

National Reporter System—United States Series

THE
FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 229

PERMANENT EDITION

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

MARCH — APRIL, 1916


ST. PAUL
WEST PUBLISHING CO.

1916

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⁴ Appointed April 3, 1916.

⁵ Appointment confirmed January 13, 1916.



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†

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

UNITED STATES *ex rel.* FISHER *et al.* v. BOARD OF DIRECTORS OF
PUBLIC SCHOOLS, PARISH OF ORLEANS.*

(Circuit Court of Appeals, Fifth Circuit. January 25, 1916.)

No. 2824.

1. EXECUTION ☞99—"PLURIES FI. FA."

A writ of "pluries fi. fa." is a writ issued where other commands of the court have proved ineffectual.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 195-202, 607; Dec. Dig. ☞99.]

2. MANDAMUS ☞1—NATURE AND SCOPE OF REMEDY.

Mandamus was originally, under the English law, a high prerogative writ in the name of the king, and issued from the King's Bench, directed to persons, corporations, and inferior courts, ordering them to do a specific act within the duty of their office. The writ is either peremptory or alternative, according as it requires the defendant absolutely to obey its behest or gives him an opportunity to show cause to the contrary.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1-3; Dec. Dig. ☞1.

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

3. SCHOOLS AND SCHOOL DISTRICTS ☞94—INDEBTEDNESS—STATUTORY PROVISIONS.

Act La. No. 214 of 1912 constitutes the school board of the parish of Orleans a body corporate under the name of the board of directors of the public schools, parish of Orleans. Section 68 requires school boards throughout the state to adopt a budget of revenues annually, and a budget of expenditures, which, in the parish of Orleans, shall not exceed 95 per cent. of the budget of revenues, and provides that in that parish, at the end of the year, after payment of all the indebtedness budgeted, the school board shall apply the surplus of 5 per cent. to any indebtedness of previous years reduced to final judgments, liquidating and fixing the amount of indebtedness, whether the judgments be absolute or limited to the revenues of any year. *Held*, that this applies to a judgment recovered against the predecessor of such board, known as the board of directors of the city schools of New Orleans; there being but one school board, and the identity of a municipal corporation not being destroyed by a change of name.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 217; Dec. Dig. ☞94.]

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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*Rehearing denied February 21, 1916.

4. MANDAMUS ⇨143—PROCEEDINGS TO PROCURE WRIT—TIME FOR APPLICATION.

A writ of mandamus to require a school board to comply with Act La. No. 214 of 1912, § 68, as to applying 5 per cent. of the budget of revenues to the payment of judgments, will not be denied on the ground that the application was filed too late for the year 1914 and too early for the year 1915, especially where the school board asserts that the statute is unconstitutional and void, thereby indicating a purpose not to comply with it at all, as, under the prayer for general relief, the court may so frame its order as to make it relate to subsequent budgets, in order to carry out the purpose of the Legislature and enforce the right of the relators.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 282-285; Dec. Dig. ⇨143.]

5. MANDAMUS ⇨111—SUBJECTS OF RELIEF—PAYMENT OF JUDGMENTS.

A court has jurisdiction by mandamus to compel a school board to obey Act La. No. 214 of 1912, § 68, requiring its budget of expenditures not to exceed 95 per cent. of its budget of revenues, and requiring the surplus of 5 per cent. to be applied to the payment of judgments.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 231, 232, 234; Dec. Dig. ⇨111.]

6. MANDAMUS ⇨111—SUBJECTS OF RELIEF—PAYMENT OF JUDGMENTS.

Mandamus to compel a school board to obey Act La. No. 214 of 1912, § 68, will not be denied because of the financial inability of the school board to pay its debts and the necessity to borrow each year a large amount of money to maintain the schools, in view of the mandatory provisions of the statute that the budget of expenditures "shall" not exceed 95 per cent. of the budget of revenues and that the board "shall" apply the surplus of 5 per cent. to indebtedness of previous years reduced to final judgment.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 231, 232, 234; Dec. Dig. ⇨111.]

7. SCHOOLS AND SCHOOL DISTRICTS ⇨94—INDEBTEDNESS—STATUTORY PROVISIONS.

Act La. No. 214 of 1912, § 71, authorizing the school board of the parish of Orleans to pledge its revenues for the current year for the purpose of promptly paying its obligations, or for such other purposes as to it may seem proper, must be construed in connection with section 68, requiring that 5 per cent. of the revenues be applied to the payment of any indebtedness of previous years reduced to judgment, and, as so construed, authorizes merely the pledging of 95 per cent. of the revenues.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 217; Dec. Dig. ⇨94.]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Mandamus by the United States, on the relation of William G. Fisher and others, against the Board of Directors of the Public Schools, Parish of Orleans. The writ was denied, and the relators bring error. Reversed.

Charles Louque, of New Orleans, La., for plaintiffs in error.

I. D. Moore, City Atty., and John F. C. Waldo, Asst. City Atty., both of New Orleans, La., for defendant in error.

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

SPEER, District Judge. In 1892, Mrs. M. M. Fisher and her husband, citizens of Spain, recovered a judgment against the board of directors of the city schools of New Orleans, for the sum of \$8,097.17, with legal interest from May 22, 1890. This was in the Circuit Court of the United States for the Eastern District of Louisiana. It was based upon a judgment on the same right of action which had been previously rendered in favor of the plaintiff in the state court, and against the board of directors of the city schools of New Orleans. The judgment was for salary due to the plaintiff for work actually done as school teacher of the public schools of New Orleans, and for the salaries of other teachers, whose claims were transferred to the petitioner. The judgment was based on the verdict of the jury. This judgment, on proper process, was revived on December 1, 1902. This was also in the then Circuit Court for the Eastern District of Louisiana, the Honorable Charles Parlange, District Judge, presiding. The judgment of revival was likewise based on the verdict of a jury. Execution was issued on October 28, 1904, to collect the amount of the judgment, with interest and costs, and the return of the marshal indicated that the president of the board of school directors stated that he had no funds with which to pay the writ, nor did he know of any property upon which a levy could be made. The marshal's return also showed that he made a demand on Patrick McGraw, treasurer of the city of New Orleans, and ex officio treasurer of the school board.

[1] It also appears by a writ of pluries *fi. fa.*, which is a writ issued where other commands of the court have proved ineffectual (3 Blackstone, Comm. 283; Archibald's Practice, 585), the marshal attempted to seize all the assets in the hands of the treasurer belonging to the board of school directors. By order of court granted on a supplemental petition, in the general nature of a garnishment proceeding, interrogatories were propounded to the city treasurer to ascertain and make available for the payment of the judgment the assets in his hands. Of school taxes, the treasurer reported that he had \$633.63. This he was ordered by Judge Parlange to pay over to the plaintiff. The date of the order is November 19, 1904. On March 10, 1913, the original plaintiff having departed this life, the relators before the court, who are alleged to be the lawful heirs of Mrs. Fisher, the original plaintiff, again filed an application to revive the original judgment. This proceeded regularly, and was again submitted to a jury, which rendered this verdict:

"We, the jury, find a verdict in favor of the plaintiff, reviving the judgment as prayed for, subject to credit for amounts already paid. December 8, 1914."

Pursuant to the verdict of the jury, the judgment, which had been revived in the Circuit Court of the United States as hereinbefore stated in 1902, in favor of Mrs. M. M. Fisher and her husband, against the board of directors of the city schools of New Orleans, for the sum of \$8,097.17, with 5 per cent. interest per annum from May 22, 1890, and costs, was by the District Court, the Honorable Rufus E. Foster, District Judge, presiding, revived as to the board of directors of the public schools, parish of Orleans, a new school board created by the Legis-

ature, with a different name, but with the same duties of the original defendant, and in favor of the plaintiffs, heirs at law of Mrs. Fisher, who are the relators in the proceeding before this court. This recovery, however, provided in the judgment of revival, was made payable out of the school taxes levied by the city of New Orleans prior to 1879. The judgment was rendered December 8, 1914, and was signed by the judge June 29, 1915. A motion for writ of error was filed by the board of directors of the public schools, parish of Orleans, July 21, 1915, with certain assignments of error. This writ of error from the judgment of revival last mentioned came on for hearing before this court at the present term, and the judgment of the District Court was affirmed. (Opinion not yet reported.)

While the application to revive the judgment was pending in the District Court, the relators, the heirs at law of Mrs. Fisher, on November 17, 1914, filed a petition in the District Court for mandamus. It is entitled "United States ex rel. Wm. G. Fisher et al. v. Board of Directors of the Public Schools, Parish of Orleans." With appropriate recitals with reference to the judgment, the issue of execution, and return of "no property" by the marshal, it further avers that in the year 1912 the Legislature of the state of Louisiana, under Act 214 of said session, created the board of directors of the public schools, parish of Orleans, and in section 68 of the act directed the board to prepare a budget of revenues every year, in the month of July, to accrue to the board during the ensuing year. It further provided that the budget should not include probable revenues arising from doubtful or contingent sources. The act further provided that, within 10 days from the adoption of the budget of revenues, the school board was directed to adopt a budget of expenditures not to exceed 95 per cent. of such budget of revenues. The petition avers that the 5 per cent. reserved of the budget of revenues was to be applied under the act of the indebtedness of relators, reduced to final judgment, and the right was given to relators to enforce this provision by such appropriate remedies as the law provides. It is averred, further, that the school board has refused to carry out the provisions of said law, and should be made to adopt their budget in conformity to said law; that relators are entitled to a writ of mandamus to compel the board to comply with the provisions of the act. It is prayed that the writ of mandamus issue, directing the board, and each of the members thereof, to adopt a budget of revenues and a budget of expenditures in the month of July each year, commencing in July, 1914, reserving 5 per cent. of the budget of revenues to be applied to the payment of the judgment obtained by relators against the board of directors of the public schools, parish of Orleans, or their predecessors. There is also, in this application, a prayer for general relief.

The Act of the General Assembly of 1912, No. 214, on which relators rely, is as follows:

"Sec. 68. Be it further enacted, etc., that it shall be the duty of the various school boards throughout the state, during the month of July of each year, to adopt a budget of revenues to accrue to said school board during the ensuing year; said budget not to include probable revenues arising from a doubtful or contingent source.

"(a) Be it further enacted, etc., that within ten days after the adoption of the budget of revenues, the school boards throughout the state shall adopt a budget of expenditures, not to exceed (100 per cent.) one hundred per cent. of the budget of revenues; in the parish of Orleans the budget of expenditures shall not exceed (95 per cent.) ninety-five per cent. of said budget of revenues. * * *

"(b) Be it further enacted, etc., that in the parish of Orleans at the end of the year after payment of all the indebtedness budgeted, the school board shall apply said surplus of (5%) five per cent. to any indebtedness of previous years reduced to final judgments liquidating and fixing the amount of indebtedness, whether the judgments be absolute or limited to the revenues of any year.

* * * * *
 "Sec. 72. Be it further enacted, etc., that all the provisions of this act shall be and are applicable to the parish of Orleans, to the schools situated therein, and to the board of directors of said parish unless the said parish of Orleans is especially excepted from the application of such provisions, and unless such provisions are in conflict, or incompatible with, or are contrary to the provisions of this act beginning with section 70 hereof. In addition to the powers, duties and rights hereinbefore granted to and imposed upon parish boards, the powers, duties and rights of said board of directors of the public schools of the parish of Orleans shall be as follows:

* * * * *
 "Second—It shall limit the annual expense of maintaining the schools to the annual revenue. * * *"

Upon this application, the District Judge ordered the defendants to show cause why the alternative writ of mandamus should not issue, as prayed for. In response to this order, the board of directors of the public schools, parish of Orleans, made its return. It may be treated as an answer and contains the following:

Alleging that it was a body separate and independent of any other, it denied its responsibility for any debt of the pre-existing board; that the judgment hereinbefore referred to was against the directors of the public schools, parish of Orleans, and not against respondents; that if, however, it should be held that there is a privity or succession between the two boards, the judgment is barred by the prescription of ten years (this defense, as heretofore stated, was denied by the District Court, the denial affirmed by this court); that the application for mandamus came too late; that respondents had adopted and promulgated a budget of revenues to accrue during the year ending June 30, 1915, and the budget of expenditures for the same time, and that the fund was exhausted and appropriated; that the demand of relators had therefore become impossible of performance; that as to budgets for subsequent years the demand of the relators is premature; that the mandamus will not be granted without due demand at the proper time and refusal thereof, nor in anticipation of a defect of duty; that paragraph (b) of section 68 of Act 214 of the General Assembly of the state of Louisiana, session of 1912, providing that the school boards shall apply the surplus of 5 per cent. to any indebtedness of previous years, reduced to final judgments, refers exclusively to debts created by the respondents, and not to judgments rendered prior to the creation of the board; that the budget for the fiscal year ending June 30, 1915, fell short, by \$411,972.96 of the debts for that year; that the act of the General Assembly, session of 1912, specifically declares that no portion of the revenues to accrue in any way shall go to pay the indebtedness of any previous year; that paragraph (b) of section 68 of said act of the General Assembly of 1912, is unconstitutional, null, and void, because in contravention of articles 227, 231, 235, 248, 252, 254, and 255 of the Constitution of the state of Louisiana, and the grounds of the alleged invalidity of the act are annexed; that all the revenues of the parish of Orleans for school purposes fail annually within the sum of \$500,000 of being sufficient to maintain and operate the schools of the city, and they have been and can be operated annually by

borrowing the sum approximately \$500,000 to make good the deficit, and this by pledging the entire revenues of the board for the year then current; that the exemption of the parish of Orleans from the operation of paragraph (a) of section 68 of the Act of the General Assembly 214 above specified, limiting the budget to not more than 95 per cent. of such revenues, and the entire paragraph (b) of said section, is unconstitutional, null, and void, as not being included in the title of the act, and the unconstitutionality is specially pleaded; and, finally, that by section 71 of that act, the respondent board was empowered for the purposes, as stated in the act, of promptly paying its obligations, or for such other purposes as said board may deem proper; and, furthermore, by paragraph (b) of the same section, restricts the payment of the 5 per cent. reserve to the eventuality, to quote from the act—"payment of all the indebtedness budgeted."

When the application for mandamus and return came on to be heard, the parties having filed a written stipulation waiving trial by jury, the cause was taken up by the court on the issues of fact as well as law. After hearing the case, the learned judge of the District Court rendered his opinion and denied the writ of mandamus. Motion for new trial was made and overruled; bill of exceptions was taken, on the ground that the conclusion of law arrived at by the court from the facts found by the judge was not legal and did not support the judgment, and by writ of error the issues were brought before this court.

[2] The purpose of the writ of mandamus is very well understood. It was originally, under English law, a high prerogative writ in the name of the king, and issued from the King's Bench, directed to persons, corporations, and inferior courts, ordering them to do a specific act within the duty of their office. It is stated, in *Encyclopedia Britannica*, title "Mandamus":

"The writ has passed in the law of the United States. There is, in the federal judiciary, an employment of the writ substantially as the old prerogative writ in the King's Bench practice, also as a mode of exercising direct jurisdiction, also as a proceeding ancillary to judgment previously rendered, in exercise of original jurisdiction, as when a Circuit Court, having rendered a judgment against a county, issues a mandamus requiring its officers to levy a tax to provide for the payment of a judgment."

The writ is either peremptory, or alternative, according as it requires the defendant absolutely to obey its behest, or gives him an opportunity to show cause to the contrary. It is the usual practice to issue the alternative writ first. The learned District Judge adopted this practice.

[3] The board of directors of the public schools, parish of Orleans, was created by the Legislature of the state of Louisiana. Its duties and liabilities are marked out by the sovereign power. A duty expressly defined is the payment of previous debts. After making provision for the various school boards throughout the state, the act provided, in the last clause of paragraph (a):

"In the parish of Orleans, the budget of expenditures shall not exceed 95 per cent. of the budget of revenues."

Then follows clause (b), which provides:

"Be it further enacted, etc., that in the parish of Orleans, at the end of the year, after the payment of all of the indebtedness budgeted, the school board shall apply its surplus of 5 per cent. to any indebtedness of previous years,

reduced to final judgments, liquidating and fixing the amount of indebtedness, whether the judgment be absolute or limited to the revenues of any year."

Now the plaintiff's claim is against the school board of the city of New Orleans. It matters not whether it be termed the school board of the city of New Orleans, or the board of directors of the public schools, parish of Orleans. The latter is the successor to all the powers and liabilities of the former. There is but one school board for the territory to which the educative jurisdiction extends. The Legislature, in the act of 1912, legislates for the various school boards throughout the state, and for the school board of the parish of Orleans. The only distinction in this act is that in the parish mentioned the school board is not permitted to expend more than 95 per cent. of its revenues, and "shall apply the surplus of five per cent. to any indebtedness of previous years, reduced to judgment, fixing the amount of the indebtedness, whether the judgment be absolute or limited to the revenues of any year." This language is explicit. It is utterly free from ambiguity. It is mandatory, a legislative mandamus. It is not contended that the board obeyed it. If it has no legal justification for disregarding it, it seems the duty of this court, by use of the writ sought, to oblige obedience to the legislative will and mandate.

[4] It is, however, urged by the respondents that the mandamus was filed too late for the year 1914, and too early for the year 1915. But, if entitled to the writ at any time, the relators, if they desire, must apply for it some time. The board has apparently disregarded the mandate of the Legislature for the years 1912, 1913, and 1914. Besides, in their return, they declare the section upon which relators rely as unconstitutional and void. This is notice to the court that they do not propose to comply with it at all. Should they do so with the conviction that it was utterly invalid, it would be a gross breach of public duty.

"Ubi jus ibi remedium." Surely the relators, since their judgment has been revived and held meritorious as against the present school board, are entitled at some time to a remedy so well established as that of mandamus in such cases. Besides, there is a prayer for general relief, and under the constantly broadening principles of modern jurisprudence and practice it is competent for the court to so frame its order as to make it relate to subsequent budgets of revenues and subsequent budgets of expenditures, in order at once to carry out the purpose of the Legislature and to enforce the ascertained right of relators.

[5] Nor does the contention of the respondents that the act of 1912 relates only to debts created by the present board seem meritorious. As early as *Girard v. Philadelphia*, 7 Wall. 1 to 16, 19 L. Ed. 53, it was held that the identity of a municipal corporation is not destroyed by a change of its name. This rule has not been departed from where rights have inured and become vested as against the corporation whose duties and liabilities the new corporation is empowered to assume. Besides, the act creating the new board, the defendants here, must be construed in *pari materia* with the act of the same body setting apart 5 per cent. of the annual revenues to pay such judgments as that upon

which this proceeding is based. See also *Broughton v. Pensacola*, 93 U. S. 266-271, on page 268, 23 L. Ed. 896, where it is declared:

"The obligations of contracts, made whilst the corporation was in existence, survives its dissolution; and the contracts may be enforced by a court in equity, so far as to subject, for their satisfaction, any property possessed by the corporation at the time."

It follows that, where the Legislature has set apart a specific fund to discharge the ascertained obligation of a previous contract, the court having jurisdiction, by mandamus, for a like reason, can compel obedience. What is true of a municipal corporation, is also true of one of its departments, such as a board of education. In *School District v. Greenfield*, 64 N. H. 85, 6 Atl. 484, it was held that beneficiary's rights in trust estate of school district were not lost by dissolution of district. In *Port of Mobile v. Watson*, 116 U. S. 305, 6 Sup. Ct. 398, 29 L. Ed. 620, it was held that the successors of Mobile City were bound by the previous contract of the city to levy a special tax to pay railroad bonds. In *McKemie v. Gorman*, 68 Ala. 447, it was held that contracts of school trustees with teachers were binding on successors of such trustees.

[6] The contentions of respondent that the mandamus should be denied because of the financial inability of the school board to pay its debts, that it must borrow about half a million of dollars each year to maintain the schools, and that the board was empowered to pledge its revenues for the current year for the purpose "of promptly paying its obligations and for other purposes said board may deem proper," all seem to be negated by controlling authorities. In the case of *City of Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560, it was held that:

"It is no return to an alternative mandamus commanding it to lay a special tax of 1 per cent. to pay the principal, and 1 per cent. to pay the interest and costs of judgments obtained against it, * * * that the funds raised by it are wholly exhausted."

There the return to the alternative writ was demurred to. The demurrer was overruled. In the opinion of Mr. Justice Swayne, for the court, the following language appears:

"The fourth section of the act of 1852 declares that the city council, if they believe the public good and best interests of the city require it, may levy and collect an annual tax of not exceeding 1 per cent., and that the amount thus collected shall be kept separate, and that annually, on the 1st of January, it shall be paid over pro rata upon the funded debt of the city that may be presented by the holders, and that this section shall continue in force until the principal and interest of the indebtedness is fully paid."

The power had not been exercised by the city authorities, and they had made no other provision for liquidating the debts due to the relator. They have no other means of possession, in payment or prospect. Excepting the facts found by the court and the undisputed testimony of Mr. Sol. Wexler, president of the board, these conditions existed in the pending case. The learned justice continues:

"The rights of the creditor and the ends of justice demand that it should be exercised in favor of affirmative action, and the law requires it. In such cases the power is in the nature of a trust for his benefit, and it was the

plain duty of the court below to give him the remedy for which he asked, by awarding a * * * writ to compel the imposition of the tax, as was done."

Justice Swayne refers to *Supervisors of Rock Island County v. State Bank*, 4 Wall. 435, 18 L. Ed. 419, "for a fuller exposition of our views" upon the subject. It will suffice to say that in that case it was held:

"Where power is given by statute to public officers, in permissive language—as that they 'may, if deemed advisable,' do a certain thing, the language used will be regarded as peremptory where the public interest or individual rights require that it should be."

This rule is, however, modified in the later case of *United States v. Thoman*, 156 U. S. 353-361, 15 Sup. Ct. 378, 39 L. Ed. 450. It is a Louisiana case. The opinion of the unanimous court is rendered by Mr. Justice White, now Chief Justice, than whom, perhaps, no other member of the Supreme Court was so familiar with the laws of Louisiana. There also was an application for mandamus to oblige the comptroller of the city of New Orleans to pay a certain judgment, upon the ground that there was a surplus of revenues for the years 1888 and 1889 in the city treasury, largely in excess of the judgments, and that the relator was entitled, by contract, to have them paid out of the surplus revenues of any year subsequent to that in which the indebtedness which he held was created. Many proceedings of this sort were consolidated. There, too, as in this case, the question was submitted to the court without a jury. The act relied upon provided that any surplus of said revenues may be applied to the payment of the indebtedness of former years. The mandamus was refused by the Circuit Court and this refusal was affirmed. In the course of his opinion, the learned justice said:

"The act of 1877, after dedicating the revenues of each year to the expenses of that year, took any surplus out of the imperative rule thus established by the proviso that 'any surplus of said revenues *may be* applied to the indebtedness of former years.' In other words, having fixed inflexibly the rule by which the revenues of the year were to be first used to pay the debts of the year, it made an exception by allowing the surplus of any year to be applied to the debts 'of former years.' The rule was imperative; the exception, permissive or facultative. Both provisions taken together operated to deprive the city government of power to use the revenues of one year to pay the debts of another, and to confer on the city authority to employ, if it so chose, the surplus of one year to pay debts of previous years. Indeed, the law made no attempt to dedicate the surplus to any particular object or to control the legislative discretion of the municipal council in its regard."

Discussing the rule of construction announced in *Supervisors v. State Bank*, supra, the learned justice continues:

"This rule of construction is, however, by no means invariable. Its application depends on the context of the statute, and on whether it is fairly to be presumed that it was the intention of the Legislature to confer a discretionary power or to impose an imperative duty"

—citing several authorities. Among these is *Minor v. Mechanics' Bank*, 1 Pet. 46, on page 63, 7 L. Ed. 47, where Mr. Justice Story, delivering the opinion of the court, said:

"The argument of the defendants is that 'may,' in this section, means 'must'; and reliance is placed upon a well-known rule of construction of public

statutes, where the word 'may' is often construed as imperative. Without question, such a construction is proper, in all cases where the Legislature means to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the Legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions."

The rule thus announced by Justice White and Mr. Justice Story would seem to make clear the duty of this court in the application of clauses (a) and (b) of section 68 of the Louisiana Act of 1912. Here the statute is mandatory in the extremest sense. There is nothing permissive about it:

"The budget of expenditures in the parish of Orleans shall not exceed 95 per cent. of the budget" of revenues; that the school board "shall apply the surplus of 5 per cent. to indebtedness of previous years, reduced to final judgment, whether the judgments be absolute or limited to the revenues of any year."

Clearly, therefore, under the familiar rule, "*Expressio unius exclusio alterius est*," the Circuit Court and Supreme Court, in *Thoman's Case*, would have granted the mandamus, had the statute read:

"Any surplus shall be applied to the payment of the indebtedness of former years."

Here, the statute declares, the board "shall" apply all excess of revenue above 95 per cent.—that is to say, 5 per cent.—to the judgments of previous years.

[7] The third paragraph of section 71, upon which respondent relies, which empowered it to pledge its revenues for the current year for the purpose of promptly paying its obligations, and for other purposes said board may deem proper, must be construed in connection with clauses (a) and (b) of section 68. It is the duty of the court to ascertain the true intention of the Legislature, if possible, by upholding both sections and gathering its general purpose therefrom. Having created an express trust for the benefit of judgment holders of previous years, and having made a peremptory declaration that the 5 per cent. surplus shall be applied to their payment, whether they are absolute or limited by former enactments, the larger latitude just quoted from the third paragraph of section 71 must be held to relate to 95 per cent. of the revenues for the current year, and not to the 5 per cent. deducted to clear away the judgments of the past, which the board and its predecessor have incurred for the education of the city's youth.

The argument offered by respondent, to the effect that the payment of this percentage thus dedicated would be inimical to the cause of education and the general welfare of the schools in the city, does not seem tenable. Surely none other than the members of such a board as the respondent here are under more lofty or compelling obligation to respect and satisfy the just demands of those teachers who consecrate their lives to the nurture and training of youth, unselfish, laborious, and sacrificial members of the community, who wield the keys to

unlock the portals of the mind, and make radiant its darkness, with the light reflected by learning's ample page.

Judgment reversed.

ALABAMA GREAT SOUTHERN RY. CO. et al. v. AMERICAN COTTON OIL CO.

(Circuit Court of Appeals, Fifth Circuit. January 10, 1916. Rehearing Denied February 1, 1916.)

No. 2786.

1. REMOVAL OF CAUSES \Leftrightarrow 19—CAUSES REMOVABLE—ACTIONS ARISING UNDER UNITED STATES CONSTITUTION AND LAWS.

Judicial Code (Act March 3, 1911, c. 231) § 24, subd. 1, 36 Stat. 1091 (Comp. St. 1913, § 991) gives United States District Courts original jurisdiction of suits arising under the Constitution or laws of the United States where the matter in controversy exceeds the sum or value of \$3,000, and subdivision 8 gives them jurisdiction of all suits and proceedings arising under any law regulating commerce, except those jurisdiction of which is conferred upon the Commerce Court. Section 28 provides that any suit of a civil nature arising under the Constitution or laws of the United States, of which the District Courts are given original jurisdiction and which may be brought in any state court may be removed to the proper District Court. The Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 593 [Comp. St. 1913, § 8592]) to Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, pars. 11, 12, 24 Stat. 386, requires common carriers receiving property for interstate transportation to issue a receipt or bill of lading, and provides that such carrier shall be liable to the lawful holder thereof for any loss, damage, or injury caused by it or by any connecting carrier. The declaration in an action brought in a state court for nondelivery of a shipment of oil showed that the oil was shipped from Vicksburg, Miss., and consigned to Cincinnati, Ohio, that the shipment was an interstate shipment, and that it was delivered by the initial carrier to a connecting carrier in good condition at a point outside the local jurisdiction of the state court. *Held*, that the action was one arising under a law of the United States, and was removable to the United States District Court, especially as the state court would have had no jurisdiction over the connecting carriers, but for the Carmack Amendment.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-46, 48, 52, 53; Dec. Dig. \Leftrightarrow 19.]

2. REMOVAL OF CAUSES \Leftrightarrow 19—CAUSES REMOVABLE—ACTIONS ARISING UNDER UNITED STATES CONSTITUTION AND LAWS.

A suit arising under a law of the United States is no less removable to a federal court because the law involved has already been decided, construed, and settled by the United States Supreme Court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-46, 48, 52, 53; Dec. Dig. \Leftrightarrow 19.]

3. COURTS \Leftrightarrow 508—INJUNCTION AGAINST STATE COURT—PROCEEDINGS AFTER REMOVAL.

In a shipper's action for nondelivery of an interstate shipment, defendants filed in the state court in which the action was brought a motion for an order removing the case to the United States District Court, and such motion was denied, whereupon the moving defendants filed a certified transcript of the record in the United States District Court. Plaintiff was proceeding in the state court, and had procured an order requiring the defendants to plead before a day fixed, and the defendants thereupon filed a bill in the federal court to enjoin plaintiff from proceeding

in the state court, and applied for a temporary restraining order restraining further proceedings in the state court pending the hearing of the questions presented by the bill. *Held*, that the application for the restraining order was appropriate and justified, and should have been granted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. Ⓒ508.]

Appeal from the District Court of the United States for the Western Division of the Southern District of Mississippi; Henry C. Niles, Judge.

Suit by the Alabama Great Southern Railway Company and others against the American Cotton Oil Company. From a judgment denying an application for a temporary injunction, complainants appeal. Reversed.

From the record before the court it appears that the American Cotton Oil Company, appellee, a corporation and citizen of the state of Ohio, brought its declaration in the circuit court of Warren county, Miss., against the appellants. They are the Alabama Great Southern Railway Company, a corporation and citizen of Alabama, and the Alabama & Vicksburg Railway Company, a corporation and citizen of Mississippi. For convenience, these will be termed the Alabama and Mississippi Railways. These railways are engaged in interstate commerce and transportation. In this capacity, at Vicksburg, the Mississippi Railway, on March 25, 1914, received a tank car of cotton seed oil. This oil was intended for the American Cotton Oil Company at Cincinnati, Ohio. The Mississippi Railway was the initial carrier, and the bill of lading indicated that the car was to be delivered at Meridian to the Alabama Railway, which was to transport it to Chattanooga, and deliver it to the Queen & Crescent Line, by which it was to be conveyed to Cincinnati.

The declaration in the state court alleged that this was an "interstate shipment, without exception," and that this was made plain by the bill of lading. This had attached a draft of the Colwell Oil Company in favor of the First National Bank of Vicksburg, Miss., for \$3,538.08, drawn on the American Cotton Oil Company at Cincinnati, Ohio. The draft was paid. It was further alleged in the declaration that the car containing the oil was moved out of Vicksburg and delivered by the Mississippi Railway to the Alabama Railway at Meridian, in good condition and without exception, and, further, that after the car was thus received by the Alabama Railway it moved from Meridian, en route to Cincinnati, over the lines of the Alabama Railway, but never reached its point of destination, and the oil in question was lost or wasted en route and never delivered. An amicable demand was made upon these railways for payment of the value of the oil, but this was refused. The Colwell Cotton Oil Company then assigned to the American Cotton Oil Company all its right, title, and interest to the oil, and to its complaint against the railways for their failure to deliver the same according to the contract. They refusing and continuing to refuse payment, the declaration setting forth the Oil Company's cause of action was filed.

Having been served with process on January 9, 1915, the railways filed a plea of general issue, and on the 16th of January, the same year, the railways notified the attorneys of record for the Oil Company that they would, on the day to which the process was made returnable, move the state court for an order removing the case to the District Court of the United States for the Western Division of the Southern District of Mississippi. This motion was made, and its technical requisites were complied with. The motion came on for a hearing before the state court, to wit, the circuit court of Warren county, Miss., which adjudged that the cause was not removable. To this ruling the railways excepted, and then caused a certified copy of the declaration, and exhibits, notice of motion to remove, petitions, and bonds, and the order of the state court, and all the proceedings taken therein, to be filed in the District Court of the United States. This was done on the 13th day of February,

1915, and in that court the railways again filed their plea of general issue. It further appears that, notwithstanding the action of the railways in filing a transcript of the record in the District Court of the United States and further complying with the requisites of the statute providing for removal of causes from the state court thereto, the plaintiff, namely, the American Cotton Oil Company, insisted upon proceeding with the trial in the state court. Pursuant to this, that court, by order, required the railways to plead on or before the 3d day of May, 1915.

In this state of the record, the railways brought in the District Court of the United States, in which the transcript had been filed, a bill in equity against the American Cotton Oil Company. The bill recited the facts hereinbefore stated, and set out the act of Congress of June 29, 1906, amendatory of the Interstate Commerce Act, and termed the Carmack Amendment. This amendment provides: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass; and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof." The bill further averred that the action was instituted by virtue of the act of Congress thus amended; that the declaration in the state court alleges that the Mississippi Railway was the initial carrier; that the oil was received as an interstate shipment, and that it was delivered to the Alabama Railway at Meridian, Miss.; that the latter operates a railroad line from Meridian, through the state of Alabama, to Chattanooga, in Tennessee; that the oil was consigned to Cincinnati, Ohio, and that it was not possible for either of the complainants to transport the oil to its destination without the assistance of connecting lines. Because of these facts, it was the purpose of the Oil Company to enforce the provisions of the Carmack Amendment in the state court; that indeed the Alabama Railway had no domicile in the county of Warren and could not have been sued separately therein, but could be so sued in connection with the initial carrier only because of the Carmack Amendment.

Averring that the District Court of the United States had original jurisdiction of all such suits of a civil nature, at common law, or in equity, which arise under the Constitution or laws of the United States, or statutes made or which shall be made under their authority, and further that because of such original jurisdiction such suits when brought in the state court may be removed by the defendant or defendants therein to the District Court of the United States for the proper district, the complainants further averred that this is a suit of that character, and that they had the right to have the same removed from the circuit court of Warren county, Miss., to the District Court having jurisdiction. Averring that the notice of petition to remove, together with copies of the petitions and bonds, were made and filed in time, they further aver that the state court where the declaration was filed, in view of the record thus made, had no right or authority to retain jurisdiction, that its order declining to remove the cause was illegal, and that the cause had been legally and properly removed to the United States court, and is now pending therein. Invoking the assistance of the District Court to prevent the American Cotton Oil Company from harassing the complainants by attempting to proceed with the suit in the state court, they pray for a writ of injunction directed to the Oil Company and its attorneys enjoining and commanding

them absolutely to refrain from attempting to further proceed with the suit in the circuit court of Warren county, and requiring them to prosecute the same in the Western division of the Southern district of Mississippi. Calling attention to the fact that the order of the state court required complainants to plead on or before the 3d day of May, 1915, that being the first Monday of the month of May, and that the District Court of the United States to which the cause was removed could not finally dispose of the controversy prior to that time, they ask for a temporary restraining order against the Oil Company and its counsel from further prosecution of the suit in the state court pending the hearing of the questions presented by the bill.

When the bill in equity came on to be heard before the District Court of the United States, the counsel for the Oil Company moved to dismiss the same for the assigned reasons that there is no equity in the bill; that it presents no ground for the granting of an injunction, no federal question for the determination of a federal court, and no facts which would authorize the removal of the suit pending in the state court to the federal court; that the alleged grounds for removal are shown not to exist as a matter of law on the face of the pleadings of the defendant, the plaintiff in the suit pending in the state court; and because the federal court for the Western division of the Southern district of Mississippi is without jurisdiction, because the questions related as constituting a federal question have been decided and settled by the Supreme Court of the United States, and therefore no federal question now exists as to the construction of the law involved in this case, etc. The application for temporary injunction sought in the bill was heard, and on the 19th day of May, 1915, it was by the court denied. This appeal was then sought and allowed.

The assignments of error are as follows: First, because the court erred in not decreeing that the application of complainants for temporary injunction be allowed; second, the court erred in refusing to grant the temporary injunction as prayed for in complainants' bill.

J. Blanc Monroe and Monte M. Lemann, both of New Orleans, La., Catchings & Catchings, of Vicksburg, Miss., and R. H. & J. H. Thompson, of Jackson, Miss., for appellants.

A. A. Armistead, of Vicksburg, Miss., for appellee.

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

SPEER, District Judge (after stating the facts as above). [1] Because of the probable recurrence of the question before the court, and others cognate, it has been thought proper to detail with some care the various facts of the transcript. We inquire, first, is the cause removable? The law relating to the question before the court is found in subdivision 1 of section 24 of the Judicial Code, defining the original jurisdiction of the District Court as follows:

"Sec. 24. The District Courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens or subjects. No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in

action if no assignment had been made: Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

Subdivision 8 of section 24 of the Judicial Code confers additional jurisdiction upon the District Courts of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court. The Commerce Court having been subsequently abolished, the exception will doubtless fail.

For more than 40 years causes involving these issues, colloquially and often judicially termed "federal" questions, have been removable from a state court to a United States court. This appears from section 2 of the act of Congress enacted March 3, 1875. This provides:

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district."

Abolishing the Circuit Court, the Judicial Code (section 28) adopts the language of the act of 1875 just quoted, except that the word "District" is used instead of the word "Circuit." It is clear, then, if it sufficiently appears from the pleadings that the controversy before the court arises under the Constitution and laws of the United States, by section 24 of the Judicial Code, the District Court would have original jurisdiction had the suit been brought therein. If such is found to be the case, then by virtue of the Judicial Code (section 28), when brought in the state court, it is removable to the District Court of the United States for the proper district.

Now, does the declaration disclose that the suit was one arising under the Constitution or laws of the United States? The amendment known as the Carmack Amendment, of June 29, 1906, to the Hepburn Act of Congress, has been set out in the statement heretofore made. It is intended to define the liability of a common carrier, like that charged here. The declaration in the state court alleges that the defendant companies are common carriers. The amendment related to contracts for transportation from a point in one state to a point in another state. The declaration alleges that the car of cotton seed oil was shipped out of Vicksburg, Miss., and that its destination was Cincinnati, Ohio. The act is designed to make the railway receiving the initial shipment liable for loss, damage, or injury to the property shipped, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or from whose line or lines such property may pass. The declaration recites that the oil was shipped from Vicksburg over the line of the Mississippi Company and was to be delivered at Meridian to the Alabama Great Southern Railway, and was to be routed by the Queen & Crescent to its destination. To the declaration was attached, as

Exhibit C, the bill of lading. This states the rate of freight from Vicksburg, Miss., to Cincinnati, Ohio. It contains this clause:

"Consigned to order of shippers, destination Cincinnati, state of Ohio. Notify American Cotton Oil Co. at Cincinnati, state of Ohio. Route Q. & C. [by which is meant Queen & Crescent]. Car initials A. C. O. X. Car No. 578. One tank of crude oil," etc.

In addition, the declaration alleges that it was an interstate shipment; that it was delivered by the Mississippi Railway to the Alabama Railway at Meridian; that, thus received, it moved from Meridian en route to Cincinnati, over the lines of the Alabama Railway, but said car never reached its point of destination, and the oil in question was lost or wasted en route and never delivered. The suit is brought for loss, damage, and injury. The amount claimed was over \$3,000. Had this declaration been filed in the proper District Court of the United States, at a glance, it would have been seen to be a suit arising under a law of the United States. That law, of course, is the Carmack Amendment, designed to give relief to shippers in interstate commerce from just such injuries as the plaintiff in the state court alleged. The nature of the injury and the validity of the remedy is referred to in the opinion of the District Court in the Riverside Mills Case, 168 Fed. 990. That it arises under the Constitution is evident. The opinion just quoted, holding the amendment constitutional, was questioned with great ability by very eminent counsel soon to become a member of the Supreme Court, but the validity of the amendment in all respects was by that court upheld.

It is true that the plaintiff in the state court in its declaration made no formal mention of the Carmack Amendment, but substantial averments to that effect were clearly made, and this court will not, of course, look solely to the form, but to the substance also. Indeed, it is plain that, but for the Carmack Amendment, there would have been no semblance of jurisdiction in the state court. The declaration alleges that the car of oil was delivered by the Mississippi Railway to the Alabama Railway, at Meridian, in good condition, and without exception. The Mississippi Railway was then conceded to be not at fault. Warren county, where the suit was brought in the state court, is on the western boundary of Mississippi. Meridian, where the car and oil were delivered in good condition to the Alabama Railway, is on the eastern boundary. There was obviously no local jurisdiction over the Alabama Railway. In the absence of the national law, the plaintiff then would have been helpless. In *Hutchinson on Common Carriers*, § 1347, it is declared:

"In the case of successive lines of carriers, over all of which the goods must pass in order to reach destination, it would not be enough to show that the goods had never reached such destination, and must, therefore, have been lost or stolen somewhere upon the route; but, unless the first carrier by express or implied contract has assumed responsibility for the whole journey, the carrier by whose negligence or omission of duty the loss has occurred must be singled out, and the responsibility must be fixed upon him by the proof. Nor in such a case could the difficulty in fixing the responsibility where it properly belonged be obviated by suing all the carriers jointly over whose lines it was necessary for the goods to pass. For, unless it could be shown with which of them the fault lay, none of them could be held liable

without proof of a partnership or of some such association as would make them jointly and severally liable for each other's faults. And the inconvenience to the owner of the goods resulting from this rule is, as we have seen, the principal argument in favor of what is known as the doctrine of Muschamp's Case, and shows the importance to the shipper of a through contract with the first carrier upon the route, where that rule does not prevail."

But the Carmack Amendment made the first carrier assume responsibility. Over two years after the Riverside Mills Case was decided, the Supreme Court of the United States again considered this most salutary provision. It was in the case of Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. It held that:

"The Carmack Amendment legislated directly upon the carrier's liability for loss of and damage to interstate shipments."

In the first paragraph of the opinion, Mr. Justice Lurton, speaking for the court, seems to determine the question here at issue. He said:

"The answer relies upon the act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887, as the only regulation applicable to an interstate shipment, and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the federal question and gives this court jurisdiction."

This opinion is also illuminative as to the general character of this clause of the Interstate Commerce Law.

"The significant and dominating features of that amendment," said the learned Associate Justice, "are these: First. It affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor' when it receives 'property for transportation from a point in one state to a point in another.' Second. Such initial carrier is made 'liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it.' Third. It is also made liable for any loss, damage or injury to such property caused by 'any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass.' Fourth. It affirmatively declares that 'no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.'"

It is not intended to intimate that jurisdiction of injuries of a general and civil nature in violation of this amendment may not be redressed in the state courts. In other words, the state courts have original jurisdiction of such issues. It has been held that where the action is not penal, but civil and transitory, it might be asserted in a state court as well as in those of the United States. Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516. That was a suit against an initial carrier in an interstate shipment. It, like this, was based on a failure to deliver goods shipped in interstate commerce. The carrier insisted that the state court had no jurisdiction and that the complaint could only be made under the provisions of sections 8 and 9 of the Interstate Commerce Act, before the Interstate Commerce Commission, or in some District or Circuit Court of the United States. The Supreme Court held otherwise, and conceded the jurisdiction of the state court. It made, however, the important statement; Mr. Justice Lamar rendering the opinion:

"The real question, therefore, presented by this assignment of error, is whether a state court may enforce a right of action arising under an act of Congress."

The language "arising under an act of Congress," of course, imports "arising under the Constitution and laws of the United States." There, then, was a recognition of the character of the right of action, which, as stated, was the same as in this case. But that was not a case of removal. While, then, the state court has original jurisdiction of a right of action arising under an act of Congress, such action may be removed to a court of the United States. In the case of *Louisville & Nashville R. R. Co. v. Mottley*, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126, the court declared:

"It is the settled interpretation of these words, as used in the statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution."

It follows that, when the plaintiff's statement does show that it "is based upon the laws or that Constitution," jurisdiction in a court of the United States does exist. To determine whether or not a case arises under the laws of the United States, the following cases cited and discussed in the very satisfactory brief of counsel for the appellants will be found additionally instructive: *Tennessee v. Davis*, 100 U. S. 264, 25 L. Ed. 648; *Nashville, C. & St. L. Ry. v. Taylor (C. C.)* 86 Fed. 177; *Texas & Pacific Ry. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Seaboard Air Line Ry. v. Duvall*, 225 U. S. 477, 32 Sup. Ct. 790, 56 L. Ed. 1171; *St. L., I. M. & So. Ry. v. Taylor, Adm'r*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Feibelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984. Indeed, if the declaration presenting the plaintiff's cause of action to the circuit court of Warren county had been filed in the District Court of the United States for the Western Division of the Southern District of Mississippi, it would have required no alteration to obtain standing there, save the heading setting forth the designation of the court from the action of which redress was sought.

The formidable array of authorities cited by the learned counsel for the appellee in their brief merits careful attention. The *Wallace Case*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516, *supra*, has already been considered. *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542, is also relied upon to sustain the contention of the defendant in error. That, however, was a habeas corpus case, and the court held that Congress had not undertaken to invest the judicial tribunals of the United States with exclusive jurisdiction to issue writs of habeas corpus, and subject to the exclusive authority of the national government, in its own courts, to determine whether persons held in custody by authority of the United States were properly so held, the states have the right by their own courts or judges to inquire into the grounds upon which any person within their respective territorial limits is restrained of his liberty, notwithstanding the illegal restraint may arise from a violation of the Constitution and laws of the United States. That ruling, while instructive, is in no sense de-

cisive of the right of removal to the United States court which is presented in this case, and was not presented in that.

In the case of *Germania Insurance Co. v. Wisconsin*, 119 U. S. 473, 7 Sup. Ct. 260, 30 L. Ed. 461, cited by appellee, the true issue was whether or not a certain person was an agent of a nonresident insurance company; that is to say, a case in which the state itself was a party, attempting to enforce statutory penalties on the company for doing business in the state without complying with the laws. Obviously that did not present a question arising under federal law.

Ames v. Kansas ex rel. Johnson, Atty. Gen., et al., 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482, also cited, was a proceeding in the nature of quo warranto, instituted by a state in its own courts to try the right of a corporation to exercise corporate powers within the territorial limits of the state; it involved also the right of removal. There, in a learned and extended opinion by Chief Justice Waite, the action of the lower court remanding the cause was reversed. The decision was based largely upon rulings of Chief Justice Marshall in *Osborn v. Bank of United States*, 9 Wheat. 825, 6 L. Ed. 204, who declared:

An act of Congress "is the first ingredient, * * * is its origin, is that from which every other part arises."

And upon the case of *Cohens v. Virginia*, 6 Wheat. 264, where on page 379, 5 L. Ed. 257, Chief Justice Marshall declared:

"The jurisdiction of the court, then, being extended * * * to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction must sustain the exemption they claim on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed."

In the case of *Starin v. New York*, 115 U. S. 257, 6 Sup. Ct. 28, 29 L. Ed. 388, upon which appellee places reliance, the question was whether the city of New York has the exclusive right to establish ferries between Manhattan Island and the shore of Staten Island, on the Kill von Kull. This was a removal case. There Chief Justice Waite declared that the character of a case is determined by the questions involved, citing *Osborn v. Bank of the United States*, 9 Wheat. 825, 6 L. Ed. 204, supra. He also stated, on page 258 of 115 U. S., on page 31 of 6 Sup. Ct., 29 L. Ed. 388:

"It is not pretended that the United States have in any manner attempted to interfere with the power of a state to grant exclusive ferry privileges across public waters between places within its own jurisdiction. * * *"

For the reason that the decision of the question involved did not depend on the Constitution or laws of the United States, and for the further reason that there was no such separate controversy as would enable one of the defendants to remove the case, it was remanded.

In *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314, et seq., also cited, a marshal of the United States was sued for trespass for seizing property in the performance of his duty. There Mr. Justice Harlan stated for the unanimous court:

"A case, therefore, depending upon the inquiry whether a marshal or his deputy has rightfully executed a lawful precept directed to the former from a court of the United States, is one arising under the laws of the United States; for, as this court has said, 'cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted'—citing *Tenn. v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Railroad Co. v. Miss.*, 102 U. S. 135, 26 L. Ed. 96."

The right of removal was upheld.

In the case of *Tennessee v. Union & Planters' Bank*, 152 U. S. 464, 14 Sup. Ct. 654, 38 L. Ed. 511, it was held that the court had no jurisdiction either original or by removal from a state court, as one arising under the laws of the United States, unless that appears by the plaintiff's statement of his own claim. But, as stated, that does abundantly appear in the case now before the court.

In *Devine v. Los Angeles*, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046, there was a question of original jurisdiction. This was sought by allegations that the defendants' adverse claims to the surface and subterranean waters of the Los Angeles river were based on an erroneous construction of the treaty of Guadalupe Hidalgo, the act of 1851, and certain state acts and city ordinances. Mr. Chief Justice Fuller, for the court, said:

"A bill in equity will not lie to dispel mere verbal assertions of ownership or to adjudge state statutes and charters unconstitutional and void. If the statutes and charters are unconstitutional, they are void and cannot constitute a cloud on title."

And further that:

"Where complainant claims title to land in California under Mexican grants confirmed by the Board of Land Commissioners, as the state of California is not in the line of such titles, a statute of that state conferring water rights on a city does not deprive complainants of their property or impair the obligation of any contract, as the state can only confer whatever rights in such waters had vested in it."

The court also held that the jurisdiction of the federal question must appear necessarily in the statement of the plaintiff's cause of action, citing *Third Street Ry. Co. v. Lewis*, 173 U. S. 457, 19 Sup. Ct. 451, 43 L. Ed. 766. Since in this the declaration of the plaintiff in the state court, as we have seen, in practical substance sets out its right, under the amendment to the act of Congress regulating interstate commerce, this case, while valuable in a general sense, is not particularly illuminative as to the duty of the court in the utterly differing case before us.

In *Bankers' Casualty Co. v. Minnesota*, 192 U. S. 373, 24 Sup. Ct. 325, 48 L. Ed. 484, an action was commenced in the Circuit Court by a citizen of one state against a railroad company, a citizen of another state, for damages for a loss of a registered mail package, where the plaintiff relied on principles of general law applicable to negligence and to the liability of defendant, if there was negligence, the fact that the suit involved the relations of the railroad company to the government did not put in controversy the construction of any provision of the Constitution or of any law of the United States on

which the recovery depended. The material facts were that the defendants' roadmaster entered the depot, unlocked the mail bag with a key he had unlawfully caused to be made, abstracted the package of currency, and converted its contents, that the room where the mail bag was placed was "not designed or capable of safely keeping valuable articles or property," and that it was through the negligence of defendant and its station agent that the man gained entrance to the room and obtained access to the mail bag. This was a case of burglary, and obviously did not present a federal question, and the court so held.

It is true, as is plausibly contended by counsel for defendant in error, that in *Gold Washing & Water Co. Case*, 96 U. S. 203, 24 L. Ed. 656, and in a number of cases to sustain removal, it is said: "It may become necessary to give a construction to the Constitution or laws of the United States." But in that case, not only did Mr. Justice Bradley dissent, but the court, Chief Justice Waite delivering the opinion declared that the "decision is to be considered as conclusive only upon the question directly involved and decided." The learned justice also adds, on page 203 of 96 U. S., 24 L. Ed. 656: "The suit must, in part at least, arise out of a controversy between the parties in regard to the *operation and effect* of the Constitution or laws upon the facts involved." Now it is difficult to conceive a case brought for violation of the Carmack Amendment of the Interstate Commerce Law which does not depend upon the operation and effect of that law. The true rule, we think, is very properly stated in *Black's Dillon on Removal of Causes*, § 109, pp. 180, 181, where a federal question is defined to be:

"A controversy or dispute between the parties, and that controversy must be not merely upon the question of fact, but upon the validity, interpretation, effect, or applicability of the law of the United States."

[2] It is insisted with apparent earnestness by the appellee that no cause is removable where the law involved has once been decided, construed, and settled by the Supreme Court of the United States, and the *Riverside Mills Case*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, is referred to as having construed and settled the Carmack Amendment. Since, however, the law relating to removal of causes because of a federal question is precisely the same as that upon which the original jurisdiction of the federal court because of such question depends, this contention, if meritorious, would seem to destroy the original jurisdiction and the right of removal as well. To state it otherwise, because the law has been definitely settled by the highest authority, if the learned counsel for defendant in error are correct in this proposition, it can no longer be utilized, except perhaps in a state court. We find it difficult to assent to reasoning which evolves this conclusion.

Nor has the *Riverside Mills Case* conclusively settled all construction and interpretation of the Carmack Amendment. This is made evident by the case of *Adams Express Co. v. Croninger*, already quoted, and other cases. Vide *St. L. S. W. Ry. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, *Ann. Cas.* 1915B, 77; *Kansas*

City Southern Ry. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; Norfolk & West. Ry. v. Dixie Tobacco Co., 228 U. S. 593, 33 Sup. Ct. 609, 57 L. Ed. 980. It may be safely conceded that, if courts and litigants always observed and maintained absolute deference to settled law, this contention might have greater force. We have as yet, however, not attained that perfectability of which Plato dreamed in the Gardens of the Academy; and, however ample may have been the construction and interpretation of the law by the Supreme Court, its "effect and applicability" to the facts of each case, it being a law of the United States, will open the courts of the United States to those who seek the remedies which it affords, and as well to those who would make defense to averments of wrong and injury, which it authorizes such courts to hear.

