited. Independently of any general rule upon this subject, it is specifically provided by clause b of this section of the Bankruptcy Act that, upon a certificate by the referee that any person has done any of the things therein forbidden, "the judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of." This provision clearly requires a hearing as to the facts, and, in my opinion, by necessary implication excludes any inference that in such case the alleged contemnor is to be purged merely by denial upon oath. The motions of the several defendants to dismiss the proceedings because of the filing of their sworn answers are hence, in my opinion, not well taken.

[3] 3. On the merits of the case, as stated at the hearing, I am of

opinion that under all the evidence a case has not been made against the alleged contemnor Dethridge, the trustee. But I am, after careful consideration of all the evidence, satisfied beyond a reasonable doubt that the alleged contemnors Boyd and Sawyer consciously and deliberately participated in the act of inducing Coplan to withdraw his bid, in consideration of $200 to be paid him, thereby enabling the Kornam Sawyer Co. to buy the property at a lower price, primarily for the benefit of Boyd, and secondarily for the benefit of the company.

4. Under all the circumstances, however, I am of opinion, especially in view of the fact that this is apparently the first case of this character to come before the courts, and there was, I think, no general knowledge in the community that conduct of this kind constituted contempt of the authority of the referee, that the ends of justice will be sufficiently met by the imposition of a suitable fine, as authorized by section 268 of the Judicial Code, with costs.

5. An order will accordingly be entered overruling the several motions of the defendants to dismiss the proceedings; discharging the defendant Dethridge; adjudging that the defendants Boyd and Sawyer have resisted an order of the referee in proceedings before him, and that each of them pay the United States of America a fine of one hundred dollars, together with all costs incident to the making of each of them a party to this proceeding; and on the application of the defendant Heard, and on account of his illness, continuing this proceeding as to him for hearing on pleadings and proof at a time and place to be hereafter designated by the court upon application of the parties.

THE ALOLA.

(District Court, E. D. Virginia. December 16, 1915.)

COLLISION ⊜25—LIMITATION OF LIABILITY—FAULT IN MANAGEMENT OF VESSEL.

The owner of a motorboat, properly manned and equipped, is entitled, under Rev. St. § 4283 (Comp. St. 1913, § 8021), to a limitation of liability on account of a collision which occurred without his privity or knowledge, as under said statute the negligence of those in charge of its navigation cannot be imputed to him.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 21; Dec. Dig. ⊜25.]

In Admiralty. Suits by I. W. Haywood, administrator of the estate of George W. Haywood, deceased, against H. C. Burdick, owner of the gasoline motorboat Alola, and against said vessel. Decree for respondent in first suit, and for libelant in second suit.

Edward R. Baird, Jr., of Norfolk, Va., for libelant.

H. H. Little, of Norfolk, Va., for respondents.

WADDILL, District Judge. The collision in this case occurred in Norfolk harbor, on the 9th day of August, 1915, about 9 o'clock in the forenoon, between the gasoline motorboat Alola, 45 feet 9 inches long

and 9 feet 8 inches beam, and a small rowboat; the motorboat running into and capsizing the rowboat, and libelant's decedent was drowned.

The question presented on the testimony adduced before the court, and arguments of counsel thereon, is whether or not the owner of the motorboat is entitled to a limitation of liability under the act of Congress providing therefor in certain cases; the vessel's responsibility for the accident being in effect conceded.

Respondent relies on the provisions of section 4283 of the Revised Statutes (Comp. St. 1913, § 8021) for his exemption from liability. He insists that the vessel was properly manned and equipped, and, while it is true the decedent lost his life in the collision, that it occurred from causes entirely without the privity or knowledge of the respondent, as owner of the motorboat; whereas, the libelant insists that such collision was brought about by the acts and omissions of those in charge of the motorboat, agents of the respondent, for whose negligence he is primarily liable, or whose faults are imputable to him.

The conclusion of the court on the testimony adduced is that the respondent is entitled to the benefit of the limitation of liability claimed by him. The evidence establishes that the vessel was properly manned and equipped at the time of the accident; that the same occurred without the respondent's privity or knowledge, and hence he is not liable for the same. Respondent, under the act of Congress in question, is only chargeable for his own willful and negligent acts, and the negligence of those in charge of the navigation of the vessel, to which he was not privy, and of which he had no knowledge, will not be imputed to him. The Republic, 61 Fed. 109, 112, 9 C. C. A. 386, and cases cited; The Tommy, 151 Fed. 570, 573, 81 C. C. A. 50, and cases cited.

A decree may be entered holding those in charge of the navigation of the motorboat to be in fault, and decreeing in favor of the libellant for the amount received from the sale of the motorboat in these proceedings, and declaring the owner personally entitled to exemption from personal liability on account of this accident.

In re NOVELTY WEB CO.

(District Court, D. New Jersey. January 17, 1916.)

CHATTEL MORTGAGES ⊂⊃63—STATUTORY AFFIDAVITS—REQUISITES AND SUFFICIENCY.

1 Comp. St. N. J. 1910, p. 463, § 4, makes chattel mortgages void as against subsequent purchasers and mortgagees in good faith, unless the mortgage is recorded and has annexed thereto an affidavit or affirmation by the holder of the mortgage stating the consideration thereof and as nearly as possible the amount due and to grow due. A chattel mortgage was dated June 17th, and an affidavit, sworn to June 20th, stated that the consideration was that the deponent had that day loaned to the mortgagor a specified sum for one year, with interest, that the mortgage was given to secure the payment thereof, and that there was due and to grow due thereon the sum specified, with interest from June 17th. The loan was in fact made by parties other than the mortgagee, to whom he

assigned the mortgage; but the money was advanced in the form of checks, which were delivered to the mortgagee and by him indorsed to the mortgagor. No money had been loaned, however, on June 20th, and there was then only an agreement to loan. The money was subsequently advanced in different amounts on June 21st, 22d, and 29th, and September 19th. *Held* that, while the statement that the loan was by the mortgagee was, strictly speaking, true, the statement that the consideration was money that day loaned was not even substantially true and the mortgage was void as to creditors as the affidavit wholly misstated the true consideration.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 125–135; Dec. Dig. ⟸63.]

In Bankruptcy. In the matter of Novelty Web Company, bankrupt. On petition to review an order of the referee adjudging a chattel mortgage given by the bankrupt to B. Edmund David and others to be a valid and subsisting lien upon the assets of the bankrupt, and as such entitled to priority in payment over a claim of Edwin M. Guinzburg for rent. Order reversed.

Jay C. Guggenheimer, of New York City, for Edwin M. Guinzburg.
William V. Rosenkrans, of Paterson, N. J., for chattel mortgagees.

HAIGHT, District Judge. The only question to be decided is whether the affidavit annexed to a chattel mortgage, given by the bankrupt to B. Edmund David and others, correctly sets forth the consideration of the mortgage and the amount due and to grow due thereon, as required by the New Jersey statute concerning chattel mortgages. 1 N. J. Comp. Stat. p. 463, § 4. The affidavit in question is as follows:

"The true consideration of said mortgage is as follows, to wit: That deponent [the mortgagee] *this day loaned* to the said Novelty Web Company, party of the first part hereto [the bankrupt], the sum of $3,000 for one year, with interest thereon at the rate of 6 per cent. per annum, and that this mortgage is given to secure the payment thereof and deponent further says that there is due and to grow due on said mortgage the sum of $3,000, besides lawful interest thereon from the 17th day of June, 1912."

The mortgage was dated on June 17, 1912, but the affidavit was not sworn to until June 20th. The facts found by the referee, and disclosed in the evidence, in respect to the consideration of the mortgage are briefly these: The bankrupt, being in financial difficulties, in the early part of June, 1912, placed the conduct of its business in the hands of three trustees for the benefit of its creditors. At the same time its board of directors passed a resolution directing its officers to borrow $3,000, to pay certain wage claimants and small creditors, and to execute a chattel mortgage, as security therefor, upon all of its machinery, chattels, and fixtures. The company being unable to procure the loan from other sources, the trustees agreed to make it themselves, but thought it improper to take the mortgage in their own names. Accordingly it was arranged that the original mortgagee, an employé of one of the trustees, should take the mortgage in his name. This he did, and on the same day that it was executed he assigned it to the trustees. The full amount which the mortgage was given to secure was actually advanced to and used by the bankrupt. The several trustees advanced various amounts. In each case,

according to the evidence, they respectively gave their personal checks to the original mortgagee, who thereupon indorsed the same over to the bankrupt. No money was advanced under this mortgage, however, until the 21st of June, 1912, at which time $752.33 was paid. The balance of the $3,000 was paid as follows: On June 22d, $247.67; on June 29th, $1,000; and on September 19th, $1,000.

In reality, therefore, no money was loaned to the bankrupt by the mortgagee; but the loan was made by his assignees. Yet, strictly speaking, the statement in the affidavit annexed to the mortgage, that the money was loaned by the mortgagee, was true. But the allegation of the affidavit, that the consideration of the mortgage was $3,000 *this day loaned* to the said Novelty Web Company, was not true in any aspect, because neither on the date of the mortgage nor the date that the affidavit was sworn to had any money been loaned by the mortgagee to the bankrupt. At most, there was but an agreement to loan. At least $1,000 was not actually loaned and advanced until nine days thereafter, and another $1,000 until three months thereafter. There is nothing to show that the money was even set apart for the bankrupt, but the reasonable conclusion to be drawn from the evidence is to the contrary. The above-mentioned provision of the New Jersey Chattel Mortgage Act has been uniformly construed by the courts of New Jersey to require that the affidavit of consideration, annexed to a chattel mortgage, must substantially show how the relation of creditor and debtor between the mortgagor and the mortgagee was created (Graham Button Co. v. Spielmann, 50 N. J. Eq. 120, 24 Atl. 571, affirmed Spielman v. Knowles, 50 N. J. Eq. 796, 27 Atl. 1033; Dunham v. Cramer, 63 N. J. Eq. 151, 51 Atl. 1011; Collerd v. Tully, 78 N. J. Eq. 557, 80 Atl. 491, Ann. Cas. 1912C, 78 [Ct. of E. & A.]); and also that it must be substantially true (Fletcher v. Bonnet, 51 N. J. Eq. 615, 28 Atl. 601 [Ct. of E. & A.]; Boice v. Conover, 54 N. J. Eq. 531, 35 Atl. 402; Miller v. Gourley, 65 N. J. Eq. 237, 55 Atl. 1083; Howell v. Stone & Downey, 75 N. J. Eq. 289, 292, 71 Atl. 914 [Ct. of E. & A.]). In Boice v. Conover, supra, Vice Chancellor Emery said (54 N. J. Eq. 538, 35 Atl. 405):

"Neither, as it seems to me, can the validity of the mortgage depend on the honesty of an affiant in making an affidavit which is substantially untrue."

While it has recently been held by the Court of Errors and Appeals of New Jersey that, in the absence of fraud, where there is an honest and substantial compliance with the statute, the mortgage will not be open to attack of other creditors merely because the affidavit is inartificially drawn and not technically precise (American Soda Fountain Co. v. Stolzenbach, 75 N. J. Law, 721, 68 Atl. 1078, 16 L. R. A. [N. S.] 703, 127 Am. St. Rep. 822; Howell v. Stone & Downey, supra; Simpson v. Anderson, 75 N. J. Eq. 581, 73 Atl. 493; Breit v. Solferino, 77 N. J. Law, 436, 72 Atl. 79), still I think it is clear, especially when the still later decision of that court in Collerd v. Tully, supra, is considered, that it was not intended by the decisions in those cases to lessen the rigor of the rule which had theretofore existed, that the affidavit, either alone or read in connection

with the mortgage, should truthfully and fully set forth the consideration. In all of those cases the affidavit was either "inartificially drawn and not technically precise," or contained matter which could properly be rejected as surplusage. I cannot conceive how it can be said that an affidavit, which explicitly states that the consideration was money loaned on a certain day, is merely inartificially drawn and substantially complies with the statute, when the true facts are that no money was loaned on that day, and, for that matter, a very substantial part of the consideration was not loaned until several months thereafter. Such an affidavit does not state the consideration with substantial truth; nor can the truth be ascertained by reading the mortgage and the affidavit together. The defect does not lie in the fact that the affidavit is not technically precise, but in that it wholly misstates the true consideration.