In view of all of the authorities cited, and others which might be cited, we conclude, in the apposite language of Mr. Justice Bradley, in *Provident Savings Society v. Ford*, 114 U. S. 642, 5 Sup. Ct. 1104, 29 L. Ed. 261, quoted by Judge Maxey in *Clark v. So. Pac. Ry.* (C. C.) 175 Fed. 122:

This suit "is pervaded from its origin to its close by United States law and United States authority."

After that careful consideration which the importance of the controversy deserves, the court is clearly of the opinion that the right of removal exists and should be upheld.

[3] The remaining question is: Was the application for injunction or temporary restraining order in the District Court appropriate? This question was early presented to the Supreme Court of the United States. In *French, Trustee, v. Hay*, 22 Wall. 250, note, 22 L. Ed. 857, the power of injunction was exercised to prevent a party whose case had been removed to a United States court from pursuing his remedy even in a state court of another state. There, too, the complainant relied upon a transcript of the record, as in this case. Said Mr. Justice Swayne, for the unanimous court:

"This bill is not an original one. It is auxiliary and dependent in its character, as much so as if it were a bill of review. The court, having jurisdiction in personam, had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory. Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive, and could not be trenching upon by any other tribunal. The court below might, upon a cross-bill, and perhaps upon motion, have given the relief which was given by the interlocutory and the final decree in the case before us. If it could not be given in this case, the result would have shown the existence of a great defect in our federal jurisprudence, and have been a reproach upon the administration of justice. * * * The prohibition in the Judiciary Act against the granting of injunctions by the courts of the United States touching proceedings in the state courts has no application here."

This case was reaffirmed in *Dietsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497. More distinctly conclusive is *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L.

Ed. 462. There Mr. Justice Harlan delivered the opinion of the court, and with his accustomed care cited the authorities. Said this learned jurist, in part:

"Certain principles, relating to the removal of cases, have been settled by former adjudications. They are: (1) If a case be a removable one, that is, if the suit, in its nature, be one of which the Circuit Court could rightfully take jurisdiction, then upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed, and the state court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void. * * * (2) After the presentation of a sufficient petition and bond to the state court in a removal case, it is competent for the Circuit Court, by a proceeding ancillary in its nature—without violating section 720 of the Revised Statutes, forbidding a court of the United States from enjoining proceedings in a state court—to restrain the party against whom a cause has been legally removed from taking further steps in the state court. *French, Trustee, v. Hay*, 22 Wall. 238 [22 L. Ed. 854]; *Dietsch v. Huidekoper*, 103 U. S. 494 [26 L. Ed. 497]; *Moran v. Sturges*, 154 U. S. 256 [14 Sup. Ct. 1019, 38 L. Ed. 981]. See also, *Sargent v. Helton*, 115 U. S. 348 [6 Sup. Ct. 78, 29 L. Ed. 412]; *Harkrader v. Wadley*, 172 U. S. 148 [19 Sup. Ct. 119, 43 L. Ed. 399]; *Gates v. Bucki*, 53 Fed. 961 [4 C. C. A. 116]; *Texas & Pacific Ry. v. Kuteman*, 54 Fed. 547 [4 C. C. A. 503]; *In re Whitelaw* [D. C.] 71 Fed. 733; *Iron Mountain Ry. v. Memphis*, 96 Fed. 114 [37 C. C. A. 410]; *James v. Central Trust Co.*, 98 Fed. 489 [39 C. C. A. 126]."

In view of these considerations, we hold that the case was removable; that the application for restraining order, or temporary injunction was appropriate and justified, and should have been granted; and that the judgment of the District Court denying the same should be reversed. It is so ordered.

KNABE BROS. CO. v. AMERICAN PIANO CO.

AMERICAN PIANO CO. v. KNABE BROS. CO.

(Circuit Court of Appeals, Sixth Circuit. February 11, 1916.)

Nos. 2673, 2674.

1. TRADE-MARKS AND TRADE-NAMES ⇨79—SUITS FOR INJUNCTIONS—PREMATURE SUITS.

Where defendant, having a corporate name somewhat similar to trade-marks and trade-names acquired by plaintiff, was arranging to put out a piano bearing its corporate name upon its fall-board and with an insufficient warning notice to purchasers, plaintiff was not bound to wait until defendant's piano was actually on the market before filing a bill for an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 89, 90; Dec. Dig. ⇨79.]

2. TRADE-MARKS AND TRADE-NAMES ⇨85—SUITS FOR INJUNCTION—DEFENSES—MISREPRESENTATION BY PLAINTIFF.

From 1837 to 1908 William Knabe, and later his sons and a son-in-law, under the name of "Wm. Knabe & Co.," and still later a corporation organized by the sons and the children of one of them, known as the "Wm. Knabe & Co. Mfg. Co.," manufactured pianos in Baltimore known to the trade as "Knabe" pianos, or "Wm. Knabe & Co." pianos, and in 1905 these names were registered as trade-marks. In 1903 grandsons of the founder of the business, whose names were Knabe, and who were

then in control of the corporation, assisted in consolidating it with other piano companies to form the plaintiff company, and the Knabe Co. transferred to plaintiff all of its assets, including its good will, trade-marks, and trade-names. Later the grandsons severed their connection with plaintiff and organized the defendant corporation, known as the "Knabe Bros. Co.," which engaged in the manufacture of pianos in or near Cincinnati. On the fall-board appeared the corporate name, without further designation, and on the cheek-block, at the left of the bass scale, a notice was prominently displayed, stating that such company's product must not be confused with the Wm. Knabe & Co. piano of Baltimore, manufactured by plaintiff, and that its managing officers were grandsons of the original William Knabe, and former officers of Wm. Knabe & Co. *Held*, that the fact that plaintiff had continued to advertise the connection of the grandsons with the manufacture of plaintiff's pianos, after their connection with it had ceased, was not ground for denying plaintiff injunctive relief, where the offending publications were promptly discontinued when complained of, and no deception was intended.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. ⚡85.]

3. TRADE-MARKS AND TRADE-NAMES ⚡85—SUITS FOR INJUNCTION—DEFENSES—MISREPRESENTATION BY PLAINTIFF.

That defendant sold pianos other than Knabe pianos as bearing the Knabe guaranty was not ground for the denial of injunctive relief, where it was not clear that the "Knabe guaranty" was anything more than a guaranty of quality.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. ⚡85.]

4. TRADE-MARKS AND TRADE-NAMES ⚡85—SUITS FOR INJUNCTION—DEFENSES—MISREPRESENTATION BY PLAINTIFF.

In view of the conveyance to plaintiff of the trade-marks and good will of its predecessors, the putting out of Knabe pianos under the name of "Wm. Knabe & Co.," without disclosing that plaintiff was only the successor to Wm. Knabe & Co., did not deprive it of its right to protect the name against infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. ⚡85.]

5. TRADE-MARKS AND TRADE-NAMES ⚡73—RIGHT TO USE OWN NAME.

Where the sale of the Knabe Co.'s assets and good will did not, in terms, restrict the right of the grandsons to manufacture and sell pianos, plaintiff did not, under the common law or under the registration of its trade-mark, have any exclusive right to the use of the name "Knabe," and the grandsons had a perfect right to employ their name in the business of manufacturing and selling pianos, either as individuals or in the name of the corporation of which they were the actual managers and operators, provided they did not invade the good will of plaintiff's business and employ trade-marks and trade-names adopted by plaintiff.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⚡73.]

6. TRADE-MARKS AND TRADE-NAMES ⚡74—REFERENCE TO PREVIOUS CONNECTION WITH ANOTHER.

Defendant had the right to advertise and make the most, by legitimate means, of the former connection on the part of its managing officers, and their familiarity, with the manufacture of pianos, and even of Knabe pianos, provided they took reasonable precautions to make it clearly appear that the goods sold by it were its own goods and of its own make, and not those of plaintiff or of its predecessors.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 85; Dec. Dig. ⚡74.]

7. TRADE-MARKS AND TRADE-NAMES ⇨73—USE OF SIMILAR NAMES.

Defendant had no right to advertise its pianos as "Knabe's," as the unqualified use of the word would naturally suggest origin of manufacture.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⇨73.]

8. TRADE-MARKS AND TRADE-NAMES ⇨73—USE OF SIMILAR NAMES.

The mere use, with or without the place of manufacture, of defendant's corporate name on its pianos, was not enough to distinguish them from plaintiff's pianos, even though script type, instead of old English used in plaintiff's trade-mark "Wm. Knabe & Co.," was used, as the ultimate purchaser of only ordinary information is the one to be considered, and presumably the general public is unfamiliar with the place of manufacture of the Wm. Knabe & Co. pianos or the precise form of its manufacturer's names; and hence the court was justified in requiring that there be placed on the outside of the piano a further warning notice than that given by the name and address on the fall-board.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⇨73.]

9. TRADE-MARKS AND TRADE-NAMES ⇨73—USE OF SIMILAR NAMES.

The court erred in requiring defendant to place its corporate name and a warning notice on a metal plate on the fall-board with finely inscribed lines, instead of the plain and universally used lettering, as this would directly and unnecessarily tend to discredit the regularity of defendant's product.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⇨73.]

10. TRADE-MARKS AND TRADE-NAMES ⇨73—USE OF SIMILAR NAMES.

Where the name "Knabe" had come to indicate both origin and quality, the court erred in requiring the warning notice to state that defendant's piano was not a "Knabe," or an "original Knabe," as defendant was thereby required to disclaim the Knabe quality, as well as an implied origin of manufacture in plaintiff or its predecessors.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⇨73.]

11. TRADE-MARKS AND TRADE-NAMES ⇨73—USE OF SIMILAR NAMES.

Defendant was entitled to use its corporate name as manufacturer upon the fall-boards of its pianos.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⇨73.]

12. TRADE-MARKS AND TRADE-NAMES ⇨73—USE OF SIMILAR NAMES.

Where no sufficient warning notice could be put on the fall-boards without substantially mutilating and thereby unduly discrediting defendant's pianos, it was not imperatively necessary that such notice should immediately follow the manufacturer's name, and, though such name appeared upon the fall-board, a proper notice permanently attached to the cheek-block, in black upon a white ground, in letters readily legible, would sufficiently protect plaintiff's rights in connection with a notice required to be displayed in salesrooms and inserted in advertisements.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⇨73.]

13. TRADE-MARKS AND TRADE-NAMES ⇨73—USE OF SIMILAR NAMES.

The notice originally used by defendant was not a sufficient warning, as it did not show that the piano was not the product of the original manufacturers of Knabe pianos, and plaintiff was entitled to such a notice; and hence a notice should be required, stating that the piano was not made by Wm. Knabe & Co., of Baltimore, the original manufacturer of Knabe pianos, nor by Wm. Knabe & Co. Mfg. Co., nor by plaintiff,

successors of Wm. Knabe & Co., that the Knabe Bros. Co., maker of the piano, had no connection with those companies, and that its managing officers were grandsons of the original Knabe, and former officers of the Knabe Co.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ☞73.]

14. TRADE-MARKS AND TRADE-NAMES ☞73—UNFAIR COMPETITION—DISPARAGEMENT OF ANOTHER'S GOODS.

Defendant had a right to advertise and represent its pianos as the only pianos made by a Knabe, or by a living Knabe, so long as such representation was true, provided it made it clearly appear that it and its officers had no connection, by succession, inheritance, or otherwise, with the business of the original manufacturers of the Knabe piano or the successors of those original manufacturers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ☞73.]

15. TRADE-MARKS AND TRADE-NAMES ☞73—USE OF SIMILAR NAMES.

It was error to enjoin defendant from representing or advertising that its pianos were Knabe pianos, and the injunction should be so limited as to permit the assertion of a claim that its pianos had the quality of Knabe pianos, provided there was such an unmistakable disclaimer as to origin of manufacture as to preclude confusion.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ☞73.]

16. TRADE-MARKS AND TRADE-NAMES ☞73—USE OF SIMILAR NAMES.

Defendant in this case is required to insert conspicuously in its circulars, catalogues, and advertisements, and to frame and keep in display upon its pianos, in salesrooms in which they were offered for sale, a notice stating in brief form the history of the Knabe business, the former connection therewith of defendant's organizers, the severance of their connection therewith, the organization of defendant, the distinction in name between the two pianos, and the lack of any connection between defendant's and plaintiff's pianos.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ☞73.]

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

Suit by the American Piano Company against the Knabe Bros. Company. From the decree, defendant appeals, and plaintiff cross-appeals. Modified.

Kramer & Bettman, of Cincinnati, Ohio (Gilbert Bettman, and John D. Ellis, both of Cincinnati, Ohio, of counsel), for appellant and cross-appellee.

Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio, and Masten & Nichols, of New York City, for appellee and cross-appellant.

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

KNAPPEN, Circuit Judge. The case is here on appeal and cross-appeal, respectively, from a final decree upon pleadings and proofs in a suit brought by the American Piano Company against the Knabe Bros. Company for infringement of trade-mark and for unfair competition.

William Knabe began the manufacture of pianos at Baltimore, Md., in 1837, continuing therein until his death in 1864, doing business for the most of that period in the name of Wm. Knabe & Co. Upon his death, his sons Ernst and William II, together with his son-in-law (Keidel), succeeded to the business, carrying it on in the same firm name until 1889, when the business was incorporated as "Wm. Knabe & Co. Manufacturing Company of Baltimore City," with a capital stock of \$1,000,000; Ernst Knabe being president until his death in 1894. Ernst's two sons, Ernst, Jr., and William III, entered the business when respectively 17 years of age, serving a thorough apprenticeship in the manufacture of pianos and every part thereof, and acquiring experience, skill, education, and training in such manufacture according to the Knabe standards and traditions. Upon the death of Ernst Knabe, Sr., his two sons named succeeded to his interest and became directors and officers; Keidel being manager. In 1898 Keidel sold out his interest to Ernst, Jr., and William III, who thereupon became the owners of substantially all the capital stock of the corporation and its active managers, being also president and vice president, respectively. In 1905 the Wm. Knabe & Co. Manufacturing Company registered, under the law of 1905 (Act Feb. 20, 1905, c. 592, 33 Stat. pt. 1, p. 724), three trade-marks, one upon the word "Knabe" alone, another upon that word in design, the third upon the name "Wm. Knabe & Co." in old English type. The pianos made by Wm. Knabe & Co. and the Wm. Knabe & Co. Manufacturing Company have generally been known to the trade either as "Wm. Knabe & Co." pianos or as "Knabe" pianos, usually, at least, bearing the name "Wm. Knabe & Co." on the fall-board. The Knabe piano has always been a high-class instrument.

In 1908 the American Piano Company was organized by way of consolidation of the Wm. Knabe & Co. Manufacturing Company, Chickering & Sons, and the Foster-Armstrong Company; the consolidated company acquiring all the capital stock of the Knabe Company (paying therefor in stock of the American Piano Company) and the Knabe Company conveying to the American Piano Company all its assets (with certain immaterial exceptions), expressly including good will, trade-marks, and trade-names. Ernst Knabe, Jr., and William Knabe III were active spirits in the formation of the American Piano Company, and upon its organization became actively connected with the management of its business, becoming directors and respectively president and vice president. In 1910, as a result of disagreements and litigation, the two Knabes retired from the American Piano Company, having parted with all their stock therein. In 1911, through the aid of their friends, they organized, under the laws of Ohio, a corporation known as the "Knabe Bros. Company," acquiring the capital stock, plant, and properties of the Smith & Nixon Piano Company at Norwood, Ohio (Ernst Knabe moving to Cincinnati from Baltimore), and proceeded to manufacture, not only the Smith & Nixon piano, under that name, but also the piano here in question. The latter piano, as first manufactured, bore upon its fall-board the words "Knabe

Bros. Co., Cincinnati" (without other designation), and upon the cheek-block, at the left of the bass scale, the following prominently displayed notice:

"NOTICE.

"Our product must not be confused with the Wm. Knabe & Co. piano of Baltimore, now manufactured by the American Piano Co.

"The managing officers of this Company are Ernst J. Knabe, Jr., and Wm. Knabe III, grandsons of the original Wm. Knabe and formerly officers of Wm. Knabe & Co. of Baltimore.

"This piano is absolutely guaranteed as to workmanship and material and has been inspected personally by" (blanks being left for signature, date and number).

Thereupon the American Piano Company filed its bill to restrain the Knabe Bros. Company from using the word "Knabe" as a part of its corporate name in manufacturing, selling, or dealing in pianos, or using upon its pianos any name or mark in which the word "Knabe" appears, or of which it forms a part, and from using that word, either alone or with other words, in circulars, catalogues, letter heads, advertisements, labels, or otherwise, in connection with the manufacture, sale, or hire of pianos; also from holding out defendant's pianos as "Knabe pianos." By cross-bill defendant sought to restrain plaintiff from certain alleged unfair misrepresentations.

A preliminary injunction was issued restraining defendant from placing upon its fall-boards the marking before referred to, and permitting only in place thereof the use of a metallic plate, which as finally approved by the court was less than three inches long and about one inch wide, bearing the following engraved inscription:

"The Knabe Bros. Company. This piano is not an original 'Knabe,' but is made under the supervision of E. J. and Wm. Knabe III, grandsons of the original Wm. Knabe I."

Plaintiff was at the same time, on defendant's application, enjoined from publishing statements that the Knabes of the present generation are still making the Wm. Knabe pianos, or are connected with that company, or that Ernst Knabe, Jr., or Wm. Knabe III have any connection with the American Piano Company. Thereafter, during the pendency of suit, defendant used upon its fall-boards only the metallic plate permitted by the court's order, discontinuing the use of the cheek-block notice. The final decree made no change respecting the markings permitted upon the fall-boards or the exterior of the pianos, except that the word "original" was to be omitted; the plate thus containing the statement "This piano is not a Knabe." Defendant was also perpetually enjoined from representing by advertisement or otherwise that its pianos are the only pianos made by a Knabe or by a living Knabe,¹ or that complainant's pianos are not Knabe pianos in fact, but only in name; also from representing by advertisement or otherwise that any part of complainant's business has been moved

¹ In fact the two Knabes mentioned seem to be the only living Knabes engaged in the piano business; Charles Keidel, a grandson of Wm. Knabe I, was for a time connected with the American Piano Co., but died during the pendency of this suit.

to Norwood or Cincinnati, or that defendant, or either or both of the Knabes mentioned, succeeded to the business conducted by complainant's Knabe factory; also from in any manner attempting to injure the good will and reputation of complainant or of the Wm. Knabe & Co. Manufacturing Company, as well as from doing anything which would lead the public to believe that defendant's pianos are Knabe pianos. The final injunction imposed restraint upon plaintiff substantially as did the temporary injunction.

[1] Defendant not only complains of the extent of the relief granted plaintiff, but asks that the bill be dismissed. Apart from the meritorious question whether defendant has invaded plaintiff's rights, the dismissal asked does not rest upon meritorious grounds. True, the bill was filed before defendant's pianos were actually upon the market; but defendant was arranging to put out a piano bearing its corporate name upon its fall-board and with the warning notices stated. Assuming for the present that the warning intended to be employed was insufficient, plaintiff was not bound to wait until the piano was actually on the market.

[2-4] But plaintiff is charged with coming into court with unclean hands: (1) By continuing to advertise by signs, catalogues, and otherwise the connection of Ernst, Jr., and William III with the manufacture of plaintiff's Knabe pianos after their connection with the plaintiff company had ceased; (2) by advertising "club sales" of pianos not in fact Knabe pianos as bearing the Knabe guaranty; and (3) in deceiving the public by selling pianos under the Knabe name without disclosing the plaintiff's successorship to Wm. Knabe & Co. It appears, however, that the offending publications were promptly discontinued when complained of, and we are not convinced that deception in that regard was intended. As to the second point: Plaintiff sold other pianos besides the Knabe, including some taken in exchange, and it is not clear that the "Knabe guaranty" meant in the case in question that the pianos were sold as Knabe pianos, or went beyond the guaranty of quality. Respecting the third point: In view of the conveyance to plaintiff of the name, trade-marks, and good will of its predecessors, a putting out of Knabe pianos under the name of "Wm. Knabe & Co." did not, in our opinion deprive plaintiff of the right to protect the name against infringement, *Herring v. Hall*, 208 U. S. 554, 557, 558, 28 Sup. Ct. 350, 52 L. Ed. 616; *Chickering v. Chickering* (C. C. A. 7) 215 Fed. 490, 499, 500, — C. C. A. —.

[5-8] Coming to the meritorious question: By the sale of the Wm. Knabe & Co. Manufacturing Company's assets and good will, the right of Ernst Knabe, Jr., and William Knabe III, to manufacture and sell pianos was in no way restricted in terms. Subject to the limitation hereafter stated, they thus had a perfect right, on severing their connection with the plaintiff company, to employ their own names in the business of manufacturing and selling pianos, either as individuals or in the name of the corporation of which they were the active managers and operators, and which in a proper sense represented their personal business. They had, however, no right to employ the trade-marks and trade-names which plaintiff had obtained

under the purchase of the Knabe Manufacturing Company's assets, or to invade the good will of that business. But by virtue neither of the common law nor of the registration under the statute of 1905 did plaintiff, as successor to Wm. Knabe & Co. or otherwise, obtain the exclusive right to the use of the name Knabe as a part of the corporate name in which the business was done. *Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 134, 25 Sup. Ct. 609, 49 L. Ed. 972, and following; *Donnell v. Herring*, 208 U. S. 267, 272-278, 28 Sup. Ct. 288, 52 L. Ed. 481, and following; *Herring v. Hall*, *supra*; *Davids Co. v. Davids*, 233 U. S. 462, 470, 34 Sup. Ct. 648, 58 L. Ed. 1046; *Hall v. Herring* (C. C. A. 6) 146 Fed. 37, 40, 76 C. C. A. 495, 14 L. R. A. (N. S.) 1182, and following; *Stix, Etc., Dry Goods Co. v. Amer. Piano Co.* (C. C. A. 8) 211 Fed. 271, 274, 127 C. C. A. 639; *Nashville Syrup Co. v. Coca-Cola Co.* (C. C. A. 6) 215 Fed. 527, 132 C. C. A. 39, Ann. Cas. 1915B, 358.

Defendant had further the right to advertise and make the most, by legitimate means, of the former connection on the part of its managing officers and their familiarity with the manufacture of pianos, and even of Knabe pianos, and to get the benefit of such legitimate prestige as was afforded thereby. This right, however, to employ the family name of these Knabes in connection with their own business was subject to this stringent limitation; the name could be employed only upon condition that reasonable precaution be taken to make it clearly appear that the goods were defendant's own goods and of its own make, and not those of plaintiff or its predecessors. If defendant did not employ plaintiff's trade-marks or trade-names, and in connection with the use of its own corporate name took such steps as to make clear the actual origin of the goods and to prevent misunderstanding and confusion with plaintiff's goods, defendant has not infringed plaintiff's rights so far as the mere putting out of pianos is concerned; otherwise, plaintiff's rights have been invaded. Defendant, of course, had no right to use the trade-name of "Knabe," or "Wm. Knabe & Co." (indeed, defendant disclaims such right), for the use of those names would naturally and directly tend at least to create confusion as to the origin of the goods. Nor has defendant the right to advertise its pianos as Knabe's, for the unqualified use of that word naturally suggests origin of manufacture. It is also clear that the mere use, either with or without the place of manufacture, of the name Knabe Bros. Company is not enough to distinguish defendant's goods from plaintiff's, for the general public is presumably unfamiliar with the place of manufacture of the Wm. Knabe & Co. pianos or the precise form of the manufacturer's name. The name "Knabe" is the impressive feature; and while dealers are presumably in little, if any, danger of being misled by the use of defendant's name without other warning, the ultimate purchaser of only ordinary information is the one to be considered. *De Voe Snuff Co. v. Wolff* (C. C. A. 6) 206 Fed. 420, 424, 124 C. C. A. 302, and cases there cited. It is also clear that defendant's use of script type (instead of the use of the old English of the trade-mark "Wm. Knabe & Co.") does not sufficiently distinguish.

[9, 10] While there was on the inside of the piano a notice that defendant had no connection with the Wm. Knabe Company or with plaintiff, we have no assurance that prospective purchasers would necessarily see or be attracted by this notice. The court was thus clearly justified in requiring that there be placed on the outside of the piano further warning notice than given by defendant's name and address on the fall-board. But we think the adoption of the metal plate as such a warning notice exceeded what was proper and necessary. The fact that defendant used on its pianos its own corporate name (containing the name "Knabe") required it to explain, but not to apologize; and we think the use of the metal plate with its finely inscribed lines, instead of the plain and universally used lettering upon the fall-board, directly and unnecessarily tended to discredit the regularity of defendant's product. We also think the statement that the piano is "not an original Knabe," or "not a Knabe," is unjustified; for thereby defendant was made to disclaim that the Knabe quality resided in its piano, and it fairly appears that the name "Knabe" has come to indicate both origin and quality. Defendant was bound to disclaim an implied origin of manufacture in plaintiff or its predecessors; it was not bound to disclaim such quality in its product.

[11-13] We think defendant entitled to use its corporate name as manufacturer upon the fall-boards of its pianos. The question is: How can plaintiff in such case be adequately protected by warning notice? It is manifestly impossible to put a sufficient notice on the fall-boards without substantially mutilating and so unduly discrediting the pianos. There is no imperative requirement that the notice immediately follow the use of the manufacturer's corporate name. The rule, as variously stated, is that defendant must accompany the use of its name "with the explanation" (*Merriam v. Saalfield*, 198 Fed. at page 375, 117 C. C. A. 245); it must "unmistakably inform" the public that the article of its production (*Singer v. June*, 163 U. S. at page 200, 16 Sup. Ct. 1002, 41 L. Ed. 118); it must so distinguish that "no one with the exercise of ordinary care can mistake" (*Saxlehner v. Eisner*, 179 U. S. at page 41, 21 Sup. Ct. 7, 45 L. Ed. 60); it must give "the antidote with the bane" (*Herring v. Hall*, 208 U. S. at page 559, 28 Sup. Ct. 350, 52 L. Ed. 616); it must be "clearly made to appear" that the goods were defendant's, and not those of plaintiff or its predecessors (*Davids v. Davids*, 233 U. S. at page 471, 34 Sup. Ct. 648, 58 L. Ed. 1046); the name cannot be used "without also giving information to the public" that it is not the business formerly carried on by Wm. Knabe & Co. (*Hall v. Herring*, 146 Fed. at pages 37, 44, 76 C. C. A. 495, 14 L. R. A. [N. S.] 1182); in other words, the means adopted must be adequate to fully prevent confusion. True, in the *Waterman Pen Case*, 235 U. S. 93, 94, 35 Sup. Ct. 91, 59 L. Ed. 142, the warning notice was required to be "juxtaposed" with the name of the manufacturer (and see *Waterman v. Drug Co.* [C. C. A. 6] 202 Fed. at page 169, 120 C. C. A. 455); but in the case of a pen a warning notice unless immediately juxtaposed would be inoperative. A piano, however, presents different considerations; its purchase is

a substantial one, and a prospective purchaser usually looks pretty carefully before buying. We see no reason to doubt that a completely effective warning against confusion as to origin would be furnished by a proper notice permanently attached to the cheek-block, in black upon a white ground, in letters readily legible, in connection with the modification of the fall-board inscription hereafter provided and the display of the notice we shall later speak of, and which we print in the margin of this opinion. It seems inconceivable that any prospective buyer would fail to see and read a notice so prominently displayed on the cheek-block. We think, however, the notice used by defendant, before the adoption of the metal plate on the fall-board, was an insufficient warning. It did not distinctly show that the piano was not the product of the original manufacturers of Knabe pianos, and such notice we think plaintiff entitled to. The inscription upon the fall-board should be in substantially the words "Made by Knabe Bros. Co., Cincinnati." The cheek-block notice should be without ornamentation, and in plain, legible letters, as large as in defendant's first manufacture, and in substantially the following form:

"NOTICE. .

"This piano is not made by Wm. Knabe & Co. of Baltimore, who were the original manufacturers of the Knabe pianos, nor by the Wm. Knabe & Co. Mfg. Co., nor by the American Piano Co., successors of Wm. Knabe & Co. The Knabe Bros. Co. (maker of this piano) is not the successor of and has no connection with either of those three companies.

"The managing officers of the Knabe Bros. Co. are Ernst J. Knabe, Jr., and William Knabe III, grandsons of the original Wm. Knabe, and formerly officers of the Wm. Knabe & Co. Mfg. Co. of Baltimore."

There may be added, if desired, the guaranty and statement of inspection, as in the original cheek-block notice. Counsel will be heard upon the precise language of the notice in connection with the settling of the form of mandate. No markings upon the piano should be required, other than the fall-board and cheek-block inscriptions referred to, in connection with those already used on the interior of the piano.

We are aware that in *Chickering v. Chickering*, 215 Fed. 490, — C. C. A. —, the Circuit Court of Appeals of the Seventh Circuit practically required defendant to use on its fall-board a new name for the piano. But the *Chickering* Case differs materially from the instant case; there the defendants were only remotely related to the original manufacturers of *Chickering* pianos, and had never until the alleged infringing action been in any way connected with the manufacture of *Chickering* pianos, so that the right to use their own name was rightly judged by a much stricter standard. Moreover, the use of a notice upon the cheek-block was evidently not considered, and apparently not suggested. We think there is no necessary conflict between our conclusion and that adopted in the *Chickering* Case.

[14, 15] Coming to the subject of defendant's representations, by advertising and otherwise: The advertising employed by defendant, or its agent, or both, went in some instances beyond what was proper; and we approve the restraint imposed by the court below in that regard, except in two particulars: (a) In paragraph 3 of the decree de-

defendant is enjoined from stating or representing, by advertisements or otherwise, that the pianos manufactured by or for defendant are the only pianos made by a Knabe or by a living Knabe, or words to that effect. We think defendant entitled to make this statement if and so long as it is the truth (as we understand it to be), provided, always, it is made clearly to appear that defendant and its officers have no connection by succession, inheritance or otherwise, with the business of the original manufacturers of the Knabe piano or the successor of those original manufacturers. (b) In paragraph 6 of the decree defendant is enjoined from making any statement, by advertisement or otherwise, that would lead the public to believe that pianos manufactured by or for defendant, or to be disposed of by or for it, are Knabe pianos. This should be so limited as not to forbid the assertion of a claim that defendant's pianos have the quality of Knabe pianos, provided, of course, there is such unmistakable disclaimer as to origin of manufacture as to preclude any confusion in that respect.

[16] In the case of *Stix, Baer & Fuller Dry Goods Co. v. American Piano Co.*, 211 Fed. 271, 127 C. C. A. 639 (to which case the plaintiff and defendant here were parties), the Circuit Court of Appeals of the Eighth Circuit (211 Fed. 277, 127 C. C. A. 639) prescribed the form of restraint imposed on the use of the name Knabe, together with the form of a notice (before referred to and marginally printed below²) required to be conspicuously inserted in circulars, catalogues, and advertisements, and to be framed and kept displayed upon defendant's pianos in all salesrooms in which they are offered for sale. For the sake of uniformity, and also because the requirement and notice meet our approval, the decree herein will contain similar provision.

We agree, also, with the Circuit Court of Appeals of the Eighth Circuit that oral representations, while not required to be as explicit as those in writing, should be in harmony with the provisions referred to. It follows from what we have said that the injunction provisions of the final decree relating to plaintiff meet our approval.

The District Court is directed to so modify its decree as to conform to the views we have expressed. The defendant will recover its costs of this court.

² NOTICE.

The Knabe Piano was made from 1837 to 1889, at Baltimore, by William Knabe & Co. In 1889 this firm was incorporated as William Knabe & Co. Manufacturing Company, and continued under that name until 1908, when it sold all its property, good will, and trade-name to the American Piano Company, which has since been, and now is, carrying on said business at Baltimore.

Ernst J. Knabe, Jr., and William Knabe III, learned the business from their father, Ernst Knabe, who had charge of it from 1804 to 1894. They were president and vice president of the above companies from 1898 to 1911. In the latter year they withdraw from the American Piano Company and organized the Knabe Bros. Company, and began making pianos in Cincinnati.

The piano made at Baltimore has been, and now is, known to the trade as the "Knabe" or "William Knabe & Co." piano. The piano of the Knabe Bros. Company is named "The Knabe Bros." piano. It is a new manufacture, and has no connection with the pianos made at Baltimore.

ENGLISH et al. v. BROWN et al.

(Circuit Court of Appeals, Third Circuit. January 26, 1916.)

Nos. 2007, 2008.

1. FRAUDULENT CONVEYANCES ⇨170—TRANSFERS BETWEEN HUSBAND AND WIFE—PAYMENT OF PRE-EXISTING INDEBTEDNESS.

A husband in failing circumstances was indebted to his wife, and also to complainants, who had brought suit on their debt. The wife knew of such suit, and that the husband was in failing circumstances, and both she and the husband knew that he could not discharge both debts, and that payment of the one debt meant loss to the other creditor of his or her debt. The husband paid his debt to his wife, by transferring to her corporate stock the value of which was inadequate to cover his debt to her. *Held* that, in view of the rule in New Jersey that an insolvent debtor may prefer one creditor, even though the preferred creditor is his wife, this transfer was not a fraud upon complainants, even though the husband intended to defraud them; the wife accepting the stock for the sole purpose of obtaining payment of her debt, and not for the purpose of aiding her husband to defraud complainants.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 521; Dec. Dig. ⇨170.]

2. JUDGMENT ⇨589—MERGER OF CAUSES OF ACTION.

B. was one of the promoters of a corporation, and contracted to give complainants a specified amount of the preferred and common stock in such corporation to be issued to him. He failed to turn over any stock to complainants, and they sued for breach of the contract, and recovered judgment for damages in New York, upon which they sued and recovered a judgment in New Jersey. Thereupon they brought an action to set aside transfers of the stock from B. to his wife, on the ground that they were made to defraud creditors, and were unsuccessful. *Held* that, if they ever had any equitable lien on the stock, it was merged in the judgment for damages and no longer existed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1065, 1100, 1101; Dec. Dig. ⇨589.]

Appeal from the District Court of the United States for the District of New Jersey; Wm. H. Hunt, Judge.

Suit by Paul A. English and others against Ella Wyman Brown and others. From a decree (219 Fed. 248) granting complainants part of the relief asked for, defendants appeal, and complainants file cross-appeal. Affirmed in part, and reversed in part, with directions.

Andrew Foulds, Jr., of New York City, and H. C. Brome, of Omaha, Neb., for complainants.

C. G. Parker, of Newark, N. J., for defendants.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The principal questions for review are, first, whether certain transfers of stock made by a husband to his wife under circumstances which include the husband's indebtedness to his wife and to others, and the husband's insolvency and his wife's knowledge thereof, were in fraud of creditors; and, second, whether

an equitable lien upon the stock transferred prevails against the wife in favor of the complainants.

The complainants, who will be referred to informally as English brothers, were interested in plaster mills located in various parts of the country. Charles B. Brown, the husband of the defendant Ella Wyman Brown, was associated with Jones and McCormick, lawyers, in the promotion of the United States Gypsum Company. In January, 1902, Brown concluded a contract with English brothers by which their plaster properties were conveyed to the Gypsum Company upon terms unimportant to this litigation. Incidental to this transaction, English brothers and Brown had entered into another but entirely separate contract, whereby Brown promised to give English brothers, "for their services in this deal out of (his share of) the promotion fund, \$31,250 preferred stock and \$18,750 common stock of U. S. Gypsum Co. when the stock is issued for promotion." In May, 1902, the promotion stock was issued, and Brown received 330 shares of preferred and 330 shares of the common stock of the company. Aside from the promotion shares which were issued to him directly, Brown was interested in promotion shares to be issued to Jones and McCormick, under a contract made between them in 1901. By this contract, Brown or his assignee became entitled to, and in February, 1912, received, 137 shares of the preferred and 152 shares of the common stock, making Brown's entire holdings of promotion stock 467 shares of preferred and 482 shares of common.

Brown failed to deliver to English brothers the shares promised under the contract of January 10, 1902, and at different times transferred his shares and assigned his rights in the Jones and McCormick contract to his wife. He made the transfers to his wife at different periods, and, as it is contended, under different circumstances, which figured in the decree entered in the litigation subsequently instituted.

The transfers were as follows:

1. On February 20, 1903, Brown transferred to his wife 200 shares of preferred and 100 shares of common stock of the company.

2. On May 15, 1905, he transferred or assigned to his wife all his interest in the Jones and McCormick contract, which in February, 1912, yielded her 137 shares of the preferred and 152 shares of the common stock.

3. On August 3, 1909, he transferred to his wife 130 shares of the preferred and 230 shares of the common stock.

After the second transfer, namely, on June 13, 1905, English brothers sued Brown on the contract in the Supreme Court of New York. On January 5, 1906, that court made an award that Brown deliver to English brothers, within thirty days, the shares in question, or, in the alternative, suffer damages in the sum of \$16,298.74. Brown neither delivered the stock nor paid the judgment, but retaliated by instituting an action by foreign attachment against English brothers, in which he attached the judgment against himself, and recovered judgment in the sum of \$52,750. This judgment was vacated in June, 1910. *Brown v. English*, 131 App. Div. 909, 115 N. Y. Supp. 1113; *Brown v. English*, 137 App. Div. 900, 122 N. Y. Supp. 1123.

In the meantime Brown had moved to New Jersey, where English brothers instituted two actions against him in a court of that State, one upon the judgment entered against him in the State of New York for the damages awarded, and the other for damages growing out of Brown's alleged malicious action against them in the State of New York. Judgment was entered by the New Jersey court in the former suit for \$21,490.20, and in the latter for \$5,320.34. While these actions were pending, Brown died, and Ella Wyman Brown, his administratrix, was made party. In the course of her administration, Ella Wyman Brown filed an inventory in the Orphans' Court of Morris County, New Jersey, showing Brown's estate to be insolvent, whereupon English brothers filed a petition alleging that Brown owned the promotion shares of stock of the Gypsum Company transferred to his wife, and praying discovery of the condition of his estate with respect to that stock. These proceedings were abortive and were subsequently discontinued. On December 5, 1912, the complainants filed a bill in the District Court of the United States for the District of New Jersey, seeking to avoid the stock transfers by Brown to his wife on the ground that they were made in fraud of the complainants' rights as creditors, and inferentially, to establish a claim of an equitable lien upon the stock. We have now before us an appeal and a cross-appeal from the decree entered in that case.

As appears in its opinion, reported in 219 Fed. 248, the District Court treated each transfer as a separate transaction, controlled and adjudged by the circumstances surrounding it. The court found that the first transaction, or the transfer of 1903, was valid, saying that:

"In the light of the decisions of the New Jersey Courts, which are not out of harmony with the decisions of the Supreme Court of the United States, the transfer to Mrs. Brown by her husband was valid, and was made for ample consideration by way of advances made to him by her from her separate estate, and with intent on his part to repay her, and without intent or purpose on his or her part to hinder or delay these plaintiffs or any one else in the collection of any claims that they might have against him at the time of the transfer. The stock, therefore, was lawfully made over to Mrs. Brown, and the plaintiffs have failed to establish any right or claim to it, or to any proceeds which ever passed into the hands of Mrs. Brown by reason of any sales of it, or any part of it."

In holding valid the second transaction, that is, the assignment on May 15, 1905, of Brown's interest in the Jones and McCormick contract, the court said:

"This, too, under the evidence, must be regarded as a bona fide transfer or sale and not as a pledge. * * * The conclusion is irresistible that when the transfer was made, Brown was solvent and paid a fair consideration, and that he and his wife acted in good faith in the matter."

We concur with the conclusions of the learned trial judge that the first and second transfers of stock by Brown to his wife were valid, and subscribe to the reasoning by which those conclusions were reached, as it appears at length in the opinion reported in 219 Fed. 253 to 261. It is therefore unnecessary to review the testimony or repeat the considerations which control our judgment in affirming this portion of the decree. It may, however, have a bearing upon a discus-

sion of the third transfer to note that in reaching the conclusion that the first and second were valid, the learned trial judge was greatly impressed, if not controlled, by the fact of Brown's solvency at the time of those transfers as evidence of good faith and lack of fraud. Evidence of Brown's solvency at the time of the first and second transfers and of his insolvency at the time of the third transfer seems to be the evidence upon which the learned trial judge distinguished the transactions and upon which he found the first two valid and the last invalid. While we recognize the probative force of the evidence of Brown's solvency as affecting the validity of the first two transfers, we are not inclined to hold that the evidence of his insolvency at the time of the third transfer is alone sufficient to distinguish that transaction from the former and to compel a different decree. The change in Brown's affairs from solvency to insolvency creates a change in the questions presented by the several transactions, but does not of itself necessarily transform the transaction from a valid to a fraudulent one.

The decree holding valid the first and second transfers was based upon evidence which established that at the time of the first and second transfers, Brown was indebted to his wife for monies loaned him from her separate estate, in amounts equal to the value of the stock transferred; that he transferred only so much of the stock as was necessary to discharge his obligations to his wife, retaining the balance; that he was solvent, and his solvency was known to his wife, and that English brothers had not asserted a claim to the stock transferred.

[1] When the learned trial judge came to consider the third transaction, which embraced the transfer on August 3, 1909, of the remainder of Brown's shares, he conceived that he was confronted with a "changed situation." With respect to Brown's indebtedness to his wife, he said:

"It may be assumed that between May 15, 1905 (the date of the second transfer), and August 3, 1909 (the date of the third transfer), her advances to her husband and his collections for her account aggregate \$20,963.18, so that when in 1909 Mr. Brown transferred to her all the stock he then had in the corporation, 130 shares of preferred and 230 shares of common, *their value was inadequate to cover his debt to her.*"

He further found that while Brown's wife had loaned to her husband this considerable sum of money between the dates of the second and third transfers, English brothers, within the same period, had instituted their action in the State of New York making a claim to Brown's shares; that Brown, as well as his wife, knew of the suit of English brothers and of its termination; that—

"much of the money advanced by her was received by Brown *when he was in failing circumstances and when Mrs. Brown knew he was so situated, and the shares were turned over to Mrs. Brown when he was without means wherewith to meet the claims of the English brothers under the original agreement between himself and them, and when he and his wife both knew that the English brothers were both diligently pressing their rights and that the transfer of the stock would necessarily operate to hinder and delay the collection of the New York judgment held by the English brothers, and which was without just right attached by Brown. I should say that under such circum-*

stances, the transaction ought not to be sustained, for the manifest purpose of the turning over on his part *was to make it impossible* for his judgment creditors to recover that to which they were justly entitled and to which they had been entitled ever since the organization of the Gypsum Company, and I think it must be found *that the wife, for the purpose of aiding him as well as to obtain a preference, took the shares with full knowledge of the circumstances* and of the judgment and the proceedings on the part of her husband to defeat the payment of the same, *and that his and her acts were done with the purpose of hindering and defrauding his creditors, the English brothers.*"

The substance of this finding, as we understand it, is that although Brown was bona fide indebted to his wife and the consideration paid by her for the stock was adequate, yet her knowledge of her husband's insolvency, of his indebtedness to English brothers, and of his inability to pay the same if she acquired the stock, disclosed the wife's complicity in her husband's fraud and made the transaction void. In searching for evidence of fraud in the third transaction different from that which related to the first and second transactions, we find nothing that distinguishes the latter from the former excepting the evidence that in the last transaction Brown transferred to his wife the entire remainder of his stock, and not, as in the other transactions, only a part of it; that at the time of the last transfer Brown had become insolvent, and English brothers were pressing their claim against him; and Brown's wife had knowledge of both of these facts. This evidence does change the situation, at least to the extent of presenting a question different from those presented by the first two transactions. The difference in the situation, however, does not alone and of necessity compel a different finding, for the new question created by the changed situation must be determined by principles of law applicable to its peculiar features. And just here is the main question in the case, whether under the evidence as it relates to the third transaction, the trial court erred in deciding that the transfer of stock, in view of Brown's insolvency and his wife's knowledge thereof, was in fraud of other creditors and therefore invalid.

The learned trial judge first disposed of certain questions preliminary to the main consideration by asserting the jurisdiction of a court of equity to recognize and enforce the payment of a debt of a husband to his wife, *English v. Brown* (D. C.) 219 Fed. 249, cases cited, and by sustaining the right of an insolvent debtor to prefer a creditor under the New Jersey law, *Green v. McCrane*, 55 N. J. Eq. 436, 37 Atl. 318, even when the preferred creditor is his wife. *Jewell v. Knight*, 123 U. S. 426, 8 Sup. Ct. 193, 31 L. Ed. 190. He then found the third transfer invalid by applying to its peculiar circumstances the general principle of law that:

"A sale may be void for bad faith though the buyer pays full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge." *Cadogan v. Kennett*, 2 Cowp. 432; *Clements v. Moore*, 6 Wall. 299, 18 L. Ed. 786; *Wadsworth v. Williams*, 100 Mass. 126; *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233.

The learned trial judge cited *Green v. Tantum*, 19 N. J. Eq. 105, as a case in which this principle was employed and as an authority which

he considered applicable to the facts of this case and binding upon his judgment. The facts in *Green v. Tantum*, briefly summarized, are these:

A verdict had been rendered and judgment was about to be entered against Joseph R. Tantum, who, seeking to avoid its payment and intending to defraud the judgment creditor, assigned a number of mortgages to his brother John for actual and adequate considerations. John was not a creditor of Joseph, and therefore did not take the assignments either to secure or to pay a pre-existing debt. He entered the transaction at the time he purchased the mortgages. Although denying knowledge of his brother's intended fraud, the court, nevertheless, found that the assignments were made and the considerations paid under circumstances which imputed fraud to John in coming to the assistance of his brother with an intention to aid him to defraud his creditor.

In *Green v. Tantum*, as in each of the cases cited in support of the law applied to the facts of this case, it is to be observed that there was a *purpose* by the grantee or transferee, who was not a creditor, *to aid the seller*, who was not his debtor, *in perpetrating a fraud upon a creditor*. The cases relied upon rule this case only if the facts of this case establish that in accepting the transfer of the property, Brown's wife accepted the same not in payment of the debt due her, but with a purpose to aid her husband to defraud English brothers of the debt due them.

The principles of law controlling the transfer and conveyance of property in fraud of creditors are well established. The law will not support a conveyance made by a debtor in failing circumstances in favor of a mere donee, though innocent of intended fraud, nor will the law hold valid a conveyance founded upon actual and full consideration, when it is a part of a scheme to enable the debtor to withdraw his property from the reach of a creditor, under circumstances that charge knowledge to the grantee of the intended fraud. *Green v. Tantum*, supra. So also the law distinguishes between a mere volunteer who enters a transaction and purchases for a present though adequate consideration, and one who accepts a transfer or takes title under a conveyance to secure or obtain the payment of a pre-existing debt. In the latter case, the law recognizes the right of a debtor in failing circumstances to prefer a bona fide creditor by making to him a valid conveyance in consideration of his debt, and of the right of the creditor, acting honestly and in good faith, to accept the same as security for or in payment of the debt. *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971; *Atlantic Refining Co. v. Stokes*, 77 N. J. Eq. 119, 75 Atl. 445; *Id.*, 78 N. J. Eq. 301, 81 Atl. 1132. The limitations upon these rights, as stated by Leaming, V. C., in *Atlantic Refining Co. v. Stokes*, supra,

"are to be found in a want of integrity of purpose upon the part of the preferred creditor. There must be no combination between him and his debtor to hinder, delay or defraud other creditors of the debtor. It is not sufficient for the purpose of setting aside such a conveyance that the object of the grantor was fraudulent; it must be shown that the grantee participated in that intent, or had knowledge of the object of the grantee, or of such facts as should

have put him upon inquiry as to the object. * * * And when the conveyance is made to secure an antecedent debt or to discharge such a debt, it has been frequently held that even knowledge upon the part of the grantee that his grantor's purpose is to defeat other creditors will not be operative to vitiate the conveyance, *providing the grantee did not actually participate in that purpose by making a reservation in favor of the grantor, or in some other manner combining with the grantor to enable him to defeat his creditors.* The reasons underlying the distinction between a present consideration and a pre-existing consideration are well expressed in a note to 20 Cyc. 472, as follows:

"The reasons that have been assigned for the distinction between one who purchases for a present consideration and one who purchased in satisfaction of a pre-existing debt are sound and unassailable. *The former is in every sense a volunteer.* He has nothing at stake—no self-interests to serve. He may, with a perfect safety, keep out of the transaction. Having no motive of interest prompting him to enter it, if yet he does enter it, knowing the fraudulent purpose of the grantor, the law, very properly, says that he enters it for the purpose of aiding that fraudulent purpose. *Not so with him who takes the property in satisfaction of a pre-existing indebtedness. He has an interest to serve. He can keep out of the transaction only at the risk of losing his claim.* The law throws upon him no duty of protecting other creditors. He has the same right to accept a voluntary preference that he has to obtain a preference by superior diligence. He may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve, and if he goes no further than is necessary to serve that purpose, the law will not charge him with fraud by reason of such knowledge."

This is the law rather than that of *Green v. Tantum*, supra, which, in our opinion, should be applied to the facts of this branch of the case. In searching the evidence for fraud in this transaction, the difference between the trial court and ourselves is not in findings of fact, but in the inferences to be drawn from the facts and in the law to be applied to them. As we read the evidence, we find that at the time of the third transaction, Brown was indebted to his wife for approximately \$20,000, that he was in failing circumstances, and that his wife knew it; that English brothers were pressing Brown for the payment of his debt to them, and that Brown's wife knew this also. We further find that both Brown and his wife knew that he could not discharge his indebtedness both to her and to English brothers, and that payment of the debt to one meant loss of the debt to the other. Brown chose to pay his debt to his wife. In doing this, he exercised his right to prefer her as a creditor to the exclusion of English brothers. *Green v. McCrane*, supra; *Jewell v. Knight*, supra. He paid her with stock, and although it took all the stock he had to make the payment, the trial court found, as do we, that the value of the stock was "inadequate to cover his debt to her."

We find nothing in the testimony which indicates that by the third transfer, Brown intended anything other than a payment of the debt to his wife, or that in making the transfer Brown reserved or anticipated any present or future interest in the stock. Brown's act was a bald preference of his wife to English brothers, and although the consequence of the act was to make impossible the payment of his debt to English brothers, the legal effect of the act was not a fraud upon them.

If Brown was guilty of no fraud, then certainly none can be imputed to his wife. But even if Brown intended to defraud English

brothers, his fraudulent intention would not invalidate the transfer of the stock to his wife if it be found that she was a bona fide creditor, that the consideration which she paid was the discharge of an antecedent debt equal to the value of the stock, and that she accepted the stock without intent to aid her husband to defraud English brothers, but with the sole purpose of obtaining payment of the debt due her. While Brown's wife knew that payment to her meant loss to English brothers, that knowledge does not constitute fraud, if, as we find, there was nothing in her conduct or in the circumstances of the transaction from which might be inferred a purpose on her part to help her husband to defraud English brothers or to participate in a scheme to withhold his property from them. *Cadogan v. Kennett, supra*; *Clements v. Moore, supra*; *Wadsworth v. Williams, supra*; *Robinson v. Holt, supra*; *Green v. Tantum, supra*.

[2] English brothers can no more complain of the application of Brown's assets to the discharge of his indebtedness to his wife than could Mrs. Brown complain if Brown had transferred his stock to English brothers in discharge of his indebtedness to them, unless, indeed, English brothers have an equitable lien upon the stock.

English brothers contend that their contract with Brown creates in their favor an equitable lien upon the stock in question. We conceive that this contention is urged in anticipation of the view which we have taken of the law to be applied in this case, for it appears that this contention was neither presented nor argued in the court below, and is not specifically raised by the bill of exceptions. It is contended by the complainants, however, that the pleadings and evidence present a case upon which a claim of an equitable lien may be asserted. Whether the contract of January, 1902, gave to English brothers an equitable lien upon Brown's promotion stock, it is certain that the contract gave them a right of action at law for a breach by Brown. English brothers elected to proceed not in equity for the enforcement of such a lien but at law to recover damages for the breach of the contract. Suit on the contract was brought in a law court of the State of New York. Judgment in damages was sought and awarded. The contract was merged in the judgment, and the judgment was for damages. Action on the New York judgment was instituted in a law court of the State of New Jersey and judgment thereupon entered. The present action in equity was brought, as we conceive, not to assert an equitable lien on the stock, but to make possible the enforcement of the New Jersey judgment by bringing the stock, after a decree invalidating its transfer, within reach of execution process. The claim of an equitable lien is without merit.