The mortgage is therefore void. If a mortgage with such an affidavit were held valid, frauds, which the courts in most instances would be powerless to detect, could easily be perpetrated, and thus one of the salutary aims of the statute be nullified. It would not be difficult to imagine a situation such as this: One would place a chattel mortgage on his property for say $5,000, the mortgagee agreeing to loan this sum, but in reality never advancing more than a small part thereof; while such a mortgage remained of record, with an affidavit that the consideration was $5,000 loaned, creditors could thereby be hindered from proceeding to collect their debts, which they might otherwise have done, had they known that, in fact, there had been actually loaned and was due on the mortgage only a small part of the sum mentioned in the affidavit, and the balance represented merely what the mortgagee had agreed to loan.

I think, therefore, that the referee was in error in holding the David chattel mortgage to be a valid lien upon the bankrupt's property. Accordingly, the order of the referee, in so far as it sustains the validity of that mortgage, will be reversed.

ROUNTREE et al. v. MT. HOOD R. CO. et al.

(District Court, D. Oregon. January 10, 1916.)

No. 6983.

1. REMOVAL OF CAUSES ⇐107—SEPARABLE CONTROVERSIES—JOINT OR SEVERAL CAUSES OF ACTION.

Whether an action against resident and nonresident defendants is joint or several is a question exclusively for the state court to determine, and where plaintiff has in good faith elected to make a joint cause of action, the question of proper joinder will not be tried in the removal proceedings, and for the purpose of removal the case must be held to be that which plaintiff has stated in his cause of action.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225–232, 234; Dec. Dig. ⇐107.]

2. REMOVAL OF CAUSES ⇐49—SEPARABLE CONTROVERSIES—JOINT OR SEVERAL CAUSES OF ACTION.

Where defendants who are manifestly not liable jointly are nevertheless joined, it may reasonably be presumed that the act of joinder was

not an act of good faith, but was done for some ulterior purpose and such joinder does not prevent removal by a nonresident defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95–99; Dec. Dig. ⇐49.]

3. REMOVAL OF CAUSES ⇐107—SEPARABLE CONTROVERSIES—JOINT OR SEVERAL CAUSES OF ACTION.

In an action in a state court against a nonresident railroad company and its resident general manager for damages from fire, the complaint alleged that the corporation, jointly with the general manager, did the acts complained of, resulting in the escape of fire from the right of way. The railroad company's petition for removal showed that it managed its business through several wholly independent departments, each having its head officer; that such general manager had control of that department of the business pertaining to the general policy of the company, but had nothing whatever to do with the care, control, or management of the right of way, the repair, maintenance, or operation of the rolling stock, or care, repair, or maintenance of the roadbed; and that the operating department was under the exclusive control of a superintendent. This petition was supported by affidavits to the same effect, but was traversed by an answer, and plaintiffs filed an affidavit showing that on the trial of another action, the general manager gave evidence tending to show that he had and exercised authority in employing, paying, and discharging employés in and about the right of way. The general manager admitted giving this testimony, but explained that what he did was in connection with a settlement through which suggestions only were made by him. *Held*, that a legal question as to the liability of the general manager and his joint liability with the company was presented, and hence the cause was not removable, as the court could not conclude that the joinder of the general manager was without right and in bad faith.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225–232, 234; Dec. Dig. ⇐107.]

At Law. Action by W. H. Rountree and another against the Mt. Hood Railroad Company and another. On motion to remand to the state court. Motion allowed.

A. J. Derby, of Hood River, Or., for plaintiffs.

Huntington & Wilson, of Portland, Or., and Ernest C. Smith, of Hood River, Or., for defendants.

WOLVERTON, District Judge. This cause having been removed from the state court to this, the matter now comes up on a motion to remand. The defendant railroad company is a citizen and inhabitant of the state of Utah, but is engaged in the business of operating a railroad within the county of Hood River, state of Oregon. The defendant Early is its general manager, and is a citizen and resident of the state of Oregon. Plaintiffs complain of injuries sustained by reason of the escape of fire from the railroad company's right of way.

[1] The real question presented for decision is whether Early was made party defendant in bad faith merely for the purpose of circumventing jurisdiction of a federal court on a cause for removal. It has become the settled law of the Supreme Court of the United States that, whether the action is joint or several only is a question exclusively for the state court to determine. In other words, if the plaintiff has in good faith elected to make a joint cause of action, the ques-

tion of proper joinder is not to be tried in the removal proceedings, and, however it may turn out upon the merits, for the purpose of removal the case must be held to be that which the plaintiff has stated in his cause of action. Alabama Great Southern Railway Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; Wecker v. National Enameling Co., 204 U. S. 176, 182, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757.

"The motive of the plaintiff" says the court in Chicago, R. I. & Pac. Ry. v. Schwyhart, 227 U. S. 184, 193, 33 Sup. Ct. 250, 251 (57 L. Ed. 473) "taken by itself, does not affect the right to remove. If there is a joint liability, he has an absolute right to enforce it, whatever the reason that makes him wish to assert the right."

[2] It may reasonably be presumed, however, where defendants, manifestly not jointly liable, are nevertheless joined, that the act of joinder was not an act of good faith, but was done for some ulterior purpose, and I take it that such an act could not well be made the basis for resisting removal. But if the legal question is presented whether the defendants joined are jointly liable, that becomes a matter for determination by the state court, and not the federal, although there might be a cleavage in the holding on that question by the two jurisdictions.