We are of opinion that the District Court committed no error in holding valid the first and second transfers of stock, and that it erred in holding invalid the third transfer. Therefore we affirm so much of the decree as is brought up by appeal No. 2008, and reverse so much of the decree as is brought up by appeal No. 2007, and direct the District Court to enter a decree in conformity with this opinion.

T. B. HARMS & FRANCIS, DAY & HUNTER v. STERN et al.*

(Circuit Court of Appeals, Second Circuit, December 14, 1915. On Motion for Rehearing, January 5, 1916.)

No. 56.

1. COURTS Ⓒ291—UNITED STATES COURTS—JURISDICTION—SUITS UNDER COPYRIGHT LAWS.

The right asserted and the defense interposed in a suit to enjoin the infringement of a copyright and for an accounting and damages were within the exclusive jurisdiction of the federal courts under Judicial Code (Act March 3, 1911, c. 231) § 256, 36 Stat. 1160 (Comp. St. 1913, § 1233), giving such courts jurisdiction exclusive of the state courts of cases arising under the copyright laws of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 833; Dec. Dig. Ⓒ291.]

2. LITERARY PROPERTY Ⓒ6—TRANSFERS—RIGHTS OF AUTHOR.

The right of an author in his unpublished manuscript is full and complete, and it is subject to his disposal as much as any property of which he is possessed, and he may make an absolute conveyance of it, and invest his grantee with full right of property thereto, including the right to secure copyright of the production.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 5; Dec. Dig. Ⓒ6.]

3. LITERARY PROPERTY Ⓒ6—TRANSFERS—EQUITIES.

Where the author of a musical composition had agreed that defendants should have the sole and exclusive production and publishing rights of all compositions written by him, persons to whom such author undertook to transfer his right, title, and interest in a composition took subject to defendants' equities, whether with or without notice.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 5; Dec. Dig. Ⓒ6.]

4. COPYRIGHTS Ⓒ41, 42—TITLE OF PERSON SECURING COPYRIGHT.

The legal title to a copyright vests in the person in whose name it is taken out; but it may be held by him in trust for the true owner.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 40, 41, 48; Dec. Dig. Ⓒ41, 42.]

5. JUDGMENT Ⓒ744—CONCLUSIVENESS—MATTERS CONCLUDED.

R. agreed with defendants that they should have the sole and exclusive production and publishing rights of all musical compositions which he might write during a period of five years. He composed a musical composition and attempted to transfer his interest therein to a company, which assigned to plaintiffs the sole and exclusive right to publish, copyright, and vend in sheet music form such musical composition. Plaintiffs procured a copyright, and sued defendants for infringement. Defendants had previously sued R. in a state court for specific performance, and the complaint was dismissed on the ground that the contract was inequitable and that it lacked mutuality of obligations and remedy. *Held*, that defendants were estopped by such judgment from claiming any equitable rights under such contract, and from claiming that plaintiffs held legal title to the copyrighted composition as trustees for them, since, no copyright having been procured when the suit for specific performance was brought, and there having been no diversity of citizenship, the state court rendering such judgment had jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1278-1281; Dec. Dig. Ⓒ744.]

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

*For further opinion on reargument, see 231 Fed. 645. *

6. JUDGMENT Ⓔ948—NECESSITY OF PLEADING JUDGMENT.

Plaintiffs could introduce the judgment of the state court without pleading it, as the rule which requires a former adjudication to be pleaded when relied upon as an estoppel is without application, when the judgment, instead of being relied on in bar of the action, is set up merely as conclusive of some particular fact or question formerly in issue and adjudicated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787-1793; Dec. Dig. Ⓔ948.]

7. SPECIFIC PERFORMANCE Ⓔ32—LACK OF MUTUALITY—CURE BY SUBSEQUENT PERFORMANCE.

A contract, lacking in mutuality when it is entered into, may by subsequent performance be cured of its defect.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. Ⓔ32.]

8. LITERARY PROPERTY Ⓔ6—SALES OF UNWRITTEN COMPOSITIONS.

If a vendor sells future acquisitions of property, such as musical compositions at the time unwritten, the equitable title thereto attaches the moment it comes into existence, and vests in the grantee.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 5; Dec. Dig. Ⓔ6.]

9. SPECIFIC PERFORMANCE Ⓔ12—DEFENSES—PIECEMEAL PERFORMANCE.

The principle that the court will not decree specific performance of a contract by piecemeal, but that it must be performed in its entirety, if performed at all, does not apply to contracts which, though they may be entire and single in themselves, contemplate a separate and piecemeal performance of separate parts.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 26-28, 37; Dec. Dig. Ⓔ12.]

10. LITERARY PROPERTY Ⓔ6—SALES OF UNWRITTEN COMPOSITIONS.

A contract selling, assigning, and transferring to defendants the right to print, publish, and sell musical compositions which R. might write during a period of five years, could not operate at law to vest the legal title in defendants to compositions subsequently written, as there can be no valid sale, unless there is an actually or potentially existing subject.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 5; Dec. Dig. Ⓔ6.]

11. LITERARY PROPERTY Ⓔ6—SALES OF UNWRITTEN COMPOSITIONS.

Such contract, though without effect at law as a contract of sale, operated as an executory agreement to sell, and imposed upon R. an obligation to perform it, the breach of which could be redressed in an action for damages.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 5; Dec. Dig. Ⓔ6.]

12. EQUITY Ⓔ65—MAXIMS—FORMER ADJUDICATION—CONCLUSIVENESS—MATTERS CONCLUDED.

R. sold, assigned, and transferred to defendants the right to print, publish, and sell all compositions which he might write during a period of five years. Defendants sued for specific performance of this contract, and the complaint was dismissed on the ground that the contract was inequitable and that it lacked mutuality of obligations and remedy. R. undertook to transfer all his right, title, and interest in a composition to a company which assigned to plaintiffs the sole and exclusive right to publish, copyright, and vend such composition in sheet music form. Plaintiffs obtained a copyright and sued defendants for infringement. *Held*, that while, if the contract had been valid, relief might be denied on the ground that R. and his assignees with notice had not done equity and did not

come into court with clean hands, the judgment in the suit for specific performance determined that the contract lacked, not only mutuality of remedy, but also mutuality of obligation, and was an adjudication that the contract was invalid, and hence defendants could not rely on such contract for any purpose.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. ⚡65.]

13. JUDGMENT ⚡551—BAR—ACTIONS AND PROCEEDINGS BARRED.

A final decree on the merits in a suit in equity operates as a bar to any further litigation between the same parties on the same subject-matter in a court of law, and a final judgment on the merits in an action at law bars any further action between the parties on the same cause of action in a court of equity, except in matters which are within the exclusive cognizance of equity, so that they could not rightfully have been determined in an action at law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 995, 996; Dec. Dig. ⚡551.]

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

Suit by T. B. Harms & Francis, Day & Hunter against Joseph W. Stern and another, copartners doing business as Jos. W. Stern & Co. From an order (222 Fed. 581) denying an injunction, plaintiff appeals. Reversed, and issuance of injunction directed.

Max D. Josephson, of New York City, for appellant.

Cohen & Richter, of New York City (Theodore B. Richter, of New York City, of counsel), for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff on February 20, 1915, secured copyright for a musical composition or song entitled "Oh, Those Days." The defendants on or about March 12, 1915, published the music of this composition, and placed it on the market for sale, in various music stores in the city of New York and throughout the different cities of the United States. The plaintiff thereupon began proceedings in the court below to protect its copyright against infringement, and asked an injunction, an accounting, and damages. The case was heard on the bill and answer and accompanying affidavits, and the injunction was refused, upon the ground that the plaintiff was in no position to ask for any equitable remedy.

The Constitution provides that:

"The Congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Article 1, § 8.

In pursuance of the authority thus conferred Congress has enacted the Copyright Law, and has specified in the fifth section the writings for which copyright can be obtained, and among them "(d) Dramatic or dramatics—musical compositions," and "(e) Musical compositions." Act March 4, 1909, c. 320, 35 Stat. pt. 1, p. 1076 (Comp. St. 1913, § 9521). The statutes of the United States provide that the jurisdic-

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

tion vested in the courts of the United States shall be exclusive of the courts of the several states "of all cases arising under the patent right or copyright laws of the United States." Rev. St. 1878, § 711; Comp. Stat. 1913, § 1233; Judicial Code, § 256.

[1] The question which this case presents, therefore, is one within the exclusive jurisdiction of the federal courts, and concerning it no state court could pass a valid judgment. It is for the federal courts alone to pass, not only upon the right which the plaintiff asserts, but upon the defense which the defendants interpose to the suit.

[2] The legal right which the plaintiff asserts is derived through an assignment by the composer of the musical composition herein involved. It appears that prior to February 10, 1915, Sigmund Romberg and Harold Atteridge delivered a musical composition to the Wintergarden Company, a New York corporation engaged in the business of producing and presenting musical comedies. All their right, title, and interest in the composition Romberg and Atteridge undertook to transfer to the Wintergarden Company. Romberg was the composer of the music and Atteridge was the author of the lyrics of the composition. The Wintergarden Company thereupon at once assigned to the plaintiff "the sole and exclusive right, license, privilege, and authority to publish, copyright, print, reprint, copy, and vend in sheet music form" the musical composition or song entitled "Oh, Those Day." The right of an author in and to his unpublished manuscript is full and complete. It is subject to his disposal as much as any property of which he is possessed. He may make an absolute conveyance of it and invest his grantee with full right of property thereto, including the right to secure copyright of the production. *Paige v. Banks*, 13 Wall. 608, 614, 20 L. Ed. 709 (1871). The plaintiff, claiming to be the sole and exclusive proprietor and owner of the composition which had never been printed or published in this or in any foreign country, secured a copyright of the composition on February 20, 1915. It is not claimed that in securing the copyright it failed to comply with the requirements of the Copyright Act. It is admitted that the legal title is in the plaintiff.

[3, 4] That defendants, since the copyright was obtained, have published the music, but not the words, of the composition, is also conceded. The claim of the defendants is that they themselves are the owners and proprietors of the music of this composition, and they deny that they have committed, any wrongful act whatever in its publication. They rely upon a written agreement made between themselves and Romberg on August 11, 1913, in justification of what they have done. That contract provided that defendants should have "the sole and exclusive production rights for all operettas, musical comedies, farces with music, etc., which Mr. Romberg may write during the course of the next five years." It also provided that defendants should have "the sole and exclusive publishing rights of all compositions which he may write during" the same period. The contract bound the defendants to pay Romberg specific royalties on the publications. The defendants allege that the musical composition was written within the five-year period named in the contract, and that the

plaintiff and the Wintergarden Company, before the respective assignments to them of this composition, had full knowledge of the contract and of defendants' right thereunder, and took subject thereto. That the plaintiff and the plaintiff's assignor had notice is not denied. But the fact of notice is unimportant, as the assignees would take subject to the equities whether with or without notice. This principle, however, would not prevent the vesting of the legal title to the composition in the plaintiff. Moreover, the legal title to a copyright vests in the person in whose name the copyright is taken out. It may, however, be held by him in trust for the true owner, and the question of true ownership is one of fact, dependent upon the circumstances of the case. *Press Publishing Co. v. Falk* (C. C.) 59 Fed. 324 (1894); *Black v. Henry G. Allen Co.* (C. C.) 42 Fed. 618, 9 L. R. A. 432 (1890); *Lawrence v. Dana*, Fed. Cas. No. 8136; 9 Cyc. 930. In *Paige v. Banks*, supra, the Supreme Court of the United States had under consideration an agreement made by Mr. Alonzo Paige, reporter of the New York Court of Chancery, in which he had agreed to furnish in manuscript the reports of that court for publication to certain law publishers, Gould & Banks. The agreement also provided that Gould & Banks should have the copyright of said reports. The court, speaking through Mr. Justice Davis, said:

"It is not covenanted that the publisher should take out the copyright, nor is there any express agreement for an assignment to them by Paige, if he should take it out. Undoubtedly the provision, that the publishers 'should have the copyright,' would authorize them to apply for it, and if Paige had taken it out in his own name it would have inured to their benefit. But, as between Paige and the publishers, the rights of the latter could not be estimated differently, whether they had or had not availed themselves of the provisions of the act."

So in the case at bar the question is whether the plaintiff holds its copyright to this production subject to the equitable rights of the defendants. The plaintiff's right is not superior in any respect to the right of Romberg, if the latter had taken out the copyright in his own name; the plaintiff stands in Romberg's shoes. Could Romberg have obtained an injunction and damages against defendants, if Romberg had copyrighted this production?

[5] At this point we are confronted by a decision rendered in the Supreme Court of New York in an action which the defendants brought against Romberg on the contract of August 11, 1913. That suit was one for specific performance of that contract and for an injunction; the defendants in this suit being the plaintiffs in that. The suit was brought against Romberg, the Shubert Theatrical Company, and Jacob J. Shubert, and was commenced on March 24, 1914. It asked for an injunction to restrain the defendants "from producing, performing, or publishing any composition written by Romberg and delivered to the Shubert Theatrical Company and Jacob J. Shubert." It also sought, according to the affidavit presented to the court below, the specific performance of the contract of August 11, 1913. The counsel for the defendants in that action moved to dismiss the complaint, and the motion was granted on November 10, 1914; the court making the following conclusions of law:

"I. The relief sought by the plaintiffs in this complaint and the complaint itself rests entirely upon the foregoing contract, from which the rights of the parties must be ascertained.

"II. Assuming that the plaintiffs could establish as facts all that they have offered by their counsel to show by his offers of proof, nevertheless, under the allegations of the complaint, and under the contract as conceded, no cause of action for equitable relief can be predicated upon the allegations of the said complaint, and said allegations contained in said offers of proof, even if the latter be assumed to have been established as facts.

"III. The defendants' motion to dismiss the complaint upon the ground that the contract is inequitable and that it lacks mutuality of obligations and remedy must be granted, and the complaint must be dismissed, with costs.

"Let judgment be entered accordingly."

The defendants in their answer in the case now before us have pleaded as their defense the contract upon which the New York court passed in entering the above judgment. They allege that by that contract—

"the said Sigmund Romberg did duly sell, assign, transfer, and set over, and vest in the defendants, the sole and exclusive right to print, publish, and sell all compositions which he might write during the period of five years from the date of the said agreement, and wherein and whereby the said Sigmund Romberg did further set over unto the defendants herein the copyright and the right to recopyright all the compositions which the said Sigmund Romberg might write during the period of the said agreement in order that the defendants might thereby protect the publishing rights vested in them by the said agreement, and that by virtue of the aforesaid agreements the defendants duly became the sole owners and proprietors of the exclusive right to print, publish, and sell each and every work composed by the said Sigmund Romberg during the period of the aforesaid agreement and of the copyright in and to each and every of such work and of the right to copyright and recopyright the same."

It is upon the contract thus set up that defendants must rely to establish that the plaintiff holds the legal title to the copyrighted composition as trustee for defendants, having the beneficial ownership. Can the defendants in this action assert any equitable rights under this contract, or are they estopped?

[6] The plaintiff has not pleaded the judgment as an estoppel. That, however, was not necessary. The rule which requires a former adjudication to be pleaded, if it is relied upon as an estoppel, is without application when the judgment, instead of being relied on in bar of the action, is set up merely as conclusive of some particular fact or question formerly in issue and adjudicated. See *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355 (1897); *Foulke v. Thalmessinger*, 1 App. Div. 598, 37 N. Y. Supp. 563, affirmed in 158 N. Y. 725, 53 N. E. 1125 (1899). The plaintiff, therefore, without pleading it, had a right to introduce the evidence of the judgment of the state court, and did so in the form of an affidavit presented to the District Court on the application for the injunction. So long as that judgment remains unreversed, it estops the defendants from claiming that they possess any equitable rights under the contract. The defendants submitted that contract to the New York court. That court had jurisdiction of the matter involved, no copyright at that time having been procured, and as there was no diversity of citizenship the federal courts not only had no exclusive jurisdiction,

but they had no jurisdiction whatever, of the subject-matter of the suit. The court held the contract to be inequitable, and lacking in mutuality of obligation and of remedy, and refused specific performance and an injunction. We know of no way by which the defendants can escape from the effects of that judgment standing unreversed. The defendants in that action and their privies had a right to rely upon it as decisive of the question that the plaintiffs in that suit had no standing in a court of equity to assert a beneficial interest in any of Romberg's writings or compositions under the contract.

[7-9] If the defendants in the present suit were not estopped from bringing in this contract, it may be that this court might reach the conclusion that defendants have a beneficial interest in the copyright. A contract lacking in mutuality when it is entered into may be subsequently performance be cured of its defect. See Fry on Specific Performance (5th Edition, with Canadian Notes) p. 241. And if a vendor sells future acquisitions—in this case, musical compositions at the time unwritten—the equitable title to the property attaches the moment it comes into existence and vests in the grantee. *Holroyd v. Marshall*, 10 House of Lords Cases, 191 (1862). And the principle that a court will not decree specific performance of a contract by piecemeal, but that it must be performed in its entirety, if performed at all, does not apply to contracts which, though they may be entire and single in themselves, contemplate a separate and piecemeal performance of separate parts. Fry on Specific Performance, § 840.

It would seem that an agreement made by an author assigning his interest in any future musical compositions he might compose, if supported by a valuable consideration and limited in time, is as much entitled to be specifically enforced as agreements made by a patentee who assigns all future improvements on a patented device. *Mississippi Glass Co. v. Franzen*, 143 Fed. 510, 74 C. C. A. 135, 6 Ann. Cas. 707 (1906). And see *Birkery Mfg. Co. v. Jones*, 71 Conn. 113, 40 Atl. 917 (1898). Such an agreement, it may be conceded, might be invalid if an author undertook for a present consideration to give an exclusive right in all writings which he might at any time in the future produce. Such an agreement might be contrary to public policy and void, just as an agreement by an inventor transferring to another a right in all inventions he might at any time thereafter make might be void. *Aspinwall Mfg. Co. v. Gill* (C. C.) 32 Fed. 697 (1887). But in this case the composer Romberg was to be paid royalties on his compositions as they were produced and sold, so that the incentive to produce was not taken away, and the contract was not unlimited in time. We do not, however, decide any of these questions now, and it is not important to the defendants how this court might have decided them if the defendants were not estopped from presenting them by the New York judgment.

But did the contract confer upon the defendants any rights at law? The District Judge seemed to be under the impression that it did. He said:

"Romberg could not be put in jail, if he performed his songs, or if he refused to make an assignment of his literary property; but the obligation to

assign was valid, and the obligees might get a judgment for damages at law for his failure to perform. The agreement, though in words of present assignment, could not come into existence; but, when Romberg composed the song, it did come into existence, and was at least valid as an executory contract to assign, whether enforceable only at law or not. * * * If Romberg's contract was valid at law, as I have decided, neither he nor his assignee with notice come blameless into a court of equity. The legal right upon which they base their claim in equity would, if Romberg had performed his valid obligations, now be vested in the defendants; they are violating that legal right only because he has already violated their right by failing to give them the title, and with it the right to do exactly what they are now doing. His prior wrong is the occasion of the acts of which he complains. In such circumstances he is in no position to ask for any equitable remedy."

[10-13] The contract "sold, assigned, and transferred" the right "to print, publish, and sell" all compositions which Romberg "might write" during a period of five years from the date of agreement. Such an agreement could not operate at law to vest the legal title in the defendants to these compositions, for the reason that the compositions were not at the time in existence. There could be no valid sale unless the thing to be sold was in *rerum natura* and under the immediate control of the vendor. The common-law doctrine is expressed in the maxim "*Licet dispositio de interesse futuro sit inutilis tamen potest fieri declaratio præcedens quæ sortiatur effectum interveniente novo actu.*" The common law prevents the sale of things which the vendor has not in his possession by falling back upon the common-sense notion that if one has not a thing to sell he cannot sell it. To every contract of sale an actually or potentially existing subject is necessary. At law one cannot transfer by a present sale what he does not then own, although he expects to acquire it. But, while the contract was without effect at law as a contract of sale, it operated as an executory agreement to sell. *Whitehead v. Root*, 2 Metc. (Ky.) 584, 587 (1859); *Parsons on Contracts*, vol. 1, p. 439; 35 Cyc. 46. And while the agreement could not be specifically enforced, it imposed upon Romberg an obligation to perform it, and the breach of the agreement could be redressed in an action for damages.

The legal and moral obligation which Romberg assumed he afterwards repudiated. If he had retained the title to the musical composition herein involved, and taken out his copyright, and defendants had published, and he had asked an injunction against them, the relief might have been denied, and he might have been informed that he who comes into equity must do so with clean hands. "He that hath committed iniquity shall not have equity." He who desires relief in equity must himself be free from fault. The plaintiff in this case, who acquired its rights with full knowledge of the legal and moral obligation resting upon its assignor, may be in no better position than its assignor; its equity may not be superior to his. All this may be perfectly true, if we assume that a valid contract existed. But it affords no help to defendants in the federal courts if the defendants are estopped by the action of the New York courts in holding the contract invalid. So long as the New York judgment stands unreversed, the defendants cannot rely upon it for any purpose at law or in equity as against the parties or their privies in the suit in the state

court. The New York court refused relief upon the ground that the contract lacked not only mutuality of remedy but also mutuality of obligation. In other words, that court held that the contract lacked that which was essential to give it any validity as a binding contract.

Now a final decree on the merits in a suit in equity operates as a bar to any further litigation between the same parties on the same subject-matter in a court of law, and a final judgment on the merits in an action at law bars any further action between the parties on the same cause of action in a court of equity, except in matters which are within the exclusive cognizance of equity, so that they could not rightfully have been determined in an action at law. And a decision adjudging a contract invalid is conclusive of that fact for all purposes in any further litigation between the same parties and their privies. *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. 585, 30 C. C. A. 293; *Stockwell v. Silloway*, 113 Mass. 384; *Goodwin v. Snyder*, 75 Wis. 450, 44 N. W. 746; *Summers v. Oberndorf*, 73 Md. 312, 20 Atl. 1068; *Chase v. Walker*, 26 Me. 555. That contract cannot, therefore, be relied upon in this court by these defendants against these plaintiffs for any purpose. With that contract eliminated from this case the defendants have no defense which they can successfully interpose to the application for the injunction.

The order is reversed, and the District Court is directed to issue an injunction *pendente lite* as prayed.

On Motion for Rehearing.

PER CURIAM. In this cause our opinion has been filed, but mandate has not yet issued. Our decision was based upon the proposition that issues in this cause were *res adjudicata*, because the record contained a judgment of the state Supreme Court entered in a suit between the same parties (or their privies). Application has been made for a reargument, and with such application there has been filed a copy of the printed case on appeal to the Appellate Division in said cause in the state court. This printed case on appeal apparently indicates that the state Supreme Court amended its judgment, subsequent to original entry, so that its disposition of the issues before it is different from what it was in the original judgment.

The mere filing of this paper book in no way changes the situation here; the only record before us is the record certified to this court by the United States District Court. We will, however, withhold mandate from issue during this session, so that the counsel, who has moved for reargument, may make application, on notice, on one of our regular motion days, for such relief as he may be advised, to show, if he can, that the state court did not hold the contract sought to be enforced invalid at law, and so operate to deprive his client of the opportunity to obtain a decision on the merits of this cause in the federal courts.

HAWES et al. v. FIRST NAT. BANK OF MADISON et al.

(Circuit Court of Appeals, Eighth Circuit, November 29, 1915.)

No. 4499.

1. COURTS ⇨307—UNITED STATES COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP—“INDISPENSABLE PARTY.”

An embarrassed debtor entered into an agreement with his creditors whereby his property was turned over to a committee of creditors in trust for the creditors, with power to hold, manage, control and sell it, etc. The committee contracted to sell certain land constituting the only property of any practical value, to M., a citizen of Illinois, whereupon certain of the creditors, two of whom were citizens of Illinois, filed a bill asking the court to assume control of the trust and administer it through a receiver appointed by it, to enjoin the trustees and their agent, in whose name title was held, from conveying the property, to enjoin any conveyance pursuant to the contract with M., and to set aside such contract and order a public sale of the land. M. was permitted to intervene. A decree was rendered adjudging that the trustees should not deliver any deeds to M., or pay him any money out of the assets of the trust estate, and ordering them to make no conveyances, except to a receiver thereby appointed, and to convey or cause to be conveyed all property to the receiver. It also dismissed M.'s intervening petition. On the trial the principal fault found with the trustees was that they had attempted to sell the lands to M. for much less than they were worth. *Held*, that M. was an indispensable party, both by the relief prayed for and by that granted, and, as he was a citizen of the same state as two of the complainants, the court had no jurisdiction, as, while the court did not in terms cancel the agreement between M. and the trustees, the decree absolutely nullified that agreement and adjudicated M.'s rights.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 850-854; Dec. Dig. ⇨307.]

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

2. COURTS ⇨310—JURISDICTION OF FEDERAL COURTS—CITIZENSHIP—SUITS FOR RECEIVERSHIPS—NECESSARY PARTIES.

The debtor was himself an indispensable party to the suit, as complainants had no right to complain of the matters involved without proof of their claims, and their claims could not be established without the debtor being present in court.

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

3. COURTS ⇨405—JURISDICTION—DIVERSE CITIZENSHIP—OBJECTIONS.

Though no objection because of a defect of parties was made in the District Court, the Circuit Court of Appeals must notice the defect itself, if it is jurisdictional.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103; Dec. Dig. ⇨405; Appeal and Error, Cent. Dig. § 3302.]

4. RECEIVERS ⇨189—COSTS OF RECEIVERSHIP—PARTIES LIABLE.

Where a receivership is procured illegally, the costs of the receivership may be taxed against the complainant procuring the appointment of the receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 379, 380; Dec. Dig. ⇨189.]

5. RECEIVERS \Leftrightarrow 189—COSTS OF RECEIVERSHIP—PAYMENT FROM PROPERTY.

Where the court appointing a receiver had no jurisdiction, it cannot claim jurisdiction over the property seized without jurisdiction, and pay costs and expenses of the receivership therefrom.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 379, 380; Dec. Dig. \Leftrightarrow 189.]

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

Suit by the First National Bank of Madison and others against Richard S. Hawes and others. From a decree in favor of complainants, defendants appeal. Reversed and remanded, with instructions.

C. C. Le Forgee, of Decatur, Ill. (Francis R. Wiley, of Decatur, Ill., on the brief), for appellant McGinley.

James C. Jones and Frank H. Sullivan, both of St. Louis, Mo. (Lon O. Hocker, of St. Louis, Mo., on the brief), for other appellants.

Thomas B. Harlan, of St. Louis, Mo. (Matthew G. Reynolds, John A. Hope, and Chase Morsey, all of St. Louis, Mo., on the brief), for appellees.

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

CARLAND, Circuit Judge. On July 3, 1914, John E. Franklin of St. Louis, Mo., owed, either directly or as an indorser, nearly \$1,000,000, to more than 100 banks in St. Louis and surrounding territory. There was a meeting of his creditors at which his financial condition was considered. In preference to bankruptcy or a receivership, the creditors and Franklin decided that a trust agreement whereby the latter should turn over all his property to a committee in trust for his creditors should be executed. The committee agreed upon was as follows: Samuel C. McCluney, a dealer in commercial paper, and who had sold about \$160,000 of Franklin paper to country banks and represented them therein; Richard S. Hawes, vice president of the Third National Bank of St. Louis, which held about \$50,000 of Franklin paper, and was correspondent for some of the country banks carrying such paper; Leonidas S. Mitchell, an officer of the National Bank of Commerce, which was carrying about \$165,000 of the paper mentioned and represented other country banks carrying the same; August E. Brooker, a banker, who represented banks with claims amounting to about \$40,000, and August Schlafly, a banker and large real estate owner who did not represent any claims against Franklin, but was his personal friend. Unless the creditors should accept this plan with unanimity, or nearly so, it could not be put into execution.

About August 15, 1914, all but 10 or 15 of the direct creditors had executed the trust agreement. Thereupon the committee above mentioned executed it and undertook the trust. The trust agreement was finally executed by 113 creditors, constituting practically all of the direct creditors and a large majority of the indirect creditors. The complainants in this case executed it. There were three parties to the agreement: Franklin as party of the first part, the committee above

mentioned, party of the second part, and the creditors of Franklin, parties of the third part. The agreement occupies nine printed pages of the record, and for obvious reasons cannot be set out here, nor is it necessary to do so. The agreement provided that Franklin should transfer all of his property to the committee and that the committee should have the following power:

"The committee shall have the authority to hold, manage, control, sell, operate, rent, and lease the property transferred or conveyed to it; to prosecute or defend any suit at law or equity affecting the title to said property, or in any wise relating thereto, and to settle, arbitrate, or compromise any such suit or any matter pertaining to the property transferred or conveyed to it, or which, by the terms of this agreement, should, in the opinion of the committee, have been so transferred or conveyed; to pay the interest or principal of any mortgage, incumbrance, or lien now existing or hereafter created against said property; to pay all taxes or special assessments levied upon said property; to sell any or all of said property for cash or for notes, and upon such terms and conditions and in such parcels as it may deem best; to borrow, from time to time, any sums of money, and to secure the repayment of the same by charge, pledge, mortgage, deed of trust, or other instrument in writing upon the property, real or personal, or any of it, conveyed and transferred to it by said Franklin, and any and all sums so borrowed shall take priority over the claims of the depositors to the property held by the committee or the amounts realized therefrom; to pay off and cause to be released and canceled any indebtedness now or hereafter existing against said property; to bid or refrain from bidding at any sale of any of said property, and to hold any property purchased by it, either in its own name or in the name of any person or corporation nominated by it; to return to said Franklin and his legal representatives any property which, in the opinion of the committee, cannot be realized on for the benefit of the creditors; and, in general, to exercise over the property conveyed and transferred to it, or its nominee, the control, power, and authority of absolute owner, save and except that the funds realized by it shall be applied by the committee as hereinafter provided."

The agreement also contained the following provision:

"The depositors agree that they will not, so long as this agreement remains in effect, institute, join in, or become parties to any proceeding at law or equity, or special proceeding in any court, for the purpose of enforcing their claim against the first party, or procuring any settlement or distribution of any of the property of the first party other than by the committee as herein provided."

The committee was empowered to sell all property and distribute the proceeds to creditors and were to return any surplus that might remain to Franklin. Franklin was also entitled to notice of sale of all collateral either by the parties holding the same or by the committee. The Third National Bank was constituted a depository where creditors might deposit their claims and the papers evidencing the same. For the more convenient handling of the property conveyed Edward W. Labitzke was to take the title to the real estate conveyed by Franklin under the agreement as agent of the committee. On April 16, 1915, the following memorandum of agreement was executed by August Schlafly, as chairman of the Franklin creditors' committee, and one William McGinley:

"This memorandum of agreement, entered into this 16th day of April, 1915, between August Schlafly, chairman of the Franklin creditors' committee, acting for and duly authorized by said committee, and William McGinley:

"(1) Said committee will sell to McGinley, or his nominees, what are known

as the Franklin lands, in Pemiscot county, Missouri, being the lands described in two deeds from Franklin to Edward W. Labitzke, and the said McGinley agrees to buy said lands on the following terms: Twenty-five thousand dollars (\$25,000.00) payable on April 19, 1915, of which ten thousand dollars (\$10,000.00) shall be cash and fifteen thousand dollars (\$15,000.00) shall be the note of said McGinley, payable in twenty (20) days and secured by collateral satisfactory to said committee; the balance of said purchase price shall consist of the note of said McGinley, or his nominee, secured by a mortgage on the lands; said note shall be for the sum of two hundred and seventy-five thousand dollars (\$275,000.00), less the amount of the principal due on the three mortgages now on the lands, being approximately one hundred forty thousand dollars (\$140,000.00), and said note shall be for approximately one hundred thirty-five thousand dollars (\$135,000.00); said note shall bear five per cent. (5%) interest and shall be due January 1, 1916.

"(2) The above agreement, is subject to the execution of a contract containing necessary provisions for defects of title, adjustment of interests on mortgages, and other conditions, which contract shall be in form satisfactory to the attorney for the committee and to said McGinley, and shall be executed on April 19, 1915.

"(3) If the committee shall on or before five o'clock on Monday, April 19, 1915, desire to rescind this contract they may do so by paying the said McGinley the sum of ten thousand dollars (\$10,000.00).

"Executed in duplicate, at St. Louis, Missouri, this 16th day of April, 1915.

"August Schlafly,

"Chairman of the Franklin Creditors' Committee.

"Wm. McGinley."

On April 19th the following memorandum was executed by the same parties:

"Date of April 19, 1915, wherever it occurs in this contract, changed by mutual consent to April 20, 1915; otherwise, contract in full force and effect.

"Wm. McGinley.

"August Schlafly,

"Chairman J. E. Franklin, Com."

At about the time the memorandum of agreement, dated April 16, 1915, was signed the original bill in this case was filed. The bill does not appear in the record, but, as it stopped any further proceedings under the memorandum, we infer that it was filed about the date thereof. On April 27, 1915, an amended bill was filed which appears in the record.

From the amended bill we learn that the action was brought by the First National Bank of Madison and the German State Bank, both citizens of Illinois, and the Bank of Tuckerman, a citizen of Arkansas, against John E. Franklin, who executed the agreement of July 3, 1914, R. S. Hawes, August Schlafly, August E. Brooker, Samuel C. McCluney, and L. S. Mitchell, constituting the committee hereinbefore mentioned, Irvin V. Barth, Third National Bank, and Edward W. Labitzke, all alleged to be citizens of Missouri. The bill was dismissed as to Barth and as to John E. Franklin, who was never served with process nor appeared in the action. Appellees allege that they are general creditors of Franklin in the aggregate sum of \$17,100. The bill was filed by them in their own behalf and all other creditors of Franklin, as beneficiaries of the trust agreement, who might be willing to join therein and bear their proportional part of the expenses of the litigation. The bill charged no fraud against the trustees, but alleged mismanagement on their part. It contained the following prayer:

"Wherefore plaintiffs pray that this honorable court assume control of said trust and administer the same through its own officers and agents, and that said Franklin be adjudged insolvent; that said Third National Bank of St. Louis act upon no orders or directions except the same be made by this honorable court; that said Edward W. Labitzke be enjoined from making conveyance of any property, real or personal, standing in his name or under his control as the agent or nominee of said committee, except by order of this court; that the defendants R. S. Hawes, August Schlafly, August E. Brooker, Samuel C. McCluney, L. S. Mitchell, and Irvin V. Barth be ordered to make due, full, and proper account of their acts and doings under and by virtue of said agreement of July 3, 1914, and that they, and each of them, be enjoined from making any conveyance of the so-called Pemiscot county, Mo., lands, pursuant to the alleged contract with William McGinley or otherwise, or from in any manner disposing of or dealing with any of the assets in their hands, except upon the order of this honorable court; that said defendants, acting as said trustees, and each of them, be required to show cause why said alleged contract with the said William McGinley should not be set aside and held for naught; that said contract be set aside and held for naught; that this court order a public sale of said Pemiscot county land upon such terms and conditions as the court may determine; and for such other and further relief as to the court may seem just and proper."

On May 3, 1915, William McGinley, party to the memorandum agreement of April 16, 1915, obtained leave to file and filed his intervening petition. McGinley was and is a citizen of Illinois. May 4, 1915, counsel for appellants moved the court to dismiss the bill for want of jurisdiction urging as a ground for the motion that William McGinley, who had intervened, was an indispensable party to the action, and that it appeared from his petition that he was a citizen of Illinois, of which state the First National Bank of Madison and the German State Bank, two of the complainants, were citizens. This motion was denied on May 17, 1915. On May 12, 1915, a supplemental allegation was permitted to be added to the bill to the effect that if the court should find a receiver should be appointed complainants were prepared to furnish or cause to be furnished a sum not exceeding \$160,000 to be used in protecting the trust estate and financing the receivership. The case came on for hearing on the merits and as a result thereof on May 19, 1915, it was adjudged that the appellants Richard S. Hawes, August Schlafly, August E. Brooker, Samuel C. McCluney, and Leonidas S. Mitchell, whether acting individually or as a committee, should not deliver to intervener William McGinley, or his nominee, any deed or deeds conveying what are known as the Franklin lands in Pemiscot county, Mo., and should not pay him any money out of assets in their hands belonging to the Franklin trust estate, and each of them were ordered not to make any conveyance of said lands, except to the receiver to be appointed by the court; that said committee convey or cause to be conveyed on or before the 29th day of May, 1915, by deed properly executed, acknowledged, and delivered to said receiver the so-called Franklin lands, being about 8,500 acres, located in Pemiscot county, state of Missouri, and that they convey or cause to be conveyed to such receiver any other lands held by them or under their control as such committee; that said committee on or before the 29th day of May, 1915, transfer and deliver to such receiver all money, stocks, bonds, promissory notes, mortgages, leases, contracts, deeds, choses in action, documents, ab-

stracts of title, correspondence, records, and papers belonging and appertaining to or constituting said trust estate or any part thereof, whether in their possession or under their control; and that they put such receiver in full possession and control of all the real and personal property constituting such Franklin trust estate. It was further ordered, adjudged, and decreed that Richard S. Hawes, August Schlafly, August E. Brooker, Samuel C. McCluney, and Leonidas S. Mitchell, and each of them, be removed and discharged as such committee and trustees, and that they be divested of all power, right, title, and interest in and to said trust estate; that they, and each of them, and their attorneys and agents, be perpetually enjoined and restrained from further acting as such committee, or as such trustees, and from exercising any control of, over, or concerning the said trust estate, or any power or authority under said agreement, except to carry into effect the provisions of the decree, and from in any manner interfering with the administration of said trust estate by the receiver named in said decree.

It was further ordered, adjudged, and decreed that Frank J. Cunningham, of Pemiscot county, state of Missouri, be appointed receiver to take charge of and administer the trust estate and execute the trust established by John E. Franklin under the said agreement of July 3, 1914; that the defendant Edward W. Labitzke, on or before May 29, 1915, convey to said Cunningham, receiver, by proper deed or deeds duly executed, acknowledged, and delivered, the land heretofore conveyed to him by John E. Franklin, or any one acting for Franklin, being what are known as the Franklin lands, and consisting of about 8,500 acres located in Pemiscot county, Mo., the record title of which said lands is now in the said Labitzke; that said Labitzke, on or before May 29, 1915, transfer and deliver unto the said Cunningham all money, rents, deeds, leases, abstracts of title, correspondence, papers, and other documents in possession or under his control belonging or appertaining to such land or trust estate; and that said Labitzke be perpetually enjoined and restrained from otherwise conveying said property or any part thereof, and from otherwise exercising any control over or concerning any such real estate or any other property held by him, belonging or appertaining to the said Franklin trust estate. It was further adjudged that, should the defendants acting as a committee, or should the said Labitzke, or either of them, fail to make the conveyances and transfers ordered on or about May 29, 1915, then that the decree entered should operate to pass to and vest in the receiver the title to all such property. It was further adjudged that the Third National Bank of St. Louis, on or before May 29, 1915, deliver to said Cunningham all money, stocks, bonds, promissory notes, mortgages, leases, contracts, deeds, documents, records, correspondence, papers, now in its possession, or which might come into its possession or under its control, belonging to or appertaining to said Franklin trust estate. It was further adjudged that said Third National Bank be perpetually enjoined and restrained from acting upon any orders or directions of the committee created by the trust agreement. It was further adjudged that the money, checks, or other property

lodged with any of the defendants by William McGinley in contemplation of the purchase of said Franklin lands, located in Pemiscot county, Mo., were no part of the said Franklin trust estate, and defendants were at liberty to dispose of the same as they might be advised. It was also adjudged that the intervening petition of William McGinley be dismissed.

[1] In the consideration of this case we are met at the threshold with the question of jurisdiction. It is urged by counsel for appellants that John E. Franklin and William McGinley were both indispensable parties, without whom the court below was without jurisdiction to render the judgment which it entered. On account of this contention it has been necessary to state the prayer of the bill and the relief granted. The classes of parties to a bill in equity have often been stated by the Supreme Court and by this court. *Minnesota v. Northern Securities Co.*, 184 U. S. 236, 22 Sup. Ct. 308, 46 L. Ed. 499; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *California v. Southern Pacific Co.*, 157 U. S. 257, 15 Sup. Ct. 591, 39 L. Ed. 683; *Gregory v. Stetson*, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792; *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635; *Byers v. McAuley*, 149 U. S. 618, 13 Sup. Ct. 906, 37 L. Ed. 867; *Barney v. Baltimore City*, 77 U. S. (6 Wall.) 280, 18 L. Ed. 825; *Sioux City T. R. & R. Co. v. Trust Co. of N. A.*, 82 Fed. 124, 27 C. C. A. 73 (8th Cir.); *Chadbourne v. Coe*, 51 Fed. 479, 2 C. C. A. 327 (8th Cir.). In *Minnesota v. Northern Securities Co.*, supra, in speaking of these classes, it was said:

"They are: (1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

The question, then, is whether the interest in the controversy of Franklin and McGinley was of such a nature that a final decree could not be made in the action without either affecting that interest or leaving the controversy in such condition that its final determination might be wholly inconsistent with equity and good conscience. The bill in its allegations is much broader in its scope than the evidence at the trial. The evidence at the trial was largely confined to the Pemiscot county lands, and the principal fault found with the trustees under the Franklin agreement was that the trustees had attempted to sell these lands to McGinley for much less than they were worth. Evidence was given both in support of the sufficiency of the consideration promised to be paid by McGinley and as to its insufficiency. We think it may be truly said after an examination of the evidence in the record that the only property of any practical value conveyed by Franklin to the trustees or to Labitzke for them was the 8,500 acres of Pemiscot county lands.

The bill did not pray for a removal of the trustees, but it was claimed that they were mismanaging the trust, and the court was asked to take the property into its possession and manage the trust itself through its officers. McGinley was allowed to intervene, but in the final decree his intervening petition was dismissed. It is said that the court did not cancel the memorandum of agreement between McGinley and Schlawly. It did not do it in terms, but what it did do, if the decree is to stand, absolutely nullified the agreement of April 16, 1914. McGinley's rights have been adjudicated, although his intervening petition has been dismissed. The committee under the trust agreement has his \$25,000 to use as they are advised. So far as McGinley is concerned, the decree entered, if he was not in court, would be wholly inconsistent with equity and good conscience. The bill prayed that the contract with McGinley be vacated and set aside. When he voluntarily appeared and was allowed to intervene, then a controversy was presented not within the judicial power of the court, as he was a citizen of the same state as the two other complainants. With McGinley out of court, no decree affecting his interest could be made, and in court he ousted the court of jurisdiction.

It is claimed by counsel for appellees that when William McGinley intervened in the action he did not by such intervention oust the court of its jurisdiction. The following cases are cited in support of this contention: *Phelps v. Oaks*, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. Ed. 888; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Hardenbergh v. Ray*, 151 U. S. 112, 14 Sup. Ct. 305, 38 L. Ed. 93; *People of Porto Rico v. Ramos*, 232 U. S. 627, 34 Sup. Ct. 461, 58 L. Ed. 763. These cases do not support counsel's contention. Without reviewing these cases, it is sufficient to say that they establish a well-known rule in federal equity practice, namely, that when a stranger to the action, or one who is not an indispensable party thereto, intervenes therein, in order to protect his own interest, his citizenship will not oust the court of jurisdiction; but this is on the theory that the court already has jurisdiction of the cause of action and of the parties and can proceed to judgment without the party who seeks to intervene. But in the case at bar both by the relief prayed for and the relief granted McGinley was an indispensable party, without whom the court could not render the decree which it did. He voluntarily appeared, but his appearance was fatal to the court's jurisdiction for the reasons stated.

[2] Whatever might be said as to Franklin being an indispensable party to an action simply to remove one or more of the trustees for misconduct under the trust agreement and to appoint new trustees in their place, we think when it was prayed in the bill that the court reach out through its receiver and seize all of the trust property for the purpose of managing the trust itself with all the attendant expenses of a receivership, and this prayer is followed by a decree which practically disemboweled the whole trust agreement, it clearly appears that Franklin was an indispensable party to the action. The appellees were general creditors, and without proof of their claims they had no right to complain. We do not see how these claims could be established with-

out Franklin in court. *Chadbourne v. Coe*, 51 Fed. 479, 2 C. C. A. 327 (8th Cir.). The trust agreement did not establish these claims, nor does it help the situation when it is said Franklin does not object. There is only one way to determine whether he does or not, and that is by making him a party to the action.

[3] It is said no objection was made below as to the absence of Franklin, but it is made here; moreover, we must notice it ourselves, if it is jurisdictional. If the court below had no jurisdiction it could not decide the merits of the controversy. Nor can we discuss them. There seems to be no alternative but to reverse the decree below and remand the case to the District Court, with instructions to cause all property seized by its receiver to be returned to the persons from whom it was taken, by proper conveyances if necessary, and to tax the costs of the action and the costs and expenses of the receivership against the appellees, complainants below.

[4] Where a receivership is procured illegally, the costs of the receivership may be taxed against the complainant procuring the appointment of such receiver. *Machinery Co. v. Hughes*, 195 Ill. 413, 63 N. E. 186, 59 L. R. A. 673; *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168; *Highley v. Deane*, 168 Ill. 266, 48 N. E. 50; *State v. People's U. S. Bank*, 197 Mo. 605, 95 S. W. 867; *Cutter v. Pollock*, 7 N. D. 631, 76 N. W. 235; *Ephraim v. Pacific Bank*, 129 Cal. 589, 62 Pac. 177; *High on Receivers* (3d Ed.) § 796; *Beach on Receivers*, § 774.

[5] In the case at bar, the court, being without jurisdiction, has no property with which to pay any one, and hence is not ruled by *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas. 1155. Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the court.

Reversed and remanded, with instructions.

COLLINS et al. v. WILLIAMSON.

(Circuit Court of Appeals, Sixth Circuit. December 17, 1915.)

No. 2648.

1. CORPORATIONS ⚡550—ASSIGNMENTS FOR CREDITORS—VALIDITY—INSOLVENCY.

A deed to all the property of a corporation, duly made in trust for the benefit of creditors, constitutes an assignment, whether the corporation be solvent or insolvent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2190; Dec. Dig. ⚡550; Assignment for Benefit of Creditors, Cent. Dig. § 94.]

2. CORPORATIONS ⚡550—ASSIGNMENT BY CORPORATION—JURISDICTION OF PROCEEDINGS.

Under the rule that where a judicial tribunal has general jurisdiction of the subject-matter, and the special facts which give it the right to act in a particular case are averred, and not controverted, upon notice to all the parties, jurisdiction is acquired, and cannot be assailed in any collateral proceeding, proceedings on a deed of general assignment made

by a corporation under the Ohio statutes are not void because of the fact that the deed is filed and the proceedings are instituted in the insolvency or probate court of a county other than that in which the principal office of the company is fixed by its articles of incorporation, where the deed recites that the company is of the county in which the deed is filed, and no objection is made by any stockholder or creditor to the jurisdiction of the court, which in such case can only be challenged by direct proceedings.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2190; Dec. Dig. Ⓒ550; Assignments for Benefit of Creditors, Cent. Dig. § 94.]

3. COURTS Ⓒ489—JURISDICTION OF FEDERAL COURTS—SUIT TO SET ASIDE DEED OF ASSIGNMENT.

Gen. Code Ohio, § 1613, vests in the court of insolvency of Hamilton county, and other provisions in the probate courts of other counties, special jurisdiction of proceedings to execute the trust created by an assignment for the benefit of creditors; but such courts are not given general equity power to set aside and vacate such a deed, which is vested in the court of common pleas. *Held*, that a federal court had jurisdiction of a suit for such purpose, where the requisite facts to confer federal jurisdiction were alleged.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1342; Dec. Dig. Ⓒ489.]

4. CORPORATIONS Ⓒ550—VALIDITY—ASSIGNMENTS FOR CREDITORS—PURPOSE OF ASSIGNMENT.

A general assignment by a corporation, forced by its majority stockholders, *held* void, where its purpose was not the protection of creditors, but to coerce stockholders to surrender corporate bonds issued as a bonus with their stock and claimed by the majority to be illegal; such purpose not being within the purview of the assignment statutes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2190; Dec. Dig. Ⓒ550; Assignments for Benefit of Creditors, Cent. Dig. § 94.]

5. CORPORATIONS Ⓒ553—RECEIVERS—GROUNDS FOR APPOINTMENT.

In a suit to set aside a deed of general assignment by a corporation, the court *held* warranted by the facts in appointing a receiver *pendente lite*.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. Ⓒ553.]

In Error to the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by Frances H. Williamson against Justus Collins, Eugene Zimmerman, George R. Collins, and the Superior Portland Cement Company. Decree for complainant, and defendants bring error. Affirmed.

Justus Collins, Eugene Zimmerman, George R. Collins, and the Superior Portland Cement Company (defendants below) appeal from a decree rendered by the District Court in favor of Frances H. Williamson as plaintiff.

The defendant company was organized in 1906, with a capital stock of \$525,000, divided into 5,250 shares, of \$100 each. The articles of incorporation provide that its principal office shall be located at Jackson, Ohio. Its plant is on lands in Lawrence and Scioto counties, purchased of Mrs. Kelley for \$100,000, of which sum \$10,000 was paid to one Wright as a commission, and by him returned to the company. Mrs. Kelley, as agreed in the terms of sale, subscribed for \$50,000 of the stock and paid for the same as calls were made by the board of directors. Wright received stock to the amount of \$25,000 for his services in consummating the deal and placing the stock. Following the contract of purchase made with Mrs. Kelley, Stern-

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

berger, who was solicited to make a large subscription for stock, declined to do so, unless, to protect his stock, bonds to an amount equal to the authorized capital stock should be issued and delivered to the respective stockholders to an extent equal to the stock subscribed for by each. This suggestion was adopted, but with reluctance on the part of Collins. To make it appear that there was a consideration for the bonds, resort was had to a fiction. The records as to the organization of the company, which for convenience had been prepared in advance of the meeting held for that purpose, were interlined so as to show that the purchase price of Mrs. Kelley's lands was \$100,000 and \$525,000 in bonds, which bonds, bearing 5 per cent. interest, are secured by a mortgage in the usual form made to the Provident Savings Bank & Trust Company as trustee, with which trust company the defendant company subsequently did its banking business. On the delivery of the bonds to Mrs. Kelley she was to return and did return them to the company to be issued by it. Calls were made from time to time for the payment of stock subscriptions, and, when they were paid to the extent of 50 per cent., bonds equaling one-half of the stock subscription of each person were delivered to him by the company. The residue of the bonds were apportioned and delivered when full payment was made for the stock. There was also a later \$25,000 issue of preferred stock, one share of common stock being given for every two shares of preferred stock.

Collins, who at all times has been president of the company, became the owner of 2,669 shares of stock, and, with the holdings of his relatives (his wife, son-in-law, and son), continuously owned a controlling interest in the company. The plaintiff and her relatives (including Wright and his wife, formerly Mrs. Kelley) owed 780 shares. Eugene Zimmerman acquired 325 shares. Owing to the financial disturbance of 1907 and depressed business conditions affecting the cement trade, the company did not prosper in the early years of its existence. It has never paid a dividend, or set aside anything to the sinking fund, which was to be five cents on each barrel of cement sold, to care for the bonds. A limited number of the bonds issued passed into the hands of third parties—the plaintiff, for instance, having disposed of hers, and Wright also having parted with at least \$12,000 worth of his. Bonds held by the Wrights had been pledged as collateral to an Ironton bank. A small amount of interest was paid on bonds which had gone into the possession of others than members of the corporation; but, excepting such small sums, the company, for want of funds, paid no interest on the bonds or on the unpaid coupons, which it was agreed should bear five per cent. interest. The company's total investment reached about \$537,000. Its business required considerable ready cash for its conduct, and to obtain working capital it became necessary at the inception of its business operations to borrow large sums. The trust company limited its credit to \$135,000, but, on account of the impairment of the company's credit by the mortgage bond issue, which from the beginning was regarded unfavorably by Collins, required in addition to the defendant company's obligation personal security. Collins indorsed the company's notes and pledged for its benefit all of the stock and bonds issued to him by the company, and also other securities, as collateral. In 1907 the indebtedness before the company's plant was put into operation reached \$55,000, and, as the trust company required further personal security when it was desired to increase the loan beyond that amount, Collins, Sternberger, and Zimmerman guaranteed a further loan to the company of \$60,000. At one time the sum due to the trust company reached \$165,000. The loans were all duly authorized by the board of directors.

The want of funds for the proper transaction of the company's business was well known to the members of the corporation and much considered by them, and, for the purpose of improving its credit, Collins, who was willing to lend his credit to the company, if all its other members did so, became persistently insistent that the stockholders surrender all their bonds, and that he and the others who had become liable for the company's bank indebtedness should be relieved of their liability. The same attitude was assumed by Zimmerman and Sternberger. The return of the bonds to the company was not effected, because the plaintiff and the Wrights did not assent

thereto. Sternberger died in June, 1912, at which time there was due \$115,000 to the trust company, which had permitted the renewal of the company's notes from time to time at their maturity. The trust company then requested further security from Sternberger's estate for the \$60,000 loan or its payment, and on failure to comply with such request it finally called for the satisfaction of the company's entire indebtedness to it. The trust company had become unwilling to accept the defendant company's notes, even if the entire bond issue were deposited with it, unless personal or other adequate security were also furnished. Without the knowledge of his associates, other than the secretary and treasurer, Collins, on February 26, 1913, at the instance of the trust company, borrowed of it \$115,000, giving his note to it for that amount, paid the company's indebtedness to it, took over the \$55,000 and the \$60,000 notes and the securities pledged for their payment, and deposited the whole of them with the trust company to protect his individual note. He also arranged to pay to the trust company \$2,500 for each of the next four months on the debt, and thereafter \$5,000 for each succeeding month until the debt was fully paid, which arrangement was reported to the stockholders; but the indebtedness could not be thus liquidated without reducing the funds requisite for the operation of the company's business.

The net profits, which for the year 1912 were about \$13,000, in 1913 approximated \$70,000; but, owing to the increasing friction within the company, arising out of its financial condition, the effort to get in the bonds, and alleged abruptness on the part of Collins towards certain members of the corporation, and the desire of Collins and Zimmerman to be relieved of their liability to the company, Collins, on his own motion, in each of the months of July, August, and September, paid \$10,000 on the bank indebtedness, and on September 16th, in behalf of the company as its president, entered into a contract with the Commercial Credit & Investment Company, of Chicago, by the terms of which he sold to the Credit Company such of the defendant company's contracts and accounts and bills receivable as it then had or might acquire for 80 per cent. of their face value, the remaining 20 per cent. to be paid to the defendant corporation when the accounts were paid in. From the sums collected on the accounts, however, the Credit Company was to retain an agreed compensation. This contract was approved by the company's directory on October 14th. The proceeds arising from the sale made to the Credit Company were so applied by Collins to the bank indebtedness as fully to satisfy it on October 30th. In consequence of such application of its funds, the company was unable to meet its bills payable as it had previously done, but, as they became due, notes were issued for the same. The contract with the Credit Company, the amount of compensation allowed for its services, the use made of the funds received from it, and the nonpayment of current bills intensified the feeling which had theretofore arisen, especially on the part of the plaintiff and her relatives. A meeting of the stockholders and also of the board of directors was therefore duly called for October 31st, to consider the financial condition of the company, and "to take action to protect the financial status of the company, and to take all necessary action tending to that end."

On October 14th, when it was determined to call such meeting, Collins, who was willing, as was Zimmerman, to give financial assistance to the company, if the other stockholders would also do so, believing, as he always had, that the bond issue was invalid, and having decided that he would no longer carry the burden of the company's finances, for the purpose of getting rid of the bonds, determined to cause the company to make an assignment to himself in trust under the state law for the benefit of its creditors; but he did not communicate that fact to the other members of the corporation. He caused the deed of assignment to be prepared, and on October 31st made known his purpose to such members, including Zimmerman, who sanctioned the plan. The making of the assignment was approved at the stockholders' meeting by a vote of 3,371 as against 1,781 shares, and also at the directors' meeting, but the approvals were not without earnest protest from the minority stockholders. The deed was executed, delivered, and filed in the insolvency court in Hamilton county (its power to administer assignments being the same as

that of probate courts), where the offices from which the company's business was directed were located, and also in Lawrence and Scioto counties, in which were the company's lands, but was not filed in the probate court of Jackson county. There was at that time upwards of \$13,000 in bank to the company's credit and about \$86,000 was owing to merchandise creditors. There was also a judgment against the company for \$5,725.

Prior to October 31st Collins had prepared letters to the creditors to be sent out by him as assignee, apprising them of the assignment and that its purpose was to get rid of the bond issue, assuring them of the solvency of the company, and soliciting their consent to a continuance of its business under the authority of the insolvency court. More than three-fourths of them assented, and thereupon, having qualified as assignee by giving a bond of \$100,000, he proceeded as assignee under authority of such court to appraise the company's property and to continue its business. The court named appraisers and also recognized as valid the contract with the Credit Company. Following the assignment, negotiations were had to compose the differences between the members of the company. The plaintiff and the Wrights never lent financial assistance to the company, or agreed to surrender their bonds, although in the negotiations immediately preceding the filing of the bill the Wrights suggested that they would either sell their stock at 95 per cent. of its face value and thus eliminate their bond holdings, or that a loan for three years be made for them to take the place of that for which certain of their bonds were hypothecated and thereby enable them to turn in the bonds still in their possession. Before negotiations were concluded, the plaintiff filed her bill in the District Court against the defendants, and on a final hearing that court decreed the deed of assignment to be null and void, enjoined Collins from acting as assignee thereunder, required him to file in such court a complete account of all of his transactions as assignee, assessed against him and Zimmerman the cost, and appointed a receiver for the defendant company, which receiver is still acting. The purpose of this appeal is to reverse such action of the trial court. Collins' conduct, as president, of the company's business operations is not successfully assailed. Annual statements were made by the directors showing the status of the company's affairs.

R. B. Smith, of Cincinnati, Ohio, for plaintiffs in error.

Lawrence Maxwell and Murray Seasongood, both of Cincinnati, Ohio, for defendant in error.

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

SATER, District Judge (after stating the facts as above). [1] It is not necessary to a decision of this case to determine, as counsel would have us do, whether the company was insolvent at the time the deed of assignment was executed and delivered to Collins, for the reason that a deed duly executed and delivered in trust for the benefit of creditors constitutes an assignment, whether the assignor be solvent or insolvent. *Wambaugh v. N. Y. Mut. L. Ins. Co.*, 59 Ohio St. 228, 241, 52 N. E. 859; *Rockel's Complete Ohio Prob. Pr.* § 1547; *In re Farrell*, 176 Fed. 505, 512, 100 C. C. A. 63 (C. C. A. 6).

[2] That the deed of assignment was not filed in Jackson county and that the assignment proceedings were not given in charge of the probate court of that county is not, as claimed by plaintiff, of controlling importance. The company's articles of incorporation, in compliance with section 8625, General Code Ohio, state where its principal office is to be located; i. e., at Jackson, Ohio. The company never availed itself of the privilege of so amending its charter as to change such place, as authorized by sections 8719-8723. Section 11092 re-

quires that a deed of assignment made by a corporation shall be filed in the probate court of the county in which the assignor resides. Such assignment becomes effective only from the time of its delivery to the probate judge. Section 11093. In *Pelton v. Transportation Co.*, 37 Ohio St. 450, it was held that a certificate of incorporation which under the statute specifies the place where the principal office of the company is to be located is conclusive as to the location of such office; but sections 11092 and 11093 do not say that, if a corporate deed of assignment be filed elsewhere than at the company's place of residence, such deed or the administration of a corporate estate by a probate court other than that sitting in such county shall be void. On the contrary, in all such cases a remedy is given by section 11094, by the terms of which, on failure for 10 days after the execution of the deed of assignment to file it or a copy of it in the proper county and of the assignee to give bond as required by law, the probate court of such county on application of the assignor or of any of his creditors, shall remove the assignee and appoint another in his place.

The deed of assignment specifically recites that the assignor is "the Superior Portland Cement Company, of the city of Cincinnati, county of Hamilton, state of Ohio, a corporation organized and doing business under the laws of the state of Ohio." The deed was sufficient on its face to warrant the insolvency court to assume jurisdiction, and nothing appeared in it or in any of the proceedings in that court to suggest that jurisdiction was wanting. Neither the assignor nor any of its members or creditors challenged that court's right to proceed with the administration of the defendant company's estate, or invoked action by the Jackson county probate court. The rule is that where a judicial tribunal has general jurisdiction of the subject-matter, as the insolvency court in this case had, and the special facts which give it the right to act in a particular case are averred and not controverted upon notice to all the parties, jurisdiction is acquired and cannot be assailed in any collateral proceeding. *Black on Judgments*, § 240. When there is a lack of power or want of jurisdiction in the court, all its acts are void; but when there is merely a wrongful or defective execution of power, its acts are voidable only, and must be reversed upon error. *Lessee of Cochran's Heirs v. Loring*, 17 Ohio, 409, 423; *Moore v. Robison*, 6 Ohio St. 302, 305. The situation presented is analogous to that in which a suit is filed in a federal judicial district in which none of the parties to the action reside. The defect as to jurisdiction being simply as to the district in which suit is brought, the parties being citizens of different states, the objection is waived, if the parties make up the issues without objecting to the jurisdiction of the court. *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 252, 253, 29 Sup. Ct. 619, 53 L. Ed. 984.

[3] It is earnestly urged that the District Court was without jurisdiction to entertain the plaintiff's bill. By the terms of section 1613, General Code of Ohio, the court of insolvency, as regards the administration of assignments in trust for the benefit of creditors, has the same jurisdiction, exercises the same powers, and discharges the same duties as are enjoined by the Constitution and laws of the state upon

probate courts, and all laws in force or hereafter enacted regulating the manner of proceeding in the administration of such assignments by the probate court extend to the court of insolvency. If a deed of assignment is valid, the jurisdiction of the insolvency court therefore extends only to qualifying assignees, controlling their conduct, and settling their accounts, and to causing the trust created by the deed to be executed according to law. That court does not have the general equity power to set aside and vacate such a deed, but such power is vested in the court of common pleas. *Home & Savings Association v. Jones*, 64 Ohio St. 147, 157, 158, 59 N. E. 885. Such power being thus vested and the facts averred in the bill being such as confer jurisdiction on a federal court, the District Court was required to entertain the case.

[4] The controversy as to whether the appointment of a receiver by the District Court was warranted must be determined from the facts of the case. The company became indebted to the trust company to the extent of \$55,000 before the operation of its plant began in the fall of 1907. Collins generously lent his credit to it for that amount, and subsequently for all other sums borrowed. Had he not done so, the enterprise would have failed for want of operating capital. Indeed, for aught that appears, it would have been unable to operate at all. It is not to be presumed that any moneyed institution prudently conducted would extend credit to a new enterprise without an established business which was bonded for practically its entire original cost, and especially if it knew as time passed, as the trust company did, that the company was unable to reduce an outstanding bank indebtedness of \$115,000 and was paying neither dividends on its stock nor interest on its bonds. Collins was never unwilling to do for himself what he requested of others as regards the surrender of bonds and the lending of financial credit to the company. The burden of carrying its finances rested peculiarly on him, although Zimmerman and Sternberger to a limited extent shared it with him. Considering that the enterprise was new and without an established business, and that, if permitted to go upon the financial rocks, it would, when closed out, in all probability realize but a small portion of the original cost, and could more easily be bought in by him than by any other stockholder, to the almost certain complete elimination of the plaintiff and her relatives, his reasonable request that the bonds be returned to the company, and that he, Zimmerman, and Sternberger should, as far as practicable, be relieved of their personal liability, which had averted financial disaster to all, and that all the stockholders proportionately aid the company, should have met with a prompt and favorable response from the plaintiff, her sister (Mrs. Wright), and the latter's husband, notwithstanding Collins' greater interest, on account of his larger holdings, and what is charged to have been at times his secret, if not arbitrary, action.

Collins was under no obligation to carry so largely a burden in which others should share. The plaintiff and her relatives apparently neither appreciated the service he had rendered them and all other stockholders, nor endeavored to avert the financial collapse which the

withdrawal of the loan of his credit to the company would produce, although his large investment, amounting to about \$275,000, placed him in a position better than theirs to protect himself in case the company encountered financial misfortune. In fairness to his associates, he should have apprised them of his purchase of the notes of the company from the trust company, giving his own note in their stead, and his payment of the indebtedness more rapidly than the contract with that company required; but in so doing he was but shifting the burden to the defendant company, where it rightfully belonged. There seemed to be no way in which he could satisfy the indebtedness for which he, Zimmerman, and the Sternberger estate were bound, other than by permitting the merchandise accounts to remain unpaid, so long as some of the stockholders blocked the only method of giving the company an improved financial standing which would enable it to obtain credit. The corporate members, however, should have been informed in advance, and should have had the opportunity of considering before its consummation the sale of the company's contracts and accounts and bills receivable to the Credit Company, the apparently high price he was paying for its services, and the application of the proceeds of such sale to the payment of the company's debts other than merchandise accounts; and yet had he proceeded, as did the complaining surety in *Barbour v. National Exchange Bank*, 45 Ohio St. 133, 12 N. E. 5, and applied for a receiver of the company, his course, whether successfully pursued or not, would in all probability have been even more harmful, though acting within strictly legal rights, than was his sale of the quick assets to the Credit Company and the application of the proceeds realized from them to the satisfaction of the company's indebtedness in advance of its actual maturity.

When he determined to cause the company to make a deed of assignment, fair play required that he should incorporate in the notice of the stockholders' and directors' meetings to be held October 31st, that the matter of the assignment was to be considered at that time. He should not have proceeded secretly, and withheld such notice until the day on which the meetings were held. That the outstanding bonds were a menace to the life of the corporation, that they were issued as an inducement to procure stock subscriptions and as a bonus without the payment of any consideration for them, is too manifest to admit of controversy; but what the rights of the holders of them as between themselves, and as between themselves and the company, may be, and as to what method is to be pursued to determine such rights, and the cancellation and the return of them to the company, if it shall ultimately be decided that such shall be done, are matters which we are not now called upon to decide.

We are not, however, informed as to how Collins expected to free the company from the incubus of the bond issue by causing the company to assign all of its property for the benefit of its creditors, and yet that was his purpose in causing the assignment to be made. An assignment will be voided which is made in furtherance of a scheme to obtain an advantageous settlement, to force a compromise or to compel creditors to enter into a composition (4 Cyc. 197, 198), and,

it may be added, whose purpose is not the protection of the creditors, but the coercion of stockholders to surrender corporate bonds, and for the reason that such action is not within the purview of the statute relating to assignments. The assignment, which was secretly planned, was arbitrarily carried out, and constituted an act of bankruptcy which would almost necessarily and speedily terminate the company's business career, to the injury of the stockholders and without benefit to the creditors. A bankruptcy proceeding in fact was, it is stated, instituted and has been held in abeyance only by the planting of the present suit. For the reasons above stated the trial court was justified in voiding the deed of assignment, and in view of *Powers v. Blue Grass Building & Loan Association* (C. C.) 86 Fed. 705, 707, the appointment of a receiver pendente lite was warranted.

[5] We are not satisfied that a further continuance of the receivership is necessary. With the deed of assignment set aside and the proceedings thereunder enjoined, there seems no occasion, so far as appears from the record before us, for winding up the corporation or withholding from the directors the control of its assets, for it cannot be presumed that the directors will mismanage the corporate business or act otherwise than in conformity to law. Should the retirement of the company's bonds be still desired, no obstacle intervenes to prevent an appropriate action to accomplish that result. The differences between the stockholders are not such as reasonable persons may not adjust. The rule is too well settled to require citation of authority that courts of equity, in the appointment of receivers, act with great caution in applying that extraordinary remedy, and require a clear case of right and of present necessity to induce their interference. The extreme remedy of taking and keeping property of a corporation out of the hands of the managers chosen by the stockholders, except as the last resort, should not be applied unless considered absolutely necessary for the preservation of the corporate property. That necessity, apparently, now ceases with the final decision concerning the validity of the trust deed; but two years have elapsed since this record was made up, and it is possible that something may be presented to the court below justifying a temporary continuation of the receivership. However, we cannot now do as appellants ask and make a peremptory direction that it be terminated.

The decree of the District Court is accordingly affirmed, with costs, but expressly without prejudice to an application to such Court at any time by either party for the termination of the receivership.

GALLUP v. CAMMACK.

(Circuit Court of Appeals, Fifth Circuit. February 7, 1916.)

No. 2777.

1. ADVERSE POSSESSION ⚡34, 44—CHARACTER OF POSSESSION—EXCLUSIVENESS AND CONTINUITY.

Under Rev. St. Tex. 1911, art. 5675, providing that any person having a right of action for the recovery of land against another having peaceable and adverse possession thereof, cultivating, using, or enjoying it, shall institute his suit therefor within 10 years after his cause of action shall have accrued and not afterwards, the occupation which will give title by adverse possession must be exclusive and continuous.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 136, 226-231; Dec. Dig. ⚡34, 44.]

2. ADVERSE POSSESSION ⚡114—CHARACTER OF POSSESSION—ENCROACHMENTS.

Rev. St. Tex. 1911, art. 5675, require actions to recover land from another having peaceable and adverse possession thereof, cultivating, using, or enjoying it, to be brought within 10 years. Article 5676 provides that the peaceable and adverse possession contemplated in the preceding article, as against the person having the right of action, shall be construed to embrace not more than 160 acres, including the improvements or the number of acres actually inclosed. Plaintiff in 1902 purchased 160 acres of land in the C. survey and thereon built his house and appurtenances. Prior to his purchase there had been an encroachment over the unlocated boundary line between the C. survey and an adjoining unoccupied section of from one to two acres, cultivated, upon which had been erected a wagon shed, with a roof, but with uninclosed sides. Plaintiff in 1903 moved on his land, and cultivated his own land and about an acre and a half to two acres in the adjoining section, corresponding practically to the former encroachment. In 1903, and again in 1907, he moved away from his land, and while away no one lived in his house, but during all of the time he cultivated his own land and the encroachment, except in 1910, and in that year he planted 12 to 15 fruit trees on the encroachment, in extending an orchard on the C. survey, and tended them, and also stored tools in the wagon shed and pastured hogs on the unoccupied section. At different times he also pastured hogs and cut posts and wood and pickets there. *Held*, that there was a mere encroachment, and not such a continuous adverse possession as to give the owner of the unoccupied section notice that he was claiming adversely any part of the section, or to authorize him to recover 160 acres of land from such section.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. ⚡114.]

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action by S. B. Cammack against David L. Gallup. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

Cammack, defendant in error, sued Gallup, plaintiff in error, to recover 160 acres out of B. B., B. & C. Railway Company, section 1, block 1, containing 640 acres. Gallup filed his answer containing the statutory plea of not guilty and a cross-action, praying for judgment for the title and possession of the whole section of land.

Gallup is the owner of the record paper title to the whole section. Cammack based his right to recover on the 10-year statute of limitations of the state of Texas, being articles 5675 and 5676 of the Revised Statutes of Texas of 1911.

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

The case was tried before a jury, and a verdict and judgment rendered in favor of Cammack for the 160 acres claimed by him, and in favor of Gallup for the remainder of the section. From this judgment, rendered on this verdict, Gallup has brought this case to this court for review.

B. B., B. & C. section 1, of which the land in controversy is a part, lies immediately west of and adjoining the William Cammack survey in Tyler county; the east boundary line of section 1 and the west boundary line of the Cammack being a common line. Cammack owned, at all times during the period in which he is claiming that his limitation title to a portion of section 1 accrued, that portion of the Cammack survey lying east of and adjoining the 160-acre tract out of section 1 which he recovered in this case. His home, dwelling house, etc., were located on that portion of the Cammack survey owned by him. He is basing his right to recover in this suit on an alleged adverse occupancy and possession from his home place over the line onto section 1 and variously estimated as containing between three-fourths and two acres.

In this court Gallup contends: "(1) That Cammack showed no such continuous use or occupancy of any portion of the 160 acres as would be sufficient to vest title thereto in him under the Texas statute of limitations; (2) that such occupancy and use as is shown to have been made by Cammack constituted a mere encroachment, and under the well-recognized so-called "encroachment" cases decided by the Supreme Court of Texas he is not entitled to recover the 160 acres in controversy; and (3) that he was not claiming to own the 160 acres under any such claim or claim of right as is recognized by the laws of Texas, and that the evidence does not bring him within the effect of the Texas limitation statutes."

These points are raised in the record by objections and exceptions to the charge, submitting the Texas limitation statute of 10 years to the jury as a basis of recovery on the plaintiff's part, and exceptions to the refusal of the court to instruct the jury peremptorily in favor of the plaintiff in error for all of the land in controversy, and exceptions to the trial court's action in submitting any issues to the jury for its determination, on the ground that there was no evidence to warrant the submission of any such issues.

Cammack testified in the trial as follows: "My name is S. B. Cammack. I am the plaintiff in this suit. I have had possession of a part of B. B., B. & C. Ry. Co. section No. 1, in Tyler county, Texas. I took possession in 1903. I moved on the place in the fall of 1902, but I did not take any possession of it until 1903. The first crop put on it was corn. This was in 1903. After the 1903 crop I put other crops on the land. I put crops on it every year with the exception of one since I have owned it. The one year that I did not put a crop on it was 1910. There is a wagon shelter and a horse lot and a garden on this land. I don't know when the wagon shelter was built there. It was there when I went there. It had been used prior to the period when I went there. I had been knowing this wagon shelter 10 or 12, or maybe 15, years before I went there. It was there when I was a small schoolboy. I used the wagon shed during 1910. I used it to have plow tools and shop tools in it. I maintained an inclosure on the land around the horse lot and garden in 1910. I put out fruit trees in the field on this land in 1910. I cultivated these fruit trees in 1910. I used the field for a hog pasture a part of the time in 1910. There are no buildings on the land that I claim, except the wagon shelter and garden and barn. The barn has been there only since January, 1911. I have used the wagon shed continuously since I went there, every year. I have figs, peaches, and apple trees on this land and I have mulberries now. They were put out in 1911. I put out other trees there but they died out. This was during my occupancy since 1902. I have English walnuts there, but they are not there now. They are dead. I gathered the fruit in 1910. The only other inclosure on section 1 is an inclosure which old man Cruse has. All of my occupancy in section 1 was under one fence, except that the garden was fenced off from the rest of it. I had two gardens on section 1. They were fenced up separately. I know where the line between section 1 and the Cammack survey is. The plat which you show me correctly shows the improvements I had on section 1 in a general way."

On cross-examination by the defendant the said plaintiff, S. B. Cammack, testified as follows: "Before I moved to the house where I now live, I lived on the old place on the Cammack survey. My dwelling house at present is on the Cammack survey, down in the southwest corner of it. I bought one hundred and sixty acres (160) of the Cammack survey in 1902 from my mother, Mrs. E. B. Cammack. I bought it on July 9, 1902. The 160 acres which I bought from her is the land on which my house is built. My house, I suppose, is 4 or 5 feet from the west line of the Cammack survey, and is over on the Cammack survey. My residence is something about 80 varas north of the southwest corner of the Cammack survey, maybe more, maybe less, I don't know exactly. 1903 was the first year I cultivated any portion of section 1. I moved into the house on the Cammack survey right soon after I got the deed to it, in the fall of 1902, as soon as the renter on the place was going out. My mother had a renter there. I never measured how much of the land on section 1 I cultivated during the year 1903. I don't know exactly. It was an acre and a half or maybe two acres, something like that. I didn't cultivate very much in 1904. I did not have anything there except a garden. There was no fence around it in 1904. The garden that I had was on the Cammack in 1904. I have not lived on that place continuously since 1903. Since then I have lived in Colmesneil part of the time. I moved into Colmesneil in the fall of 1903 and lived there in a rent house. I don't remember exactly how long I stayed in Colmesneil. I moved back on my place on the Cammack survey some time about September, 1904, having left there the fall of 1903. It is about six miles from Colmesneil to my house. I have moved away from that house since then. This was in 1907, I think, maybe in February. It might have been January or February, 1908. It was some time in the winter, some time in the winter of 1907 or 1908. When I moved away that time I lived about a mile south of my house on the Cammack survey in February, 1910, and went on my mother's old place, which is nearly a half mile north of my place on the Cammack, and is stated to be on the north end of the Cammack survey. I lived there at my mother's old place one year, which would bring it down until some time about February, 1911. I then moved back on my place, back to my house down on the southwest part of the Cammack, and have been living there ever since then. No one lived in my house while I was away. I did not rent it out. In the spring of 1903 I put about two acres or an acre and a half of the land on section 1 lying west of the Cammack survey in cultivation. This was in the early spring, about the time we usually put crops in. As well as I remember, I put corn in that year. I was cultivating the land out of the Cammack survey that I own and that is described in the deed from my mother. There was no fence along the west line of the Cammack survey at that place. There was a lane along there between this patch and my place. This lane runs west of the Cammack line, but not all the way. It runs kind of across the line. There was no fence running along the west boundary line of the Cammack survey. There is no fence there now. I don't know exactly how much land I had in cultivation in 1903 on the Cammack survey; I suppose about 12 or 15 acres. There was nothing between the field on the Cammack survey and the field on section 1, except a road which ran along there between them. I planted Irish potatoes and turnips in the field on section 1 in the fall of 1904, while I was living in Colmesneil. I went out there and planted them in the patch west of my house. I suppose there was about an acre and a half in that patch but don't know exactly. I planted a crop there in 1905. I think it was sweet potatoes, but I don't know that I can tell you exactly what I planted there every year. This was in that patch off of the Cammack. During all of these years I was using the land on the Cammack, putting it in crops every year. I put a crop in there in 1906, and worked the patch and my field too. I did this also in 1907 and 1908 and 1909. There was no crop planted there in 1910, except the fruit trees; that is all. In 1910 I was living on my mother's place a half mile north of this place. The field down there on section 1 was planted in oats that year, but I did not have any crop on section 1. The only thing I had there that year was an orchard. Part of this orchard was on the acre and a half I have been talking about, and part of it was not. Not very much

of the orchard was off of the Cammack. Perhaps an eighth of an acre was off of the Cammack, 12 or 15 trees, something like that. So that all these years all the land that I had cultivated or was using was this patch of about an acre and a half and the orchard of about one-eighth of an acre. I cultivated the patch of an acre and a half every year, except one year, which was in 1910, and the orchard was there during 1910 on the eighth of an acre. It is correct that the only use and occupancy of any land on section 1 by me during these years has been a little less than two acres. All of that is one improvement around the house. It is all under one fence on the Cammack and section 1. I never surveyed the lines of section 1. Mr. John Cruse lived something like 400 yards from my house."

On redirect examination the said plaintiff, S. B. Cammack, testified as follows: "When I went on that land, and took possession of the improvements, and put out the other improvements, I was claiming 160 acres of section 1. I have claimed 160 acres there from the time I went down to it up to the present time. I tended the patch there and made a crop on it every year except 1910. I went back there every year except 1910, and made a crop, whether I was living in the house or not. In 1910 I pastured my hogs on section 1, and tended the fruit trees, and put out other fruit trees, and had tools in the wagon shed, the same as any other years. I have used that shed every year. It has been in constant use, and even though I moved away I kept my tools in the shed. This wagon shed is outside of the inclosure about which I have been testifying. It is clear outside of the fence. I have cut posts and wood and pickets off of section 1 outside of the part I was cultivating. I did these things on other parts of section 1 within the limits I am claiming. I have pastured hogs on other portions of section 1 out on the section. I did this under a claim to 160 acres."

On recross-examination the said plaintiff, S. B. Cammack, testified: 'I happened to first start to claim 160 acres of section 1 by cultivating it. I first claimed it in the winter of 1902. The thing that put it into my head to start claiming 160 acres of that section was that I thought I could claim it by cultivating it. I have never had any specific tract of 160 acres out of that section surveyed off at all. I was only claiming 160 acres. I was not claiming an undivided interest in every acre of the section. I was claiming 160 acres. I suppose I was claiming an undivided 160 acres in the section. I claimed 160 acres. I claimed it west of my house there, and the 160 acres that I wanted would include my improvements there. There was no definite piece of land that I claimed. There were no lines there. I did not have it surveyed out.'

The following is the material part of the trial judge's charge to the jury:

"The defendant in the case, in addition to denying the right of the plaintiff to recover 160 acres of land, has filed what is known as a cross-action for the entire survey, and in the state of the case before the jury the only issue for you to decide is as to whether the plaintiff has shown his right to recover 160 acres claimed by him under the 10-year statute of limitation. The defendant, as a matter of law, is entitled to recover the entire section, outside of the 160 acres, and is entitled to recover the 160 acres also, unless the jury find from a preponderance of the evidence that the plaintiff has established his right to recover the 160 acres under the 10-year statute of limitation.

"The law upon the subject provides: 'Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward.'

"Another section provides: 'The peaceable and adverse possession contemplated in the preceding article as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements.'

"A subsequent section of the statute provides: 'Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable and adverse possession shall be held to have full title, precluding all claims.'

“So that the court informs the jury as a matter of law that should you find by a preponderance of the evidence that the plaintiff Cammack had matured his title under the 10-year statute of limitation by proving the elements and facts necessary to constitute such title, then his title will be sufficient to entitle him to bring suit as plaintiff and recover upon the 10-year statute of limitation 160 acres of land, but before you could reach that conclusion the plaintiff must show the jury by a preponderance of the evidence that his title has matured under the 10-year statute of limitation by proving by the testimony the necessary elements to mature his title under that statute. You will observe from the reading of the statute that there are three indispensable elements to be proven by the plaintiff in this case before he can recover; that is, he must show that he has had peaceable possession of the 160 acres, he must show that he has had adverse possession of 160 acres, and he must show that he has cultivated, used, *or* enjoyed the land. It is not necessary to show that he has cultivated, used *and* enjoyed the land, but must show cultivating, use, or enjoyment of it. It is not necessary in this case, in order to entitle the plaintiff to recover, that he show that he has had possession of the entire 160 acres, cultivating, using, or enjoying it; but where he has not shown possession of the entire 160 acres, then the burden devolves upon him to show possession of a portion of the tract, exercising over that portion such acts of ownership and dominion as would manifest an intention to claim the entire 160 acres. In other words, where the plaintiff in a case like this has proven to the satisfaction of the jury by a preponderance of the evidence that his possession of that part of the tract was of such character as manifested on his part an intention to assert an adverse claim to the whole 160 acres, it is not necessary for him to show actual possession of the entire 160 acres; but the possession must be of such character and surrounded by such circumstances as evinced plainly an intention on the part of the plaintiff to assert title to the entire 160 acres. Where he has done that, then the law would, by construction, extend his possession over the part over which he had his flag flying to the whole 160 acres. But in order to fulfill these requirements of the law he must show the character of possession which the law requires under the statute, viz. peaceable and adverse possession.

“The meaning of these terms has not been left to judicial construction, but the Legislature has defined what it takes to constitute in Texas ‘peaceable possession’ and ‘adverse possession.’ The court will now read in your hearing the definitions given by the Legislature of Texas of the terms ‘peaceable possession’ and ‘adverse possession.’ ‘Peaceable possession, within the meaning of this chapter, is such as is continuous and not interrupted by adverse suit to recover the estate.’ That is, before the plaintiff in this case could recover, he would have to show by a preponderance of the evidence that his possession had been continuous for the full period of 10 years prior to the institution of the suit. The possession must be consecutive year by year, and be a peaceable possession for the full period of 10 years. In other words, if a man goes into possession of a tract of land and holds it for 5 years, and abandons that possession and moves away for a period of time, and then comes back and retakes possession, there would be such a break in his possession as would take it out of the definition of peaceable possession, because the possession would not be continuous, and therefore one necessary element in the case would be lacking, and in such case the plaintiff would not be entitled to recover under the 10-year statute of limitation. So in this case, if the jury find that the plaintiff went into possession of a portion of the land in controversy, with the intent on his part to assert adverse claim to the entire 160 acres, but you further find that he abandoned that possession before the completion of the 10-year period, such abandonment would have the effect in law to destroy the continuity of his possession, and thereby take out of the case one necessary element of the plaintiff’s right to recover.

“Another requirement of the law is that the possession must be not only peaceable, but adverse. The Legislature of the state of Texas has not left to the construction of courts and juries what it takes to constitute ‘adverse possession,’ but has defined it as follows: ‘Adverse possession is an actual and visible appropriation of the land, commenced and continued under a

claim of right inconsistent with and hostile to the claim of another.' The meaning of the definition which I have read to you, gentlemen, is that the possession, in order to constitute adverse possession, must be an open, plain possession evincing an intention upon the part of the plaintiff to claim the land adversely against all the world. As some law writers have put it, and counsel has used the term, it must be such possession as to show that the plaintiff had 'kept his flag flying' for a full period of 10 consecutive years, thereby notifying all comers that he was holding adversely against the whole world, and by the possession he had of a part of the land manifesting an intention to claim the whole 160 acres.

"There is another element necessary to constitute adverse possession, and that is that the acts of ownership and assertion of claim by the plaintiff must have been such in their nature, or in connection with the circumstances surrounding them, as to put a reasonably prudent person on notice that plaintiff was on the ground asserting adverse claim to 160 acres. In other words, if the acts of the plaintiff were not such as to advise the owner, if he was a reasonably prudent person, that the land was claimed adversely, then it would not be such adverse assertion of claim as would assist in maturing the statute. A man may not in this state perform qualified acts of dominion over land, and thereby obtain title by limitation; but the acts of ownership and assertion of claim must plainly manifest a disposition and intent on his part hostile to every one else, and be such as would put a reasonably prudent person upon notice that he was asserting such adverse claim. Where it fulfills those requirements, the provisions of the law are satisfied, and in such case, if the possession has been for a period of 10 full consecutive years, the title by limitation will mature. Where it falls short of that, the title will not mature.

"In this case you have heard much testimony as to where the lines of section No. 1 and where the lines of the Cammack survey are. The purpose of the testimony is to enable the jury to determine whether the possession of the plaintiff of the land to which he asserts title was a mere encroachment by the plaintiff on the land contained in survey No. 1, or whether it was a peaceable, adverse possession of it within the terms of the law as I have detailed to you. In other words, if an adjoining landowner extends his possession over to land not his as of right, and thereby takes in some small portion of the land to which he does not hold the record title, the law will not presume that he intended by that encroachment to assert an adverse claim; but the law would presume in such case that the extension of his possession over onto the adjacent land was by mistake, and that the owner of the land upon which the encroachment was made would not thereby be put upon notice that the plaintiff was intending to assert title to the 160 acres owned by the man holding the record title. It is for the jury to say whether the possession of the plaintiff was an encroachment, which did not put the owner of section No. 1 on notice, or whether the owner, by exercising such care as a reasonably prudent person would have exercised under the circumstances, would have understood from the acts of dominion and ownership asserted by the plaintiff that he was upon a portion of the survey asserting an adverse claim and intending to set up title to 160 acres. If the proof has reached that character of certainty in the minds of the jury, then the plaintiff would be entitled to recover. If the jury find from the testimony that it was a mere encroachment by the plaintiff on section No. 1, and that the owner of section No. 1 would not be put upon notice by the acts of dominion and ownership and assertion of claim made by the plaintiff that he intended to claim the land adversely, it would become the duty of the jury to return a verdict for the defendant. I have tried to make the matter as clear as I can. If you find any difficulty in understanding the charge, you are invited to interrogate me. It is a question for the jury to determine whether for a full period of 10 years the plaintiff in this case was in adverse possession of the land—that is, whether he was in possession of a part of it, asserting claim to 160 acres of it, and asserting it in such manner as to show he was 'flying his flag,' and setting up title to it, and claiming it adversely against all the world, and whether

such acts would put a reasonably prudent person upon notice of the character and nature of his claim."

Ballinger Mills, of Galveston, Tex., for plaintiff in error.
Oliver J. Todd, of Beaumont, Tex., for defendant in error.

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

PARDEE, Circuit Judge (after stating the facts as above). The charge of the trial judge clearly gives the law of Texas in regard to acquiring title under the 10-year statute of limitation; but the question brought before us is whether the evidence in the case shows such continuous adverse possession by Cammack as warrants a recovery by him under the provisions of the said statute. In *Sellman v. Hardin*, 58 Tex. 86, it is held that evidence that claimants had paid taxes on the land, and used firewood from it, and kept people from trespassing on it, and had built a hogpen on it, and used it as a ranch for his cattle and horses, but had made no inclosure except the hogpen, nor had he ever lived upon it, nor occupied it by a tenant, was not sufficient to show such adverse possession as would sustain the plea of limitation. Grazing cattle or cutting timber does not show such possession as will support a plea of limitation.

[1] The occupation must be exclusive and continuous. See *Richards v. Smith*, 67 Tex. 610, 4 S. W. 571; *Pendleton v. Snyder*, 5 Civ. App. 427, 24 S. W. 363. In *Bracken v. Jones*, 63 Tex. 184, it was held that where the claimant fenced and cultivated 4 acres on adjoining land in connection with his own premises from 1859 down to March 15, 1882, about 23 years, it did not establish such possession as would give him title to more than he had enclosed. In that case the court said:

"Possession, to be of any value to vest a right or bar a remedy, must be actual, continued, visible, notorious, distinct, and hostile. It must be fair and open as 'the statute was not made to serve the purpose of artifice and trick.' *Sailor v. Hertzogg*, 2 Pa. 185, quoted in *Word v. Drouthett*, 44 Tex. 370; *Satterwhite v. Rosser*, 61 Tex. 166. It can scarcely be said that in such a case as the present the possession is notorious, visible, and distinct, so as to fulfil the requirements of the 10-year section of the statute of limitation. Whilst the true owner is chargeable with a knowledge of the boundaries of his land, he can hardly be affected with notice that a neighbor, who has encroached a few feet upon his tract, is doing so for the purpose of acquiring title to 640 acres of it. He would rather impute it to a mistake on the part of the apparent trespasser as to the division line between them. Whilst this might not excuse the party trespassed upon for not asserting his right to the land actually occupied by the trespasser, it would certainly save him from such consequences as the loss of a section of his land. The party encroaching would be entitled to no more than the land actually occupied by him. The case is different when one settles upon the land of another, claiming under a recorded deed, and having his improvements located within the bounds called for in such deed. Then the true owner has notice of the extent of the claim of his adversary, and that the improvements are upon it as well as upon his own land, and that, if continued for the requisite period of time, they will give title to the extent of the land described in the recorded instrument. He knows the consequences of such possession, and must provide against them. *Brownson v. Scanlan*, 59 Tex. 222. But suppose such a possessor should, by accident or otherwise, have a small portion of his improvements

beyond the line of his boundaries, as claimed in the deed. Is he to get to the limits of his deed by 5 years' possession, and 640 acres besides by reason of his slight extension of improvements beyond his line? If so, he would recover far beyond what a 10 years' possession, under the law we are considering, would give him. The extent of a recovery in such case, over and above the 640 acres, is the amount actually covered by the inclosure of the trespasser. *Charlie v. Saffold*, supra [13 Tex. 94]. In the case of *Mooring v. Campbell*, 47 Tex. 41, this court considered that the state of case most prominent in the minds of the legislators in enacting the foregoing provisions of our statute of limitations was the case where one person is in adverse possession with all of his improvements on a large tract of land belonging to another. 'Any flexibility,' it was said, 'in adapting the statute to a state of facts variant from this must be arrived at by construction.' And Chief Justice Roberts, after alluding to the strange, if not unreasonable, consequences of allowing one person to acquire 640 acres of land from his neighbor by merely a strip of adjoining land in a field belonging to the former, says that we must confine 'the construction of the statute to the particular facts of each case.'" *Bracken v. Jones*, 63 Tex. 184 et seq.

Titel v. Garland, 99 Tex. 201, 87 S. W. 1152, *Holland v. Nance*, 102 Tex. 183, 114 S. W. 346, and *Bender v. Brooks*, 103 Tex. 335, 127 S. W. 168, all Supreme Court decisions, cite *Bracken v. Jones* with approval.

In *Bender v. Brooks*, the court, after citing *Bracken v. Jones*, said:

"In the case now before us, as in the case just quoted, the house and all improvements, except a portion of the fencing, was upon another tract of land. The use of the field was incidental to the use of the house, and the possession of the field in its entirety could be referred only to the possession of the house and the other land inclosed within the field. The inclosure gave not the slightest intimation to the true owner that the person who was residing upon the 30 acres of the adjoining tract was setting up claim to the entire survey of 663 acres. The evidence does not tend to prove a possession adverse to the owner of the Dunman survey. We therefore hold that the evidence submitted with this certificate did not justify the court in submitting the issue of limitation to the jury." 103 Tex. 335, 127 S. W. 168.

In *Smith v. Jones et al.*, 103 Tex. 632, 132 S. W. 469, the Supreme Court of Texas, after distinguishing *Bracken v. Jones* and *Holland v. Nance*, supra, as to facts involved, held:

"A tenant of a tract made a survey of adjacent land and located thereon a dwelling house and other buildings incident to a home, for which purpose the land was afterwards held and used for more than 10 years. Held, that the court could not rule, as a matter of law, that the possession was too deceptive in its appearance to support the defense of limitations."

In *Stevens v. Pedregon*, 173 S. W. 210, the Supreme Court of Texas, after quoting from *Sellman v. Hardin*, supra, held as follows:

"At no time from the first entry upon the land to the institution of this suit does defendant in error claim to have actually resided upon the land, nor to have had the land or any part of it inclosed; nor does he claim that at any time he had a tenant upon it for a length of time sufficient to constitute limitation under any provision of the law or any decision of this court. Such possession as he claims to have had consisted of cultivating a small portion of the land, one year at one place and the next year at another. Some years there was no cultivation of any part of the land for the want of water. There was nothing in his acts that would indicate a claim of ownership of the land. All that defendant in error did in the use of the land might well have been regarded as harmless trespass. *Schleicher et al. v. Gatlin*, 85 Tex. 270, 20 S. W. 120."

As to adverse possession and directing verdict, see *Bundick v. Moore-Cortes Canal Co.* (Tex. Civ. App.) 177 S. W. 1031-1035, and *Texas & N. O. R. Co. v. Williams* (Tex. Civ. App.) 178 S. W. 701.

Many other Texas decisions of the Supreme Court and the Courts of Civil Appeals, considering the question of the adverse possession necessary to support a title to land under the Texas statutes of limitation, can be shown, but it would serve no useful purpose. The most, if not all, are applications of the statutes to the particular facts as presented in each case.

[2] Cammack's evidence (copied in full above) shows his entire case and claims in the trial court, and may be summarized as follows: He bought 160 acres of the Cammack survey July 9, 1902, and on this land his house and appurtenances were then and subsequently built. Prior to this purchase there had been an encroachment over the unlocated boundary line between the Cammack survey and section 1 of from one to two acres, cultivated and upon which had been erected a four-post wagon shed, with a roof, but uninclosed sides; but this encroachment had been abandoned—at least, Cammack in this case takes nothing from it. Cammack moved onto his purchase in the fall of 1902, but did not take possession until 1903, in which year he cultivated his own land and about an acre and a half to two acres on section 1 adjoining on the west, practically the same land as the former encroachment; but he did not live there continuously. In the fall of 1903 he moved into Colmezneil, about six miles distant, and there lived in a rent house, but moved back to the Cammack survey in September, 1904. He moved again in February, 1907, to a place about a mile south of his house on the Cammack survey, moving back in 1911. No one lived in his house while he was away. During all the time, however, he cultivated his own land and the encroachment, except during 1910 he had no portion of the encroachment in cultivation, except he planted about an eighth of an acre in fruit trees (12 to 15) in extending an orchard on the Cammack survey, and during the year tended fruit trees and used the wagon shed for storing tools. During 1910 and at other times he pastured hogs on section 1, and at times not given he had pastured hogs and cut posts and wood and pickets on section 1. Cammack's claims of 160 acres from section 1 were mental, save as shown by the foregoing facts.

On this state of facts, in the light of the decisions of the Texas courts hereinabove given, we conclude that the evidence, taken most favorably to the defendant in error, shows a mere encroachment, and no such continuous adverse possession by Cammack as to give the owner of the unoccupied section 1 notice that he was claiming adversely any part of said section, or to authorize a recovery by him of 160 acres of land from said section under the provisions of the Texas statute of 10 years' limitation as against the owner of the record or paper title. In our opinion, the trial judge erred in refusing to direct a verdict for the plaintiff in error.

The judgment of the District Court should be reversed, and the cause remanded, with instructions to grant a new trial; and it is so ordered and adjudged.

AMERICAN SEA GREEN SLATE CO. et al. v. O'HALLORAN et al.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 64.

1. MONOPOLIES ⇨17—SALES OF GOODS—APPOINTING EXCLUSIVE AGENT.

If a corporation organized by producers of slate, and to which they sold their output, was not a combination obnoxious to Sherman Act July 2, 1890, c. 647, 26 Stat. 209, the appointment by it of an exclusive selling agent was not unlawful.

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

2. MONOPOLIES ⇨28—REMEDIES OF PERSONS INJURED—DAMAGES RECOVERABLE.

If a corporation organized by producers of slate was an unlawful combination, damages directly caused by reason of its appointment of an exclusive selling agent were recoverable as other damages, under Sherman Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (Comp. St. 1913, § 8829), providing that any person injured in his business or property by any act forbidden or declared to be unlawful thereby may recover threefold the damages sustained.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⇨28.]

3. MONOPOLIES ⇨28—REMEDIES OF PERSONS INJURED—DAMAGES RECOVERABLE.

To recover damages under Sherman Act, § 7, plaintiffs must show that as a result of defendant's acts actual damages susceptible of expression in figures were sustained, and they must not be speculative, remote, or uncertain.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⇨28.]

4. MONOPOLIES ⇨28—ACTIONS FOR DAMAGES—EVIDENCE.

In an action for damages under Sherman Act, § 7, the damages must be proved by facts from which their existence is logically and legally inferable, and not by conjectures or estimates.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⇨28.]

5. MONOPOLIES ⇨28—ACTIONS FOR DAMAGES—EVIDENCE.

The producers of a particular kind of slate organized a corporation and sold all of their output to it at 10 per cent. discount from its list prices. The corporation sold to wholesalers, including plaintiffs. A number of persons in the roofing business in Cleveland, some of whom had been plaintiffs' customers, organized a roofing company, and such company was constituted the exclusive selling agent of the slate company in Cleveland. *Held* that, in an action by plaintiffs under Sherman Act, § 7, plaintiffs could not recover damages caused by the fact that they were compelled to buy at a price higher than the market value, where there was no evidence of market value, except evidence as to the price at which the producers sold to the slate company, as this company bought each producer's whole product, including sizes slow of sale, as well as sizes largely desired, and it was not fair to assume that, had there been no combination, plaintiffs could have bought from the producers at the price at which they sold to the company.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⇨28.]

6. MONOPOLIES ⚡28—ACTIONS FOR DAMAGES—EVIDENCE.

Damages for the loss of the business of former customers of plaintiffs, who became members of the roofing company, could not be recovered on the supposition that they would have continued to buy as much as in previous years, where there was no evidence to support this supposition, and there was not even evidence that such former customers obtained any slate at all of the kind in question.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⚡28.]

7. MONOPOLIES ⚡28—ACTIONS FOR DAMAGES—EVIDENCE.

Damages could not be recovered for the loss of the business of the customers who ceased buying from plaintiffs and became members of the roofing company, unless plaintiffs showed that the change was made because of the unlawful combination, since this could not be inferred from the fact that the change was made.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⚡28.]

In Error to the District Court of the United States for the Northern District of New York.

Action by James O'Halloran and another against the American Sea Green Slate Company and others. Judgment for plaintiffs, and defendants bring error. Reversed.

This cause comes here upon writ of error to review a judgment in favor of defendants in error who were plaintiffs below. The action was brought to recover treble damages under section 7 of the act of Congress of July 2, 1890, the Sherman Anti-Trust Act. By stipulation of the parties the cause was tried by the court without a jury; findings of fact and conclusions of law were filed, to some of which exceptions were taken. The opinion of the District Judge will be found in 207 Fed. 187.

Lewis E. Carr, of Albany, N. Y. (Walter C. Noyes, of New York City, and J. B. McCormick, of Granville, N. Y., of counsel), for plaintiffs in error.

Randall J. Le Boeuf, of Albany, N. Y., for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The opinion of Judge Ray sets forth the facts very fully. As it may readily be consulted, a very brief statement of the issues is all that need be made here. Sea green slate is produced in a small section located in the state of Vermont. Prior to 1904 the various producers of this slate dealt independently with purchasers of such product. In 1904 many of these producers incorporated a company known as the American Sea Green Slate Company, in which they became stockholders. Slate of this sort comes in different dimensions, and apparently it has always been the practice to list the prices of different sizes; competition between the sellers being brought about by variance between the discounts which they would allow on one or more or all of the sizes in which they dealt. To the new company its stockholders sold all their output each year at 10 per cent. discount from the company's list prices; and the company sold to all

wholesalers, including the plaintiffs, at a discount of 25 cents per square, a square being the quantity necessary to cover 100 feet of roof when laid with a three-inch lap. In 1909 a number of persons engaged in the roofing business in Cleveland, some of whom were and had been customers of the plaintiffs, O'Halloran & Jacobs, organized and became members of a corporation known as Cuyahoga Roofing Company. Thereafter such company was constituted exclusive selling agent of defendant company in Cleveland. For all further facts, other than such as are incidentally referred to hereinafter, the opinion in the District Court should be consulted.

[1, 2] Preliminary to any discussion we may state, as to the Cuyahoga Company, that its appointment as exclusive selling agent is a matter of no importance. If upon examination of the record the conclusion were reached that the original combination, the American Sea Green Slate Company, was not one obnoxious to the Sherman Act, it could appoint an exclusive selling agent anywhere. See our decision in *Locker v. American Tobacco Co.*, 218 Fed. 447, 134 C. C. A. 247 (Nov. 10, 1914). If, however, the Sea Green Slate Company were an unlawful combination, then damages directly caused by reason of its appointment of an exclusive agent might be shown, on the same theory that damages caused by other of its acts could be shown.

Important causes involving the construction of the first two sections of the Sherman Act are now before the Supreme Court; some have been argued, others will be argued in the near future. About the facts in the case at bar there is much to be said on both sides. If any reversible error be found, which would result in a new trial, it would seem to be wiser not to pass upon the questions now before the Supreme Court. The answers of that tribunal to those questions will be made known before a new trial can be had. Therefore, without now discussing the question whether the Sea Green Slate Company was a combination of the sort forbidden by the Sherman Act, and assuming for the purposes of this writ of error that it was such a combination, we proceed directly to a consideration of the findings and conclusions assessing damages.

[3, 4] To recover under the seventh section plaintiffs must show that, as a result of defendants' acts, actual damages were sustained—damages in some amount which is susceptible of expression in figures. These damages must be proved by facts from which their existence is logically and legally inferable—not by conjectures, or estimates. They must not be speculative, remote, or uncertain. As we understand the law, a jury may not merely *guess* that plaintiff lost \$1,000 or \$10,000 which they might have made, even if they feel reasonably sure that some loss was sustained. They cannot award damage as they do for pain or suffering in an action for personal injuries, or for reputation as they do in a libel suit.

That was a defect in the original Sherman Act from the viewpoint of the individual trader; the treble damage section frequently did not give him relief. He could only get such relief by stirring up the government to apply for an injunction and dissolution of the combination. That defect is now cured by the Clayton Act, which gives the injured

party equitable relief to terminate the illegal combination, which is hurting him.

Judge Ray found \$7,522.95 actual damage, which he trebled. The items of this are these:

1. Because plaintiffs were compelled to buy slate at a price higher than the market value. They bought 68,434.21 squares.....	\$6,126.97
2. Loss of the business of Morgan Bros. and two others (which was worth the sum of \$61.50 a month as the judge finds).....	1,045.50
3. Loss on 720 squares.....	172.08
4. Loss on 640 squares.....	152.96
5. Loss by expenses of an Akron shipment.....	25.44
	\$7,522.95

[5] 1. As to the damages for loss resulting from the circumstance that plaintiffs were compelled to buy at a price higher than the market value: Certain suggestive facts are found in the findings. Thus it appears that in the period prior to the advent of the Sea Green Slate Company plaintiffs bought and sold 35,571 squares (an average of about 8,200 a year). In the period when the company was in existence they bought and sold 66,434 squares (an average of about 12,500 a year). To infer that the result of the combination was to reduce the volume of their business is not warranted by these figures. In the period prior to the company's advent plaintiffs made a gross profit, on sea green slate, of \$11,089.02 (an average of something over \$2,300 a year). In the period when the company was in existence they made a gross profit of \$18,435.37 (an average of something over \$3,300 a year).