[3] With these premises in view, let us examine the record. The complaint charges that the corporation jointly with Early, the latter acting in the regular course of employment, did the acts complained of, resulting in the escape of fire from the railroad company's right of way and the consequent injury of plaintiffs' property. The railroad company, by its petition for removal, shows, among other things, that the company manages its business through several wholly independent departments, each having its head officer; that Early is, and was at the time of the trouble, vice president and general manager of the company, and has and had control of that department of business pertaining to the general policy of the company, to its relations with other transportation companies, to making contracts for equipment, fuel, and other appliances, and to the fixing of rates for transportation, but has and had nothing whatever to do with the care, control, or management of the right of way, or the repair, maintenance, or operation of the engines, cars, or other rolling stock, or the care, repair, or maintenance of the roadbed; that the operating department is under the exclusive control and direction of an officer, other than Early, who is called a superintendent, and that such superintendent has the exclusive care, management, and control of the right of way and roadbed, and employs and discharges all employés engaged in taking care of and maintaining the right of way and roadbed, and all persons engaged in the operation, control, and direction of trains, engines and cars over the road.

The plaintiffs, by an answer to the petition, have traversed completely the allegation that Early had nothing to do with the care, control, and management of the right of way, etc., and that the operating department is under the exclusive control and direction of a superintendent, etc. In further support of the petition, Early's affidavit

has been filed, setting forth the same matter in effect that the petition contains, and the affidavit of A. Wilson has also been filed corroborating Early in part. On the other hand, the plaintiffs have filed the affidavit of Paul B. Powers, showing that at a trial had in Hood River county on April 5, 1915, Early gave evidence tending to show that he did have and exercise authority in employing, paying, and discharging employés in and about the right of way of the railroad. Early admits that he gave the testimony, but explains that what he did was in connection with a settlement made with one Pappas, through which suggestions only were made touching his further employment by the company. Now, it is quite apparent, from these pleadings, affidavits, and counter affidavits, that there is presented a legal question as to the liability of Early and his joint liability with the railroad company for the alleged injuries sustained by the plaintiffs. What this court might say touching such liability is not the test as to the railroad company's right of removal. That is a question for the state court to determine upon proper pleadings and proof in that court. As it relates to the authority of Early as general manager with respect to keeping the right of way clear of combustible débris and the employment and discharge of laborers in that service, there is a palpable dispute, and it is by no means without controversy that the railroad company and Early have stated the real fact touching Early's authority in the premises.

It was held in Ches. & Ohio Ry. v. Cockrell, 232 U. S. 146, 152, 34 Sup. Ct. 278, 58 L. Ed. 544, that merely to traverse the allegations of joint liability made on the part of the plaintiff is not sufficient to show fraud, but that facts must be set forth such as compel the conclusion that the joinder is without right and made in bad faith. This holding has been reaffirmed in a very recent case. Chicago, Rock Island & Pac. Ry. Co. et al. v. Whiteaker, 239 U. S. 421, 36 Sup. Ct. 152, 60 L. Ed. —. If this be so, it must also be true that, where the defendant attempts to show bad faith by allegations and affidavits, and those allegations and affidavits are completely traversed, bad faith has not been established. In other words, the court cannot conclude that the joinder was without right and made in bad faith.

The question whether nonfeasance would acquit Early of joint liability with the railroad company can hardly arise in this proceeding, because the allegations and affidavits tending to show nonfeasance are traversed, and the railroad company's case in that respect is not established. At least, it is not made so clear that the court will presume bad faith on the part of plaintiffs in joining the defendants in the action.

The motion to remand will be allowed.

THE ANGLO-PATAGONIAN.

(District Court, E. D. Virginia. December 14, 1915.)

1. SHIPPING ⟸84—LIABILITY FOR INJURIES SUSTAINED BY DRY-DOCK EMPLOYÉS.

Employés of a dry dock while making repairs on a ship were injured by the fall of the starboard anchor, which was swinging in the usual way out of the hawse pipes. The dry-dock company had nothing to do with the ship except to make the repairs, and the ship was under the control and direction of her master and crew. *Held*, that the anchor was a part of the ship's appliances and under her control, and for damages caused by the falling thereof by reason of insecure fastening or imperfections in connection with its construction, the ship as between herself and the dry-dock employés, was liable.

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

2. SHIPPING ⟸84—LIABILITY FOR INJURIES SUSTAINED BY DRY-DOCK EMPLOYÉS.

It was the duty of the ship, in view of the fact that the workmen were working immediately beneath the swinging anchor, to take no chances and see that a safe course was adopted, and, whether the slipping of the anchor was due to weight upon the brake band holding it, or to vibration or jar caused by the work of repairs, or to its actual loosening by some person, the ship was liable.

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

3. DAMAGES ⟸132—PERSONAL INJURIES—AMOUNT.

A riveter and boiler maker 40 years old, who had worked in a shipyard for 15 years, was married, and had six children, and had been making from $20 to $25 a week, sustained injuries permanent in character, consisting of a dislocation of his right shoulder, a fracture of the upper part of his arm, a broken ankle, and partial paralysis of the right arm. He was in the hospital 8 weeks and operated on 3 times, and still was being treated daily. He had partially recovered and had a good-holding arm, but could not again work as a riveter and boiler maker. *Held* that an allowance of $7,000 would be proper.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385, 396; Dec. Dig. ⟸132.]

4. DAMAGES ⟸132—PERSONAL INJURIES—AMOUNT.

A colored foreman rigger, who had worked 7 years in a shipyard, was married, and had two children, had his left leg crushed so as to require amputation, and was in the hospital 7 weeks. He had been earning about $2.50 a day with some extra work, his average weekly pay being from $18 to $25, and his earnings for the year preceding the injury $947. Subsequent to the injury he was working as a passer at $15 a week, but there was no such regular position as passer. *Held*, that an award of $5,500 would be proper compensation.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385, 396; Dec. Dig. ⟸132.]