The fundamental difficulty, however, with the figuring by which the conclusion was reached that their loss was \$6,126.97 is that the "market price" for all varieties of slate is taken at the list price, less 10 per cent. It is true that such is the price which the Sea Green Slate Company agreed to pay and did pay to the producers from whom it bought. But the company contracted to and did buy every producer's *whole* product, as produced. This included sizes slow of sale as well as sizes largely desired. Plaintiff only bought such sizes as it had orders for, or knew it could promptly place. It seems an unfair assumption, under these circumstances, that, had there been no combination, the plaintiffs could have bought all the squares they desired from the producers at a uniform discount of 10 per cent. Unless there be given more evidence as to market value during the years in question, we do not see how this specific amount of "loss" can be calculated.

[6] 2. There is allowed \$1,045.50 for the loss of the business of three concerns doing business in Cleveland, viz. Morgan Bros., David & Glaive, and Koberna. This is figured out as follows: Prior to the organization of the Cuyahoga Roofing Company, plaintiffs sold sea green slate in Cleveland to the three concerns enumerated. Subsequent to such organization these concerns ceased to buy such slate from plaintiffs; therefore, it is contended, the rate of profit which plaintiffs made on sales to these three concerns during the years the latter did purchase such slate is the measure of the profit plaintiffs would have made during the period of the existence of this roofing company. This

figuring is highly speculative; it presupposes that the three concerns would have bought as much sea green slate per annum in the later years as in the earlier ones. There is no evidence to support any such supposition; the finding merely states that the three concerns (during the later period) discontinued all purchases from the plaintiffs, and "discontinued their business as independent roofers, but continued their business solely as members of the Roofing Company." How much slate the business brought into the Roofing Company by these three concerns amounted to, or whether any slate at all of this kind was obtained, through the Roofing Company, for any customers originally of the three concerns, does not appear. No one of the three was called to testify.

[7] Moreover, without any testimony from the three concerns, it is assumed that they ceased buying from the plaintiffs because of defendants' acts. But these three concerns were free to change at will: several reasons might be suggested why they ceased buying from the plaintiff. It was for the plaintiffs to show that the change was *because* of defendant's combination. If that were the reason, it was *provable* out of the mouths of the three dealers; merely to infer it from the fact that they made the change is pure speculation.

3 and 4. Loss on 720 squares in 1909 and 640 squares in 1910 in Cleveland, where the Cuyahoga Company was exclusive selling agent: As to these squares it is found that plaintiffs bought them and sold them at list price, 23.9 cents per square. By reason of this circumstance the court finds that they were injured \$172.08 and \$152.96 (these sums including expenses of sale). A statement put in evidence, taken from plaintiffs' own books, showed that during the period when the Cuyahoga Company was in existence plaintiffs sold in Cleveland 5,867 squares in 1909 at a profit of 33 cents per square and 3,768 squares in 1910 at a profit of 29.5 cents per square. Inasmuch as in the thirty-eighth finding it is shown that in the 4½ years prior to the advent of the Sea Green Slate Company plaintiffs' profits on their total sales of this slate was at 29.5 cents per square yard, it is difficult to see how, if these 720 and 640 squares are included in the list of sales above referred to, direct loss on sales in Cleveland by reason of the combination can be found. We are unable to determine whether or not these special sales are therein included, and, if not, why they are not. It seems unnecessary, however, further to discuss these small items, because the result of our decision as to the large items will involve a new trial, when points which are now obscure may be illuminated by further proof.

5. Expenses on Akron shipment: According to the findings, defendants refused on a certain date to sell to plaintiffs sea green slate for shipment into Cleveland; this refusal presumably was to carry out the objects of the combination. Requiring some slate for delivery in Cleveland, plaintiffs ordered a lot to be shipped to a firm at Akron, intending to divert it while en route to Cleveland for plaintiff's account, under some arrangement with the Akron firm. Plaintiffs failed so to divert it, and it had to be reshipped from Akron to Cleveland, thereby putting plaintiffs to an additional expense for extra switching and

freight charges. This expense \$25.44 was allowed as damages, and trebled. The finding does not show whether this expense was incurred solely because plaintiffs had to get the goods in this roundabout way, or whether, if they had given timely and proper notice of diversion to the railroad, the goods would have reached them without additional expense. Presumably this point will be made clear on a new trial.

The judgment is reversed.

DELAWARE, L. & W. R. CO. v. WELSHMAN.

(Circuit Court of Appeals, Third Circuit. December 9, 1915. On Petition for Rehearing, January 31, 1916.)

No. 1969.

1. RAILROADS ⚡328—CROSSING ACCIDENTS—DUTY TO STOP, LOOK, AND LISTEN.

It is the positive duty of an automobile driver, approaching railroad tracks where there is a restricted vision, to stop, look, and listen at a time and place where stopping, looking, and listening will be effective.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1057-1070; Dec. Dig. ⚡328.]

2. RAILROADS ⚡330—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—RAISING GATES.

The raising of railroad crossing gates is an invitation to travelers to cross the railroad tracks, but is an invitation only to cross with due care, and the traveler must use his sight, hearing, and such other factors of safety as the situation and circumstances permit and require.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1071-1074; Dec. Dig. ⚡330.]

3. RAILROADS ⚡350—CROSSING ACCIDENTS—ACTIONS—QUESTIONS FOR JURY.

An automobile driver stopped about 15 feet north of a railroad crossing where the crossing gates were down, at which point he could not see the approach of trains. As soon as a passing train had passed the gates were raised, and he proceeded to cross without again stopping until struck by an east-bound train on the south track when almost across. Photographs were in evidence indicating that as he passed the north gate his view of trains on the south track was shut off by a gradually rising bank extending to an overhead crossing 350 feet away, and it appeared that beyond such crossing the tracks curved to the north. The crossing watchman testified that trains could not be seen beyond the overhead crossing. *Held*, that it was a question for the jury whether he was negligent in failing to stop before reaching the track, and whether such negligence contributed to the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. ⚡350.]

On Petition for Rehearing.

4. COURTS ⚡376—UNITED STATES COURTS—CONFORMITY TO STATE PRACTICE.

The New Jersey crossing statute, providing that whenever any railroad shall have installed any safety gates, bell, or other device at any crossing, or placed a flagman at such crossing, persons approaching it may assume that the warning appliances are in good order and will be properly operated, unless a notice to the contrary is conspicuously posted, or that the flagman will guard such crossing with sufficient care, and that, in any action for injuries at such a crossing, no plaintiff shall be barred of the action because of the failure of the person injured to stop, look, or

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

listen, does not require every case of injury at a protected grade crossing to be submitted to the jury, but simply declares a rule of evidence to which the federal courts in New Jersey should conform.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 984; Dec. Dig. 376.]

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

Action by Alice B. Welshman, executrix of George O. Welshman, deceased, against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Frederic B. Scott, of New York City, for plaintiff in error.

W. Locke Rockwell, of Newark, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Mrs. Alice B. Welshman, executrix of Dr. George O. Welshman and a citizen of New Jersey, brought suit and recovered a verdict against the Delaware, Lackawanna & Western Railroad Company, a corporate citizen of Pennsylvania, for damages based on the death of Dr. Welshman through the defendant's alleged negligence. The defendant, on entry of judgment, sued out this writ. While there are 16 formal assignments of error, they finally narrow to the court's alleged error in refusing defendant's request for binding instructions. Whether the court erred depends on the answer to two questions: First, was there evidence tending to show defendant was negligent? and, second, should the court, as a matter of law, have held that Dr. Welshman was guilty of contributory negligence?

Confining ourselves to such testimony as bears on these questions, we may say the proofs on behalf of the plaintiff tended to show that on the afternoon of the accident Dr. Welshman drove his automobile to the north side of defendant's Grove street double-track crossing in East Orange, N. J. The crossing was protected by safety gates operated by a watchman, who stood on the southwest corner of the crossing. The watchman was apprised of the approach of trains by the ringing of a bell in his watch box and by a color change in an indicator, also in the box. The bell and indicator were actuated electrically by an approaching train when 2,000 feet distant from the crossing. All the apparatus was in order. Dr. Welshman stopped his car about 15 feet from the gates, which at that time were down to allow a west-bound train to pass. As soon as this train passed the gateman raised the south and then the north gate. Thereupon Dr. Welshman started his machine at moderate speed to cross the tracks. Heavy wagons crossed at the same time. About the time the doctor reached the west-bound track the gateman, who had discovered from the bell and signal that an east-bound express then due was coming, dropped the north gate, but kept the south gate up and cried and waved to the doctor to hurry forward. Whether the cry was heard or heeded does not appear, but the doctor proceeded slowly across. He almost reached

the other side, but the hinder part of his rear wheel was caught by the locomotive, his car demolished, and he himself instantly killed.

The court submitted to the jury the question of the defendant's negligence in three aspects: First, failure to ring a bell a proper statutory distance from the crossing; second, the alleged failure of the engineer, after he saw Dr. Welshman in danger, to take proper steps to check or stop the train; third, the alleged negligence of the watchman in operating the gates. These questions were all submitted to the jury in terms to which no objection is made, provided admissible evidence on those several questions existed. Without reciting such evidence it suffices to say it is found in the record, the trial judge properly submitted it to the jury, and he committed no error in refusing to give binding instructions for the defendant on the ground of no negligence by defendant being shown. It follows, therefore, the judgment must be affirmed, unless the court erred in refusing to further hold as a matter of law that Dr. Welshman was guilty of contributory negligence.

[1] We deem it proper to here note that this court has no purpose to recede in any respect from the principle laid down in *New York Cent. & H. R. Ry. Co. v. Maidment*, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794, and restated in *Brommer v. Penna. R. R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924, in reference to automobile drivers making dashes over crossings without taking proper precautions. In the former case we said:

"The duty of an automobile driver, approaching tracks where there is restricted vision, to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty, and these safeguarding steps the plaintiff failed to take. He stopped where stopping served no purpose, and failed to stop where stopping would have disclosed danger. He made chance, and not sight, the guaranty of his safety. We are clear he was guilty of contributory negligence, and the judgment below should be reversed."

[2] The facts in those cases were so different that, apart from their general principle, those decisions are not applicable to the case in hand. Here Dr. Welshman did not attempt to cross the track until the gates were raised by a watchman, who was presumably competent, and who was in a better position than the doctor to see an approaching train. The railroad having indicated its estimate of the safety of the situation by raising the gates, and Dr. Welshman having acted accordingly, it is manifest that this court would not be justified in holding that in accepting this invitation to cross the decedent was so heedless of his own safety that, as a matter of law, he was guilty of contributory negligence. On the contrary, we think the experience and judgment of everyday life is that the raised gate is an index of the railroad's view that crossing may be safely made, and that a crosser may reasonably accept it as an invitation to go forward. And such have been the adjudged cases. We avoid needless presentation of other decisions by referring to a single well-considered case, *Erie Company v. Schultz*, 183 Fed. 674, 106 C. C. A. 23, where the Circuit Court of Appeals of the Sixth Circuit collected the authorities and said:

"If a flagman beckons the waiting team driver to come ahead, or if a towerman raises the lowered gates, in either case there is a representation to the driver that there is no approaching train within striking distance. The driver who moves forward under this representation cannot be held to the same strict rule of instant and constant and extreme vigilance which is enforced against one who crosses in sole reliance on his own judgment."

Of course, the raising of the gates did not make the railroad either an insurer or the sole guardian of the crosser's safety. The duty of care, of the use by the crosser of sight, hearing, and such other factors of safety as the situation and circumstances permitted and required of one intent on his own safety, still rested on him. The raised gate is not an invitation to cross without care, but an invitation to cross with the use of all care the situation permits. To hold otherwise would be to make gates and flagman harmful creators of negligence instead of helpful aids to safety. The crossing driver must bear in mind that the flagman is human and therefore liable to make mistakes, and that in so important a thing as his own safety and life the driver must not intrust them to any one man, but that common sense as well as common law require him, notwithstanding the invitation, to himself use all possible care to aid in a safe crossing. If the driver does not contribute such care, he contributes lack of care, and lack of care is contributory negligence. To this reciprocal duty of care which the law casts upon the crosser who accepts the invitation of a raised gate, the court below called the jury's attention, saying:

The deceased "owed to the railroad company a reciprocal duty, namely, to take care to protect himself from danger. The measure of duty of care on his part was to exercise ordinary and reasonable care; that is to say, such care as an ordinarily prudent person would have exercised under the same circumstances."

And the verdict must be accepted as a finding that the deceased took such possible care as the situation called for.

[3] That the question of Dr. Welshman's contributory negligence was peculiarly one of disputed facts and disputable inferences, and therefore for a jury, is apparent when the situation and surroundings are understood. He came to the crossing and stopped about 15 feet from the track. The gates were down. From that point he could not see the approach of trains. A west-bound one passed, and thereafter the south gate and then the north gate were opened and he started to cross. At this point comes the crux of the case. The railroad company says the positive duty rested upon Dr. Welshman before he reached the track to again stop, look, and listen, and his failure to do so was in law contributory negligence. The plaintiff says this view ignores the invitation of the raised gate, and the real question is not one of law alone, but one of fact, namely, whether in view of both the invitation to cross and of all the surrounding circumstances the nonstoppage by Dr. Welshman was negligence, and whether such negligence contributed to the accident.

The crossing surroundings throw light on that question. Dr. Welshman had no view of approaching trains from where he stopped. Whether he could have had a view of east-bound trains on the south

track before he drove the machine on the north track is, as we view it, a disputed question. The photographs in evidence show that as Dr. Welshman passed the gate his view of east-bound trains on the south track was shut off by a gradually rising bank, which extended westward from Grove street 350 feet to an overhead bridge crossing at Maple avenue. This bridge was 24 feet above the tracks, and the bank between it and the crossing was somewhat higher. Beyond Maple avenue the tracks curved to the north. Now, while there was testimony that as Dr. Welshman drew near the tracks there were places from which he could see trains approaching at a distance of from 600 to 1,500 feet, yet it was also proved by the watchman himself that this was not the fact, and that even from his place on the south side of the crossing—which was manifestly a better viewpoint than Dr. Welshman's—one could not see an approaching train farther than the Maple avenue bridge. On that point we quote his evidence at length:

"Q. How far up the track could you see, the east-bound track, when you stood at the handle of the gate? A. As far as the bridge, the Maple avenue bridge. Q. Could you see a train on the east-bound track as far as the bridge? A. Just about as far as the bridge. Q. Look at the photograph. When you were standing here, could you see a train as far as the Maple avenue bridge? A. You can see as far as the bridge, *but that is as far as you can see*; just this end of the bridge. * * * Q. When did you actually see it [the east-bound train that struck the decedent]? A. I didn't see it until the engineer blowed his whistle at the bridge. Q. You didn't see it until that time? A. No, sir; *that is as far as you can see*. * * *

"By the Court: Q. Let me ask you one more question. You say that you first saw the train itself—the first time you saw or could see the train was when the engineer blew the whistle at the Maple avenue bridge? A. Yes, sir. Q. That is right? A. Yes; that is as far as I could see. Q. Where was the automobile at that time? A. Between the east and west bound tracks."

The Maple avenue bridge was 350 feet from the crossing, and if this testimony of the watchman, who was called by the defendant, was believed, it shows that the furthest view Dr. Welshman could possibly have had of an approaching train was only 350 feet. As Maple avenue was the extent of view from the superior viewpoint of the watchman, it is manifest that Dr. Welshman could not have seen the train in time to avoid the accident, had he stopped his machine at any point to look for it, and that the surrounding circumstances were such that reasonable minds might well conclude that the proper course for him to pursue, after the gates were raised, was to give his attention to driving his car over the crossing without attempting to stop and look for approaching trains. Indeed, the whole situation was peculiarly one for a jury to consider, and from its disputed facts and disputable inferences determine whether, after the invitation to cross, Dr. Welshman was in any respect negligent, and, if so, whether such negligence in any way contributed to the injury. This issue it found in his favor and the judgment entered on its verdict must be affirmed. In thus determining the case on the general principles of the law, it becomes unnecessary for us to discuss the question raised in reference to the New Jersey crossing statute.

On Petition for Rehearing.

PER CURIAM. [4] The motion for rehearing has had our careful consideration, and we see no reason to differ from the conclusion heretofore reached. While we refrained from discussing in the opinion filed the New Jersey crossing statute, it will be apparent that, in view of the late case in this court of Erie Railroad Company v. Schmidt, 225 Fed. 516, 140 C. C. A. 659, there could be no uncertainty that that statute, in our view of it, was no bar to the present plaintiff's recovery. We here reiterate the views expressed in that case:

"This statute has not been construed by the New Jersey courts, and its full meaning may not be entirely free from doubt; but so far as the facts of the present case require us to declare its meaning we think the proper construction is as follows: A railroad company may protect a crossing by a safety device, or by a flagman, or by both these means. If the device is not in order, due notice to that effect must be given; in the absence of such notice, an approaching traveler may assume that the device is in order and will be duly and properly operated. If a flagman is on duty, the traveler may assume that such employé will give sufficient warning of danger; and if the traveler be nevertheless injured or killed, no action brought for such injury or death shall be defeated by the mere fact that the traveler did not stop, look, and listen. * * * In our opinion, the railroad is mistaken in supposing that the act compels the trial judge to submit to the jury every case of injury or death at a protected grade crossing in New Jersey. The evidence may establish contributory negligence so clearly that the judge would be bound to give the jury binding instructions in favor of the railroad. The act does no more than declare as a rule of evidence that in certain situations the mere fact that the deceased did not stop, look, and listen shall not of itself defeat recovery; but it does not attempt to lay down a rule that every grade crossing case where contributory negligence is alleged must be submitted to a jury. For example: A situation may easily be supposed where the warning of a flagman might be seen and recklessly disregarded, and in such a case the duty of the judge has not been changed by the statute. The Legislature has done nothing more than exercise its conceded power to regulate procedure; it simply provides that a plaintiff is not to be defeated unless more than a specified minimum of evidence be present. This, of course, would bind the state courts, and we see no reason why the federal courts in New Jersey should not conform to the same procedure."

The motion for a rehearing is therefore denied.

WALLER et al. v. TEXAS & P. RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 52.

1. LIMITATION OF ACTIONS ⇨182—PLEADING STATUTE AS DEFENSE—NECESSITY OF PLEADING.

In a suit in equity it is not essential that the statute of limitation should be specifically pleaded.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676-680, 682, 695, 705; Dec. Dig. ⇨182.]

2. EQUITY ⇨71—LACHES—LAPSE OF TIME.

In 1872 the B. R. Co. executed a deed of trust on all of its property including its interest in lands in Louisiana granted to it by Congress to

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

aid in the construction of a railroad. The B. Co. did nothing towards perfecting the grant, and subsequently conveyed its property to the N. Co., which later consolidated with another company, forming the defendant company. The railroad having been constructed by agencies other than the B. Co., Congress in 1887 forfeited the grant to the B. Co. and confirmed the title of the N. Co. The bonds secured by the deed of trust matured in 1902, and more than 10 years thereafter, when the period of limitation in both Louisiana and New York had expired, the holders of certain of the bonds brought suit in New York seeking to hold the defendant personally liable on the bonds. All of the facts relied on were known, or could have been ascertained, if any effort with that end in view had been undertaken during the period of limitation. *Held*, that the suit was barred by laches.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204-211; Dec. Dig. ⇨71.]

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

Suit by David J. Waller, Jr., and another, trustees under the will of David J. Waller, deceased, in their own behalf and in behalf of all other bondholders of the New Orleans, Baton Rouge & Vicksburg Railroad Company, against the Texas & Pacific Railway Company and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

On appeal from a decree which dismissed the bill in a suit commenced by certain bondholders holding 30 bonds of \$1,000 each issued by the New Orleans, Baton Rouge & Vicksburg Railroad Company in September, 1872, and payable September 1, 1902. These bonds were secured by a deed of trust by the Baton Rouge Company to the Union Trust Company of New York upon all of the said Baton Rouge Railroads property, including its right of way and land grant given it by Congress.

The following is the opinion of Evans, District Judge, on dismissing the bill:

The time at our disposal affords opportunity only for the very condensed statement which follows, wherein we shall omit all details except those necessary to an understanding of the one essential ground upon which we shall base our judgment. Many other propositions were indeed very ably and elaborately discussed by the learned counsel, but we shall confine ourselves to that one of the defenses upon which we think our decision must turn.

On September 4, 1872, the New Orleans, Baton Rouge & Vicksburg Railroad Company, a Louisiana corporation created in 1869, and which, for convenience, we shall speak of as the Baton Rouge Company, executed a deed of trust to the Union Trust Company of New York to secure the payment of \$12,000,000 of its 30-year bonds, each of the denomination of \$1,000, the principal of which to become due at the end of 30 years, namely, September 1, 1902, coupons being attached to each bond, whereby the maker of the bond agreed to pay interest semiannually until the principal was due. By this deed of trust (which we shall call the mortgage) the Baton Rouge Company conveyed to the trustee named all of its property including certain conditional interest in lands granted to it by Congress under the act of 1871 (Act March 3, 1871, c. 122, 16 Stat. 573), to aid in the construction of a railroad from New Orleans to Vicksburg. Only 1,500 of these bonds (aggregating \$1,500,000) were sold or issued, and of them nearly all were taken up in some way long before their maturity. What was done with the proceeds or how some of them were taken up in no way appears from the testimony, though it is not contended by the plaintiff that any part of the proceeds of those bonds was applied by anybody to the construction of the railroad afterwards built by those who suc-

ceded the Baton Rouge Company, which latter company never did anything towards actually perfecting the land grant, inasmuch as it appears only to have filed what was regarded as an insufficient map of its general location in the office of the Secretary of the Interior at Washington. The plaintiff's in-estate, in due course, for value and before their maturity, became the owner and holder of the 30 bonds described in the bill, each of them being one of those issued under the mortgage referred to, and each being for the sum of \$1,000.

Under date of January 5, 1880, the Baton Rouge Company entered into an agreement in writing with the New Orleans Pacific Railroad Company, which we shall call the New Orleans Company, and which was another Louisiana corporation created in 1875. The language of that agreement was as follows:

"This indenture, made the fifth day of January, one thousand eight hundred and eighty, between the New Orleans, Baton Rouge & Vicksburg Railroad Company, a corporation created and existing under and by virtue of a special act of the Legislature of the state of Louisiana, approved December 30, 1869, party of the first part, and the New Orleans Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the state of Louisiana, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar lawful money of the United States of America to it in hand paid by the said party of the second part, at or before the ensailing and delivery of these presents, the receipt whereof is hereby acknowledged, and of other good and valuable considerations, has remised, released, and quitclaimed, and by these presents does remise, release, and quitclaim unto the said party of the second part, and to its successors and assigns forever, all the right, title, and interest of said party of the first part, its successors, or assigns, of, in, or to a certain grant of public lands granted to the said party of the first part by an act of the Congress of the United States, approved March 3, 1871, and entitled 'An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes,' together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profit thereof, to have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part to its successors and assigns forever.

"In witness whereof, the said party of the first part hath caused its corporate seal to be hereunto affixed, and these presents to be signed by its President and Secretary the day and year first above written.

"W. H. Barnum, President.

"Wm. M. Barnum, Secretary."

Nearly 11 years after the issuance of the bonds described in the bill, namely, in April, 1883, and after the construction of the railroad by agencies other than that of the Baton Rouge Company, the New Orleans Company, for purposes therein recited, executed to John F. Dillon and Henry M. Alexander a deed of trust covering, among other things, the Baton Rouge Company's possible interest in the property referred to in the agreement which we have just copied. This last deed of trust contained a clause as follows: "And whereas the New Orleans, Baton Rouge & Vicksburg Railroad Company has transferred and assigned its right to the said land grant to the said New Orleans Pacific Railway Company, which said last-mentioned company has accepted the same, without, however, assuming or becoming liable for any of the debts, obligations, claims, or charges of the New Orleans Baton Rouge & Vicksburg Railroad Company." There was a consolidation of the New Orleans Company and the Texas Pacific Railroad Company, from which resulted the defendant, the Texas & Pacific Railway Company, and the latter company became bound to pay all the then existing indebtedness of the New Orleans Company, though, unless inferentially, it did not become bound to pay those of the Baton Rouge Company. And here it may be important to recall that the land grant lands, while in any way under the control of the Baton Rouge Company, had in no manner contributed to the construction of the railroad itself. Indeed, the Baton Rouge Company had not paid and never did pay to the United States

even the expenses of the survey of those lands and so entirely nominal had become any claim of that company to the land grants lands that by the act of February 8, 1887 (24 Stat. 391, c. 120) Congress forfeited the grant to the Baton Rouge Company and confirmed the title of the New Orleans Company. In these ways the land may have become liable for the debts of the New Orleans Company and the Texas & Pacific Company, but we have not been able to see how it can be inferred from any statutory provision or any agreement in writing that any trust upon that property could or did expressly or impliedly result for the payment of any of the debts of the Baton Rouge Company.

While, indeed, my sympathies are with the plaintiff as the holder for value of the bonds which are the subject of this action, neither the quitclaim deed we have copied, nor any statute, nor any conjunction of both agreement and statute, have enabled us to see how any express trust ever existed in plaintiff's favor, or in favor of his decedent, except that created by the mortgage to the Union Trust Company as trustee, the bonds and limitations of which are set forth in the deed itself, which instrument, as we have seen, is in effect nothing more or less than a mortgage, and to be treated as such. If, as distinguished from that, there exists now or ever existed any trust, it must necessarily be one which arises *ex maleficio* or by mere implication and construction. To say the least, it is very difficult to see how any trust apart from the lien created by the mortgage of September, 1872, ever arose or could have arisen. Of course, the lien or trust of that mortgage rested upon the property of the Baton Rouge Company embraced in the mortgage, but that was neither more nor less than an ordinary mortgage lien only. If that lien still exist by virtue of that mortgage it may, of course, be enforced in a direct action in a court having jurisdiction, namely, a court, either state or federal, sitting in Louisiana. A suit to subject that property to the mortgage must necessarily be brought and prosecuted in the state of the situs of the property and not elsewhere. The situs of that real estate is not here, and this action is not that sort of suit. This suit seeks to enforce the collection of the mortgage debt, not indeed from the property mortgaged, but from another corporation now alleged to be personally liable for it. We have concluded that any such liability, if it exist at all, must be one that is secondary in character and resulting from some trust *ex delicto* to be implied (if such implication can arise) from some state of fact shown, and not upon any direct undertaking by the New Orleans Company or the defendant to pay the debt of another, to wit, the Baton Rouge Company. This statement will indicate our view to be that our decision must turn upon either one or both of the affirmative defenses made by the Texas & Pacific Railway Company (the only defendant before the court, the others having long ago been dismissed from the cause), and which defenses may compendiously be referred to, the first as that of the statute of limitations, and the second as that which imputes to the plaintiff such laches in bringing his action as should prevent the chancellor from granting relief.

And, first, as to the statute of limitations:

The bonds described in the bill matured in September, 1902. This action was commenced on May 7, 1913, more than 10 years after the bonds became due. The principal and interest would aggregate at this time over \$104,000. It is well settled that the law of the forum is that which governs where the statute of limitations is invoked. The forum being New York, the statute of that state is the one to govern in equity causes as well as in actions at law. *Lewis v. Marshall*, 5 Pet. 470, 8 L. Ed. 195. And see also *O'Brien v. Wheelock*, 184 U. S. 450, 493, 22 Sup. Ct. 354, 46 L. Ed. 636. The applicable provisions of the law of New York are embraced in the following sections and parts of sections of the Code of Civil Procedure, to wit:

Section 380 is as follows: "The following actions must be commenced within the following periods, after the cause of action has accrued."

"Sec. 381. Within twenty years: An action upon a sealed instrument. But where the action is brought for breach of a covenant of seisin, or against incumbrances, the cause of action is, for the purposes of this section only, deemed to have accrued upon an eviction, and not before."

"Sec. 382. Within six years: 1. An action upon a contract obligation or liability express or implied; except a judgment or sealed instrument. 2. An action to recover upon a liability created by statute; except a penalty or forfeiture."

"Sec. 388. An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues."

"Sec. 390a. Where a cause of action arises outside of this state, an action cannot be brought, in a court of this state, to enforce said cause of action, after the expiration of the time limited by the laws of the state or country where the cause of action arose, for bringing an action upon said cause of action, except where the cause of action originally accrued in favor of a resident of this state. Nothing in this act contained shall affect any pending action or proceeding."

The court in this connection must avail itself also of the judicial knowledge imputed to it respecting the provisions of the Louisiana Code. That Code seems to fix the period of prescription (or, as we call it, the period of limitation) at not over ten years—that is to say, a suit upon a negotiable instrument is prescribed in five years after maturity, and a suit upon a mortgage is prescribed at ten years after it becomes enforceable. See Merrick's Revised Code of Louisiana. If a suit brought in Louisiana to enforce a mortgage upon real estate situated there is prescribed by ten years' delay after the cause of action has arisen, it would seem that the provisions of section 390a of the New York Code might certainly be applicable to the situation with which we are confronted. This action not being against the mortgagor nor against the maker of the bonds, but against a third party who is a stranger to both, is not a suit upon the mortgage, nor one upon the bonds in any direct way, nevertheless both the mortgage and the bonds are in a large sense, though incidentally, the basis of the action, for without them the plaintiff could not succeed. As the claim against the defendant the Texas & Pacific Railway Company, must be based upon some implication to be drawn from facts aliunde the mortgage and the bonds of the Baton Rouge Company, we incline strongly to think that section 382 of the New York Code fixes the limitation governing this case, or, if it does not, then that section 388 does, and this, too, notwithstanding the provisions of section 410 of the New York Code, the second clause of which does not as we think, apply to a case like this, but must be confined to those examples of express trusts explicitly named therein. We have carefully examined the cases of Northern Pacific Railway Co. v. Boyd, 228 U. S. 48, 33 Sup. Ct. 554, 57 L. Ed. 931, and Angle v. Chicago, etc., Railway Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, but cannot find that they are controlling here, nor that the statute of limitations was either pleaded or discussed by the court in either of them.

We need give little time to a discussion of the defense of laches, though it is quite difficult to find in the testimony anything to justify or excuse the long delay in bringing the action, especially as the bonds on their face referred to the mortgage which was recorded in the proper offices in Louisiana whereby notice was given to all holders. We much incline to think that this defense also should be sustained, but prefer rather to base our decree upon the statute of limitation. As to the defense of laches we think consideration may helpfully be given to O'Brien v. Wheelock, 184 U. S. 450, 493, 22 Sup. Ct. 354, 46 L. Ed. 636. The court, during the trial, was purposely very liberal in the admission of testimony, especially when offered by the plaintiff, preferring to be free to give it any weight it might be entitled to rather than to exclude it altogether. But while dealing with the question of admissibility in that spirit, some few items of proffered testimony seemed to be so remote as to fall outside of any reasonable limit.

We think it results that the bill must be dismissed, with costs, and a decree accordingly may be prepared and submitted.

King & Osborn, of New York City (David Bennett King, W. Russell Osborn, and William A. Milliken, all of New York City, of counsel), for appellants.

Thomas J. Freeman, of New Orleans, La., and Lawrence Greer and F. C. Nicodemus, Jr., both of New York City, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The facts are stated in the opinion of Judge Evans and need not be repeated here at length. The suit is brought upon 30 bonds issued by the New Orleans, Baton Rouge & Vicksburg Railroad Company in September 1872, payable 30 years from date—September 1, 1902—and secured by a trust deed from the railroad company to the Union Trust Company of New York upon all its property including its right of way and the land grant given the Baton Rouge Company by Congress.

[1] The proposition is somewhat startling that the holder of the obligations of one corporation secured by a mortgage on its property may maintain a suit 40 years after the date of such obligation and based thereon against another corporation not a party thereto. The Texas & Pacific Company has not in terms pleaded the statute of limitation of New York and Louisiana but it has clearly presented the issue of laches and delay by charging that the complainants have been "guilty of such laches in the premises that no complaint may now be made in respect of the said bonds." This being a suit in equity it is not essential that the statute should be specifically pleaded. *Harpending v. Dutch Church*, 16 Pet. 455, 10 L. Ed. 1029; *Badger v. Badger*, 2 Wall. 87, 17 L. Ed. 836.

[2] In view of the facts, the defense of laches and unreasonable delay is always available and has we think been clearly established. The bonds matured September 4, 1902, but no suit was commenced until May 7, 1913, more than 10 years thereafter when the period of limitation in both Louisiana and New York had expired. All of the facts now relied on were known or could have been ascertained if any effort with that end in view had been undertaken.

The attitude of the owners of these bonds so far as appears from the record has been one of supineness and indifference during the entire period prior to the commencement of this action. As was said by the Supreme Court:

"The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief." *O'Brien v. Wheelock*, 184 U. S. 450, 493, 22 Sup. Ct. 354, 46 L. Ed. 636.

We are of the opinion that the complainants waited too long before commencing the action.

The decree is affirmed with costs.

PENNSYLVANIA UTILITIES CO. V. BROOKS.

(Circuit Court of Appeals, Third Circuit. January 27, 1916.)

No. 1981.

ELECTRICITY ⤵19—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Plaintiff was an employé of a contractor working on an electric generating plant owned by defendant, and was injured by a current sent through a wire without his knowledge. The court adopted defendant's theory that it was not liable if the contractor had notice of the defects responsible for the injury, but refused a directed verdict asked for on the ground that plaintiff's foreman knew the current had been permanently turned on. Plaintiff contended that the foreman was not the contractor's representative, and that to constitute notice to the contractor notice should have been given to P., who was in charge of the whole work. There was also a controverted question of fact as to the cause of the accident. There was evidence that plaintiff was ignorant of the dangers of electricity, excepting by contact with the wire, and there was no evidence that defendant notified either P. or the foreman that the current turned on was of a voltage sufficient to create danger by contact with the static zone, or notified them of the danger, or that they independently possessed knowledge thereof. *Held*, that the motion for a directed verdict was properly denied, as there was a question for the jury, even though S. was told that the current had been turned on.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. ⤵19.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by James H. Brooks against the Pennsylvania Utilities Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward J. Fox, of Easton, Pa., and Joseph A. Slattery and Robert E. Steedle, both of Philadelphia, Pa., for plaintiff in error.

T. McKeen Chidsey, Smith, Paff & Laub, and Calvin Smith, all of Easton, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The one error assigned is the refusal of the trial court to direct a verdict for the defendant.

The defendant (plaintiff in error) owned an electric generating plant. The Atlantic Construction Company was an independent contractor, engaged in enlarging the plant and in installing additional electrical apparatus. The plaintiff (defendant in error) was an employé of the Construction Company, at work upon the plant by invitation or permission of the defendant.

Before the completion of the work the defendant renewed the operation of the plant by turning on the current, whereby the plaintiff sustained the injuries of which he complains.

The additions or improvements consisted of conduits, high tension lines and transformers, the installation of which did not involve contact with or work upon the old apparatus. The work was of different

kinds, performed by workmen grouped according to the character of the work to be done. The groups or gangs consisted of laborers, carpenters, iron construction men and electrical construction men and their helpers.

Peterson, an officer or employé of the Construction Company, was in charge of the entire work, while Smith was the foreman of the electric construction gang, in which the plaintiff was an electrician's helper. The work was known as "dead" work, that is, it had nothing to do with handling wires or apparatus containing live currents. Whenever tests were to be made by turning on the current, the plaintiff and his co-workers were warned by Smith, their immediate foreman.

Several weeks before the injury to the plaintiff, the defendant, the owner of the property, permanently charged some of the new construction with electric current carrying 33,000 volts, without, as it is claimed, notifying the plaintiff. On the day of his injury, the plaintiff was working at a bench near or beneath a partially insulated high tension wire carrying electricity of this large voltage. He was employed in putting threads on a pipe to be used as a conduit. The pipe was a little less than ten feet in length. Upon removing the pipe from a vise, the plaintiff swung or revolved it in the air, bringing it in contact with or in close proximity to this highly charged wire. The current grounded through his body and caused his injuries.

The defendant admitted that it had permanently turned the current through the wire in contact with or in proximity to which the plaintiff was injured, but for defense, maintained, that that fact, if not known to the plaintiff, was known to Smith, his foreman, and therefore no duty devolved upon it either to warn or protect the plaintiff, who was engaged at work upon its premises, not as its employé but as the employé of the Construction Company, an independent contractor. For this position the defendant relied upon the principle of law cited with approval in the case of *Newingham v. Blair*, 232 Pa 511, 81 Atl. 556, that,

"It is the rule that the owner of property owes to an independent contractor and his servants at work thereon, the duty of exercising reasonable care to have the premises in a safe condition for the work, *unless the defects responsible for the injury were known to the contractor.*"

As the court charged the jury precisely as requested by the defendant, the defendant, of course, does not complain of the instructions upon the law, and as the plaintiff has not sued out a writ of error, he, of course, cannot charge error in the law. Therefore, there is neither ground nor occasion, in view of the errors assigned, to inquire or determine whether error was committed in charging the law. We must assume, for the purposes of this case, that the law as prayed by the defendant and as charged by the court was correct, and determine the one question raised by the assignments of error, whether in applying the law to the facts, the court erred in refusing to direct a verdict for the defendant.

The prayer for a directed verdict was made upon the contention that Smith, the foreman of the independent contractor, of whom the plain-

tiff was a servant, knew that the current had been permanently turned on; that knowledge of the foreman was knowledge of the master, and therefore, negligence in failing to warn the plaintiff, if any existed, was that of the plaintiff's master and not of the defendant. This contention was based upon testimony claimed to be undisputed.

It appears by the testimony, with little contradiction, that Smith knew that the current had been permanently turned on, and had told some of his men, though not the plaintiff. Confronted with this testimony, the plaintiff maintained that Smith was not the representative of the independent contractor, being but a boss of one of its several gangs, but that Peterson, who was in charge of the whole work and of all the gangs, was the representative of the contractor, whom the defendant should have notified of the turning on of the current, or whose independent knowledge thereof would have become the knowledge of the master and bound the plaintiff. This was earnestly urged because there was no evidence that Peterson was so notified or independently possessed such knowledge. Upon the issue thus raised was the case largely argued before us. But this was by no means the sole issue upon which the trial judge submitted the case to the jury. In the first place, there was a controverted question of fact as to how the accident occurred, namely, whether in swinging the pipe, the plaintiff brought it in contact with the heavily charged wire, causing the current to ground through his body, or in revolving the pipe he merely projected it into the static zone surrounding the uninsulated high tension wire, without bringing it into contact with the wire, causing the current to jump or arc from the wire to the pipe and ground through his body.

If from this conflict of testimony the jury had found that the plaintiff brought the pipe in contact with the wire, and thereby drew the current through his body, there would have arisen, in addition to a question of contributory negligence, the question of notice by the defendant and knowledge of the latent danger of Smith or Peterson according as the knowledge of one or the other became the knowledge of the Construction Company, the employer of the plaintiff. This is one theory upon which the case might have been decided, but there is another presented by the testimony. This is, that the plaintiff did not bring the pipe in contact with the wire, but in revolving the pipe, brought it within the static zone, and as a consequence the current jumped from the wire to the pipe and flashed through his body. A finding based upon such a theory would open up a wide range of disputes amply supplied by the testimony, in which the principle of law advanced by the defendant and charged by the court would or would not have a bearing, according as the jury found the facts.

Surrounding every wire carrying electric current is a zone charged with electricity. This is known as the static zone, and the electricity with which it is charged is known as static electricity. Static electricity surrounding a wire carrying electricity of high voltage possesses the property of causing the electric current to arc or jump from the wire to an object within its zone, though the object be not in contact with the wire. The higher the voltage of the current in the

line, the more readily will the current jump across an air gap. The length of the arc or the jump depends upon the quantity of static electricity present, as well as upon atmosphere conditions, the tendency to jump being greater when the day is damp, as was the day upon which the plaintiff was injured. The current in the wire may jump through the static zone for a distance of from two to twenty inches.

Of this property or habit of electricity the defendant had knowledge, for the superintendent of its plant warned certain of the Construction Company's employes of dangers present at the very place in which the plaintiff was at work when injured. Having permanently turned on the current, it was the defendant's duty to inform either the plaintiff, *Standard Steel Car Co. v. M'Guire*, 161 Fed. 527, 530, 531, 88 C. C. A. 469 (C. C. A. 3d), or the plaintiff's master, of this latent danger, unless, indeed, the plaintiff or his master already knew it.

There was testimony that the plaintiff was familiar with electric appliances and understood and was alive to their dangers. On the other hand, it was testified that the plaintiff worked entirely upon dead work which revealed none of the properties of electricity; that he had never heard of static electricity or static zones; that he was ignorant of the dangers of electricity excepting by contact with electric wires; and that he had not been notified and did not know that the current had been permanently turned on.

While the jury may have found that Smith knew that the current had been permanently turned on and that Peterson did not know it, there is no evidence in the case, so far as we can find, that the defendant notified either Smith or Peterson that the current so permanently turned on was of a voltage to create danger by contact with its static zone, or that the defendant notified either Smith or Peterson of the danger of a static zone, or that Smith or Peterson independently possessed knowledge of such a danger, which, under the rule of law became the knowledge of the Construction Company and bound the plaintiff. The question, therefore, was, not whether Smith or Peterson (whichever may have been the vice-principal of the Construction Company) knew that at the time of the accident the current had been permanently turned on, but whether Smith or Peterson knew what the defendant knew of the presence and danger of a static zone surrounding a high tension current at the place at which the plaintiff was working, and by such knowledge, as the employer of the plaintiff, relieved the defendant of its duty to supply the plaintiff with a reasonably safe place in which to work and to protect him from latent dangers by reasonable precautions and timely warnings. This was one of the questions which the court left to the jury, based upon evidence which, if not conclusive against the defendant, was certainly open to dispute.

The learned trial judge said in his charge:

"From the evidence in the case it appears that this static zone which exists about electric wires, may cause a disruptive charge of electricity and cause injury to a person who either comes himself, or causes something which he has in his hands or in his possession to come within that static zone. As I recall the testimony, *there is no evidence that any warning was given to anybody of that static zone, and it is for the jury to determine as to whether*

the presence of that static zone, assuming that he had knowledge that the current was turned on at that time, was not known as well to the employers of the plaintiff as it was to the defendant. If the employers (the Construction Company) knew of the presence of the static zone and knew that the current was turned on at that time, it was their duty to warn him of that condition, and if the injury came from the lack of warning on their part, then the plaintiff could not recover."

Whether the defendant warned the plaintiff or his master of the presence and danger of a static zone, whether the master, through its vice-principals possessed such knowledge because of opportunities equal to those of the defendant to learn of such a zone, and whether, therefore, the negligence which caused the plaintiff's injuries, was the negligence of the master or the defendant, were all questions for the jury.

In *Dunn v. Cavanaugh*, 185 Fed. 451, 107 C. C. A. 521, the plaintiff's decedent was warned not to touch or *go near* certain electric wires. He was not told of the existence or the danger of a static current by which he might be injured without touching the wires. There was no evidence that he knew of it. He entered the static zone, and a flame leaped from the wire and killed him. The defendant assigned for error, that in view of the warning, the court should have directed a verdict for the defendants. The court said:

"But we think the judge was quite right in leaving it to the jury to say whether the warnings would not be understood by an ordinarily prudent person as referring to actual contact with the wires, and whether they were of such character as to advise him of the danger which actually caused his death.

"The defendants further contend that a verdict should have been directed in their favor, because the decedent was guilty of contributory negligence as a matter of law in lowering the boatswain's chair so as to get opposite instead of being above the wire. This question we think was properly submitted to the jury, because if all the decedent had to apprehend was the danger of touching the wires he could not be said to be guilty of contributory negligence in getting opposite one, at least as a matter of law.

"The defendants further contend that the verdict should have been directed in their favor, because decedent assumed the risk of the injury which he sustained. He assumed all risks he knew or ought to have known to exist. But it was for the jury to say whether he did know or ought to have known of this particular danger. It certainly would be obvious to very few persons not experts or engaged in business involving electrical currents of high tension."

The question before us is not whether the court erred in its instructions upon the law. The question is whether it erred in refusing to direct a verdict for the defendant by applying the law to testimony which the defendant conceived to be undisputed. Upon both phases of the case the trial court thought there was conflict in the testimony. Certainly upon one phase, open for the jury to adopt, there was a clear conflict which required the trial court to submit the case to the jury. The testimony upon either theory of the case is ample to support the verdict rendered.

The judgment below is affirmed.

JEWELL et al. v. TRILBY MINES CO. et al.

SAME v. MOOSE GOLD MINING CO.

(Circuit Court of Appeals, Eighth Circuit. November 16, 1915.)

Nos. 4470, 4471.

1. QUIETING TITLE ⇨45—PLEADING—DEFENSES.

Rev. St. Colo. 1908, § 4089, provides that every person in actual possession of lands under claim and color of title made in good faith, and who shall for seven successive years pay all taxes legally assessed, shall be adjudged to be the legal owner of such lands according to the purport of his paper title. *Held* that, in a suit to quiet title, defendants' claim of title under this section was an affirmative defense, which it was the duty of defendants to set up and establish, and which would not justify a dismissal upon motion.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 93; Dec. Dig. ⇨45.]

2. TRUSTS ⇨372—ESTABLISHMENT—ACTIONS—LACHES.

Ordinarily courts of equity, acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish stale trusts, except where the trust is clearly established and the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the cestui que trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 600-603; Dec. Dig. ⇨372.]

3. QUIETING TITLE ⇨29—LACHES—GUARDIAN'S AND ADMINISTRATOR'S SALE OF MINING PROPERTY.

Plaintiffs' father died in 1892, while plaintiffs were minors, and in October of that year an administrator appointed by a Missouri probate court was authorized to sell their father's interest in a mining claim in Colorado. In 1894 a guardian of plaintiffs and a curator of the estate of their deceased father, appointed by the same court, was authorized to sell the father's interest in another mining claim, also situated in Colorado. The sales were made for what might well have been considered a fair price at that time, and the properties were developed with the expense, exertion, and risk incidental to mining enterprises. In 1913, 15 years after the oldest plaintiff, and 8 years after the youngest plaintiff, reached her majority, a bill was filed to quiet title and for an accounting, on the theory that the Missouri probate court had no jurisdiction to authorize the sales. Though fraud was alleged, no facts supporting the charge of fraud were alleged, except the want of authority of the administrator and the guardian to make the sales, and the assertion of title and the enjoyment of the properties by the purchasers. It appeared that plaintiffs knew of the appointment of the administrator and the guardian, and while they claimed that they had no knowledge of their rights until in 1913, all that transpired in connection with the estate was disclosed by the public records. *Held*, that the suit was barred by laches, since ignorance which is the effect of inexcusable negligence is no excuse for laches, and knowledge of facts and circumstances which would put a person of ordinary prudence and diligence on inquiry is, in law, equivalent to a knowledge of the facts which a reasonably diligent inquiry would disclose.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 63; Dec. Dig. ⇨29.]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

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

Suits by Nellie A. Brene Jewell and others against the Trilby Mines Company and another and against the Moose Gold Mining Company. From a decree dismissing the bills, plaintiffs appeal. Affirmed.

Charles Roach, of Denver, Colo. (William L. Pierce, of Belvidere, Ill., and H. A. Hicks, of Denver, Colo., on the brief), for appellants.

F. A. Williams, of Denver, Colo. (G. W. Whitford, of Denver, Colo., on the brief), for appellees Trilby Mines Co. and George Diehl.

William Story, Jr., of Salt Lake City, Utah (William Story and Frederick Steigmeyer, both of Salt Lake City, Utah, on the brief), for appellee Moose Gold Mining Co.

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

VAN VALKENBURGH, District Judge. October 18, 1913, in cause No. 4470, appellants brought against all the above-named appellees a bill of complaint, entitled "a bill to quiet title and for accounting," whereby they sought to establish their right and title to an undivided one-half interest in and to a certain piece of mining property known and described as the Ben Harrison lode and mining claim, and to an undivided one-third interest in and to a certain piece of mining property known and described as the Moose lode and mining claim. January 20, 1914, a hearing was had on motions of appellants Diehl and the Moose Gold Mining Company to dismiss the bill on the ground of misjoinder. The result of this hearing was that No. 4470 proceeded upon an amended bill to determine the rights of complainants to the Ben Harrison lode and mining claim, and on April 15, 1914, a bill of complaint was filed in cause No. 4471 against the Moose Gold Mining Company to determine the rights of complainants in and to the Moose lode. The bills, in effect, seek to enforce a trust in the defendants for the benefit of complainants to the extent of the interests claimed in the bills. The two cases were heard together on appeal, and inasmuch as the controlling principles, as we view them, apply with equal force to both, they will be considered and disposed of in one opinion.

In cause No. 4470 the facts upon which the cause of action is based are these: July 18, 1891, the Ben Harrison lode was located by one G. A. Sheek and Gus P. Brene. January 11, 1892, Gus P. Brene died intestate in Phelps county, Mo., leaving as his heirs the four minor children, who are now complainants in this cause. March 2, 1894, the probate court of Phelps county, Mo., appointed one Victor Brene as guardian of the persons of complainants and curator of the estate of their deceased father. On the same day this guardian filed in said court his petition to sell one-half of the Ben Harrison lode, and an order of sale was entered by the court. April 2, 1894, the guardian executed a deed for one-half of said property to one Clarence Edsall; the consideration named being \$4,000. Later in the year a receiver's certificate and patent were issued. December 1, 1904, Edsall conveyed the Ben Harrison claim to the Moose Gold Mining Company. December 7, 1908, the latter company conveyed to the Trilby Mines

Company, which immediately entered into and ever since has been in exclusive possession of the Ben Harrison lode. November 10, 1908, the Trilby Mines Company executed upon said property a mortgage to the Colorado Title & Trust Company, as trustee, to secure an indebtedness of \$90,000. August 2, 1913, the property was conveyed under mortgage sale to the defendant George Diehl. In October following this suit was commenced.

In cause No. 4471, the following additional facts should be stated: July 22, 1891, the said Gus P. Brene, together with one G. A. Sheek and one William J. Banta, discovered and located the Moose lode and mining claim hereinabove referred to, and after the death of Brene, to wit, on or about the 11th day of February, 1892, the said Victor Brene was appointed administrator of the estate of Gus P. Brene, deceased, by the probate court of Phelps county, Mo. On or about October 22, 1892, said probate court, upon application entered an order in the matter of the administration of said estate, authorizing the administrator to convey the interest of Gus P. Brene, deceased, in said Moose lode and mining claim. October 22, 1892, the administrator, together with W. J. Banta and G. A. Sheek as grantors, acknowledged and delivered to John E. Smith, John B. Glasser, and Ward Hunt a deed to the last-named property. The deed purports on its face to have been executed by Brene, as such administrator, under the authority of the order of sale made by the probate court of Phelps county, Mo., as aforesaid. August 12, 1893, Smith, Glasser, and Hunt conveyed the Moose lode to the Moose Gold Mining Company, appellee herein.

It is conceded that no letters of administration were taken out in Colorado, in which state the property in controversy is situated, and appellants base their claims upon the contention that the probate court of Phelps county, Mo., was without jurisdiction to make the orders of sale above recited, and that the deeds under which defendants claim were void. On the date these actions were originally brought the plaintiff Nellie A. Brene Jewell was 33 years of age, 15 years above her majority; Flora S. Brene Spindler was 32 years of age, 14 years above her majority; Zona F. Brene Smail was 28 years of age, 10 years above her majority; and the youngest of the complainant heirs, Bessie M. Brene, was 26 years of age, 8 years above her majority. In the bills it is alleged that complainants had no actual knowledge of the proceedings in the probate court; that they received no part of the proceeds of the sales; that they lived in Phelps county until their majority; that thereafter, on dates not stated, they took up their places of residence in different states, other than the state of Colorado; that they first became aware of their interest in the mining claims in suit in June, 1913, at which time, they allege, a representative of the holders and owners of the bonds secured by trust deed upon the Ben Harrison lode called upon the complainant Nellie A. Brene Jewell, and sought to obtain from her and her codefendants quitclaim deeds for the alleged purpose of correcting some irregularities in the early transfers of this property. It is further alleged that the Moose Gold Mining Company, the Trilby Mines Company, and the officers, solici

tors, agents, and employes of said companies have been contriving and confederating together to defraud plaintiffs of their rights and interests in said claims, but no facts are stated to support a charge of fraud against either the administrator and guardian or the defendants in these actions, unless such is to be inferred from the alleged want of authority in the former and the assertion of title and the enjoyment of the properties by the latter.

In their answers below the defendants set up section 4073, R. S. of Colorado, which provides:

"Bills of relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within five years after the cause thereof shall accrue, and not later."

Also section 4089, which provides:

"That every person in actual possession of lands under claim and color of title, made in good faith and who shall for seven successive years pay all taxes legally assessed on such lands shall be held and adjudged to be the legal owner of said lands according to the purport of his paper title."

[1] They also urged the laches of the plaintiffs in bar of their recovery, and prayed that the bills be dismissed. The cases were set down as upon motions to dismiss upon the defenses thus pleaded, and upon hearing said motions were sustained, and the bills dismissed accordingly. From the decrees thus entered these appeals are taken. With respect to section 4089 of the Colorado Statutes, providing that legal ownership shall be adjudged where all taxes legally assessed shall be paid for seven successive years under claim of title made in good faith, we think the court below was clearly right in holding that this is an affirmative defense which it is the duty of defendants to set up and establish, and that such a defense would not justify a dismissal upon motion.

Appellants contend that the five-year limitation provided by section 4073 has no application, because this section, as construed by the courts of last resort in Colorado, has no reference to and imposes no limitation upon actions affecting realty only. Defendants insist that, although the bill is entitled as one to quiet title, nevertheless it is, in effect, one to establish a trusteeship on the part of the defendants; that section 4073, by its express terms, has application to such actions; and that the holding in Colorado is not to the contrary. This was the view to which the trial court inclined, and an examination of the cases cited persuades us that this view involves a question of interest and substance. *Harding v. Burris*, 52 Colo. 132, 119 Pac. 1063; *Munson v. Marks*, 52 Colo. 553, 124 Pac. 187; *Munson v. Keim*, 53 Colo. 576, 127 Pac. 1026; *Empire R. & C. Co. v. Zehr*, 54 Colo. 185, 129 Pac. 828; *Rowe v. Mulvane*, 25 Colo. App. 502, 139 Pac. 1041-1044. Nevertheless it is conceded that in the application of the doctrine of laches the settled rule is that federal courts of equity are not bound by, but that they usually act or refuse to act in analogy to, statutes of limitation relating to actions at law of like character. *Kelley v. Boettcher et al.*, 85 Fed. 55, 29 C. C. A. 14; *Redd v. Brun*, 84 C. C. A. 638, 157 Fed. 190. We prefer not to base a decision upon the construction of a state statute of limitation, unless the applica-

tion of its terms and provisions is clear and practically unmistakable. It is necessary to consider, therefore, whether the delay of complainants in bringing these actions is such inexcusable laches as to bar relief.

[2, 3] Generally speaking, courts of equity, acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established and the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the cestui que trust. *Badger v. Badger*, 2 Wall. 87, 17 L. Ed. 836. There is no sufficient, if indeed any, substantial allegation of fraud in the bills. Complainants allege that they had no knowledge of the rights here asserted until in June, 1913. But ignorance which is the effect of inexcusable negligence is no excuse for laches, and knowledge of facts and circumstances 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. *Swift v. Smith*, 25 C. C. A. 154, 79 Fed. 709-713. It is not denied that complainants knew that an administrator was appointed in the probate court of Phelps county. They knew also of the appointment of their guardian and curator. The bill avers:

"That if the guardian said anything to her [Nellie] with reference to what he was doing, she has no recollection of his having done so, and would not have comprehended what he meant if he had spoken to her about it."

But, as was said in *Swift v. Smith* supra:

"She was not the victim of any actual fraud or of any concealment. All the facts on which she now relies for relief were spread upon the records of the probate court, * * * open and ready for her inspection."

All the complainants had many years, after they became of age, to inspect these records. The proceeding of administration is in the nature of a proceeding in rem, and in a sense these complainants were parties thereto.

"The possession of the means of knowledge is equivalent to knowledge itself. A party who has the opportunity of knowing the facts of which he complains cannot avail himself of his inactivity, and thus escape the imputation of laches. The grounds of attack against the validity of the orders of sale and the executor's deeds were matters of record." *Williamson v. Beardsley*, 69 C. C. A. 615, 618, 137 Fed. 467, 470.

In that case, as in *Swift v. Smith*, supra, this court has held that parties to proceedings of this nature in probate courts are parties thereto, and are bound by a knowledge of what such records disclose. While the lapse of time alone ordinarily is not sufficient to constitute a defense, nevertheless courts take into consideration not only that the peace of society requires the discouragement of antiquated and stale demands, but also the situation of the parties which renders the prosecution of such suits inequitable. Such a situation is discussed by the Supreme Court in *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214, wherein it is said:

"While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth * * * millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

At the time these claims were sold under orders of the probate court they consisted of little more than mere locations. The interest of Brene was attempted to be purchased for what may well have been considered a fair price at that time. Since then, it would appear from the bill that the properties have been developed with all the expense, exertion, and risk incidental to mining enterprises. That ultimate success may have been achieved and large returns realized cannot alter the situation. The complainants, charged with knowledge of what transpired in connection with the administration of the estate of their deceased father, as disclosed by the public records of the county in which he died, and in which they arrived at years of discretion, have since allowed long years to pass without seeking to ascertain or pursue any rights or remedies which might have been theirs if seasonably invoked. We think the trial court properly ruled that they are barred by their laches in this regard.

It results that the decree dismissing the bills should be affirmed; and it is accordingly so ordered.

LOVE et al. v. NORTH AMERICAN CO. et al.

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

No. 4491.

1. RECEIVERS ↔ 158—CLAIMS—PRIORITY.

A state Corporation Commission prescribed certain railroad freight rates, and the railroad company appealed to the Supreme Court, giving a supersedeas bond conditioned for the refund to the Corporation Commission for the parties entitled thereto of all charges collected pending the appeal, in excess of those authorized by the decision of the Supreme Court. The Supreme Court on December 5, 1912, decided the appeals, and prescribed rates lower than those collected by the railroad company. Thereafter an unsecured creditor filed a bill against the railroad company, in which receivers were appointed within six months after the decision of the appeals. In May, 1914, mortgage trustees commenced proceedings for the appointment of receivers, which were consolidated with the creditor's suit. Subsequent to the collection of the excess charges, and down to the appointment of the receivers, there was in the company's treasury at all times an amount in excess of the excess charges so collected. From a time prior to the Corporation Commission's orders the gross receipts had been in excess of the actual operating expenses, and during such period there had been paid, both before and after the appointment of the receivers, amounts in excess of such charges by way of interest

on the mortgage indebtedness, and during the receivership sums largely in excess of such excess freight charges had been expended for betterments and improvements. *Held*, that the shippers' claims for the refund of such excess charges were entitled to payment as preferred claims, as against the claims of bondholders and other general creditors, and it was immaterial that the claims were not presented by the shippers, but by the Commission and by the surety on the supersedeas bond, who had paid to the Commission a part of the amount collected, as the sums collected belonged to the shippers, and it would be presumed that they were a part of the money in the company's treasury which passed to the receivers, and having been paid to the bondholders or for the betterment of the property, a court of equity would direct the restoration of such sums.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301-306; Dec. Dig. ⚡158.]

2. RECEIVERS ⚡158—CLAIMS—PRIORITY.

Such claims were also entitled to payment as preferred claims, on the ground that the duty of the railroad company to restore its excessive exactions was a duty owing, not only to the shippers, but to the state, whose orders had been superseded, and such a public duty will be carefully safeguarded by a court of equity which has taken over the business of a public carrier by means of a receivership.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301-306; Dec. Dig. ⚡158.]

3. RECEIVERS ⚡158—CLAIMS—PRIORITY.

Such claims were also entitled to preferential payment under the rule giving preference over bondholders secured by a prior mortgage to claims incurred for the current expenses of the ordinary operation of the mortgagor's property in the usual course of business of the mortgagor, within a limited time, usually not exceeding six months anterior to the appointment of the receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301-306; Dec. Dig. ⚡158.]

4. SUBROGATION ⚡7—PAYMENTS BY SURETIES ON BOND—CLAIMS—PRIORITY.

The rule that, when a surety company signs a bond for an independent consideration, it will not be subrogated, if subrogation will prejudice the rights of persons having independent equities, had no application, as it will not be applied as against creditors on whose behalf the bond is given, and the bondholders of the railroad company had no equity superior to that of the surety on the supersedeas bond.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21-29, 58, 77, 83, 92; Dec. Dig. ⚡7.]

Appeal from the District Court of the United States for the Eastern District of Missouri; Walter H. Sanborn, Judge.

Suit by the North American Company against the St. Louis & San Francisco Railroad Company, in which a receiver of the railroad company was appointed, and in which J. E. Love and others, constituting the Corporation Commission of the state of Oklahoma, and the United States Fidelity & Guaranty Company intervened. From a judgment allowing the claims of the interveners, but denying them a preference, the interveners appeal. Reversed and remanded, with instructions.

C. B. Ames, of Oklahoma City, Okl. (John M. Wood, of St. Louis, Mo., and Ames, Chambers, Lowe & Richardson, of Oklahoma City, Okl., on the brief), for appellants.

Edward T. Miller, of St. Louis, Mo. (William F. Evans, of St. Louis, Mo., on the brief), for appellees.

Nagel & Kirby, of St. Louis, Mo. (White & Case, of New York City, Charles Nagel, of St. Louis, Mo., and Roberts Walker and Perley H. Noyes, both of New York City, of counsel), for mortgage trustees.

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

CARLAND, Circuit Judge. This is a petition in intervention filed June 14, 1914, wherein the Corporation Commission of the state of Oklahoma and the United States Fidelity & Guaranty Company pray that the sum of \$88,751.86 be declared to be entitled to preferential payment as against the claims of the bondholders and other general creditors of the St. Louis & San Francisco Railroad Company, hereafter called the Frisco Company. The claims of interveners were allowed by the District Court, but denied a preference.

The facts conditioning the preferential character of the claims are as follows: On July 3, 7, and 31, 1911, and on September 14, 1911, the Corporation Commission of Oklahoma made five separate orders in cases pending before it, wherein the Frisco Company was a party, prescribing certain rates for the transportation of freight. The Frisco Company appealed from said orders to the Supreme Court of Oklahoma. The orders were superseded by the giving of a supersedeas bond in each case signed by the Frisco Company as principal and by the Fidelity & Guaranty Company as surety. The condition of the bond in each case was as follows:

"Now, therefore, if the said St. Louis & San Francisco Railroad Company shall refund to the Corporation Commission of the state of Oklahoma, for the parties entitled thereto, all charges which said company may collect or receive, pending said appeal, in excess of those fixed or authorized by the final decision of the Supreme Court of the state of Oklahoma on appeal, * * * then this obligation shall become null and void; otherwise, to remain in full force and effect."

The Supreme Court decided the appeals December 5, 1912 (35 Okl. 214, 128 Pac. 900; 35 Okl. 220, 128 Pac. 903; 35 Okl. 224, 128 Pac. 904; 35 Okl. 229, 128 Pac. 907; 35 Okl. 233, 128 Pac. 908), and the rates prescribed by the Supreme Court were made effective as of the original date of the orders appealed from. The rates prescribed by the Supreme Court were higher than the Corporation Commission rates, but lower than the regular rates prescribed and collected by the Frisco Company. It thus happened that there became due to the parties entitled thereto, namely, the shippers of freight, from the Frisco Company, \$88,751.86 as excessive charges for the transportation of freight. This is the demand which the interveners ask to have allowed as a preference.

The Fidelity & Guaranty Company paid \$12,124.51 of this amount to the Corporation Commission for the benefit of the parties entitled. The Fidelity & Guaranty Company on July 23, 1908, entered into a contract with the Frisco Company, whereby it agreed to sign all bonds

or instruments which the Frisco Company should desire to execute for a certain consideration specified in the contract, and it is conceded that the Frisco Company paid the surety company the sum of \$580 for signing the supersedeas bonds in question.

On May 27, 1913, on a bill filed by the North American Company, an unsecured creditor of the Frisco Company, receivers were appointed for said company. On May 27, 1914, the Bankers' Trust Company and Neill A. McMillan, trustees under the general lien mortgage of the Frisco Company, commenced proceedings in which the appointment of receivers was prayed for, and this suit so commenced by the trustees was afterwards, on the 22d day of June, 1914, consolidated with the suit brought by the unsecured creditor on the 27th day of May, 1913. It thus appears that the bondholders took no proceedings to impound the revenue of the Frisco Company until May 22, 1914. The claims of the shippers arose at the time the Supreme Court of Oklahoma decided the appeals, namely, December 5, 1912, which was within six months from the date on which the receivers were appointed. Subsequent to the collection of said excess charges by the Frisco Company there was at all times in its treasury, down to the date of the appointment of the receivers, an amount of money equal to or in excess of the aggregate of the sums so collected. The gross receipts of the Frisco Company during the period from July 1, 1911, to May 27, 1913, were in excess of its actual operating expenses, and since the appointment of the receivers the gross receipts have continuously been in excess of its actual operating expenses. During the period from July 1, 1911, to May 27, 1913, the Frisco Company paid large sums in excess of the excess charges so collected by way of interest on its mortgaged indebtedness, and during the period of the receivership the receivers have expended for betterments and improvements sums in excess of \$1,000,000 as well as sums in excess of said excess charges by way of interest on defendants' bonded indebtedness.

When the receivers were appointed, they received from the Frisco Company, as shown by their first bimonthly report, over \$600,000 in cash. It also appears that, eliminating all items except current receipts and current expenses, the earnings and operating expenses of the Frisco Company, from May 27, 1913, to April 30, 1914 (all prior to any action by the bondholders), were as follows:

Earnings	\$48,380,219.06
Operating expenses	35,449,360.17
Leaving a balance of earnings	.
over operating expenses of.....	\$12,930,858.89

[1] The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for the transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor the Frisco Company itself. Without question they belong to the shippers. We must not be deceived as to the true status of this claim, nor allow the bond, or the fact that the claim is presented by the Corporation Commission, to blind us to the fact that the claim is one due to the shippers for excessive charges paid by them to the Frisco Company for trans-

portation of freight. The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteers, like the receivers, the money belonged to the shippers after the payment the same as before. It will be presumed that it was a part of the money in the treasury of the company which passed to the receivers. That money came into the hands of a court of equity. What ought such a court to have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. It having been paid to the bondholders, or for permanent betterment of the property for their benefit through the agency of a court of equity, that court, as a court of conscience, can do no less than direct its restoration.

[2] There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity, that has taken over the business of a public carrier by means of a receivership, ought to be equally careful to enforce.

[3] Petitioners' claim also comes within the rule which underlies the right to a preferential payment. Freight rates are the lifeblood of railroad operation. It will not be contradicted that, if there were no freight rates paid in the United States, not a wheel would turn on any road. What does the law say in regard to the allowance of preferences? We accept the law as established by the Supreme Court of the United States, and by this court, as follows:

The class of claims which under the decisions of the Supreme Court may lawfully receive an equitable preference in payment out of the income or out of the corpus of the property of a mortgaged railroad over the bondholders secured by a prior mortgage is limited to claims incurred for the current expenses of the ordinary operation of the mortgaged property in the usual course of the business of the mortgagor. The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the ordinary operation of the property of the mortgagor incurred in the usual course of its business, for labor, supplies, and like things, necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appointment of the receiver, the claim may be preferred in payment, otherwise it may not be. *Illinois Trust & Savings Bank v. Doud*, 105 Fed. 123, 124, 129, 44 C. C. A. 389, 390, 395, 52 L. R. A. 481; *Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co.*, 154 Fed. 629, 632, 83 C. C. A. 403, 406; *Blair v. R. R. Co.* (C. C.) 23 Fed. 523; *Whiteley v. Central Trust Co.*, 76 Fed. 74, 75, 77, 22 C. C. A. 67, 34 L. R. A. 303; *Gay v. Hudson River Electric Power Co.* (C. C.) 182 Fed. 904, 907, 909; *Pennsylvania Steel Co. v. New*

York City R. Co. (C. C.) 165 Fed. 485; Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co. (C. C.) 68 Fed. 36, 41, 42; Fordyce v. Omaha City & E. Ry. Co. (C. C.) 145 Fed. 544, 556, 557; Chicago & A. R. Co. v. U. S. & Mex. Trust Co., 225 Fed. 940, — C. C. A. —; Martin Metal Mfg. Co. v. Same, 225 Fed. 961, — C. C. A. —.

We think that what has been heretofore said establishes that the claim of the shippers is a claim incurred "for the current expenses of the ordinary operation of the railroad in the usual course of business of the road." On principle it cannot be distinguished from payments to sureties who have signed bonds to stay the execution of judgments and claims for holders of unused tickets for refunds, and many other like charges which are habitually allowed, and have been allowed in the receivership of the Frisco Company.

[4] We are aware that, when a surety company signs a bond for an independent consideration, it will not be subrogated, when subrogation would prejudice the rights of persons having independent equities. That is not the case here. The principle stated, however, in our judgment, ought never to be applied as against the creditors on whose behalf the bond is given. The bondholders of the Frisco Company have no equity that is superior to that of the surety company.

The judgment appealed from is therefore reversed, and the cause remanded to the District Court, with instructions to allow the claim of the Fidelity & Guaranty Company, in the sum of \$12,124.51, with legal interest from the date that the surety company paid the same, and also to allow the claim of the Corporation Commission, for the benefit of the people entitled thereto, in the sum of \$76,627.35, with legal interest from December 5, 1912, as preferred claims, as against the claims of the bondholders and other general creditors of the Frisco road.

PRESS PUB. CO. v. GILLETTE.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 70.

1. LIBEL AND SLANDER ⇨123—QUESTIONS FOR JURY—PRIVILEGE.

Plaintiff, a former army officer, who had resigned and gone into private business, but had applied for reinstatement, joined with other Americans residing in Mexico in a memorial to the President, reviewing conditions in Mexico, making a savage attack on Madero, and violently criticizing the policy of the administration of this country in dealing with Mexico since Huerta's advent. He also addressed other communications to the President and Secretary of State, in which his bitter opposition to such policy was expressed most vehemently. Defendant's newspaper, in commenting on the memorial, referred to its signers as a "troop of Benedict Arnolds." The court charged, and defendant's counsel agreed, that this meant that their conduct was traitorous and treasonable. *Held*, that whether this transcended the limits of fair criticism was a question for the jury, and the denial of defendant's motion for a directed verdict was not error, especially as it cannot be held that criticism of the policy and conduct of the administration in time of peace,

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

though severe, bitter, and vehement, is traitorous and treasonable, even when indulged in by a former army officer, who is asking reinstatement.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. ↪123.]

2. LIBEL AND SLANDER ↪50½—PRIVILEGE—TEST.

In determining whether an alleged libelous article is privileged, as constituting fair and reasonable comment, its relevancy to the subject commented on is not the sole test; there being also a question as to whether it goes beyond reasonable limits.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. ↪50½.]

3. LIBEL AND SLANDER ↪123—QUESTIONS FOR JURY—PRIVILEGE.

Whether the limits of fair criticism have been transcended by an alleged libelous article may sometimes be a question of law, but ordinarily is one of fact for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. ↪123.]

4. LIBEL AND SLANDER ↪128—REVIEW—AMOUNT OF DAMAGES.

In an action for libel, the finding of the jury as to the amount of compensatory damages cannot be disturbed by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 380-385; Dec. Dig. ↪128.]

In Error to the District Court of the United States for the Southern District of New York.

Action by Cassius E. Gillette against the Press Publishing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, against plaintiff in error, who was defendant below. The action was for libel against the corporation which publishes the New York World; the jury was instructed that there was no proof of actual malice, and that they could award only compensatory damages, if any. Their verdict was for \$20,000. The publication complained of reads as follows:

"A Score of Benedict Arnolds.

"To a score of Americans in Mexico we are indebted for a public admission that the late President Madero was lynched and that his death was necessary to the salvation of the country. These Americans are for the most part concessionaries or representatives of Big Business, but they are led, we are sorry to say, by a retired officer of the United States Army (meaning plaintiff).

"Offensive as this shameful confession may be to the conspirators who murdered Madero and denied it, what shall be said of the impudence that in their behalf instructs the government at Washington to recognize Huerta; that attributes the attitude of President Wilson to personal prejudice; that pronounces Mexicans unfit for self-government; that proclaims the lie that we give no native a vote in the Philippines; and that compares despotic rule south of the Rio Grande with conditions in the District of Columbia, where the franchise is withheld?

"This memorial has been presented to General Huerta, but it is also to be transmitted to Washington. It is the most significant document that the Mexican situation has yet produced. It proves that great American business interests in Mexico are murderous, as well as tyrannical and treasonable. It shows, furthermore, the sort of advice on which the usurper Huerta has been acting.

"What punishment is adequate for such a troop of Benedict Arnolds? Is there a crime that our commercial greed will not condone? Is there an affront

to the American name and the American government that our adventurers in foreign lands will not perpetrate in the hope of gain?"

In the same issue of the paper there was an article in the news columns, which, so far as presently pertinent, reads as follows:

"21 Americans Laud Huerta; Score U. S. Policy in Mexico.

"Group in Mexico City, Headed by Major C. C. Gillette, Retired, Says Peons are Unfit to Vote and Asks Postponement of Election.

"Mexico City, Oct. 10—Provisional President Huerta today listened to the reading of a remarkable document presented to him for his approval by a group of Americans who disapprove of President Wilson's Mexican policy and seek to impress Washington with that fact. * * *

"The peculiar feature of the petition is that it was drafted, in main, by Major Cassius C. Gillette, U. S. A., retired, whose signature also heads the list of signers.

"Gillette, who several years ago resigned from the army to accept a job as engineer in charge of filtration plant construction in Philadelphia, recently has been promoting mining ventures in Mexico. Despite his retirement, he still is subject to discipline by the War Department. Curiosity is expressed here as to how the Secretary of War will regard Gillette's brusque criticism of President Wilson, his commander in chief. * * *"

There was no claim to recover damages on account of this news article.

Howard Taylor, of New York City, for plaintiff in error.

Arthur C. Palmer, of New York City (John Ingle, Jr., of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). At the end of the case defendant's counsel moved for a direction of a verdict upon the ground that the defense of privilege had been made out as a matter of law, and reserved exception to the court's refusal to do so. There were other errors assigned to portions of the charge and to admission or exclusion of testimony. The main proposition contended for by defendant is that the *facts* set forth in the editorial were proved, and that the comment was fair and reasonable, and therefore privileged.

The facts set forth in the editorial, as enumerated in defendant's brief, are these:

1. That a score of Americans in Mexico, of whom plaintiff was one, had admitted that the late President Madero was lynched, and had expressed the sentiment that his death was necessary to the salvation of the country.

2. That these Americans were for the most part concessionaries or representatives of Big Business.

3. That they were led by a retired officer of the United States Army.

4. That the Americans (including plaintiff) were undertaking to instruct the government at Washington to recognize Huerta.

5. That they attribute the attitude of President Wilson to personal prejudice.

6. That they pronounced Mexicans unfit for self-government.

7. That they untruthfully asserted that the United States gives no native a vote in the Philippines.

8. That they compared despotic rule south of the Rio Grande with conditions in the District of Columbia, where the franchise is withheld.

9. That the memorial of the score of Americans (including plaintiff) had been presented to General Huerta and also had been (or was about to be) transmitted to Washington.

It is conceded that the plaintiff was not a retired officer of the United States Army, that he had been an officer thereof, that he had resigned and gone into private business prior to the occurrences referred to, and that he had applied for reinstatement in the Army. The testimony relied on to prove the facts above enumerated consists mainly of several articles, petitions, protests, letters, etc., written by, or at least signed by, the plaintiff. The principal one of these is a memorial to the President of the United States, dated September 27, 1913, and signed by plaintiff and some 20 other American citizens, who state that they have resided in Mexico severally for periods ranging from 6 to 35 years. It sets forth early conditions in Mexico and briefly recites its history down to the advent of Diaz. It reviews Diaz's long administration, and the social, political, and economical condition of Mexico at the date of the memorial. How accurate this part of the memorial may be we do not know; similar statements have been publicly made before and since by persons who had been in Mexico for a longer or shorter time. There is also a savage attack on Madero; whether justified or not the record does not disclose. It ends with the suggestion that it was a good thing for Mexico that he was put out of the way. The rest of the document is a violent criticism of the policy of the present administration of this country in dealing with Mexico since Huerta's advent.

Without going further into any of this literature, it may be assumed for the purposes of this appeal that, with the exception of the statement that plaintiff was an officer on the retired list of the Army, the "facts" enumerated on defendant's brief were proved.

[1, 2] The facts being proved, defendant's counsel contends that the comment on them was privileged, because it was fair and reasonable. "Fair and reasonable" comment, as he defines it, is comment which is "relevant, germane, and relates to the subject in hand." In substance, this is a contention that relevancy is the sole test to be applied. We do not understand this to be the law; there still remains the question whether "the comment went beyond reasonable limits." *Gandia v. Pettingill*, 222 U. S. 452, 32 Sup. Ct. 127, 56 L. Ed. 267. But, even if relevancy were the only test to be applied, the defendant in this case would be no better off. Surely no one would contend that, when the facts showed that a person had been caught passing counterfeit 50-cent pieces, it would be relevant to refer to the occurrence as the "Discovery of Another Jack the Ripper."

We may take a single phrase from the editorial, which, referring to the memorial that was the subject of comment, and to the plaintiff and others who signed it, said: "What punishment is adequate for such a troop of Benedict Arnolds?" We assent to the proposition that this phrase cannot be construed to imply a statement that the troop of signers had offered to sell a fortified post of the United States to the commander of an enemy army for money and other valuable considerations. The trial judge held that the phrase "charac-

terized plaintiff's conduct as traitorous and treasonable, because that is what Benedict Arnold means." With this part of the charge defendant's counsel says "we quite agree," and that construction may be accepted here.

Besides the memorial, other communications from plaintiff to the President and to the Secretary of State were put in evidence. Manifestly he was bitterly opposed to the Mexican policy of the administration and expressed his opposition most vehemently. Apparently neither plaintiff nor the author of the editorial have modeled their style in accordance with the suggestions contained in Whipple's interesting essay on the "Economy of Invective." We have carefully read the memorial and all the other documents, also the testimony of plaintiff, direct and cross, and fail to find anywhere in them any statements which are "traitorous and treasonable." It would involve the prescribing of a novel rule of conduct in this country to hold that, in time of peace, criticism of the policy and conduct of an administration, even though severe, bitter, and vehement, is "traitorous and treasonable." The doctrine of *lèse majesté*, as distinguished from treason as defined in the Constitution, has no place in our political system.

We do not perceive how the circumstance that plaintiff was once an officer of the Army, who, before his deliverances here in evidence, resigned and engaged in private business, changes the situation, nor the further circumstance that he had asked to be reinstated in the army. While he is a private citizen there seems to be no good reason why he should not be treated as such.

[3] The question whether the limits of fair criticism have been transcended may sometimes be a question of law, but ordinarily it is a question of fact for the jury, and it seems to us it was one for the jury in this case. The charge to the jury was exceedingly well stated and involved no error prejudicial to defendant. Indeed, although a few of the assignments of error refer to it, defendant's counsel frankly admits that it was fair and impartial. The only fault he finds with it is that it should have ended with a direction to find for the defendant, which he asserts was its "logical conclusion." That proposition has been disposed of *supra*.


[4] We do not think it necessary to refer to the few alleged errors in admission or rejection of testimony; they seem to us unimportant. The finding of the jury as to the amount of damages cannot be disturbed by this court.

The judgment is affirmed.


HOGG v. MAXWELL et al.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 21.

PERPETUITIES 4—SUSPENSION OF ABSOLUTE OWNERSHIP—TRUSTS.

A testator in the fifth clause of his will gave his residuary estate to a trust company, in trust to invest and keep it invested, pay the income to his widow and daughters during the widow's lifetime, and upon her death or remarriage to divide it into as many equal shares as there might be daughters living and issue of daughters dead, and thereafter pay the income of the share of each daughter to her. The seventh clause appointed executors, and authorized and empowered them to lease or sell all or any portion of the real estate of which he might die seised as should seem best in their discretion, and execute and deliver good and sufficient leases and conveyances, to retain any securities and investments, and turn over all or any part thereof to the trustee, and empowered the trustee to accept and hold any such securities and investments, and apportion them among the different trust funds. It further directed that certain securities should not be disposed of by the executors or the trustee during the lifetime of the wife without the consent of the surviving children, or after her death or remarriage by the trustees without the consent of the beneficiary of the fund to which they might be apportioned. It further authorized and empowered the executors and trustee to invest the moneys of the estate in certain railroad bonds and stocks. The statutes of New York provide that the absolute ownership of personal property shall not be suspended by any limitation or condition for longer than during two lives in being at the death of the testator. *Held* that, while the words "executors and trustees" repeatedly appeared in conjunction, it was not intended to give the executors any other or different status from what they would have as executors merely, and the will did not violate the statute, as statutes against perpetuities do not overthrow testamentary provisions because of the time elapsing during the necessary administrative work preliminary to the distribution of the estate among legatees.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. 4.]


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

Bill by Caroline F. Hogg against Lascelles C. Maxwell and others. Decree for defendants, and complainant appeals. Affirmed.

The suit is brought by the widow of Charles B. Hogg, a resident of New York state, to procure a construction of his will. The plaintiff contends that a certain trust created by the fifth clause of said will and the remainders limited upon it are void under the statutes of the state of New York against perpetuities.

The following is the opinion of Evans, District Judge, in the court below:

The complainant insists that the fifth and seventh clauses of the will of her late husband, Charles B. Hogg, are void under the statutes of New York against perpetuities and the suspension of the right of alienation. It is not altogether easy to grasp the ground of the argument in favor of complainant's contention, but it seems to be that the will makes it impossible for the vesting of certain estates, meant to be given the testator's grandchildren upon the death of the complainant and the testator's daughters, respectively, to

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

become effective upon the death of two persons in being at the time of the testator's death and the coming into possession by the United States Trust Company, as trustee, during which period nothing could come to the grandchildren or their respective mothers, and it is argued, therefore, that the bequests provided for in the fifth and seventh clauses of the will are not so made as to become effective upon the termination of two lives in being, but upon some other intervening contingency not embraced in the statutes.

This contention is largely based upon the fact that the coming into possession by the trustee must be suspended and delayed by the work of the executors, who are to administer the estate and reduce it to the condition in which it is required to be turned over to the trustee for the purposes provided by the will. Complainant's counsel has cited certain authorities, such as *Matter of Wilcox*, 194 N. Y. 288, 87 N. E. 497, *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. 585, *Morse v. Morse*, 85 N. Y. 53, *Smith v. Edwards*, 88 N. Y. 92, and others of similar character; but we have not been convinced that they apply to or should control the case in hand. The Legislature must be presumed to have had in contemplation the fact that inevitably there would in every case be required more or less time to prepare an estate for distribution by the ascertainment and settlement of the testator's indebtedness, and it would seem very clear that the statutes under consideration had reference to the *termination* of certain possible long periods, and that in legislating against perpetuities the lawmaking power did not intend to overthrow testamentary provisions such as appear here upon the ground that at the *beginning* it would take some months to do the necessary administrative work preliminary to the distribution of the estate among legatees. It must be supposed that this necessary status was not an evil to be remedied by legislation.

But no elaboration of our views seems to be at all necessary as we are clearly of the opinion (1) that the assailed provisions of the will are not open to the objections made; and (2) that the statutes relied upon do not admit of the interpretation we have been urged to adopt. Nor is it necessary to comment upon the defense of prior adjudication, for while it would seem very probable that the state courts, in considering the clauses of the will now again brought in contestation, have entertained views similar to those we have expressed, nevertheless this case will be well decided if, independently of the question of *res adjudicata*, our ruling that the fifth and seventh clauses of the will are valid be correct.

It results that a decree must be entered dismissing the bill, with costs.

Wood, Cooke & Seitz, of New York City (William G. Cooke and Howard O. Wood, both of New York City, and Howard Chipp, of Kingston, N. Y., of counsel), for appellant.

Stewart & Shearer and Henry W. Simpson, all of New York City (William A. W. Stewart and George L. Shearer, both of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The nub of the case is well stated by Judge Evans, as follows:

"In legislating against perpetuities the lawmaking power did not intend to overthrow testamentary provisions such as appear here upon the ground that at the beginning it would take some months to do the necessary administrative work preliminary to the distribution of the estate among legatees. It must be supposed that this necessary status was not an evil to be remedied by legislators."

This is in accord with the views of the state courts expressed in a suit between the same parties to construe this same will. In that suit it was prayed that the trust attempted to be created by the fifth clause of the will and the remainders limited thereon be adjudged void. The

Supreme Court, Special Term, stated the contention of the plaintiff in that suit as being:

"That the trusts created by the will are invalid because the estate does not vest in the trustee in possession immediately on the death of the testator but is postponed while it is being administered by the executors. The plaintiff also claims that all the contingencies on the happenings of which the ultimate estates in remainder vest, may happen while the property of the estate is in the hands of the executors, and the time allowed by law for the suspension of the power of alienation may pass before the trust estate comes into possession of the trustee."

This is precisely the argument here presented. The Special Term, the Appellate Division (151 App. Div. 514, 135 N. Y. Supp. 928, and 151 App. Div. 885, 136 N. Y. Supp. 1137), and the Court of Appeals (206 N. Y. 743, 100 N. E. 1128) all decided adversely to the plaintiff.

The fifth clause is too long to quote; it gives all the residue of testator's property, real and personal (after payment of certain specific legacies), to the United States Trust Company, in trust to invest and keep invested, to pay out of the income to the widow (until death or remarriage) \$5,200 annually, to pay the balance of income annually in equal shares to testator's three daughters (with the usual provision for surviving children of deceased daughters); as to the principal of the trust fund, upon death or remarriage of the widow, to divide the same into as many equal shares as there may be daughters living and issue of daughters dead; thereafter during the life of any then surviving daughter to pay the income of her share to her, and at her death to pay over the principal to her issue surviving. There is the usual provision to cover the case of a daughter dying without issue.

Plaintiff concedes that this is a perfectly valid clause, and that, if the seventh clause of the will had merely nominated and appointed executors, this suit would not have been brought. She seeks to sustain the bill on what seems to us a strained and unreasonable construction of this seventh clause. That clause reads as follows:

"Seventh. I hereby nominate and appoint my sons-in-law Lascelles C. Maxwell and Thomas Y. Crafts, both of the borough of Brooklyn, city and state of New York, to be the executors of this will, and I hereby authorize and empower them and the survivor of them to lease or sell all or any portion of the real estate of which I may die seised, at such times and in such manner as shall seem best in their discretion, and to execute and deliver good and sufficient leases and conveyances therefor; and I also authorize and empower my said executors to retain any securities or investments in my possession at the time of my death and to turn over all or any part of such investments to my said trustee, and my said trustee to accept and hold any such securities or investments and to apportion them among the trust funds hereinbefore created at the respective market prices of such investment when so turned over or apportioned; and I further direct that the securities of the Standard Oil Company which may be held by me at the time of my death shall not be disposed of by either my executors or my said trustee during the life of my above mentioned wife without the consent of all my children surviving at the time and that after the division of my property upon the death or remarriage of my said wife, that none of such Standard Oil Securities shall be disposed of by my trustees without the consent of the beneficiary of the fund to which the same may respectively be apportioned; I further authorize and empower my said executors and my said trustee to invest the moneys of my estate which may come into their hands in the first mortgage bonds and stocks of any railroad company owning or operating a railroad within the United States

of America which has paid its dividends of not less than four per centum per annum upon its capital stock for not less than ten consecutive years immediately preceding such investment, as well as in the securities authorized by law."

The statutes of New York provide that the absolute ownership of personal property shall not be suspended by any limitation, or condition for a longer period than during the continuance and until the termination of not more than two lives in being at the death of the testator. That is the period of suspension provided by the fifth clause with its express trust. The theory of plaintiff is that the seventh clause creates another trust estate vested in the executors, which estate may possibly unlawfully postpone the taking effect of the United States Trust Company's trust as well as the remainders limited to the issue of the daughters.

The draughtsman would have produced a more carefully articulated structure, if he had inserted two clauses (instead of the seventh single clause), one dealing with special powers or authorization to the executors, the other dealing with special powers or authorization to the trustee. It is generally desirable to provide some such authorization as to sale or leasing, as to retention of investments, as to distribution of designated investments, as to investment and reinvestment of money realized from sales. In this case it was the wish of the testator to give the same power and authority in these matters to the trustee that he gave to the executors, so the draughtsman undertook to make provision for both these grants of power in a single clause. In consequence the words "executors and trustees" repeatedly appear in conjunction; but it seems to us perfectly manifest that there was no intention to give the executors any other or different status from what they would have as executors merely, on whom certain authority as to marshaling and investments was given, without the exercise of which administration would prove more burdensome to the estate.

We concur with Judge Evans in his reasoning and conclusion.
The decree is affirmed, with costs.

GRAND TRUNK RY. CO. v. UNITED STATES.

(Circuit Court of Appeals. Seventh Circuit. October 5, 1915. Rehearing Denied January 3, 1916.)

No. 2166.

1. CARRIERS \Leftrightarrow 37—CONFINEMENT OF LIVE STOCK—LIABILITY FOR PENALTIES.

Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 (Comp. St. 1913, § 8651), provides that no railroad, whose road forms any part of a line of road over which animals shall be conveyed from one state or territory into or through another state or territory, shall confine them for longer than 28 consecutive hours without unloading them for rest, water, and feeding. A shipment of horses from a point in Ontario, Canada, to a point in British Columbia, passing through Michigan and Illinois en route, was confined in excess of 28 hours while being transported from a point in Michigan into and through the state of Illinois to a point therein where the animals were

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

unloaded. *Held*, that this constituted a violation of the statute, the point of origin of the shipment and its final destination not being material.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ☞37.]

2. PLEADING ☞375—CONFINEMENT OF LIVE STOCK—ACTIONS FOR PENALTIES.

Under Act June 29, 1906, prohibiting the confinement of live stock in cars for more than 28 consecutive hours without unloading, unless prevented by storm or by other accidental or unavoidable causes, the existence of storms or other unavoidable causes is a matter of defense, and in an action for the statutory penalty an allegation in the declaration negating their existence was surplusage, not requiring to be proved.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1224; Dec. Dig. ☞375.]

3. PLEADING ☞63—STATUTES—EXCEPTIONS AND PROVISOS.

Whether or not an exception or proviso in a statute need be pleaded depends upon its separableness from the clause describing the offense—not separableness in locality, but in respect of its being a part of the definition of the offense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 10, 133; Dec. Dig. ☞63.]

4. CARRIERS ☞37—CONFINEMENT OF LIVE STOCK—LIABILITY FOR PENALTIES —“WILLFULLY.”

Act June 29, 1906, provides that any railroad company which knowingly and “willfully” fails to comply therewith shall for every such failure be liable for a specified penalty. *Held*, that an evil intent is not required, and it is a violation for defendant purposely or intentionally to fail to obey the statute, having knowledge of the facts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ☞37.]

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

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

Action for statutory penalties by the United States against the Grand Trunk Railway Company. Judgment for the United States, and defendant brings error. Affirmed.

The United States, defendant in error, brought this suit against plaintiff in error to recover a penalty for violation of the act of June 29, 1906 (U. S. Comp. Stat. 1901, Supp. 1911, p. 1341), commonly known as the Twenty-Eight Hour Law, and being “An act to prevent cruelty to animals while in transit,” etc. The declaration is in one count, and charges that plaintiff in error knowingly and willfully confined a shipment of horses, loaded at Lucknow, in Ontario, Canada, transported from that point over its road through Michigan into Illinois, and destined to a point in British Columbia, for a period exceeding 28 hours, without unloading, in accordance with the requirements of the statute. The cause was submitted to the court without a jury, upon a stipulation of facts in substance as follows: The shipment, consisting of two cars containing 17 horses each, was loaded at 12 o'clock noon on February 1, 1911, at Lucknow, in Ontario, Canada, and left that place on that date; it reached Port Huron, Mich., at 12:50 a. m. on February 2, and Elsdon, Ill., on February 3, where it was unloaded at 11:30 a. m. on that day, making a total period of 46 hours and 30 minutes from the time it left Lucknow. The point of destination was New Westminster, British Columbia, in the Dominion of Canada, and the shipment was unloaded for the purpose of watering, feeding, and rest-

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

ing the animals at Elsdon, Ill. It was a continuous, through shipment between the above two Canadian points by connecting carriers, of which plaintiff in error was the originating carrier and carried the animals in question from Lucknow, Ontario, to Elsdon, Ill., on its own road. On one of the cars there was a 36-hour request. Upon the evidence thus presented, the court entered judgment against plaintiff in error in the sum of \$500, to reverse which judgment this writ of error was sued out.

George W. Kretzinger, Jr., of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Frederick Dickinson, both of Chicago, Ill., for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The pertinent sections of the statute under which this suit was instituted, omitting the portions not essential to the consideration of the case, provide:

"That no railroad * * * whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one state or territory or the District of Columbia into or through another state, or territory, or the District of Columbia, * * * shall confine the same * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. * * * That any railroad * * * who knowingly and willfully fails to comply with the provisions [of the act] shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars."

[1] It is plaintiff in error's contention that the provisions of the statute are applicable only to shipments of live stock originating within the United States; that since the point of origin of the shipment here involved was in Ontario, Canada, there was no violation of the act, notwithstanding the fact that the period of confinement while passing through Michigan and Illinois en route to final destination in British Columbia, as to one of the cars, exceeded the 28-hour limitation.

We find no difficulty in applying the act to the conceded facts in this case, and in doing so it is unnecessary to give to any of the words of the act a meaning different from their fair and obvious signification. Whether or not the period of time which intervened the initial shipment from Lucknow, Canada, and the arrival of the stock car at the Michigan line, should be taken into consideration, need not now be passed upon. Plaintiff in error carried the animals here involved over its road from the state of Michigan into and through the state of Illinois, and confined them without rest, food, or water beyond the permitted number of hours while they were being thus conveyed. The point of origin of the shipment and its final destination are therefore, in our opinion, not here material. There is a wide difference between the provisions of the Interstate Commerce Act and its amendments in respect to the circumstances of this case, and the provisions of the present act. Decisions holding that shipments in bond from a point in a foreign state through states or territories of the United States to an-

other foreign point do not come within the provisions of the Commerce Act are not pertinent. The object of the latter act is not thwarted by such a shipment, nor are the interests of the people of the United States affected thereby; whereas, the infliction of the cruelty upon animals prohibited by the statute, within the United States, is a violation of the purpose of the 28-hour law whenever it occurs within the jurisdiction of the federal government. The construction contended for by plaintiff in error would enable a foreign shipper to transport stock from Windsor, Canada, to Mexico, through the States without resting, feeding, or watering the same, and thereby defeat the purpose of the statute. "A statute, penal or otherwise," the Supreme Court has said, "must be construed with reference to the object in view, and never so interpreted as to defeat its own purpose if any other reasonable meaning is possible." *The Emily*, 9 Wheat. 381, 6 L. Ed. 116.

[2, 3] It is further urged that no case was made out against plaintiff in error, because the negative allegation of the declaration with respect to the absence of storms or other unavoidable causes excusing compliance with the act was not proved by affirmative evidence, and that there is no showing that the statute was willfully violated. Whether or not an exception or proviso in a statute need be pleaded depends upon its separableness from the clause describing the offense—not separableness in locality, but in respect of its being a part of the definition of the offense. As was said by the Supreme Court in *United States v. Cook*, 17 Wall. 168, 176, 21 L. Ed. 538:

"If the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is a matter of defense and must be shown by the other party, though it be in the same section or even in the succeeding sentence."

The exception here falls clearly within the latter class, and therefore the allegation in the declaration negating the exception was mere surplusage, and proof in support thereof was unnecessary. The Circuit Court of Appeals for the First Circuit, in *New York Cent. & H. R. R. Co. v. United States*, 165 Fed. 833, 91 C. C. A. 519, has held that the government need not allege or prove the nonexistence of accidental or unavoidable causes excusing compliance with the provisions of the 28-hour law. See also *United States v. Great Northern Ry. Co.*, 220 Fed. 630, 136 C. C. A. 238.

[4] The word "willfully," as used in the act, has a number of times engaged the attention of the courts, and has quite uniformly been held not to require an evil intent, but only that the defendant should have purposely or intentionally failed to obey the statute, having knowledge of the facts. *New York Cent. & H. R. R. Co. v. United States*, supra; *St. Louis & S. F. R. Co. v. United States*, 169 Fed. 69, 94 C. C. A. 437; *United States v. Sioux City Stockyards Co.* (C. C.) 162 Fed. 556; *United States v. Union Pacific Ry. Co.*, 169 Fed. 65, 94 C. C. A. 433. In *St. Joseph Stockyards Co. v. United States*, 187 Fed. 104, 110 C. C. A. 432, and *C. & Q. Ry. Co. v. United States*, 194 Fed. 342, 114

C. C. A. 334, cited by plaintiff in error, "willfully" is defined as meaning:

"Purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."

We think the evidence in the present case clearly shows such knowledge of the facts on the part of plaintiff in error and such indifference to the requirements of the statute as to constitute a willful violation thereof.

The judgment of the District Court is affirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

In re OPPENHEIM.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 20.

RECEIVERS ⇨147—DISTRIBUTION OF ESTATE—RETENTION OF MONEY TO AWAIT JUDGMENT IN ANOTHER ACTION.

A federal court *held* to have properly denied a petition for an order requiring its receiver of an insolvent corporation to retain a sum in his hands to await the determination of an action brought by petitioner in a state court to recover damages from the corporation for having procured his disbarment by perjured testimony, where petitioner was not a party to the record and had filed no claim against the estate, although the time fixed for filing claims had long expired.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 257-259; Dec. Dig. ⇨147.]

Coxe, Circuit Judge, dissenting.

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

Suit in equity by the Pennsylvania Steel Company and another against the New York City Railway Company and others. In the matter of the application of Benjamin Oppenheim for an order against Douglas Robinson, as receiver of the Metropolitan Street Railway Company. From an order denying the petition, petitioner appeals. Affirmed.

B. E. Messler and Johnston & Johnston, both of New York City (Lewis Johnston, of New York City, of counsel), for appellant.

Masten & Nichols, of New York City (A. H. Masten and Frederick W. Kobbé, both of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. Benjamin Oppenheim filed a petition in the District Court praying that the receiver of the Metropolitan Street Railway Company—

"be required to retain in his hands sufficient moneys to pay any judgment which may be recovered by the said Benjamin Oppenheim against the said

Metropolitan Street Railway Company or the other defendants in said action brought by him in the New York Supreme Court, New York county, until the final determination of said action. The sum retained should be \$300,000."

The cause of action sued on in the Supreme Court was that the Metropolitan Company and certain of its agents, officers, and directors had maliciously conspired to have the plaintiff disbarred on the false charge, sustained by bribed witnesses, that he had himself suborned witnesses in a negligence action against the company in which he was attorney for the plaintiff. The chronology is as follows:

March 23, 1901, upon charges filed by the Metropolitan Company, the petitioner was disbarred by the Appellate Division of the Supreme Court, First Department; in June, 1910, the petitioner discovered the existence of documentary evidence tending to prove that the witnesses against him in the disbarment proceeding had been bribed and suborned to commit perjury by the Metropolitan Company and certain of its agents, officers, and directors; May 26, 1911, the petitioner moved in the Appellate Division to have the order of disbarment vacated; February 7, 1913, the order was vacated and the petitioner reinstated; September 24, 1914, the petitioner began the suit in the Supreme Court; November 13, 1914, he filed this petition.

The court below, January 12, 1910, made a general order that no claim should be filed against the estate of the Metropolitan Company after March 1, 1910, and that they should be filed nunc pro tunc as of January 15, 1908. The District Court denied the petitioner's motion, on the ground that his claim was contingent on January 15, 1908, and therefore not provable. We shall affirm the order on somewhat different grounds.

The petitioner has never filed a claim in this proceeding, nor even asked permission to do so. He has selected another and different forum in which to assert his rights. In this proceeding he is an entire stranger, and has no standing to ask that the winding up of the estate be delayed to await the outcome of his suit in the state court. Even if he had a standing, the disposition of his petition by the court below was a matter of discretion, which is not appealable, unless the discretion was abused.

We see no abuse of discretion. Any claim that the petitioner had was complete when he was disbarred March 23, 1901, and action thereon was barred by the statute of limitations (section 382 of the New York Code of Civil Procedure) six years thereafter, viz., March 23, 1907, or ten years thereafter, viz., March 23, 1911 (section 388). Recovery would therefore seem to be impossible. He did not need to await bringing suit until the order of the Appellate Division disbarring him had been vacated. That was not *res adjudicata* between him and the Metropolitan Company. It was in a proceeding instituted, not for the benefit of the Metropolitan Company, but for the public.

The petitioner's claim is not for vindication, which he has accomplished by his proceedings in the Appellate Division, but for money damages, and should be treated like all other money claims. His conduct has been marked by laches throughout. He waited nearly a year after discovering the evidence on which he now relies before

applying for reinstatement to the Appellate Division. After he was reinstated, he waited over a year and a half before bringing suit. We can see no equity in delaying the winding up of this estate, now near at hand, or in taking out of it, at the expense of diligent creditors, a fund to await the determination of his suit in another forum.

The order is affirmed.

On appeal from an order of the District Court of the United States for the Southern District of New York, which denied the application of Benjamin Oppenheim, intervening petitioner, for an order directing Douglas Robinson, as receiver of the Metropolitan Street Railway Company, to retain in his hands sufficient money to satisfy any judgment which said Oppenheim may recover in an action now pending in the Supreme Court of New York against said railway company and the individual defendants who are alleged to have been directors and employes of the said railway company at the times the acts complained of took place. Oppenheim alleges that the defendants on or about January 5, 1900, falsely and maliciously preferred charges of misconduct against him, accusing him of having caused false testimony to be given in an action to recover damages brought against the railway company by Harriet Nugent, an infant, which resulted in a verdict in her favor for \$5,000; that as a result of charges against him he was disbarred.

COXE, Circuit Judge (dissenting). This action is *sui generis* and it is altogether improbable that another similar controversy will arise. There is, therefore, little danger that a decision which permits a claimant, so seriously injured as was Oppenheim, to receive some redress for his wrongs will be "recorded for a precedent" in the case of claims susceptible of easy proof.

The appellant is not making an extraordinary or unreasonable demand of the court; all he asks is that, pending the proof of his claim in the state court, the entire property of the railway company shall not be distributed to other creditors, rendering any judgment he may recover a mere *brutum fulmen*. The petitioner seeks by this proceeding redress against the Metropolitan Street Railway Company and its receiver for one of the most grievous wrongs which can befall a reputable member of the bar, *viz.*, disbarment. He was charged with having procured perjured testimony to be given in an action against the defendant Railway Company for damages which action resulted in a verdict of \$5,000 for the plaintiff. The referee to whom the matter was referred found the appellant guilty and he was disbarred by an order of the Appellate Division of the Supreme Court on March 22, 1901. On February 7, 1913, he was reinstated, having at last discovered proof of the source of the perjured testimony. During this period of twelve years he suffered the ignominy of the judgment against him. His principal means of livelihood was taken from him, as he was unable to practice his profession. His vindication came when it was discovered that the testimony on which the decree of disbarment rested was false and was procured by the agents of the railway,

knowing it to be false. The general order fixing the last day for filing claims against the Metropolitan Company provided that they must be presented to the special master on or before January 15, 1908. The petitioner was not reinstated until February, 1913, five years thereafter.

The claim arose in March, 1901, when the petitioner was disbarred, it existed in January, 1908, but it could not be asserted or presented then for lack of proof which the petitioner was unable to procure at that time. If what this petitioner alleges be true, his life has been wrecked during its best years by false testimony brought against him by the Metropolitan Street Railway Company. He has known of his innocence, but only recently, and in an unexpected manner, has he been able to secure the proof. The delay was not due to his negligence or lack of effort. In such circumstances every consideration of fairness demands that a just and meritorious claim should not be lost in a maze of technicalities. In fact it would seem that all of those indirectly responsible for this wrong should be glad to see that some substantial reparation is made. The claim is not a contingent claim but one depending upon proof which has only recently been discovered. On and prior to January 15, 1908, the appellant knew that he had a claim but he could not assert it for lack of proof. Within a reasonable time after his vindication came he asked relief in the District Court. He could not have proved his claim prior to January 15, 1908, because it was not until five years afterwards that he was reinstated as a lawyer. Until he was vindicated by the Appellate Division it is idle to talk of laches in presenting the claim. Even now the appellant does not ask that anything be paid him until he has established his claim and the amount of his damages by competent proof. All he asks is that when the claim is liquidated he will not be met by the statement that the receiver has no funds.