5. DAMAGES ⟸131—PERSONAL INJURIES—AMOUNT.

An employé in the fitter's department of a shipyard, who was married and had one child, had worked in the shipyard 8 years, and was earning $12 a week, sustained injuries, consisting of a fracture of the left thigh and other bruises. He was in the hospital 14 weeks and was still under treatment. The fractured limb would probably recover in three or four months more. His arm was also seriously injured, and the extent of

the injury could not be fully determined. *Held*, that an allowance of $4,000 would be reasonable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357–367, 370; Dec. Dig. ⟸131.]

6. DEATH ⟸99—INJURIES CAUSING DEATH—DAMAGES—AMOUNT.

A colored laborer in a shipyard, 25 years old and earning about $12.75 a week, sustained injuries from which he died. He left surviving a mother 55 years old, to whom he had been giving $5 a week for the support of the home. *Held*, that an award of $2,000 to the mother would be reasonable, in view of her age, and what she had and probably would have received from deceased.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125–130; Dec. Dig. ⟸99.]

7. DAMAGES ⟸131—PERSONAL INJURIES—AMOUNT.

Where an employé in a shipyard sustained slight injuries detaining him from work about 3 weeks, after which he was regularly at work, a nominal allowance of $100 would be proper.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357–367, 370; Dec. Dig. ⟸131.]

In Admiralty. Three libels by William Ledwitch and others, by Enoch Spratley, and by R. D. Smith, administrator of William Byrd, deceased, against the British steamship Anglo-Patagonian. Decree for the libelants.

Allen D. Jones and J. Thomas Newsome, both of Newport News, Va., and William A. Graff, of Norfolk, Va., for libelants.

Hughes, Little & Seawell, of Norfolk, Va., for respondent.

WADDILL, District Judge. These are three libels filed to recover damages growing out of one accident, all dependent upon the same facts, and which, for convenience, and by consent of counsel, are heard together.

On the 2d day of June, 1915, the steamship Anglo-Patagonian was placed in dry dock at Newport News, Va., for the purpose of having repairs made to her stem, necessitated by a collision shortly theretofore sustained in Hampton Roads. The ship was placed upon the ways, resting upon keel blocks and bilge blocks, and the shipyard authorities thereupon erected a wooden framework on the outside of the ship, necessary to make the repairs; stages were swung from the bows of the ship, with a view of taking off the old plates in and about said bows, and attaching new plates; that such staging under the starboard bow was swung on ropes running up to the deck, and there made fast to the rear of the staging, the forward end of the staging resting upon cross-beams supported by two uprights, which uprights were lashed to the ship, the ends thereof fastened to the bow of the ship. On the 5th day of June, about 11:30 o'clock in the forenoon, the libelants while on said staging and at work on the repairs to the ship, were thrown therefrom to the bottom of the dock, by reason of the starboard anchor of the ship dropping from the hawse pipe upon and striking the staging with great violence, tearing the same to pieces, causing the injuries sued for. The ship, while in the dry dock, continued under the control and direction of her master and crew, and they remained thereon. The Dry

Dock Company had nothing to do with the ship save make the repairs to her stem, as hereinbefore stated. At the time of entering the dry dock, and during the making of the repairs, the ship had her anchors swung in the usual way out of the hawse pipes; and the giving way or releasing the brake band holding the starboard anchor precipitated it violently upon and destroyed the framework around the ship's bow, and these proceedings were instituted to recover damages for injuries sustained by the libelants, respectively, therefrom.

The damage to the ship's stem and bow, which apparently had not been injured or affected by the previous collision, was at a point considerably below the hawse pipe. The libelants insist that the injuries were received solely because of the failure of the ship to properly make fast her anchor, and to have and maintain proper instrumentalities for that purpose; whereas, the ship contends that she had fully discharged her duty in this respect; that the ship's windlass was of the Clark and Chapman type, one of the well-recognized makes of anchor construction, and in general use; that this anchor contained the necessary and proper anchor brake band, as well as a compressor, or chain stopper, all of which were in proper condition; that at and before the accident, her anchor was made fast by the hand brake, which was amply sufficient for the purpose, and the accustomed way of making fast anchors while in port, and that its compressors, or chain stoppers, were not being used because it was only necessary to use the same in stress of weather and at sea; that immediately after the accident, it was found that the spindle or clutch had been slightly turned or loosened, which caused it to give way, and that this was done, not by the ship, or any of its employés, or those for whom she was responsible, but resulted either from vibration incident to the repairs then being made, or the act of some of the shipyard employés for whom they were not responsible. Libelants insist, nevertheless, that the ship is responsible for the falling of the anchor, whether the same was caused by reason of the insecure fastening thereof, the improper releasing of the same, or the failure to make it entirely safe by the use of the compressor or chain stopper then at hand. They further contend that a devil's claw, with which the windlass was not equipped, would have made the anchor even more secure than the compressor or chain stopper, and that the latter appliance, with which the ship was equipped, was upon inspection, found to be out of order.

[1] The case turns entirely upon whose fault it was, if that of any one, that the anchor gave way, causing the injuries complained of. The anchor was undoubtedly part of the ship's appliances, and under her control, and for damages arising from the falling of the same, by reason of insecure fastening or imperfections in connection with its construction, the ship clearly, as between herself and these libelants, is liable. The ship insists that it was not necessary for her to do more than properly make the anchor fast in the hawse pipe, by the brake band of the windlass; that that was the universal custom when in port and in dry dock in this country, though in Europe it was customary to lower the anchor to the bottom of the dock, when in dry dock.

[2] It seems to the court that the test of the sufficiency of what the

ship did in this case should be determined in the light of the result that followed. She confessedly did not adopt the safe method of holding her anchor, having regard to the injury to her stem; and the fact that workmen were engaged in its repair immediately beneath the swinging anchor required that she should have taken no chances, and, on the contrary, seen that a safe course was adopted. Doubtless it was believed that the brake band was sufficient, but the element of doubt or hazard entered into that, arising either from its failure to hold from any cause, or from some one interfering with or loosening the same, which the ship says was done in this case. Whether the weight upon the brake band allowed the anchor to slip, or vibration or jar from the work going on, on the ship beneath the anchor, or the actual loosening of the same by some person caused it, is immaterial. The ship took chances of all this, certainly as between herself and these libelants, when she permitted an appliance and instrumentality of the character in question to be used without properly safeguarding the same, and she cannot escape liability either by insisting that what she did was sufficient, or that others, as well as herself, may have been in part responsible for what occurred. Upon the whole case, in the judgment of the court, it is clear that as between the ship and these libelants she is responsible for the injuries sustained by the latter, because of the failure to have, use, and maintain a safe appliance to protect against the running, slipping, or giving way of the anchor which caused the damage sued for.

This leaves for determination the amount of damages to be awarded to the several libelants, which presents more than usual difficulty, by reason of the fact that the persons injured are not of the same grade of employment, and different considerations necessarily enter into the ascertainment of the amounts to be allowed.

[3] 1. Edward Ledwitch, white, age 40 years, by trade riveter and boiler maker, making from $20 to $25 per week; married, six children; worked in shipyard 15 years. Injuries received permanent in character, consisted of dislocation of right shoulder, fractured upper part of arm, broken ankle, partial paralysis of right arm due to injury of nerve trunks; in hospital 8 weeks, operated on three times, and still has to be treated daily; has partially recovered, and has now a good-holding arm, but cannot work as a riveter and boiler maker again. For his injuries, an allowance of $7,000 is made.

[4] 2. Edward Pressey, colored, age 35, married, two children, a foreman rigger; 7 years in shipyard, earning about $2.50 a day, and extra work; average weekly pay $18 to $25. Injuries, left leg crushed and amputated; not injured otherwise; in hospital 7 weeks. Now doing work as a passer, that is, where he can sit down and give signals to others; but there is no such regular position as a passer. Is getting in this temporary place $15 a week. Last year made $947 as foreman rigger. In this case, the court thinks an award of $5,500 proper compensation.

[5] 3. Peter Johnson, white, aged 38 years, married, one child, in fitter's department, earning $12 a week. Worked at shipyard 8 years. Injuries consisted of fracture of left thigh, and other bruises; in hospital 14 weeks, and still under treatment; fractured limb will probably

recover in three or four months yet to come. Serious injury to arm, the extent of which cannot be fully determined now. In this case, an allowance of $4,000 is deemed reasonable.

[6] 4. William Byrd, colored, aged 25 years, a laborer in shipyard, earned about $12.75 a week; left surviving him a mother 55 years old, to whom he had given $5 a week for the support of the home; died in a few hours after the injury. In this case, an award of $2,000, payable to his mother, is believed to be reasonable under all the circumstances, taking into account the age of the mother, and what she received, and probably would have received from the deceased.

[7] 5. Enoch Spratley, colored, sustained slight injuries which detained him from work some 3 weeks; now regularly at work. Only a nominal allowance should be made him, say $100.

A decree will be entered in favor of the several libelants against the respondent steamship for the amounts hereinbefore set forth on presentation.

In re MURPHY.

(District Court, N. D. California, First Division. December, 1914.)

BANKRUPTCY ⊂=59—"ACT OF BANKRUPTCY"—FAILURE TO RELEASE LEVY OF ATTACHMENT.

The failure of an alleged bankrupt to release the levy of an attachment upon his supposed interest in property transferred by him nearly seven years previously did not constitute an act of bankruptcy, though the transfer was alleged to be fraudulent, as it could not appear that the attaching creditor would obtain a preference until such sale had been determined to be fraudulent in an action to which the transferee was a party.

[Ed. Note. For other cases, see Bankruptcy, Cent. Dig. §§ 81, 82; Dec. Dig. ⊂=59.

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

In Bankruptcy. In the matter of Herman Murphy, bankrupt. On demurrer to petition for adjudication. Heard on report of the referee. Report affirmed, petition denied, and proceeding dismissed.

Daniel O'Connell, of San Francisco, Cal., for petitioning creditors.
Mastick & Partridge, of San Francisco, Cal., for bankrupt.

DOOLING, District Judge. The argument on the demurrer to the petition herein was directed solely to the time of the sale averred in the petition, and not to the character thereof, and the only question decided in overruling the demurrer was that the petition was filed in time. No authority has been cited to the effect that the failure of an alleged bankrupt to release the levy of an attachment upon his supposed interest in property transferred by him nearly seven years previously constitutes an act of bankruptcy, even though followed by averments that such transfer was a fraudulent one. Nor can it appear that such attaching creditor will obtain a preference until such

sale has been determined to be fraudulent in an action to which the transferee is a party. Nor will a court listen with much patience to a petitioning creditor, who complains that he himself has received a preference under such proceedings.

For these reasons the report of the referee is affirmed, the petition for adjudication denied, and the proceeding dismissed.

MEMORANDUM DECISIONS

BOARD OF DIRECTORS OF PUBLIC SCHOOLS OF PARISH OF ORLEANS v. FISHER et al.* (Circuit Court of Appeals, Fifth Circuit. January 19, 1916.) No. 2819. In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. I. D. Moore and John F. C. Waldo, both of New Orleans, La., for plaintiff in error. Chas. Louque, of New Orleans, La., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and SPEER, District Judge.

PER CURIAM. In the transcript we find no bill of exceptions showing objections to any rulings of the court, nor do we find any prejudicial error patent of record. The assigned errors are none of them well taken. Judgment affirmed.

BORLAND v. NORTHERN TRUST SAFE DEPOSIT CO. (Circuit Court of Appeals, Seventh Circuit. July 8, 1915. Rehearing Denied November 26, 1915.) No. 2139. Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois. Josiah McRoberts, of Chicago, Ill., for appellant. George D. Seymour, of New Haven, Conn., and Robert H. Parkinson, of Chicago, Ill., for appellee. Before BAKER and KOHLSAAT, Circuit Judges, and CARPENTER, District Judge.