If what he asserts be true he has been grievously wronged by the Metropolitan Street Railway Company acting through its attorneys and agents. He asks for an opportunity to present his case to a jury and hopes to recover some damages for the ignominy he has suffered and the pecuniary loss sustained by reason of his being prevented from practicing his profession during twelve of the best years of his life. He is met by a plea that his claim is barred, that he has waited too long to assert it and that in any event it will be inconvenient for the receiver to keep a fund on hand to meet a judgment which he may recover. To my mind this is not the time nor is this the tribunal to settle these questions. If the petitioner has no case the trial court will so say, if on the other hand he has a valid cause of action he should not, when he seeks to enforce it, be met with the statement that, knowing of his claim, this court and the District Court permitted the receiver to divest himself of every vestige of property which might satisfy the judgment.

I appreciate the necessity of having the receivership terminated as soon as possible, but I cannot believe that it would seriously embarrass the receivership if a reasonable sum were set aside for a short period

to meet any judgment which the petitioner may recover. Even were this otherwise, I think matters based on convenience should be subordinate to matters based on right.

KALISTHENIC EXHIBITION CO. Inc., v. EMMONS, Collector.

(Circuit Court of Appeals, First Circuit. January 27, 1916.)

No. 1152.

CUSTOMS DUTIES Ⓒ22—PROHIBITION OF IMPORTATION—STATUTORY PROVISIONS.

Negatives of a prize fight, from which positive films are to be made and exhibited before the members and guests of clubs, societies, associations, and athletic clubs, with no limitation as to the number of guests, is within the inhibition of Act July 31, 1912, c. 263, 37 Stat. 240, as supplemented by the Act of October 3, 1913, c. 16, par. 380, 38 Stat. 151.

[Ed. Note.—For other cases see Customs Duties, Cent. Dig. § 18; Dec. Dig. Ⓒ22.]

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Suit by the Kalisthenic Exhibition Company, Incorporated, against Willis T. Emmons, Collector. From a decree (225 Fed. 902) dismissing the bill, complainant appeals. Affirmed.

Robert T. Whitehouse, of Portland, Me. (Woodman & Whitehouse, of Portland, Me., Loucks & Alexander, of Schenectady, N. Y., Tyler, Corneau & Eames, of Boston, Mass., and McLaughlin & Stern, of New York City, on the brief), for appellant.

John F. A. Merrill, U. S. Dist. Atty., of Portland, Me. (Arthur Chapman, Asst. U. S. Dist. Atty., of Portland, Me., on the brief), for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. The statutes on which this case rests are the Act of July 31, 1912, 37 Stat. 240, and the Customs Act of October 3, 1913, c. 16, par. 380, 38 Stat. 151. The parts necessary to be cited from the earlier act are as follows:

"It shall be unlawful for any person * * * to bring or cause to be brought into the United States from abroad any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition." Section 1.

The statute contains other language intended to prohibit the circulation in any way, or the exhibition of "any matter or thing herein forbidden to be deposited for mailing, delivery or carriage in interstate commerce," and closes with a severe penalty for its violation.

The Customs Act of October 3, 1913, chapter 16, paragraph 380, 38 Stat. 151, is as follows:

"Photographic cameras, and parts thereof, not specially provided for in this section, photographic dry plates, not specially provided for in this

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

section, 15 per centum ad valorem; photographic-film negatives imported in any form, for use in any way in connection with moving-picture exhibits, or for making or reproducing pictures for such exhibits, exposed but not developed, 2 cents per linear or running foot; if exposed and developed, 3 cents per linear or running foot; photographic-film positives, imported in any form, for use in any way in connection with moving-picture exhibits, including herein all moving, motion, motophotography or cinematography film pictures, prints, positives or duplicates of every kind and nature, and of whatever substance made 1 cent per linear or running foot: Provided, however, that all photographic films imported under this section shall be subject to such censorship as may be imposed by the Secretary of the Treasury."

A question is fairly made whether the earlier act covers negative films, which class of films are involved in this case; but the later act clearly applies to both negative and positive films, and by its closing provision apparently bars importations except subject to censorship; and, as no censorship has been imposed which reaches this case, the bar therefor continues, so far as we perceive.

This bill was brought by the importer to restrain the collector of the port of Portland and Falmouth from refusing entry of the films in question. In view of the decision of the Supreme Court in *Weber v. Freed*, 239 U. S. 325, 36 Sup. Ct. 131, 60 L. Ed. —, passed down December 13, 1915, that court laid down a rule sufficiently broad to determine absolutely the proposition that, so far as we have cited these statutes, the power of Congress to enact them was absolute; and at the present they stand effectually in the way of any importations which are prohibited by their spirit and letter.

The assignment of alleged errors on this appeal is, on well-settled rules of practice, too general to be effective, except on the single proposition that the film here was not within the inhibition of the statute, because it was a negative film, and not a positive one. The later act effectually bars importations of either class of films pending censorship to be imposed by the Secretary of the Treasury, and none has been imposed. It is true the assignment of alleged errors specifically covers the proposition that the film in the present case was not one which is "designed to be used, or which may be used for purposes of public exhibition," within the terms of the act of July 31, 1912. Perhaps, on a fair construction of the legislation to which we have referred, the film could not be imported for any purpose pending the establishment of a censorship by the Secretary of the Treasury; but in the present case the District Court decided that this negative film might "at least be used for purposes of public exhibition." The illustrations given by the District Court in that connection firmly establish the correctness of this conclusion, and that the conclusion was correct is also established by the following extract from the testimony of Harry H. Frazee, executive and managing officer of the complainant corporation, and its principal witness. After some hesitation on the part of the court and counsel as to the proper method of ascertaining what were the purposes of the complainant corporation or its officers or agent, in connection with this film, the following occurred:

"The Court: You may now ask him his own intention; he is the manager.

"Q. What is your own intention and purpose in regard to the use of these

films, or any positives made from the films, as manager of the corporation? A. My intention is that they shall be exhibited for private exhibitions before clubs, societies, associations, and athletic clubs.

"Q. With what contractual arrangements with the clubs? A. A flat sum for each exhibition.

"Q. That is, you agree to exhibit for a flat sum to a club? A. A picture and an operator, and they pay a flat sum for them, and they have the absolute charge.

"Q. And under this arrangement the exhibition is to the members of the clubs and such guests as they may invite? A. Yes.

"Q. Is it your purpose to attempt to use the negatives themselves for any purposes of exhibition directly? A. No, sir.

"Q. What do you propose to do? A. Have a positive made from the negative. You couldn't use the negative.

"Q. (By the Court). To have a positive made from the negative and exhibit to the clubs and their guests? A. Yes, sir."

Following this is some discussion with the witness as to the amount involved in exhibitions, private or public. As we understand the testimony, the amount involved in a private exhibition for clubs "at the very least conservative estimate would be \$100,000 at the present time"; while "the value of the unlimited right of public exhibition would be \$1,000,000 at least." In any fair view of the case, what the exhibitors might undertake to describe of the various methods of exhibition intended, the one as private and the other as public, it is plain that in any view of the facts, considering that the clubs would limit admissions only according to their own determinations, the exhibitions fairly intended, or fairly possible or probable, were practically unlimited; and, any fair construction on exhibitions made under the circumstances described, and yielding so large returns, could not in any fair sense be regarded as other than public.

It might well be said that the purpose of the importation was in violation of the original statute, although the importation was of merely a negative film, even if it could be said that the statute from any point of view made or intended to make a distinction as between the negative film and the positive film. The language of the act is very broad; so broad that it relates to films, not only designed, but which may be used, for purposes of public exhibition. The production of a negative film, and its importation, is inevitably only the first step in the final use as a positive film. The whole, from the beginning to the end, is only a development from taking the negative film to the final exhibition of the positive film. The negative film has no practical use of value, as the evidence shows, except to be developed in a positive form and exhibited in connection therewith. The whole is a process in which every step counts. It is only fair to say that the negative film is, it is true, the first step, but a necessary step, in the exhibition by the use of the positive film, and naturally and inevitably leads up to that exhibition and that use, and in a fair sense of the expression the negative film is obtained only for the purpose of setting in motion a progress of events which result in the final exhibition by the use of the positive film. However, it is probable that the two statutes must be construed together, to be operative and to accomplish any purpose whatever, and therefore it is plain that the film in any form, whether positive or negative, is barred until there has been

some position action on the part of the Treasury Department to regulate its use in some manner which the public morals justify and support.

The decree of the District Court is affirmed, and the appellee recovers his costs.

DODGE and BINGHAM, Circuit Judges, concur in the result reached in the above opinion, believing the conclusion of the District Court, that the film in question is within the inhibition of the statute, to be correct.

FIDELITY & DEPOSIT CO. v. UNITED STATES, to Use of FOWDEN
(WITMAN, Intervener).

(Circuit Court of Appeals, Third Circuit. December 31, 1915. Rehearing
Denied January 31, 1916.)

No. 2006.

1. UNITED STATES \Leftrightarrow 67—ACTIONS ON CONTRACTORS' BONDS—PLEADING—PRESUMPTIONS.

The statute relative to suits on government contractors' bonds provides that, if the government does not sue within six months, other claimants shall, upon application therefor and furnishing an affidavit, be furnished with a certified copy of the contract and bond, upon which they shall have a right of action. On March 13, 1914, a contractor settled with the government, and on September 12th the government certified to the accuracy of a copy of the bond and contract, upon which a subcontractor on February 25, 1915, brought suit. W. intervened in such suit and filed a statement of his claim, upon which judgment was rendered, and the surety brought error, contending that the failure of the statement of claim to allege that the government did not sue was a fatal defect. The surety furnished no information to show that the government did sue. *Held* that, as the conclusion was almost irresistible that the government did not sue, the surety's contention was so purely technical that it was fully met by the presumption in favor of regularity, which would justify the assumption that the original plaintiff alleged all necessary facts to show that the suit was not premature, especially as the fact that the government certified to the accuracy of the copy of the bond and contract on September 12th was not conclusive that the copy was "furnished" the original plaintiff before the expiration of the six months.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. \Leftrightarrow 67.]

2. UNITED STATES \Leftrightarrow 67—ACTIONS ON CONTRACTORS' BONDS—RECOVERY OF INTEREST.

Where the penalty of a government contractor's bond was sufficient to pay all claims against the contractor, a claimant was entitled to recover such interest as might have been recovered against the contractor.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. \Leftrightarrow 67.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by the United States, to the use of William T. Fowden, against the Fidelity & Deposit Company, in which J. J. Witman intervened. Judgment for Witman, and defendant brings error. Affirmed.

Benjamin A. Stansburg, of Baltimore, Md., and Stanley Williamson, of Philadelphia, Pa., for plaintiff in error.

George H. Stein, of Philadelphia, Pa., and Harvey F. Heinly, of Reading, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In August, 1912, the Fidelity & Deposit Company of Maryland became surety in the penal sum of \$18,000 on the bond of J. W. Emery, who had contracted to do certain work for the government. Complying with the federal statutes, the bond provided, *inter alia*, that Emery should "promptly make payment to all persons supplying labor or materials in the prosecution of the work contemplated by said contract." Emery settled finally with the government on March 13, 1914, but on that date he was (and still is) indebted to several subcontractors that had furnished materials. Among these were William T. Fowden, who brought suit on the bond on February 25, 1915, and J. J. Witman, who intervened in that suit on February 26. Afterward Witman filed a statement of his claim, the Fidelity Company filed an affidavit of defense thereto, and the District Court, considering the affidavit insufficient (except to a small part of the claim), entered judgment in Witman's favor for \$1,161.56, of which \$119.94 is interest. This writ of error challenges the correctness of that judgment.

[1] 1. The principal point insisted on by the surety is that the suit was prematurely brought. The foundation for the argument is this: The act of Congress provides inferentially that during the period of six months after the date of final settlement no one except the government may sue on a contractor's bond. If the government does sue within that period, other claimants may intervene (subject to the government's priority) and may have their rights adjudicated in the same suit. If the government does not sue within that period, the field is open, and other claimants "shall upon application therefor and furnishing affidavit," etc., "be furnished with a certified copy of said contract and bond upon which he or they shall have a right of action," etc. Now, it appears in the record before us that March 13, 1914, was the date of final settlement with Emery. Accordingly the government had the exclusive right to sue until September 13, inclusive; but, as Witman's statement does not aver in terms either that the government sued or did not sue, the surety alleges the absence of such an averment to be a fatal defect.

It is to be regretted that the controversy was not disposed of in the court below by a brief amendment, but as this was not done we must take the case as we find it. We should be more impressed with the surety's argument, if there was room for a real doubt concerning the facts; but we regard the position as purely technical, because for two reasons the conclusion is almost irresistible that no suit was ever brought by the government. The first reason is because under date of September 12, when the six months period was on the very point of expiring, the government certified to the accuracy of a copy of Emery's

bond and contract, and this would scarcely have been done, if suit had already been brought or was about to be brought. And the second reason is even stronger: The present suit was not brought during the six months period, but in February, 1915, several months after the period expired, and it is certain that if a suit by the government had then been pending the surety (as one of the defendants in such a suit) could not have been ignorant of that fact. Nevertheless, although it is peculiarly able to answer the question, the surety maintains silence and furnishes no information, taking its stand on the narrow proposition that, as the government *might* conceivably have sued during the very brief time intervening between September 12 (the date of its certificate) and September 14, Witman was bound to aver and to prove that such a suit was not actually brought. We have just stated the reasons why we think that (even on the record as it stands) we may fairly infer that no suit was brought by the government; but we may pass these reasons by, and reply to the point by another answer that we think is equally effective, although the answer is as narrow as the point itself. The answer is simply that the matter before us is Witman's intervening claim, and not the original institution of the suit by the use plaintiff, Fowden. The record before us on this writ of error does not show on what averments Fowden rested the right of suit, which he was bringing for himself and for all other creditors in a similar situation; but the usual presumption in favor of regularity justifies us in assuming that Fowden made every proper averment to show that the suit was not premature, and of course upon this assumption the surety's position ceases to have any value. We may perhaps add the suggestion that the date when the government certified to the accuracy of the copy of Emery's bond and contract does not establish conclusively that the copy was "furnished" to Fowden on September 12, the date borne by the certificate. No doubt the copy was certified to on that day, but whether it was delivered on that day in Washington or elsewhere, or whether it was delivered to Fowden personally, or reached him by messenger or by mail, or when it actually came into his hands, does not appear. Of course these are technical answers, but they are made to a technical objection, and moreover to an objection that could have been so easily removed that it has hardly seemed worth while to discuss it at all. We see no substantial merit in the argument, and therefore overrule it.

[2] 2. And we find nothing more substantial in the surety's second objection to the judgment below, namely, the inclusion of interest. The District Court awarded to Witman the amount of interest to which he would have been entitled if he had been suing Emery, and this is precisely the obligation that the surety undertook to make good. It is not a case where a surety is asked to pay interest on the penal sum of the bond; in such a situation the award of interest is governed by circumstances that are not present here. The total of Emery's debts secured by the bond do not exceed \$3,500, so that the penal sum of \$18,000 is much more than is necessary to pay all the claims, principal and interest. In a word, the surety is merely asked in this suit to fulfill its contract, and we can see no reason why (up to the limit of the

penal sum) it should not carry out the contract by paying interest as well as principal. Since Emery failed to make payment promptly he was unquestionably chargeable with interest, and this is the default the surety agreed to take care of. There have been delays in ascertaining the exact amount of the surety's obligation, but the delays belong to the statutory remedy, and of this the surety was fully informed when it executed the bond.

The judgment is affirmed.

LUCKENBACH et al. v. PIERSON et al.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 16.

SHIPPING ⚡52—**TIME CHARTER—WITHDRAWAL OF VESSEL BY OWNER.**

The owner of a vessel under a time charter gave notice that he would withdraw her from the charterer at the end of her then voyage for non-payment of charter hire, as authorized by the charter party. Thereafter the charterer tendered the hire in arrear, but the owner refused to accept the same, and when the vessel had discharged at the end of her voyage took possession of her. *Held* that, while the notice did not effect a withdrawal, because the vessel was then on a voyage, not having waived the same by accepting payment, the owner was within his rights in withdrawing her when she had discharged.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 211-213; Dec. Dig. ⚡52.]

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

Suit in admiralty by Edgar F. Luckenbach and another, as executors of the will of Lewis Luckenbach, deceased, against Ralph Pierson and others. From a decree holding the owner's withdrawal of a steamer under a time charter wrongful, libelants appeal. Modified and affirmed.

Peter S. Carter, of New York City, for appellants.

Convers & Kirlin, of New York City (John M. Woolsey, of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. November 9, 1905, Lewis Luckenbach chartered the steamer Harry Luckenbach to Ralph Pierson & Co. under a time charter, government form, for a term of 10 calendar months. The steamer was delivered January 27, 1906. The material provisions of the charter party are:

"(4) That the charterers shall pay for the use and hire of the said vessel fifty-five hundred (5,500) dollars per calendar month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition to the owners (unless lost) at New York or Baltimore, Md."

"(6) Payment of the said hire to be made in cash, semimonthly, in advance, or as agreed, and in default of such payment the owners shall have the faculty

of withdrawing the said steamer from the service of the charterers without prejudice to any claim they (the owners) may otherwise have on the charterers, in pursuance of this charter."

"(22) Steamer to work night and day if required by charterers, and all steam winches to be at charterers' disposal during loading and discharging, and charterers to provide men to work same both day and night as required, charterers agreeing to pay all expenses."

Charter hire due June 11, 1906, for one-half month in advance, being in arrear, Luckenbach wrote Pierson as follows:

"New York, June 27, 1906.

"Gentlemen: If I do not receive a check for \$2,750 for hire of the steamer Harry Luckenbach, from June 11th to June 27th, due June 11th, and \$2,750 for the hire of said steamer from June 27th to July 11th, by four o'clock this afternoon, I will withdraw said steamer from your service as per clause #6 of charter party dated New York, November 9, 1905.

"Yours truly, Lewis Luckenbach.

"P. S.—As already advised, I will charge you 6% interest on money not paid the day it was due."

At this date the steamer was loading a cargo of coal at Baltimore to be delivered at Frenchman's Bay, Me., for which port she sailed June 29th.

June 30th Luckenbach wrote again as follows:

"New York, June 30, 1906.

"Gentlemen: S/S 'Harry Luckenbach,' Please take notice that the master of above steamer sailed from Lambert's Point for Frenchman's Bay, with a cargo of coal, without signing bills of lading, owing to Messrs. Castner, Curran & Bullitt not allowing the master to insert a clause, whereby we would be protected in our claim for freight. We are willing to sign bills of lading upon receipt of charter hire for which you are in arrears.

"Yours very truly, Lewis Luckenbach, per Potter.

"We shall withdraw steamer soon as present trip is completed as per ours of 27th inst."

July 5th Pierson & Co., replied to these letters as follows:

"New York, July 5, 1906.

"Dear Sir: Your favors June 27th and 30th received; contents noted. We cannot understand your determination to withdraw this steamer from charter dated New York, November 9, 1905, inasmuch as your hire money is guaranteed by the deposit of Pennsylvania Railroad stock in the German-American Bank to joint account. We beg to inclose our certified check, value fifty-five hundred (\$5,500) dollars, in settlement of hire to July 12th, also our bill for commission on same, amounting to one hundred thirty-seven dollars, fifty(\$137.50) cents, from which you will note we have deducted interest at the rate of 6% on the hire's due as per agreement. Kindly receipt inclosed bills, and return to us in due course.

"Yours very truly."

July 6th Luckenbach replied:

"New York, July 6, 1906.

"Gentlemen: If you are willing to pay me \$5,500.00, I will apply same to cover the defaulted charter hire of the steamer Harry Luckenbach. But in accepting same it does not, in any way, reinstate said steamer under charter party heretofore canceled. This vessel is open for charter. If you have any freights to offer, I will be pleased to hear from you.

"Yours very truly."

July 12th Pierson & Co. wrote:

"New York, July 12, 1906.

"Dear Sir: We herewith inclose * * * certified check for charter hire of the steamer *Harry Luckenbach*, pursuant to charter of date November 9, 1905, for the coming two weeks, also our bill for commission, and desire to say we still hold for your call the certified check \$5,500 heretofore tendered you.

"Respectfully yours."

July 2d the steamer arrived at Frenchman's Bay and the cargo having been discharged July 16th Luckenbach ordered her back to New York, where she arrived on the 18th.

The District Judge held that there was only a threat to withdraw the vessel, not carried out until cargo was discharged at Frenchman's Bay, before which time Pierson & Co. having tendered all hire in arrear, the withdrawal was wrongful. The decree appealed from awarded to the libelants, executors of Luckenbach, charter hire to July 16th, less certain admitted deductions and to Pierson & Co. the damages sustained by them as the result of the wrongful withdrawal.

The act of Luckenbach is frequently referred to throughout the case as an attempt to cancel or rescind the charter party. This hardly fits the situation. One who wishes to cancel or rescind a contract can and should do so presently. But the withdrawal of a vessel from a charter party means that the owner shall deprive the charterer of any further enjoyment or use of the vessel and take it into his own exclusive possession. This can be presently done, even where the vessel is at sea, provided she is light; but if there be any cargo on board no withdrawal can be made until the cargo be relanded if the vessel is at the loading port, or until it be discharged if she is at sea or at destination. In the present case, when Luckenbach notified Pierson & Co. that he would withdraw the vessel on June 27th if the hire in arrear were not then paid, she was loading at Baltimore and he could have done so by relanding the cargo. As he did not, but allowed her to proceed on her voyage, a proceeding entirely inconsistent with a then withdrawal, the notice of that date was ineffectual; but June 30th he gave notice that he would withdraw the vessel at the end of her trip. He could not actually do so until her cargo was discharged July 16th. If in the meantime he had accepted payment of the charter hire in arrear, he would have waived this notice. But he refused the tender then made, without objecting to its character or amount, and consistently and persistently maintained that he had exercised his privilege to withdraw the vessel. The charterer could not deprive him of his right to do so by any tender of the hire in arrear, nor can the court alter the contract made by the parties.

The case particularly relied upon by the charterer, Owners of Steamer *Langford v. Canadian Forwarding & Exporting Co.*, 10 Asp. Mar. Cas. N. S. 414, differs in a most material particular, viz., that before the discharge of the cargo the owners had accepted all hire overdue, so that then there was no default and they had no right to withdraw the vessel. Sir Arthur Wilson, delivering the opinion of the Privy Council, said:

"Their Lordships think it clear that there was no withdrawal of the steamer until that effected by the master on the 4th of October. And on that date there was nothing to justify a withdrawal; for there was nothing in arrear, the full hire for the month ending the 11th October having been paid and received."

As we hold that the withdrawal of July 16th, in pursuance of the notice of June 30th, was rightful, the owner is entitled to hire down to that date, and other questions discussed need not be considered. The allowance of damages to the charterer must be stricken out, and the decree, so modified, is affirmed, with interest and costs.

In re CASLON PRESS.

WESTERN TYPE FOUNDRY v. CENTRAL TRUST CO. OF ILLINOIS.

(Circuit Court of Appeals, Seventh Circuit. August 6, 1915.)

No. 2201.

BANKRUPTCY ⇨161—VOIDABLE "PREFERENCE"—TRANSFERS CONSTITUTING.

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), provides that the trustee as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, and as to all property not in the custody of the bankruptcy court with all the rights, etc., of a judgment creditor holding an execution duly returned unsatisfied. Section 60a provides that a person shall be deemed to have given a preference if, being insolvent, he has within four months before bankruptcy made a transfer of any of his property, the effect of which will be to enable any creditor to obtain a greater percentage of his debt than other creditors of the same class. Section 60b makes such preferences voidable by the trustee. More than four months before bankruptcy the bankrupt executed an unacknowledged chattel mortgage for a present loan, and promised to give another chattel mortgage on specific chattels for the purchase price thereof. Within the four months the promised mortgage was given, and both mortgages were acknowledged and recorded. It was conceded that both mortgages, though good as against the debtor, were invalid as against lien creditors until acknowledged and recorded; but it was contended that both mortgages were given for a present consideration, and that a transfer for a present consideration could not be a preference. *Held* that, assuming that a mortgage given for a present consideration, executed before, but recorded within, the four months period, is not voidable as a preference, the mortgages in question were voidable, since there was no transfer valid as against lien creditors or the trustee in bankruptcy until the mortgages were acknowledged, and the only consideration for the mortgages at that time was the pre-existing obligation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. ⇨161.

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

Petition to Review and Revise an Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois; J. Otis Humphrey, Judge.

In the matter of the Caslon Press, bankrupt. A petition for the payment of the Western Type Foundry in priority to the claims of unsecured creditors, opposed by the Central Trust Company of Illinois, trustee of the bankrupt, was dismissed, and the claimant files a petition to revise. Petition to revise denied.

An unacknowledged Illinois chattel mortgage was executed in August, 1912, for a present loan, and a promise to give a chattel mortgage on other specific chattels as part purchase price was made in July, 1911, by the bankrupt to the petitioner, both, therefore, more than four months before January 28, 1913, when the bankruptcy petition was filed. Within the four months, while the debtor was insolvent to the knowledge of the petitioner, the promised mortgage was executed, and both mortgages were then improperly and defectively acknowledged and recorded. The day before the bankruptcy petition was filed they were both properly reacknowledged and re-recorded. By agreement, the property covered thereby was sold by the trustee, petitioner's liens, if any, to be paid out of the proceeds. A petition that they be paid in priority to the claims of unsecured creditors was dismissed. To revise this order the present petition was filed.

John Lyle Vette, of Chicago, Ill., for petitioner.

Alfred Livingston, of Chicago, Ill., for respondent.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge (after stating the facts as above). Unless petitioner's liens were validly created as against the trustee by the unacknowledged mortgage and by the promise to execute a mortgage, they cannot be upheld; all subsequent acts were performed within the four months period, during the debtor's insolvency and with the creditor's knowledge thereof, so that, if effective only from the later date, they operated to create voidable preferences under section 60 of the Bankruptcy Act.

Petitioner concedes that, although good as against the debtor, both would be invalid in Illinois as against a lien creditor until duly acknowledged and recorded. It contends, however, that both were created for a present consideration in 1912 and 1911, respectively; that a transfer for a present consideration can never be a preference within section 60a, and therefore cannot be voidable as such under section 60b; that therefore it is immaterial when they were recorded, as long as they were recorded before the bankruptcy petition was filed.

While before the amendment of 1910, the authorities were in conflict (*In re Boyd*, 213 Fed. 774, 130 C. C. A. 288, and cases cited therein), we held (*In re Sturtevant*, 188 Fed. 196, 110 C. C. A. 68), where a duly acknowledged mortgage was given for a present consideration, in accordance with this construction of section 60, distinguishing *In re Beckhaus*, 177 Fed. 141, 100 C. C. A. 561, in which the mortgage was a voidable preference when executed because given to secure a pre-existing debt. A similar distinction was made in the Sixth circuit. *Loeser v. Bank*, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233; *In re Klein*, 197 Fed. 241, 116 C. C. A. 603.

Whether, under the 1910 amendment of section 60b (section 60a, defining a preference, is unchanged), not only a mortgage, voidable as a preference when executed (*Carey v. Donohue*, 209 Fed. 329, 126 C. C. A. 254), and one given to secure a pre-existing debt, but, as in

the Klein Case, not voidable when executed, but also a mortgage given for a present consideration, executed before, but recorded within, the four months period, can be attacked under section 60b, as held in *Brigman v. Covington*, 219 Fed. 500, 135 C. C. A. 250, 33 Am. Bankr. Rep. 644 (C. C. A. 4th Circuit)—*contra*, *Anderson v. Chenault*, 208 Fed. 400, 125 C. C. A. 616 (C. C. A. 5th Circuit), and *In re Watson* (D. C.) 201 Fed. 962 (affirmed on other grounds in 216 Fed. 483, — C. C. A. —)—we need not now determine, because, in our judgment, nothing that was done before the four months period amounted to a complete transfer for a present consideration.

Inasmuch as both the legal and the equitable mortgages were concededly invalid as against lien creditors until duly acknowledged, they would have been equally invalid as against the trustee under section 47a (2), as amended in 1910, if the bankruptcy petition had been filed before they were acknowledged. No unilateral act of the creditor could have changed this situation. Recording an unacknowledged or an improperly acknowledged chattel mortgage concededly gives no constructive notice, and therefore does not better the position of the mortgagee as against the subsequent lienor in Illinois. A further act by the grantor itself, the acknowledgment, is a prerequisite to the grantee's power to secure an effectual recording of the conveyance, such as will protect it under some circumstances against subsequent lienors, including, since the 1910 amendment of section 47a (2), the trustee in bankruptcy.

Until the transfer sought to be made by the mortgage was perfected by the proper acknowledgment of the instrument, the transfer itself was incomplete; recorded or unrecorded, it was utterly without value as against subsequent lienors, including, since 1910, the trustee in bankruptcy. Therefore only when the mortgages were duly reacknowledged were the transfers in fact made. At that time, nothing of value was given therefor by the creditor; the sole consideration for the debtor's act, without which the creditor would have had no right of any value as against the trustee, was the pre-existing obligation.

Prior to the perfection of the transfer, petitioner was a creditor, and as its apparent security was worthless as against a trustee in bankruptcy, it was, for all practical purposes, an unsecured creditor; the effect of the enforcement of the security, which it finally obtained only by the later acts of the debtor, would enable it to obtain a greater percentage of its debt than any other unsecured creditor; the transfer thus completed was, therefore, a preference under section 60a, and voidable as such under section 60b, because made by an insolvent within four months of bankruptcy, operating as a preference at the time that it was perfected as a transfer, and received with reasonable cause to believe that this would be its effect.

The petition to revise will therefore be denied.

WATTS, WATTS & CO., Limited, v. UNIONE AUSTRIACA DI NAVIGAZIONE.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 67.

1. WAR ⚡16—JURISDICTION—DISCRETION OF COURT.

Whether the District Court would take jurisdiction of a libel in personam by a British corporation against an Austrian corporation for coal furnished the steamers of the Austrian corporation from time to time at Algiers, a French dependency, was a matter within the discretion of that court.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80-84; Dec. Dig. ⚡16.]

2. WAR ⚡16—JURISDICTION—DISCRETION OF COURT.

A British corporation supplied coal to the steamers of an Austrian corporation from time to time at Algiers, and drafts were drawn therefor, payable at London and duly accepted. Before maturity war was declared, and each sovereign prohibited its citizens from paying debts due an enemy, and the accepting bank at London refused payment, whereupon a libel in personam was filed for the amount of the original debt, and a steamer was attached. *Held*, that the District Court did not abuse its discretion in declining to take jurisdiction, on the ground that it would be inexpedient to do so under the circumstances.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80-84; Dec. Dig. ⚡16.]

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

Libel in admiralty by Watts, Watts & Co., Limited, against the Unione Austriaca di Navigazione. From a decree declining to take jurisdiction, and dismissing the libel without prejudice (224 Fed. 188), the libelant appeals. Affirmed.

Convers & Kirlin, of New York City (J. Parker Kirlin and John M. Woolsey, both of New York City, of counsel), for appellant.

Haight, Sandford & Smith, of New York City (Charles S. Haight and Clarence Bishop Smith, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. [1, 2] The libelant, a British corporation, supplied coal to the steamers of the respondent, an Austrian corporation, from time to time at Algiers, a French dependency. The master in each case drew a draft for the price of the coal to the order of the libelant payable at London. Of such drafts drawn during the months of May, June, and July, 1914, and duly accepted payable in London, the first fell due August 7th, and the last October 1st. Great Britain declared war upon Austria-Hungary beginning from midnight August 12th. Each sovereign prohibited its citizens from paying any debt due

an enemy during the continuance of the war. Payment of the drafts was refused by the accepting bank at London.

The libelant filed a libel in personam against the respondent, not upon the drafts, but to recover for the debt, and attached the steamer Martha Washington. The respondent does not deny its obligation to pay.

Judge Veeder, in the District Court, feeling that it was inexpedient under these circumstances to take jurisdiction of the controversy, dismissed the libel without prejudice. Whether to take or to decline jurisdiction was a matter within his discretion (see *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *Benedict on Admiralty*, § 195), and, as no abuse of discretion appears, the decree is affirmed.

BRADY v. RELIANCE MOTION PICTURE CORP. et al.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 192.

COPYRIGHTS ⇨85—SUITS FOR INJUNCTION—RIGHT TO RELIEF.

Rev. St. § 4955, provided that copyrights should be assignable and that the assignment should be recorded in the office of the librarian of Congress within 60 days after its execution, in default of which it should be void as against any subsequent purchaser for a valuable consideration without notice. The publisher of a story had it copyrighted, and released the motion picture rights to corporations, which laid out a large sum of money in constructing a moving picture film of the story, made contracts for its exhibition, and had it generally exhibited. The author sued to enjoin them from selling, leasing, or using the moving picture films, and to compel the publisher to assign all rights in the copyright, except the right of serial publication to him. He contended that the copyright taken out covered all rights, that he conferred the whole copyright privilege on the publisher, but that the publisher held it as trustee for him as to all rights other than that of serial publication. *Held* that, assuming these contentions to be true, a preliminary injunction was properly denied, in the absence of any showing of actual or constructive notice on the part of the film companies, as they could surely be no worse off than if the publisher had actually assigned such rights to the author, and moreover, independent of statute, one clothing another with apparent ownership, though actually as trustee, cannot defeat the title of those who in good faith, for a valuable consideration, and without notice deal with the trustee.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. ⇨85.]

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

Suit by Cyrus Townsend Brady against the Reliance Motion Picture Corporation and others. From an order denying a preliminary injunction in a copyright case, complainant appeals. Affirmed.

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

W. M. Seabury, of New York City, for appellant.

Nicoll, Anable, Lindsay & Fuller, of New York City (T. S. Fuller and Mortimer Boyle, both of New York City, of counsel), for appellee Munsey Company.

W. N. Seligsberg, of New York City, for appellee Reliance Motion Picture Corporation.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. July 16, 1906, the complainant, author of a story called "The Child of God," signed the following document:

July 16th, 1906.

Received from Frank A. Munsey \$240.00 in payment for manuscript and copyright of "*A Child of God*" (4,800 words at 5c. per word).

Received above \$240.00. Thank you very much.

Cyrus Townsend Brady.

7/18/06

Please receipt and return.

Please sign this receipt and return it to Frank A. Munsey, 111 Fifth Ave., New York. Unless expressly otherwise stipulated, all MSS. drawings, etc., sold to Frank A. Munsey are purchased with copyright and all rights.

Author reserves right of book publication and dramatic rights, if any, after serial publication is completed. 7/18/06.

G. T. Brady.

The words underscored were written.

March 25, 1907, the defendant, the Frank A. Munsey Company, printed the story in its serial number of Munsey's Magazine for May and duly copyrighted the periodical. April 25, 1907, prior to the publication of the May number, the Munsey Company deposited two copies in the office of the librarian of Congress. December 22, 1914, the Munsey Company released the picture rights in the story to the defendant Mutual Film Corporation. The Mutual Company subsequently employed the defendant Reliance Motion Picture Corporation to construct a moving picture film of the story. It laid out in this way a large sum of money, made contracts with other parties for exhibition of the film throughout the country, and it has already been very generally exhibited.

The complainant filed this bill, praying that the defendant the Munsey Company might be required to reassign to him all rights in and to the copyright, except the right of serial publication; that the other defendants be enjoined from selling, leasing, or using the moving picture films; and that all the defendants be required to account to him for damages and profits.

The single question before us for consideration is whether Judge Hough was right in refusing to grant a preliminary injunction. It will not be necessary to consider the averments of the affidavits as to good or bad faith made by the complainant and the defendant Munsey Company, respectively, or as to notice or absence of notice, actual or constructive, made by the complainant and the film companies, respectively, because upon the theory of law stated by the complainant himself the order will be affirmed.

The complainant contends that the copyright taken out by the Munsey Company covered all rights, and that he did confer the whole copy-

right privilege upon it to hold the same for its own benefit as to serial publication and as trustee for him as to all other rights. Assuming these premises, the complainant could have required the Munsey Company, at least after serial publication in 1907, to reassign to him all the other rights. Had this been done, such assignment would have been void as against subsequent purchasers or mortgagees without notice, for a valuable consideration, unless recorded in the office of the librarian of Congress within 60 days after its execution. Rev. Stat. U. S. § 4955; *Photo Drama Co. v. Social Uplift Corporation*, 220 Fed. 448, 137 C. C. A. 42. Such persons can surely not be worse off when no actual assignment whatever has been made. Moreover, without reference to any statute, when one clothes another with apparent ownership, though actually as trustee, he cannot defeat the title of those who in good faith, for a valuable consideration, and without notice deal with the trustee. *Cowdrey v. Vandemburgh*, 101 U. S. 572, 25 L. Ed. 923. Actual notice to the film companies is not pretended, and we discover no sufficient evidence of constructive notice to justify the issuance of a preliminary injunction against them or either of them. The order is affirmed.

MARLER et al. v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Fifth Circuit. January 31, 1916.)

No. 2768.

RAILROADS ⇨400—ACTIONS FOR DEATH—DIRECTION OF VERDICT.

Where, in an action against a railroad company for death, the evidence clearly established that the decedent was guilty of contributory negligence, and furnished no substantial support for a finding that those in charge of the engine had a last clear chance to avoid injuring him after his peril was apparent, a verdict for defendant was properly directed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. ⇨400.]

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action by John I. Marler and others against the Illinois Central Railroad Company. Judgment on a directed verdict for defendant, and plaintiffs bring error. Affirmed.

William H. Watkins, of Jackson, Miss., and James Wm. Cassedy, of Brookhaven, Miss., for plaintiffs in error.

Edw. Mayes, of Jackson, Miss., for defendant in error.

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

PER CURIAM. This action, although brought in the state of Mississippi, was to recover damages for the negligent killing of plaintiff's intestate in the state of Louisiana.

The evidence clearly established that the plaintiff's intestate was guilty of contributory negligence, and none of it was such as to fur-

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

nish substantial support for a finding that those in charge of the engine had a "last clear chance," after his peril due to his negligence, was apparent, to avoid injuring him. In this state of the evidence, the direction of a verdict for the defendant below was proper. See *Harrison v. Louisiana Western R. R. Co.*, 132 La. 761, 61 South. 782; *May v. Texas, etc., Ry. Co.*, 123 La. 647, 49 South. 272; *Texas & Pacific Ry. Co. v. Modawell*, 151 Fed. 421, 80 C. C. A. 651, 9 L. R. A. (N. S.) 646.

Jones v. Mackay Telegraph Co. (La.) 68 South. 379, appears to have been decided on its peculiar facts, and does not affect the "last clear chance" doctrine, as declared in *Harrison v. Louisiana Western Railroad Co.*, *supra*.

Judgment affirmed.

**TRENTON & MERCER COUNTY TRACTION CORP. et al. v. BOARD OF
PUBLIC UTILITY COM'RS OF NEW JERSEY.**

(Circuit Court of Appeals, Third Circuit. January 31, 1916.)

No. 2065.

**CARRIERS ⇐18—ENJOINING ENFORCEMENT OF RATES—TEMPORARY INJUNCTION
—DISCRETION OF COURT.**

In a suit by a traction company against a state Board of Public Utility Commissioners for an injunction, the grant or refusal of a preliminary injunction pending the hearing of the case was a matter resting in the sound discretion of the three judges who heard the application therefor in the District Court.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 85; Dec. Dig. ⇐18.]

Appeal from the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Suit by the Trenton & Mercer County Traction Corporation and others against the Board of Public Utility Commissioners of the State of New Jersey. From an order (227 Fed. 502) denying a preliminary injunction, complainants appeal. Affirmed.

Edward M. Hunt, of Trenton, N. J. (Frank S. Katzenbach, Jr., and G. W. Macpherson, both of Trenton, N. J., of counsel), for appellants.

Charles E. Bird, of Trenton, N. J., and Frank H. Sommer, of Newark, N. J. (George L. Record, of Jersey City, N. J., of counsel), for appellee.

Before BUFFINGTON and McPHERSON, Circuit Judges, and DICKINSON, District Judge.

BUFFINGTON, Circuit Judge. This case comes before us on appeal from an order of the court below refusing to issue a preliminary injunction against the Board of Public Utility Commissioners of the state of New Jersey pending the hearing of the case. The grant or refusal of such injunction was a matter resting in the sound discretion of the three judges who heard the application in the court below.

After a full discussion of the cause in this court we find no abuse of discretion in such refusal, and the decree will be affirmed. We refrain from any present discussion of the important questions here involved, holding our views in abeyance until the cause comes before us on final hearing. As the case is of large importance, both to the people of Trenton and also to the traction company, it should be heard promptly, and as the calendar of the court below is so crowded as to prevent Judges Rellstab and Haight from hearing it soon, the case has been specially assigned for hearing before Hon. Victor B. Woolley, of Wilmington, Del., a member of this court, with a view to its earlier disposition.

TATE v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1915.)

No. 1300.

1. PATENTS ⚡129—SUIT FOR INFRINGEMENT—ESTOPPEL TO DENY VALIDITY OF PATENT—LICENSEE.

While a licensee is estopped to deny the validity of the patent, when the license is at an end, whether by reason of the expiration of time or the completion of the number of patented articles for which it provided, there is no longer any contract relation, and no ground of estoppel.

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

2. PATENTS ⚡129—SUIT FOR INFRINGEMENT—ESTOPPEL OF LICENSEE TO DENY VALIDITY OF PATENT.

Where the owner of a patent repudiates a license by suing the licensee for infringement, he cannot rely on it as an estoppel.

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

3. PATENTS ⚡27—INVENTION—ADAPTING OLD DEVICE TO NEW USE.

A change in an old machine or instrument, which so affects its operation and construction as to adapt it to a new use, is patentable.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. ⚡27.]

4. PATENTS ⚡328—VALIDITY—CONSTRUCTION OF CLAIMS.

The Tate patent, No. 643,560, for an improvement in locomotives, being a device for securing the boiler to the frame, claim 2, is void as too broad.

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by John H. Tate against the Baltimore & Ohio Railroad Company for infringement of letters patent No. 643,560, for an improvement in locomotives, granted February 13, 1900, to J. B. Tate. Judgment for defendant, and plaintiff brings error. Affirmed.

O. Ellery Edwards, Jr., of New York City (Ritchie, Janney, Griswold & Hamilton, of Baltimore, Md., and Joseph L. Levy, of New York City, on the brief), for plaintiff in error.

J. Snowden Bell and William A. Redding, both of New York City, for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WOODS, Circuit Judge. In this action of Tate, patentee, to recover damages from the Baltimore & Ohio Railroad Company for infringement of a patent for an improvement in locomotives, the District Judge at the close of the evidence directed a verdict for the defendant, holding: (1) That the device of the patentee had been anticipated by the Sharp British patent; (2) that the second claim of the patentee under which the suit was brought was too broad, in that it covered, not only his device, but the prior art. Error is assigned in both holdings.

In his specifications the patentee said:

"My invention relates to an improvement in locomotives, and more particularly to means for securing the boiler on the frame of a locomotive; the object of the invention being to provide means of the above-mentioned character which will securely hold a boiler in place and at the same time permit the ready removal of the boiler when desired. A further object is to simplify and improve boiler-mountings."

His claims are:

"1. In a boiler-mounting, the combination with the mud-ring of the boiler and a frame of block depending from said mud-ring and a clamp secured to said frame and detachably connected with said depending block.

"2. In a device for securing a locomotive boiler on its frame, the combination with a mud-ring of a block secured to the mud-ring, having a groove therein, a clamp secured to the frame, and a flange or lip on the clamp to enter the groove and secure the block and frame together.

"3. In a device for securing a locomotive boiler on its frame, the combination with a mud-ring of blocks secured to the mud-ring and having grooves therein, clamping-plates disposed on the outer faces of the frame, flanges or lips on said plates to enter the grooves in the blocks, strips or plates disposed on the inner faces of the frame, bolts securing said first and last mentioned plates together and to the frame, and a strip disposed between said blocks and frame.

"4. In a device for securing a locomotive boiler on the frame, the combination with a mud-ring, of a block integral with the mud-ring and having a groove therein, a clamping-plate, having a lip to enter said groove, another plate disposed on the opposite face of the frame-section, and a bolt passing through the frame and plates and having a head between its ends seated in the frame and nuts adapted to be screwed on at the ends of the bolts to secure the parts together."

The action was brought under claim 2, and the plaintiff stands or falls on that.

[1] The first basis of assignment of error is that the Baltimore & Ohio Railroad Company, being a licensee of plaintiff, cannot dispute the patent. In the year 1902 the defendant obtained a license from the plaintiff to use his patent on 48 locomotives. The device was used according to the license on the 48 engines and defendant paid the price agreed on. Afterwards the defendant used the device on 999 locomotives without license, and it is for this use that the suit is brought.

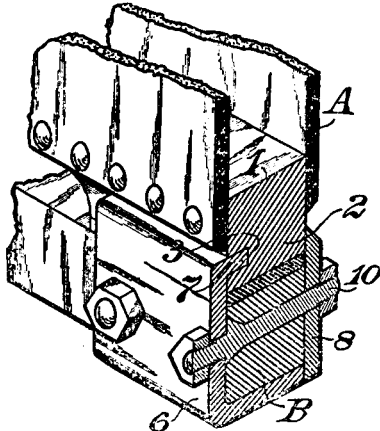
The rule is that a licensee is estopped to deny the validity of the patent as long as he is acting under it; but when the license is at an end, whether by reason of expiration of time or the completion of the number of patented articles for which it provided, there is no longer any contract relation, and there is no ground of estoppel. The fact that

the license once existed is merely evidence of a former admission of the validity of the patent. *Dueber Watch Case Mfg. Co. v. Robbins*, 75 Fed. 17, 21 C. C. A. 198. The defendant's license and its estoppel ended with the use of plaintiff's device on 48 locomotives.

[2] It seems, also, that the patentee, in suing for infringement, and not for royalties, is held to repudiate the license and therefore cannot rely on it as an estoppel. *St. Paul Plow Works v. Starling*, 140 U. S. 184, 11 Sup. Ct. 803, 35 L. Ed. 404. The plaintiff's device, so far as its features are here involved, is made plain by the figure below showing the attachment on one side of the locomotive boiler.

We quote the plaintiff's description in his specifications, so far as it is pertinent to the issue and applies to the figure:

"A represents an engine-boiler and B a frame on which it is mounted. The boiler A is made with a mud-ring 1, provided at opposite points with depending blocks or extensions 2, provided on their outer faces with longitudinal grooves 3. * * * My improved clamping-plate 6, made L-shaped in cross-section and provided on its upper edge with an inwardly projecting flange or lip 7 to enter the groove 3 in the block 2, is placed against the frame and block 2, and a plate or strip 8 is disposed against the inner face of the block 2 and a frame B, and said plate 8 and clamping-plate 6 are made with aligned holes for the reception of bolts 10 to secure them in place."

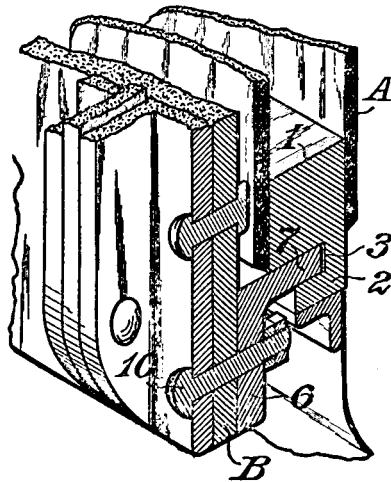


The British patent is shown by this figure:

The defendant insists that it fits plaintiff's claim 2, as follows:

"In a device for securing a locomotive boiler on its frame, the combination with a mud-ring (1) of a block (2), secured to the mud-ring having a groove (3) therein, a clamp (6), secured to the frame and a flange or lip (7), on the clamp to enter the groove and secure the block and frame together."

It will be seen that in this contention the plate 8 on plaintiff's patent must be omitted, as it does not appear, nor is its place supplied by an equivalent, in the British patent. The issue, therefore, focuses on the plate or strip 8 disposed against the inner surface of the block 2. The main object attained in both patents is holding the frame rigid laterally, while allowing longitudinal heat expansion in the groove provided. The difference between them and the advantage of the



Tate patent, according to the testimony of the expert, is that, in case the boiler is thrown in its movement to one side when the British patent is used, the stress is borne entirely by the frame on that side, while in the use of the Tate patent the stress from either side is borne by both frames in common. This is due to the use of plate 8 as a part of the clamp.

[3] It seems plain that the device is in this respect a useful improvement over the British patent. Nevertheless, if it is a mere adaptation of a mechanical instrument already in use, which would have occurred to a person of ordinary mechanical skill, it is not patentable. On the other hand, if it makes such a change in the operation and construction of an old machine or instrument, even by one step, as to adapt it to a new use, it is patentable. *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; *Mast v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856; *Diamond Rubber Co. v. Consolidated Tire Co.*, 220 U. S. 440, 31 Sup. Ct. 444, 55 L. Ed. 527.

[4] The regions of invention and mechanical skill fade into each other, and the line of just discrimination between them is often difficult to draw. In view, however, of the presumption in favor of the patent from its issue by the Patent Office, the evidence in its favor furnished by its use by defendant under a license, the evidence of the expert, and the evident difference between the Tate and the British patents, we think an issue of fact was presented, whether the plaintiff's patent was merely a mechanical adaptation of the prior art or a novel device performing a different function.

The same reasoning applies to the construction of Baldwin Locomotive Works relied on to show that the patent was covered by the prior art. The defendant contends that the cross-ties in that device performed the same functions as a clamping device including the plate 8 in the Tate patent. The considerations in favor of this view are not convincing; but, even if they were, it does not follow that the Tate patent is not patentable, since there was ground to conclude that it performed the same function by a new and better method.

Had plaintiff fully described his device in his claim 2, on which he stands or falls, we have endeavored to show there would be good ground for the jury to find that the use of plate 8 in his clamping device in combination was such an improvement in design and result on the prior art as to make it patentable. But we cannot resist the conclusion that the plaintiff's claim is broader than his device or invention, and that the British patent may be read on claim 2 just as clearly as the plaintiff's. Nothing is said about the plate 8 in the claim, and with that left out of the combination it will be seen by comparison that the British patent answers fully the description in claim 2, allowing for the difference in the location of the frame on American and British locomotives. That the plaintiff did not intend to limit his claim 2 to a combination with plate 8 as an essential feature of the device is shown by the fact that in his claims 3 and 4 he clearly embraces and describes that plate. The plaintiff's patent being at best nothing more than an improvement on the prior art, it must receive a narrow construction. *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 24 Sup. Ct.

291, 48 L. Ed. 437. On the point of reading a feature into a claim for the purpose of sustaining the patent, it is said in *McCarty v. Lehigh Valley R. Co.*, 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358:

"While this may be done with a view of showing the connection in which a device is used, and proving that it is an operative device, we know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement. The difficulty is that, if we once begin to include elements not mentioned in the claim in order to limit such claims and avoid a defense in anticipation, we should never know where to stop. If, for example, a prior device were produced exhibiting the combination of these claims plus the springs, the patentee might insist upon reading some other element into the claims, such, for instance, as the side frames and all the other operative portions of the mechanism constituting the car truck, to prove that the prior device was not an anticipation. It might also require us to read into the fourth claim the flanges and pillars described in the third. This doctrine is too obviously untenable to require argument."

We conclude that the plaintiff's claim 2 must fail, because it is so broad as to be covered by the prior art.

Affirmed.

MORTON v. A. H. ANDREWS CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1915. Rehearing
Denied January 3, 1916.)

No. 2218.

PATENTS 328—VALIDITY AND INFRINGEMENT—BUNK CAR.

The Morton patent, No. 582,217, for a bunk car, for moving lumber in and out of the drying room, was not anticipated and discloses invention, but is entitled to a narrow construction only, and a limited range of equivalents; also *held* 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 Horace J. Morton against the A. H. Andrews Company. Decree for defendant, and complainant appeals. Reversed.

On February 27, 1896, appellant filed his application for a bunk car used in connection with drying rooms, whereby lumber can be run into and out of a drying room. The object set out was to obtain a bunk car constructed of steel or other metal, which should be simple, strong, and easily assembled at the lumber drying kiln, one that could be easily moved in and out of the kiln, one which should operate with flanged wheels, presumably upon tracks—the car to be constructed lower than the bunk cars then in use, to enable the operator to pile thereon a higher pile of lumber than theretofore. For the side supports of his car, appellant uses channel irons arranged as right and left, combined with spreaders extending between the web of the two channel irons and holding them rigidly in place, rigid axles between and connecting the channels, surrounded by a hub inclosing roller bearings, about which rollers the flanged wheels revolve, and rotatable washers mounted on the axle against which the ends of the rollers abut.