PER CURIAM. This is an appeal from a decree adjudging that appellant's patent, No. 940,300, November 16, 1909, for a safety deposit box lock, was not infringed by the locks used by appellee. In our judgment the two locks, as fully described and explained in Judge Sanborn's opinion in 212 Fed. 178, differ so radically in their structural laws that the case was properly disposed of by the finding of noninfringement. The decree is affirmed.

BROOM et al. v. CHAPMAN et al. (Circuit Court of Appeals, Fifth Circuit. January 31, 1916.) No. 2783. Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. W. D. Gordon and V. A. Collins, both of Beaumont, Tex., for appellants. Ballinger Mills, of Galveston, Tex., for appellees. Before PARDEE and WALKER, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The decree of res judicata pleaded in this case was conclusive on the merits. We find no prejudicial error in the rulings of the court. The decree appealed from is affirmed.

CHAN NGUN YUK et al. v. WHITE, Immigration Com'r. LEE CHOY v. SAME. CHUN WOI SAN v. UNITED STATES. DULLAH et al. v. WHITE, Immigration Com'r. QUAN KAY v. SAME. (Circuit Court of Appeals, Ninth Circuit. January 10, 1916.) Nos. 2706, 2701, 2694, 2700, 2707. Appeals from

*Rehearing denied February 21, 1916.

the District Court of the United States for the First Division of the Northern District of California. Jno. W. Preston, U. S. Atty., and Casper A. Ornbaum, Asst. U. S. Atty., both of San Francisco, Cal., for appellee. On motion of counsel for appellees, appeals dismissed for the noncompliance by the appellants with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (the appellant in each case having failed to file a record thereof and to docket the case by or before the return day required by said rule).

CLEVELAND-CLIFFS IRON CO. v. GAMBLE. (Circuit Court of Appeals, Sixth Circuit. December 7, 1915.) No. 2653. In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Action at law by Henry Gamble against the Cleveland-Cliffs Iron Company. Judgment for plaintiff, and defendant brings error. Affirmed. See, also, 158 Fed. 49, 85 C. C. A. 379, and 201 Fed. 329, 119 C. C. A. 567. Horace Andrews, of Cleveland, Ohio, and Wm. P. Belden, of Ishpeming, Mich., for plaintiff in error. G. W. Weadock of Saginaw, Mich., for defendant in error. Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

PER CURIAM. This case is here for the third time. See 158 Fed. 49, 85 C. C. A. 379; 201 Fed. 329, 119 C. C. A. 567. Any further statement of facts is unnecessary. The plaintiff again recovered a verdict, and the substantial complaint against the recovery is that there is no evidence tending to show any causal relation between the original offer and the later purchase, which causal relation we thought vital to plaintiff's case. 201 Fed. 331, 119 C. C. A. 567. The sufficiency of the examination and estimate by the Cleveland Company to serve as the intervening link, as suggested in our last opinion, is attacked because it is said to have appeared upon the last trial that this examination was made wholly as the result of a later offer, made by Mr. Corliss and after the negotiations resulting from Gamble's offer had been abandoned. It may well be thought that the prepondérance of proof is with the Cleveland Company on this issue, but we cannot say there was no evidence to go to the jury. The negotiations induced by Gamble had been suspended until the Manistique Company should put the lands again on the market; if the Manistique Company had done so directly, and the Cleveland Company had purchased, there would be a clear possibility that the negotiations should be considered only as having been interrupted. When the Cleveland Company received the new offer from Mr. Corliss, and examined the lands, it knew they were the same lands which had been offered by Gamble; and hence it must have supposed that the Manistique Company, through Mr. Corliss, was again putting the lands on the market. This leaves some room for the inference that the old negotiations were renewed; and the fact that it turned out that Mr. Corliss had imperfect authority from the Manistique Company is not controlling. We have held that as matter of law the Cleveland-Cliffs Company's agent had authority to agree to pay Gamble a commission if the lands were purchased. The trial judge charged this, but made the authority also cover the agent's agreement to "pay for information" regarding the lands. Under the surrounding facts, the difference between these two things is not vital enough to justify a finding of prejudicial error. The judgment is affirmed.

COLUMBIA LOAN CO. v. FERKEL et al. (Circuit Court of Appeals, Seventh Circuit. July 8, 1915. Rehearing Denied November 26, 1915.) No. 2138. Appeal from the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge. Charles C. Collins, of St. Louis, Mo., and Thomas E. Gillespie, of East St. Louis, Ill., for appellant. Oscar E. Buder, of St. Louis, Mo., for appellees. Before BAKER and KOHLSAAT, Circuit Judges, and CARPENTER, District Judge.

PER CURIAM. Appellees prevailed in their suit to reform a lease of real estate; and this appeal involves only a determination of the sufficiency of the

evidence to support the decree. An examination of the evidence has satisfied us that the decree was proper, and accordingly it is affirmed.

DURE v. WRIGHT. (Circuit Court of Appeals, Fifth Circuit. December 11, 1915.) No. 2826. Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. John R. L. Smith, of Macon, Ga., for appellant. George S. Jones and Orville A. Park, both of Macon, Ga., for appellee. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. We have examined the transcript in this case in all the aspects suggested by the assignments of error, and, having considered the same in the light of the briefs of counsel, we conclude that for the reasons given by Judge Speer (221 Fed. 736), found in the record, the decree appealed from should be affirmed; and it is so ordered.

ELK GARDEN CO. v. T. W. THAYER CO. (Circuit Court of Appeals, Fourth Circuit. May 4, 1915.) No. 1269. In Error to the District Court of the United States at Abingdon, Va. Writ of error dismissed on motion of plaintiff in error by and with consent of defendant in error. H. E. Widener and J. Irby Hurt, both of Abingdon, Va., for plaintiff in error. George E. Penn, Sr., of Abingdon, Va., for defendant in error. For opinion below, see 206 Fed. 212.

FIRST NAT. BANK OF HANOVER, PA., et al. v. DICKINSON. (Circuit Court of Appeals, Fourth Circuit. May 21, 1915.) No. 1353. Appeal from the District Court of the United States at Charleston, W. Va., in Bankruptcy. Appeal dismissed, with leave to appellants to move to reinstate cause within 10 days—no brief being filed by appellants and no counsel appearing for the respective parties upon case being called. Joseph H. Gaines, of Charleston, W. Va., for appellants. Payne, Minor & Bouchelle, of Charleston, W. Va., for appellee.

JOHN CHURCH CO. v. HILLIARD HOTEL CO. et al. (Circuit Court of Appeals, Second Circuit. December 27, 1915.) No. 204. Appeal from the District Court of the United States for the Southern District of New York. Appeal from decree dismissing bill for alleged infringement of copyright. Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed, with costs. Submitted without argument. See, also, 221 Fed. 229, 136 C. C. A. 639.

JOHNSON et al. v. HUNTER. (Circuit Court of Appeals, Fifth Circuit. January 31, 1916.) No. 2798. In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge. Robert B. Mayes, G. Garland Lyell, Marcellus Green, and Garner W. Green, all of Jackson, Miss., for plaintiffs in error. Silas W. Davis, of New Orleans, La., and J. N. Flowers, of Jackson, Miss., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. We find none of the assignments of error well taken. The plaintiff below was entitled to the judgment he received, and the same is affirmed.

McILHANEY & CO. v. F. M. HOYT SHOE CO. et al. (Circuit Court of Appeals, Fourth Circuit. December 21, 1915.) No. 1370. Appeal from the District Court of the United States at Columbia, S. C., in Bankruptcy. Appeal

dismissed on motion of appellants. Dunlap, Dunlap & Hollis, of Rock Hill, S. C., and Arthur L. Gaston, of Chester, S. C., for appellant. Thos. F. McDow, of York, S. C., and B. J. White, of Rock Hill, S. C., for appellees.

OWNERS' REALTY CO. v. BICKEL et al. (Circuit Court of Appeals, Fourth Circuit. December 1, 1915.) No. 1402. Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States at Baltimore, Md., in Bankruptcy. Petition to superintend and revise dismissed on motion of petitioner. John L. G. Lee, of Baltimore, Md., for petitioner. G. W. S. Musgrave and Donald B. Creecy, both of Baltimore, Md., for respondents.

P. J. WILLIS & BRO. v. TEMPLE. (Circuit Court of Appeals, Fifth Circuit. January 31, 1916.) No. 2854. Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. Oliver J. Todd, of Beaumont, Tex., for appellant. F. D. Minor and F. D. Minor, Jr., both of Beaumont, Tex., for appellee. Before PARDEE and WALKER, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. We find no prejudicial error in the rulings, conclusions, or decree of the court below. The decree appealed from is affirmed.

RANDALL et al. v. DAMPSKIBSSELSKABET DANNEBROG. (Circuit Court of Appeals, Fourth Circuit. November 15, 1915.) No. 1346. Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge. Daniel R. Randall, of Baltimore, Md. (R. E. Lee Marshall, of Baltimore, Md., on the brief), for appellants. John M. Woolsey, of New York City (Convers & Kirlin, of New York City, and Ritchie, Janney, Griswold & Hamilton, of Baltimore, Md., on the brief), for appellee. Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PER CURIAM. The facts of this case are fully stated and discussed in the opinion of the court below (217 Fed. 902), and nothing would be gained by repetition. We agree with the learned District Judge that on the whole "the libelant has a little the better of the argument," and are therefore of opinion that the decree appealed from should be affirmed.

RUE v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. December 23, 1915. Rehearing Denied January 17, 1916.) No. 2794. In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. Cecil H. Smith, of Sherman, Tex., for plaintiff in error. Clarence Merritt, U. S. Atty., of McKinney, Tex. Before PARDEE and WALKER, Circuit Judges, and SPEER, District Judge.

PER CURIAM. On a full consideration of the transcript, we are unable to find any reversible error in the proceedings in the trial court. The undisputed evidence and the admitted facts fully warranted the verdict rendered. Judgment affirmed.

In re SILBERSTEIN. (Circuit Court of Appeals, Second Circuit. January 11, 1916.) No. 105. Appeal from the District Court of the United States for the Southern District of New York. Lesser Brothers, of New York City (W. Lesser, of New York City, of counsel), for appellant. Leopold Freiman and A. Rickman, both of New York City, for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Order (225 Fed. 665) affirmed. See, also, 227 Fed. 1021, — C. C. A. —.

WILSON v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. January 4, 1916.) No. 4415. In Error to the District Court of the United States for the Eastern District of Oklahoma. William Pfeiffer, of Ardmore, Okl., for plaintiff in error. D. H. Linebaugh, U. S. Atty., and W. P. McGinnis, Sp. Asst. U. S. Atty., both of Muskogee, Okl. Before HOOK, Circuit Judge, and ELLIOTT and YOUMANS, District Judges.

HOOK, Circuit Judge. Wilson was convicted and sentenced for introducing or carrying a quart of whisky from without the state of Oklahoma into a part of that state which was formerly in Indian Territory contrary to Act March 1, 1895, c. 145, 28 Stat. 697. It is unnecessary to recite the evidence. We think it was insufficient to justify conviction, and that the request of the accused for a directed verdict in his favor should have been granted. The sentence is reversed, and the cause is remanded for a new trial.

YEE TUN v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. January 6, 1916.) No. 133. Appeal from the District Court of the United States for the Southern District of New York. R. M. Moore, of New York City, for appellant. H. Snowden Marshall, U. S. Atty., of New York City (H. A. Content, Asst. U. S. Atty., of New York City, of counsel), for the United States. Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed in open court.

END OF CASES IN VOL. 228