Ten days prior to the filing of Morton's application, one Bemis filed his application for a lumber truck, likewise for use in connection with lumber drying kilns. These trucks also have for side support channel irons kept apart by

spreaders called in the application "washers." The Bemis specification says "The essential feature of the invention resides in the peculiar construction of the washer." These washers are hollow and cylindrical, so as to permit the passage of bolts therethrough. These bolts have threaded exterior ends extending through the channel web, "whereby," says the patentee, "the side strips of the truck frame may, by tightening the nuts upon the bolts, be sprung inward sufficiently to cause the nuts upon the bolts to be securely held or locked against possible accidental displacement."

On February 27, 1896, the examiner rejected claims 3 and 4 of Morton. On September 18, 1896, Morton amended these claims respectively by adding the words "such spreaders having peripheral edges against which the channel irons are respectively forced by a bolt extending centrally through the spreader." On April 9, 1896, an interference was declared between Morton and Bemis. This interference was redeclared, as amended, with one Hussey as an additional party, on July 30, 1896. The issue was: "A bunk car consisting of channel irons arranged as rights and lefts, in combination with spreaders extending between the channel irons and flanged wheels mounted between such channel irons, said spreaders having a peripheral edge extending beyond, or taking a bearing against the channel irons before the central portion, and means, such as a bolt passing through the central portion, of the spreader and the channel irons for forcing the web of the channel iron into the end of the spreader and thus springing such web." This, according to the examiner, was substantially Morton's original claims 1, 2, and 3, Bemis' claims 1 and 2, and Hussey's claims 1, 2, and 3. It was awarded to Bemis September 21, 1896. On August 1, 1896, an interference was had between Morton and Hussey upon the issue: "A bunk car consisting of channel irons arranged as right and left, spreaders extending between the channel irons and holding them rigidly in place, axles having shoulders on the ends thereof, extending between the channel irons and held rigidly in place, flanged wheels mounted upon the axles, rollers in the hubs of the wheels and around the axles and washers at the ends of the axle against which the rollers abut." This issue the examiner states is substantially that of Morton's claims 4 and 5 and Hussey's claims 4 and 5.

On September 16, 1896, Morton canceled his original claims 1, 2, and 3, which claims read as follows:

"1. A bunk car consisting of channel irons arranged as rights and lefts, combined with spreaders extending between the channel irons and flanged wheels rotatably mounted between such channel irons; such spreaders having, respectively, a circular edge, a hub extending beyond the circular edge and into but not through the web of the channel irons, and means for forcing such web over the hub and so springing such web, substantially as described.

"2. A bunk car consisting of channel irons arranged as right and left, combined with spreaders, having, respectively, a hub extending beyond the peripheral edge thereof, securing the channel irons together, such hub extending into but not through the web of the channel iron, a bolt having a head on one end and a nut on the other end and washers on the bolt, whereby the web of the channel is forced over the hub and sprung, and wheels rotatably mounted between the channel irons, substantially as described.

"3. A bunk car consisting of channel irons arranged as right and left, combined with spreaders extending beyond the channel irons and holding them respectively in place; and flanged wheels, rotatably mounted between such channel irons, substantially as described,"

—and renumbered claims 4 and 5 as claims 1 and 2, without change in his specification. On October 12, 1896, the August 1, 1896, issue was awarded to him. Amended claim 4, afterwards made claim 1 of the patent, reads as follows:

"A bunk car, consisting of channel irons arranged as right and left, combined with spreaders extending between the channel irons and holding them respectively in place such spreaders having peripheral edges against which the channel irons are respectively forced by a bolt extending centrally through the spreader, and flanged wheels rotatably mounted between the channel irons, such wheels consisting of a nonrotatable axle rigidly secured between

the channel irons, a flanged wheel, rollers in the hub of the wheel and around the axle, and washers rotatably mounted on the axle at the ends of the hubs, substantially as described."

Claim 2, originally claim 5, was unchanged, and reads as follows, viz.:

"A bunk car consisting of channel irons arranged as right and left, spreaders extending between the channel irons and holding them rigidly in place, axles having shoulders on the ends thereof extending between the channel irons and held rigidly in place, a flanged wheel around the axle, rollers in the hub of the wheel and around such axle, and washers mounted on the axle against which the ends of the rollers abut, substantially as described."

Bemis' first claim calls for "the wheels having their axles journaled in openings formed in said side pieces," and his specification calls for "wheels which are grooved to fit the track upon which they are designed to run, are journaled in openings provided for the purpose in the side strips A and are preferably provided with roller or ball bearings." Morton has in his new claim 1 the Bemis spreaders. His flanged wheels turn about a nonrotatable, roller-bearing axle and washer at the end of the rollers. In order to bring his axle down as low as possible, and insure rigidity and nonrotatability thereof, Morton cuts shoulders thereon. By means of his rotatably mounted washer upon which the ends of the rollers abut, the latter are held in place, friction is reduced, and patentee is enabled to set his axle down low, thereby permitting the use of large wheels without protruding the periphery thereof above the platform of the car. The last above named features are not referred to in the claims. What the claims do provide, as against Bemis, are the combination of the roller mounted wheels, the locked axle, and the rotatable washers at the ends of the hubs or rollers, in combination.

In addition to Bemis, appellee relies on Arnold patent, No. 453,953, dated June 9, 1891, for a drier car, and Chatfield patent, No. 468,559, dated February 9, 1892, for a founder's truck. Arnold does not employ channel irons, and stands high from the track. The device of the Chatfield patent does not disclose the use of channel bars. Its arrangement is entirely different. It is not the combination of either appellant's or appellee's car. Other patents in the prior art are still more remote.

Appellee's truck, style No. 2, shows wheels not extending above the platform of the car. It also has the notched axis, the nonrotatable axle, the rollers, the rotatable washers abutting on the ends of the hub, or rollers, the channel side beams, and the hollow spreaders with bolts therethrough. Appellee claims a shop right or license to manufacture the device of the patent in suit.

It appears that Morton was employed by A. H. Andrews & Co. from 1884 to 1895. During the first five years of his connection with that company he was employed in making the "Noyes" lumber drier, and during the remaining period of his employment with A. H. Andrews & Co. he was engaged in making for them a lumber drier of his own invention. He had invented several lumber driers other than that of the patent and licensed A. H. Andrews & Co. to manufacture them; he receiving royalties, and also a salary for his services in connection with the manufacture of the driers. He invented the car in suit in the early part of 1894, and A. H. Andrews & Co. began to manufacture and sell it in that year, and continued so to do until some time in 1895, when they failed. It nowhere appears upon what terms Morton dealt with A. H. Andrews & Co. with reference to the car in suit. Thereafter the receiver, on or about February 10, 1896, by order of court transferred, with other property, "all of his right, title, and interest in and to the patents," etc., of A. H. Andrews & Co., to Heney & Merle Manufacturing Co. This latter company assigned the property and rights thus acquired to James B. Heney, who in turn, on or about May 21, 1896, sold the same to appellee, the A. H. Andrews Co. For about one year, from the time he severed his connection with A. H. Andrews & Co. until he entered the employ of appellee, Morton manufactured the bunk car of his patent under his own name. In 1896 he entered the employ of appellee, and continued in its employ until December 31, 1905, when it appears that the contract between the parties was abrogated. The record does not disclose what was done after 1905. During the first three or four of the nine years of Morton's employment with appellee he manu-

factured the device of his patent and sold it to appellee, and during the remaining period of approximately five years appellee itself manufactured the device under a profit sharing contract. There is no ground disclosed in the record justifying the claim of a license asserted by appellee.

The error assigned is the failure of the court to sustain the bill and to decree infringement. Other facts appear in the opinion.

Fred L. Chappell, of Kalamazoo, Mich., for appellant.

Dwight B. Cheever, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). On March 26, 1896, Morton's claims 3 and 4 were rejected by the examiner. These claims were amended and placed in interference with Bemis and Hüssey. The issue declared was the subject-matter of Morton's claims 1, 2, and 3, as defined by the examiner. These were awarded to Bemis. Morton thereupon acquiesced in the award, canceled claims 1, 2, and 3, and renumbered his two remaining claims as 1 and 2, being the claims now in issue. Bemis was granted the following claims in pursuance of said award:

"In a truck for use in lumber drying kilns, two parallel side pieces *A, A*, the wheels having their axles journaled in openings formed in said side pieces, the washers or separators *B* interposed at intervals of the length of the truck and serving to hold the side pieces at the required distance apart, the said washers *B* being hollow and having central openings for the passage of a securing bolt, the thickness of the washer at the point at which the bolt passes through it being less than at the periphery of the washer, substantially as described and for the purpose specified.

"A washer designed for separating the channel steel strip forming the frame of a lumber kiln truck, of the character described, the said washer consisting of a hollow body portion having apertured ends for the passage of a securing bolt, the ends being provided with a thickened portion surrounding the central bolt opening and the length of the washer at the point at which the bolt passes through it being less than at the outer face of the washer, substantially as described."

By reference to the claims in suit it will be seen that they embody the substance of Bemis' claim 1, with modifications of the grooved wheels and their adjustments. Bemis claims "the wheels having their axles journaled in openings formed in said side pieces" in combination, etc., confining his claims in the main to a lumber truck having specific arrangements of its spreaders, while Morton places particular stress upon the arrangement of the wheels in his truck. In a general way Bemis may be read upon Morton. Morton, however, claims to have been the first to invent and reduce to practice a bunk car of the kind in suit as a matter of fact. No reason is perceived for in any way limiting the terms of Bemis' claim 1. It covers a bunk car—wheels, spreaders, channel irons, and all that is necessary to make a complete bunk car, lacking only the special features of Morton's truck arrangement, to wit, nonrotatable axles, washers rotatably mounted on the axle at the ends of the hubs (that is abutting on the ends of the rollers contained in the hub), the lower axles with notch-formed shoulders, etc.

As before stated, Morton insists that it was not intended to concede to Bemis the channel irons, spreaders, etc., in combination with the

flanged wheel adjustments shown by Morton. In support of this contention Morton asserts (1) that Bemis consented by his conduct to the award of the issue of the interference between him and Hussey of August 1, 1896, of which he had notice; (2) that he never canceled or was asked to cancel his original claims 4 and 5; (3) that he was in fact the first inventor of his truck notwithstanding the cancellation to Bemis; (4) that all Bemis can claim as against Morton is contained in Morton's claim 3 as amended; (5) that the matter was granted to him in the patent in suit; (6) that Bemis is not in the prior art as to invention.

It is true Morton's claims in suit were not canceled or even formally discredited in the interference. That he is not entitled to claim a car constructed from channel irons, spreaders, and flanged wheels seems incontrovertible. What he did get was a bunk car constructed substantially in the manner described in the claims in suit, which must depend for novelty upon the features wherein such claims differ from Bemis.

The use of channel irons, which are always available, constitutes a great element of convenience, and strength as well. The art is a simple one, in which advances of a basic nature cannot be looked for. Every new idea tending to improve the usefulness of the device is entitled to serious consideration, and where, as here, efficiency is enhanced, in so simple a construction as a bunk car—a thing which has been in the broadest glare of man's simplest needs for a long period of time—no act of invention is too slight to be within the protection of the statute. Therefore, taking these matters into consideration, together with the presumptions arising from the grant of the patent, we hold the patent to be valid, but entitled to but a narrow range of equivalents.

Appellee's device is shown as Complainant's Exhibit No. 5 and is termed "defendant's truck, style 2." From the evidence it appears to be almost identical with the Morton bunk car in appearance. It has the right and left channel beams related to each other, as shown in the patent. The spreaders are double, instead of in a single piece. They serve the same purpose in substantially the same way; their outer rims bear against the inner faces of the beams as in the patent. The spreaders are provided with longitudinal central bolts, which clamp or pinch as in Morton; the rims, however, being skeletonized somewhat. It has Morton's axle openings in the beams. It has the notched axle ends for locking and lowering the axles. The axles are rigidly clamped against endwise displacement or rotation. There are anti-friction rollers, rotatable wheels, loose washers on the axles bearing against the ends of the hubs and of the rollers. The adjustment of the wheels is practically the same. Without invoking any material degree of the doctrine of equivalents, it appropriates the subject-matter of both of the claims in suit.

From the statement of facts herein, it is evident that appellee's claim to a shop right or license to manufacture the device of the claims of the patent in suit is without merit. It obtained no such right under its purchase of the assets of A. H. Andrews & Co. The

rights of Andrews & Co., if any, in the patent, were not superior to those of a naked license, and were therefore not assignable. *Hapgood v. Hewitt*, 119 U. S. 226, 234, 7 Sup. Ct. 193, 30 L. Ed. 369. Appellant was entitled to the relief above indicated, and the dismissal of the bill was error.

The decree of the District Court is reversed, with direction to proceed further in accordance herewith.

PHILADELPHIA RUBBER WORKS CO. v. UNITED STATES RUBBER RECLAIMING WORKS.

(Circuit Court of Appeals, Second Circuit. November 9, 1915. On Motion to Modify Decree, December 22, 1915.)

No. 121.

PATENTS ↻328—VALIDITY AND INFRINGEMENT—PROCESS FOR RECLAIMING RUBBER FROM VULCANIZED RUBBER WASTE.

The Marks patent, No. 635,141, for a process for reclaiming rubber from vulcanized rubber waste, was not anticipated, and sufficiently describes an operative process which produces substantially the product claimed; also *held* infringed.

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

Suit in equity by the Philadelphia Rubber Works Company against the United States Rubber Reclaiming Works. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 225 Fed. 789.

This cause comes here upon appeal from a decree of the District Court, Western District of New York, for injunction and accounting in a suit for alleged infringement of a patent. The patent sued upon is No. 635,141, granted October 17, 1899, to Arthur H. Marks for a "process for reclaiming rubber from vulcanized rubber waste."

The single claim reads as follows: "The described process for devulcanizing rubber waste which consists in submerging the finely-ground rubber waste in a dilute alkaline solution in a sealed vessel, in heating the contents of the vessel to a temperature of 344 degrees Fahrenheit more or less substantially as specified, and in maintaining said temperature for twenty-four hours more or less substantially as specified."

The opinion of Judge Hazel in the District Court will be found in 225 Fed. 789. A few months before his decision was rendered, the District Court for the Northern District of Ohio, Eastern Division, rendered a decision, adverse to the validity of the patent, in a suit brought by this complainant against the Portage Rubber Company. Judge Clarke's opinion will be found in 227 Fed. 623.

Francis J. Wing, of Cleveland, Ohio, and Arthur v. Briesen and Fritz Ziegler, Jr., both of New York City, for appellant.

Charles Neave and Alan N. Mann, both of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Both Judge Clarke and Judge Hazel have elaborately discussed the questions presented in these two causes,

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

and in their opinions there will be found quotations from the records and testimony, which need not be here repeated; the opinions should be consulted for a comprehensive statement of the controversy. It is sufficient here briefly to indicate why this court has reached the conclusion hereinafter indicated.

There is a mass of testimony in the record, dealing technically and scientifically with the *theories* as to just how the solution of the patent acts upon the rubber scrap when the mixture is heated as prescribed in the patent. It is interesting, perhaps, but of no especial importance, since it is in no way helpful towards finding the answer to the simple question: What did the patentee disclose? He advanced no theory in his specifications; it was not necessary for him to do so. All that the law required of him was a plain statement of his process, set forth in sufficient detail to be understood by a person skilled in the art. If the result of his process is a product which he describes as "devulcanized rubber having substantially the characteristics of fresh rubber and capable of being used in like manner and for like purpose," and if it further appears that this is the first time that this particular process was disclosed to the world, Marks was entitled to his patent. Whether he had some theory when he applied, or has one now, whether the experts have conflicting theories or not, are matters of no importance.

The description of the process is couched in plain and simple language. Finely ground rubber waste is put into a vessel. This vessel itself is located in an outer receptacle capable of containing it and of being tightly closed. No special shape is prescribed for either the vessel or receptacle; they may be cylindrical or square, high or squat; it is sufficient that one shall contain the other with a space to spare between the two. Upon the rubber waste that has been put into the inner vessel there is poured a dilute alkaline solution, a 3 per cent. solution of caustic soda being preferred. The patentee does not state the relative proportions of waste and solution, but he does give very clear and definite instructions as to the quantity of solution which shall be used. There is to be enough of the solution to permeate the finely ground rubber waste and completely submerge it. The inner vessel is then sealed up to prevent evaporation of the solution, and steam is let into the outer receptacle under a pressure of 125 pounds, more or less, equivalent to a temperature of 344 degrees Fahrenheit. This steam pressure is maintained for the time necessary—say 24 hours.

There certainly seems to be no obscurity about these directions. The rubber waste is to be finely ground; the patentee does not say through what size mesh its particles should pass, but it might be supposed that a person skilled in the art would know what would be the range of finely ground waste; and the art of reclaiming rubber from waste (or trying to do so) was an old one. The solution is stated to be "a dilute alkaline solution"—3 per cent. of caustic soda is given as preferred—but it might be supposed that one skilled in the art would know within what limits he might depart from 3 per cent. and still have "a dilute alkaline solution." Presumably all rubber waste is not absolutely identical, some may require a stronger solution than others, and

it might be supposed that a person skilled in the art would know how much he should vary the strength of the dilute solution in order to obtain results with the kind of finely-ground waste he was treating. Certainly the patentee's statement as to temperature and period of steam application is quite specific. Examination of the record indicates that the suppositions above postulated as to what one skilled in the art would know about "finely-ground rubber waste" and "a dilute alkaline solution" are fully warranted. There is no vagueness about the patentee's disclosure of his process.

Does it accomplish its intended result? Out of the mixture of waste and solution does there, when the process is complete, remain "devulcanized rubber having substantially the characteristics of fresh rubber and capable of being used in like manner and for like purposes"?

Defendant put his expert witness on the stand to prove a series of experiments he had made, following the directions of the patent and not producing the result which the patentee claimed. This expert had never had any experience in treating rubber; practically he was not skilled in the art. It is not infrequent in patent causes to find that experiments conducted to show that a patent lacks utility turn out as it was expected they would. Plaintiff calls attention to the statement of a witness, who had had large experience in treating rubber, that by following the Marks patent exactly he had produced a fair product. This defense, inoperativeness, is usually determined by the fate of another defense, infringement. If a patented process fails to produce a fair result, it will not be used commercially. Conversely, if a defendant is found to use the patented process commercially, it will be presumed that he gets a fair product by its use; and it will take more than a series of laboratory experiments to show that no such product results. Reaching as we have the conclusion hereinafter expressed as to infringement, we are satisfied that the patent sufficiently discloses a process which enables a person skilled in the art to produce the result which the patentee indicates. What is the showing of the prior art? Hall, No. 19,172, states that ground rubber waste should be submitted to the "operation of boiling water in caldrons, kettles, or tanks of any description." He says that lime water or alum can be used; but the method of using is manifestly remote from Marks. Hall, No. 22,217, submits the ground waste "in a close or proper vessel to the action of steam direct upon the rubber, or in connection with water for the space of 48 hours." That is not the Marks process. Hall, 25,160, provides for placing the ground waste "in a close steam boiler or other suitable vessel, into which steam is conducted through a steam pipe. In its passage through the pipe the steam is superheated." This also is not the Marks process.

It would be a waste of time to enumerate all the prior patents in the record; some suggesting one element, some another, of Marks' process. We may proceed at once to the patent to Mitchell, No. 395,987, January 8, 1889, which both Judge Clarke and Judge Hazel concur in holding comes nearer than any other to suggesting the process of the patent in suit. The discussion of this patent in their several opinions may be read; they reached opposite conclusions. Judge

Clarke finds that it "comes very close to being, if indeed it is not, a clear anticipation of the process of the Marks patent." Judge Hazel finds that Mitchell's process "defiberized rubber waste by the use of acid and pressure and then devulcanized it by an additional step after washing out the caustic soda," while Marks, on the other hand, "defiberized, desulphurized, and devulcanized waste rubber by a single operation and in so doing achieved a different result from Mitchell." After a careful study of the two patents in the light of the discussion of them by experts and counsel, we entirely concur with Judge Hazel's conclusions. This Mitchell patent cannot be transformed from a two-step process to a one-step process merely because in an English patent (20,289 of 1889) Mitchell recommended a one-step process to be carried out by the use of other agents than those specified in Mitchell, 395,987, and in Marks. In this English patent we find recommendations to use iron in the form of borings or filings, or even larger pieces, turpentine, bi-sulphide of carbon and naphtha. The following excerpts from the Mitchell patent, 395,987, indicate to us quite clearly that Judge Hazel's construction was a correct one. After describing a process for removing fiber and mineral matter, Mitchell says:

"Where the waste is unvulcanized this ends the process. * * * When, however, it is desired to devulcanize the rubber, I subject it to further treatment, as follows: Immediately after washing out the mud, and before the contents of the vessel have had time to cool, I again close the cock of the blow-off pipe *E* and force in steam until a pressure of say 125 pounds and a temperature of 383 degrees Fahrenheit have reached, by maintaining which for a period of from 12 to 36 hours the rubber will be devulcanized."

Before the steam is thus applied the defiberized waste has been thoroughly washed, first with hot and then with cold water. It is the subjection of this thoroughly cleaned waste directly to steam under pressure which, as Mitchell's patent states, "devulcanized" the rubber. We are unable to see how such a process can be held to anticipate Marks' process, or even to approach it so closely as to negative invention.

As to the defense of alleged prior uses, it seems unnecessary to add anything to Judge Hazel's discussion of this branch of the case.

The only witness available to show what process defendant employs was a detective; such process being carried on in secret. We concur with Judge Hazel that his testimony made out at least a prima facie case of infringement. Inasmuch as defendant introduced no evidence to show either what its process was or what it was *not* (*Badische Anilin v. Klipstein* [C. C.] 125 Fed. 543), we think infringement was sufficiently proved.

The decree is affirmed, with costs.

Walter C. Noyes, Arthur v. Briesen, and Fritz Ziegler, Jr., all of New York City, for petitioner.

Before LACOMBE, COXE, and WARD, Circuit Judges.

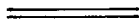
On Motion to Modify Decree.

PER CURIAM. This is a motion to recall the mandate recently sent down in this cause and to direct a modification of the interlocutory

decree which was affirmed. That decree is in the usual form. It finds validity of the patent, title, and infringement, directs recovery of profits and damages since October 9, 1906, and sends the case to a master to take account and report as to such profits and damages since October 9, 1906. Apparently this date is six years prior to the beginning of the suit. It is now asked that the decree be altered, so as to avoid all reference to this date, except for a proviso at the end of the clause that there shall be no assessment or accounting of profits and damages for any infringement committed prior to October 9, 1906.

We see no reason for modifying the interlocutory decree. The master will take account and state profits and damages, if any, for the period from the date named October 9, 1906, down. If either side so wishes, the master will distribute the amount into two or more periods, so that in the event of defendant (upon coming in of the master's report) convincing the court that it should not be held for profits or damages for one or more of those periods, final decree may be entered without any rehearing before the master. The decree, as it stands seems to us sufficiently elastic to allow this practice to be followed; but, if it is not, the District Court has power to make such a regulation for the master's guidance, without any reference to this court for authority so to do.

Motion denied.



IRVING IRON WORKS CO. v. HEBBERD & WENZ, Inc.

(Circuit Court of Appeals, Second Circuit, November 9, 1915.)

No. 48.

PATENTS ④—328—VALIDITY AND INFRINGEMENT—FASTENING FOR GRATINGS.

The Berson patent, No. 1,105,873, for means for fastening floor and sidewalk gratings, claim 1, *held* to disclose patentable invention, but not infringed.

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

Suit in equity by the Irving Iron Works Company against Hebbard & Wenz, Incorporated. Decree for defendant, and plaintiff appeals. Affirmed.

This cause comes here upon appeal from a decree dismissing the bill in a suit brought for alleged infringement of a patent. The patent is No. 1,105,873 issued August 4, 1914 (on application filed December 12, 1913), to N. Berson, for "means for fastening floor and sidewalk grating."

The opinion of Judge Veeder in the District Court is as follows:

Suit for infringement of claim 1 of patent No. 1,105,873, for means for fastening floor and sidewalk gratings, granted to Nathan Berson, assignor to Irving Iron Works Company, August 4, 1914. The claim involved reads:

④—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"The combination, with a grating having a plurality of substantially parallel projecting bars at each end and a frame for holding the said grating having end supporting pieces for the grating, of a projecting member set in the frame and having a roughened under surface extending substantially parallel to the grating, and a swinging member pivoted in the projecting ends of the grating and adapted to engage the roughened under surface of the projecting member."

From mere inspection of the patented device one would doubtless be inclined to regard it as a product of mechanical skill only. But, when it is considered in connection with the testimony in this case, I think it must be admitted that it discloses patentable invention. The evidence shows that the patented device solved a real difficulty which trained engineers had failed to solve, and that it was immediately adopted by the Public Service Commission for use on the subways.

The patent is therefore valid for what the inventor described and claimed. The combination, as set forth in the claim, includes "a projecting member set in the frame and having a roughened under surface * * * and a swinging member * * * adapted to engage the roughened under surface of the projecting member." The function of the roughened under surface of the projecting member, thus accentuated in the claim, is distinctly stated in the specification. The projecting member illustrated in the drawings is a bolt mounted in the vertical flange of the angle iron and clamped thereto by a lock nut. "The lock nut 7 can then be easily screwed up with a spanner thereby fastening the bolt rigidly in a horizontal position with its serrated under surface bearing down on the swinging member 8. This prevents the surging member 8 from being easily disengaged from the bolt and firmly fastens the grating in the frame."

While I am unable to assent to the defendant's contention that in its structure the projecting member is not "set in the frame," I agree that its projecting member has no "roughened under surface" as required by the claim. In the defendant's device the inwardly projecting member is stamped out of the vertical portion of the frame. Instead of having a roughened under surface, it is relatively smooth, or as smooth as it can be, considering the manner in which it is made. If it can also be said to be relatively rough as compared with a filed and polished surface, it is sufficient to say that there is no intentional roughening of the under surface, and that as compared with the plaintiff's threaded bolt it is smooth. Certainly it is not rough enough to perform the function which the complainant's claim and specification require.

I am therefore of opinion that the defendant's structure does not infringe.

A. Parker Smith, of New York City, for appellant.

Munn & Munn, of New York City (T. H. Anderson, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The patentee in his specifications states that:

"The problem of providing a simple and efficient fastening for holding the gratings in their supporting frames of angle iron or equivalent construction, which can be conveniently operated both in attaching and detaching, has presented some difficulty. Such fastening must be placed below the upper surface of the grating so as not to present any projections against which the feet of pedestrians may strike, and when so located it soon becomes buried in accumulated dirt, rust, or ice, which, added to the inaccessibility of its position, makes it difficult to detach when the grating is to be taken up, as well as difficult to install in the first place. I have invented a simple form of attachment for such gratings which overcomes these difficulties, and the best form of apparatus at present known to me, embodying the principle of my invention, is illustrated in the accompanying sheet of drawings."

The claim, infringement of which is charged, reads:

"1. The combination with a grating having a plurality of substantially parallel projecting bars at each end, and a frame for holding the said grating having end supporting pieces for the grating, of a projecting member set in the frame and having a roughened under surface extending substantially parallel to the grating, and a swinging member pivoted in the projecting ends of the grating and adapted to engage the roughened under surface of the projecting member."

The prior art contains a patent, No. 1,105,791, granted August 4, 1914 (on application filed July 7, 1913), to Walter E. Irving, for "means for fastening floor and sidewalk gratings." The claim of the Irving patent reads:

"The combination with a grating having a plurality of projecting bars at each end, and a frame for holding the same having end pieces of angle iron, of a threaded bolt loosely fitting in a hole in the vertical flange of the angle iron, a nut for clamping said bolt rigidly to said angle iron in a position parallel to the grating, and a swinging plate perforated to engage said bolt and pivoted to the projecting bars of the grating."

This sufficiently describes Irving's device. It is quite apparent that the claim of the patent in suit can be given no broad construction; the mere substitution of a hook, or an eye, or some other device, for a hole in a swinging plate, such hole, hook, eye, or what not engaging with a projection, would not be patentable. Examination of the specification shows that Berson effected a co-operation of the two parts of the holding device which apparently made it more efficient. His swinging member is a U-shaped structure adapted to swing under the projection with which it is to engage. His projecting member, which is a bolt, screw-threaded as bolts are, extends parallel to the horizontal flange of the angle iron on which the grating rests; the bolt being mounted in the vertical flange of the angle iron. A hole is made in this flange, through which the bolt is inserted and clamped to the flange by a lock nut. This hole is made larger than the bolt, so that the latter may be pointed slightly upward, if necessary, to facilitate swinging the U-shaped structure under it. The lock nut can then be easily screwed up with a spanner, thereby fastening the bolt rigidly in a horizontal position with its serrated under surface (the serration being the screw-threads) bearing down on the swinging member. This, as patentee points out, "prevents the swinging member from being easily disengaged from the bolt and firmly fastens the grating in the frame." It would seem to constitute a more effective holding device than one so arranged that the loop will swing in and out under the projection, without being directly pressed upon by the latter, after it has swung under. It is not necessary for us now to determine whether this particular arrangement of parts constitutes patentable invention; for the purposes of this appeal it may be assumed that the Berson patent is valid.

The details of the holding device above set forth are stated in the specifications to be "preferable," but we think claim 1 cannot be sustained unless they are read into it; the claim itself seems to indicate that this is to be done, because it enumerates the projecting member

"set in the frame," which implies that it is inserted in the frame and there affixed in the manner described in the patent, or, it may be, in some other equivalent manner which makes the two parts of the locking device function as Berson's parts do, the projection "bearing down" on the swinging loop to secure firm fastening.

The defendant's device differs from this. Its swinging hook, which is the equivalent of the U-shaped structure, swings under a projection from the vertical flange of the angle iron. That projection is a tongue or lug stamped out of the vertical flange, which does not nip or bear down on the swinging hook, and therefore lacks the function of firm fastening which the Berson combination secures. As claim 1 must be construed, if it is to stand, defendant does not infringe it.

Decree affirmed, with costs.

SCHMIDT v. CENTRAL FOUNDRY CO. et al.

(Circuit Court of Appeals, Third Circuit. January 12, 1916. Rehearing
Denied February 9, 1916.)

No. 1991.

PATENTS ⇨328—VALIDITY—UTILITY OF DEVICE.

The Schmidt patent, No. 924,840, for an improvement in pipe couplings,
claims 1 and 3, *held* void for lack of utility.

Appeal from the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

Suit in equity by Charles R. Schmidt against the Central Foundry Company and others. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 218 Fed. 466.

Connolly Bros., of Washington, D. C. (Thomas A. Connolly and Joseph B. Connolly, both of Washington, D. C., of counsel), for appellant.

Charles Neave and Clarence D. Kerr, both of New York City, for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The patent in suit, which was issued to the plaintiff, Charles R. Schmidt, on June 15, 1909, is for an improvement in pipe couplings, and relates "particularly to couplings for cast iron pipes wherein the interfitting faucet and spigot ends are tapered and machined or ground to produce a tight joint." The District Court dismissed the bill (218 Fed. 466) on the ground that

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

Schmidt—who had been the vice president and manager of the defendant company while he was developing the invention and was applying for the patent—had impliedly licensed the company to use the coupling and was therefore estopped from recovering damages for infringement.

We do not indicate any disapproval of the opinion below, but we feel disposed to decide the case on the ground that the claims in suit are invalid. The field of the patent is very narrow, as the following paragraphs from the specification will show :

"My invention has for its object the provision of novel means for producing a perfectly tight joint in couplings of the above-mentioned character, and in order to accomplish the desired result I so construct the faucet end of each pipe section as to render the same elastic, to that it will yield under the strain imposed upon it by the spigot end or entering member of the adjacent pipe section and accommodate itself to inequality or unexactness in the shape of the spigot end, due to imperfect workmanship, and will also permit of adjacent sections of pipe being perfectly joined, even though they are laid somewhat out of exact alinement. I produce the required elasticity of the faucet section by enlarging the bore of the faucet section adjacent to the tapered portion, so as to diminish the thickness of the wall of the faucet member and render the same expansible and elastic to a sufficient degree to accomplish the desired result."

* * * * *

"This enlargement of the bore or cavity of the faucet section in the rear of the tapered portion provides the required elasticity for the accomplishment of the first object hereinbefore set forth and constitutes the most important feature of my invention, and the manner in which the elasticity so provided is utilized in the provision of a perfectly tight joint will be hereinafter described."

* * * * *

"The parts as described are preferably made of cast iron, and when the adjacent ends of pipe sections are to be joined, the spigot end of one section is inserted in the faucet end of an adjacent section and bolts 5 are passed through the holes in the lugs of both sections, and when the bolts are tightened up by screwing up the nuts with which they are provided the two sections are drawn tightly together and form a perfectly tight and water or gas proof joint. If desired, the clamps 15 are also applied as shown in Fig. 2, and serve to hold the members tightly together in the event of the bolts failing to do so. In drawing the sections together, the faucet section yields or expands slightly owing to its elasticity, so that when the coupling operation is completed the spigot end will be tightly and snugly fitted in the faucet end, notwithstanding any slight irregularity that may exist in either section, and notwithstanding any slight deviation in axial alinement of the two sections that may occur."

Nothing described in the foregoing paragraphs is new, unless it be the annular groove that is the chief object of the patent. This is produced by—

"enlarging the bore of the faucet section adjacent to the tapered portion so as to diminish the thickness of the wall of the faucet member and render the same expansible and elastic to a sufficient degree to accomplish the desired result."

The claims in issue are 1 and 3, and they are similarly restricted:

"1. In a coupling for pipes, a coupling section having a tapered spigot end, in combination with a faucet section having a tapered faucet opening to receive said spigot end, the sections being provided with means for drawing them together, and the bore of the faucet section being enlarged adjacent the inner

end of the tapered portion thereof and being sufficiently elastic at said enlargement to expand when the sections are drawn tightly together.

"3. In a coupling for pipes, the combination of an exterior tapered spigot section with an interiorly tapered faucet section and means for drawing said sections together, the bore of the faucet section being enlarged at the rear of the tapered portion and being elastic at such enlargement, the inner walls of the enlarged portion being formed on curved lines."

It should be noted that the object of the patent is not to secure flexibility of the joint. The object is to increase the elasticity of the wall of the pipe itself, so that when the spigot end is forced into the faucet end the force shall compel the metal of the faucet to expand slightly and thus to admit the spigot a little more completely in order to make a tighter joint. The patentee's theory is that he will secure the needed elasticity by making the metal thinner close to the tapered portion, and for this purpose he provides the annular groove referred to. But whether he does in fact secure the elasticity he seeks is so much in doubt that we cannot regard it as proved. He did not testify himself, and the only evidence to support the theory was offered in rebuttal, and is so unsatisfactory that we cannot rely upon it safely. It consists of several mechanical tests that were made at the patentee's instance, but the value of the evidence is much impaired by the facts that the tests (1) were altogether *ex parte*, and (2) were not comparative. In other words, the witness tested certain couplings that were furnished to him by the patentee, but no tests were made of couplings that lacked the groove in question, and moreover all the tests were made without the defendant's knowledge. We have no evidence therefore concerning the fact of the increased elasticity, and (theory for theory) we have a positive expert opinion that the groove will produce no such result as the patentee hoped. In the ordinary case, an infringer is not permitted to deny the utility of the invention; but the acts of infringement complained of here were practically committed by Schmidt himself while he was acting for the foundry company as one of its responsible officers. On the ground, therefore, that the utility of the patent is not apparent, and that upon all the evidence we cannot avoid the conclusion that the groove in question serves no useful purpose, we are obliged to hold that the claims in suit are void.

The decree dismissing the bill is therefore affirmed.

GARRISON et al. v. EAGLE WAGON WORKS et al.
(Circuit Court of Appeals, Second Circuit. November 9, 1915.)
No. 30.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—DUMPING CAR.

The Lawrence patent, No. 645,816, for a dumping car having a hopper bottom with hinged doors swinging downward to discharge the load and a double run of equalizing chain to hold them securely in place when closed, as to the latter feature was not anticipated and discloses patentable invention; also *held* infringed.

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

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

Suit in equity by William T. Garrison and another against the Eagle Wagon Works and William Deveson, for infringement of patent No. 645,816, granted March 20, 1900, to George H. Lawrence, for a dumping car. Decree for defendants, and complainants appeal. Reversed.

The following is the opinion of the trial court:

In this action complainant asserts that defendant infringes the Lawrence patent for a dumper freight car by manufacturing a dumping wagon, intended to be drawn by horses, or at all events not to be self-propelled. Defendant's wagon is constructed in conformity with patent 699,262, issued May 6, 1902, to Van Wagenen.

In *Eagle Wagon Works v. Columbia Wagon Co.* (D. C.) 181 Fed. 150, the defendant in this case sued one alleged to infringe the Van Wagenen patent. In that suit the Lawrence patent was cited as an anticipation of the Van Wagenen invention. The defense was held not good, and the result affirmed in 183 Fed. 772, 106 C. C. A. 137. Unless this trial court is to take the unusual and extreme course of disagreeing with the Circuit Court of Appeals for the Third Circuit, this action must fail, provided the record be not so very different as to compel a different judgment.

This is the contention of present complainant, who asserts that the record in the Third circuit case "contained no proof that road wagons of the dumping type were frequently constructed with bottom doors hinged transversely, instead of longitudinally, and were perfectly operative." In my judgment it is very doubtful whether the present record does contain evidence that road wagons of the dumping type with doors transversely hinged were "perfectly operative." It is even more doubtful whether such road wagons, even if operative mechanically, were so successful as to close the door of invention to those devising wagons of the kind manufactured by this defendant.

It does not infrequently happen that a new record in a new case requires the abandonment of earlier decisions on the same patent. But it is also true that the first decision on a patent furnishes a species of target at which evidence may be directed in future litigation. Such evidence ought to be critically considered, and unless it is very strong earlier decisions should be adhered to. I do not think that the new evidence before this court is very strong, and I am sure that it is not sufficiently compelling to require this trial court to disagree with the appellate tribunal of the Third circuit.

Bill dismissed.

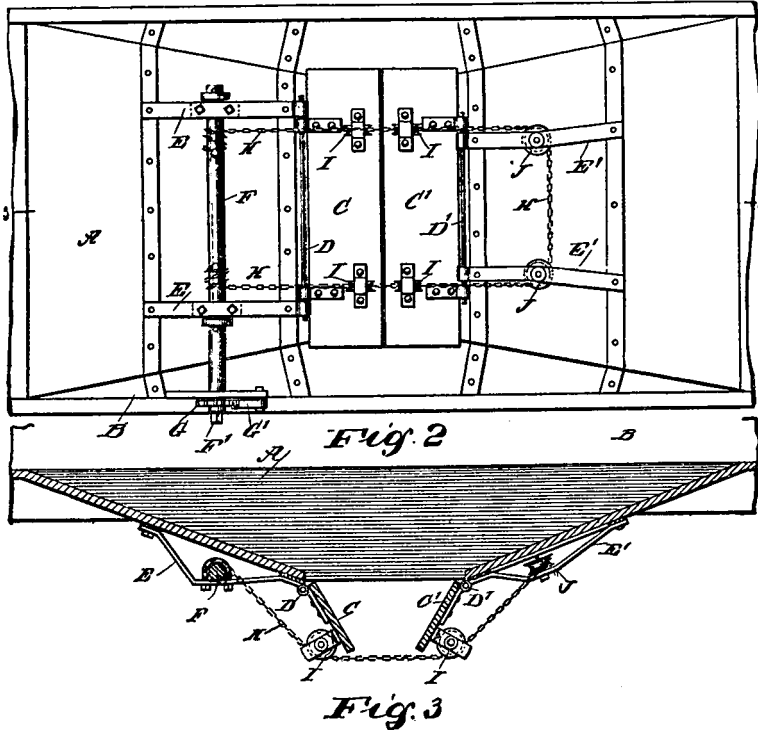
H. T. Fenton, of Philadelphia, Pa., for appellants.

Frederick G. Bodell, of Syracuse, N. Y., and A. E. Parsons, of Syracuse, N. Y., for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The improved dumping car belongs to the class in which the load is dumped by opening the bottom. The bottom is composed usually of two hinged doors, which normally are closed and held in closed position by some device; when released they swing downward, and the load falls or slides out; thereafter the doors are again raised into place and the car is ready to receive another load. The specification states that car is "simple and durable in construction and arranged to permit of conveniently opening and securely closing the doors without danger of unequal closing of said doors and a consequent loss of the loaded material." The structure in all its details is very clearly set forth. Figs. 2 and 3 here reproduced will make the description easy to understand. Fig. 2 is a plan view of the bottom of the car viewed from below. Other figures and the use of

the word "hopper" indicate a car with sloping sides running down to the doors, so that when the latter are open the loan will readily slide down to the aperture of discharge. Figure 3 is a sectional slide elevation on the line 3,3 indicated on Figure 2.



The patentee states that the hopper bottom "is provided with usual doors *C C'*" connected by hinges *D D'*, with the hopper-bottom, so as to readily swing into an open position when released. At one side of the hinge *D* for the door *C* is arranged a framework *E*, in which is journaled an extending winding shaft *F*, provided at one outer end with a square offset *F'* for the frame of a crank arm or other device to allow the operator to turn the shaft; the shaft being provided near the offset *F'* with a ratchet wheel *G*, adapted to be engaged by a pawl *G'* to lock shaft *F* against accidental unwinding.

"On the shaft *F* wind the ends of a chain *H*, extending longitudinally of the car and transversely across the doors *C C'* and under pulleys *I*, journaled in suitable bearings, at or near the free ends of the doors *C C'* at the under side thereof. The chain *H* then extends to and passes over pulleys *J* journaled in suitable bearings in the framework *E'* secured to the hopper bottom *A* at one side of the hinge *D*."

The patentee then describes a method of arranging the pulleys *I* and their journals, so that when the doors are closed there is formed "a truss chain for securely holding the door." This feature is referred

to only in claim 4, which is not involved in this suit. The specification then proceeds to detail the processes of opening the doors by releasing the pawl and of closing them by turning the shaft *F* and winding up the ends of the chain. These are so apparent from a glance at the drawings that description may be omitted. The patentee then points out the advantages of his structure as follows:

"Now it is evident that in case there is any slack in one of the runs of the chain it is readily equalized owing to the chain passing over the pulleys *J*, spaced apart on the car body and on the side of the doors opposite to that on which the shaft *F* is located. Hence the two runs of the chain push equally on the doors, near the ends thereof, and consequently both doors are swung properly into a closed position and are held in this position against accidental opening or against sagging at one end of the door owing to the equalized chain, the ends of which are uniformly wound up on the shaft *F*, the latter being locked against rotation by the pawl *G'* engaging the ratchet wheel *G*."

The claims in controversy are:

"1. A dumping car, provided with a winding shaft located on the under side of the car and at one side of the dumping doors, and an equalizing chain arranged for winding at its ends on said shaft, the chain extending transversely across the dumping doors and having a traveling connection with the car, to allow the chain to equalize, substantially as shown and described.

"2. A dumping car, provided with a winding shaft on the under side of the car body and at one side of the dumping doors, an equalizing chain arranged to wind at its ends on said shaft, the chain extending transversely across the dumping doors and car body, and pulleys on the car body at the side of the doors opposite that at which the shaft is located, the chain passing over said pulleys, to allow the chain to equalize, substantially as shown and described.

"3. A dumping car, provided with a winding shaft on the under side of the car body and at one side of the dumping doors, an equalizing chain arranged to wind at its ends on said shaft, the chain extending transversely across the dumping doors and car body, pulleys on the car body at the side of the doors opposite that at which the shaft is located, the chain passing over said pulleys, to allow the chain to equalize, and door pulleys on the under side of the doors at or near the free ends thereof, and under which the chain passes from the winding shaft to the car body pulleys, substantially as shown and described."

It often happens that a patentee's description will indicate in detail the points in which his device differs from those of the prior art. There is no such detailed indication here. It will therefore be necessary to refer to the prior art as disclosed by the record to ascertain just what it is which Lawrence showed by way of improvement: when that is disclosed we can see whether it constituted patentable invention. Vehicles with dumping bottom are used on ordinary roads and on railroad tracks; so far as the arrangements for opening or closing their dumping doors are concerned they belong to the same art. This prior art may be considered in the order in which it is given in the reference index.

One Deveson identified a sketch of what he called "old style Watson wagon," which he said he had dealt in—presumably prior to the patent in suit. We find no such sketch in the record, but from his testimony it is apparent that it had two chains with no equalizing device. The Watson patent, 378,272, February 21, 1888, shows a dumping wagon in which the bottom of the wagon box is divided lengthwise through the center, the two hinged parts swinging downwardly to discharge the load. The doors are swung up into place and held there by four separate

chains wound on two drums, each chain is independent of the others. Each door is held in place by a pull upward and at each outside corner, no chain runs under either door crosswise or lengthwise. The Johnson patent, 474,744, May 10, 1892, shows bottom doors opening transversely; it has a single chain which runs only once transversely across the middle of the doors. There is no equalizer and the chain crossing the doors once only, there is nothing to be equalized. Brown, 131,248, September 10, 1872; Hoadley, 183,396, October 17, 1876; Hubbard, 303,518, August 12, 1884, and 295,174, March 18, 1884, show equalizing devices for whiffletrees. Haas, 293,167, February 5, 1884, shows a machine for drawing metal bars in which there is an equalizing device. Scherer, 451,173, April 28, 1891, has an equalizer in a burial apparatus. It needed no reference to these remote arts to establish the proposition that the mechanic art was familiar with various devices for equalizing the pull of cables, ropes, and what-not. But if Lawrence was the first to place under the bottom of a dumping car two runs of chain across both doors so located as to hold them efficiently and to secure such an equalizing of the pull on the chain, when wound up, that the chain presses uniformly against both doors, we do not see why he should be deprived of the fruits of his ingenuity because he employs one or more common mechanical devices in carrying out his method. That he was the first to do this is manifest from the record. Indeed upon the argument defendant's counsel admitted that the use of an equalizer in connection with a dumping car the bottom of which is held up by runs of chain was new with Lawrence.

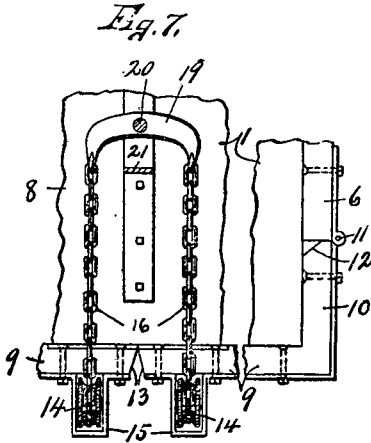
We find no file wrapper in the record, nor any action in the Patent Office which would call for any modification of the claims in controversy, which in plain language cover the simple and apparently useful device which Lawrence disclosed. Does the defendant's device infringe? It has the two hinged doors, the single chain underrunning them twice and an equalizing device at the side opposite the shaft on which the ends of the chain are wound, such equalizing device operating as Lawrence's does and accomplishing the same result. It is contended, however, that infringement is not shown for the following reasons.

1. Defendant's wagon is not a railroad car for dumping coal; it is a road wagon for dumping dirt or stone. For anything that appears in the record this is a single art; so far as the opening and closing of the doors is concerned there is no difference between a dumping car and a dumping cart. At the opening of his specification the patentee says that his invention relates to railroad coal-cars of the hopper bottom type. He had already stated that he had invented a new and "improved dumping car." There is nothing in his drawings to indicate that the device is not adaptable for carts as well as cars. In his claims he does not confine himself to railroad cars, in each of them referring to the vehicle in which his arrangement is to be placed as a "dumping car."

2. That in defendant's car the opening between the doors runs fore and aft, instead of transversely. For some sort of dumping the one method may be preferable to the other, but the chains of defendant

which cross the doors fore and aft near their free edge, work in the same way as plaintiff's and are equalized in their effect just as plaintiff's are.

3. As an equalizer the defendant sometimes uses a single large wheel instead of the two small wheels *JJ*; sometimes it uses a yoke pivoted centrally as here shown to the ends of which the chain is attached. These are manifest equivalents.



4. That defendant's device is patented. It is made under patent to Van Wagenen, 699,262, May 6, 1902 (application August 8, 1901), a junior patent to Lawrence's. But a junior patent may have some additional feature of improvement, which will be found patentable over the senior patent, and nevertheless a structure made under it will infringe if it includes the patentable feature of the senior patent. This Van Wagenen patent was sustained by the Court of Appeals, Third Circuit, in a suit brought by the present defendant against the Columbia Wagon Company. 183

Fed. 771, 106 C. C. A. 137. In that suit the Lawrence patent was cited as an anticipation. We do not know what the record in that suit disclosed; but if the same question were presented to us on the record here we should be strongly inclined to reach a different conclusion. The Third Circuit laid much stress on the circumstance that in the Lawrence patent the runs of chain extend transversely across the dumping doors, whereas in Van Wagenen they run across the doors near their meeting edge. This is a necessary result of the one set of doors opening fore and aft while the other opens across. The court says nothing at all about the equalizing of the chain stress, which seems to us the really important contribution of Lawrence to the art. However the question of the patentability of the Van Wagenen patent is not here; and in the suit in the Third Circuit the defense of noninfringement was not raised. It may be noted that in a later Van Wagenen patent, 779,891, January 10, 1905, the equalizing yoke is eccentrically pivoted; this secures such a modification of action that one door is closed a trifle sooner than the other. If this modification subserves a useful purpose the later Van Wagenen device would no doubt be patentable despite the Lawrence patent, but it would nevertheless infringe that patent since its equalizer operates just as Lawrence's does to keep an equal strain on both doors when closed, holding them more firmly in position than the single unequalized chain of the prior art, or the plurality of independent chains which obviously required careful regulation to insure a constant equal pressure by each chain.

The decree is reversed, with costs, and cause remanded, with instructions to enter decree in accordance with this opinion.

CHEATHAM ELECTRIC SWITCHING DEVICE CO. v. BROOKLYN RAPID TRANSIT CO. et al.

(District Court, E. D. New York. December 21, 1915.)

No. 3-11.

PATENTS Ⓒ323—SUIT FOR INFRINGEMENT—ISSUES—SCOPE OF DECREE.

A judgment at law for infringement was recovered against two defendants, the infringing article being an electric railway switch of a type known as "No. 14." Afterward suit in equity was brought against the same defendants to recover on account of additional switches of the same type put in use by defendants after the judgment and a decree for complainant was entered. On the accounting complainant offered evidence of the use by defendants of another type known as "No. 15," which was excluded on the ground that the question of infringement by that type had not been tried, whereupon complainant brought a second equity suit against the same and other defendants, in which such question was tried and decided in favor of defendants. Pending the hearing the patent expired. Defendants had ceased to use No. 14 switch before commencement of the suit. *Held*, that under such circumstances complainant was not entitled to take a decree against the new defendants for infringement by the No. 14 device, which was a question not litigated as against them and not in itself within the equity jurisdiction, since there was no ground for injunction, and the remedy at law was adequate.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 596-599; Dec. Dig. Ⓒ323.]

In Equity. Suit by the Cheatham Electric Switching Device Company against the Brooklyn Rapid Transit Company, the Brooklyn Heights Railroad Company, the Nassau Electric Railroad Company, the Brooklyn, Queens County & Suburban Railroad Company, the Coney Island & Brooklyn Railroad Company, and the Transit Development Company. On motion by complainant for decree. Denied.

For former opinion, see 227 Fed. 613.

O. Ellery Edwards, Jr., of New York City, for plaintiff.

T. J. Johnston, of New York City, for defendants.

CHATFIELD, District Judge. A decree was entered in this case upon the 19th day of October, 1915, dismissing the bill upon an opinion made herein upon the 18th day of October, 1915. This decree has been vacated, in order to listen to an application for reargument which has now been denied,¹ and also to consider certain motions made by the plaintiff and which he was prevented from urging, through accidental default in attendance at the time the said decree was noticed for settlement and entry. The objections are so fundamental that the

¹ This was a motion for reargument, based upon the decision by the Circuit Court of Appeals of the Second Circuit, on the 9th day of November, 1915, in the case of Garrison et al. v. Eagle Wagon Works and William Deveson, 229 Fed. 159, — C. C. A. —.

Chatfield, District Judge (in memorandum). Motion for rehearing denied. The claims of the Lawrence patent allow the use of equivalents. The claim of Cheatham, however, was not of the same character. This was the point of the decision as it was made.

November 29, 1915.

court of its own motion set aside the decree, so as to dispose of these questions upon the merits.

The complaint upon which the action is brought charges infringement during the term of six years last past of patents Nos. 612,702 and 917,541. A reference to the opinion in *Cheatham v. B. R. T.* (D. C.) 226 Fed. 495, and to other parallel cases in (D. C.) 197 Fed. 563 (C. C.) 191 Fed. 727, 203 Fed. (D. C.) 285, *Id.*, will give details of the previous litigation. The complaint then alleges the institution and trial of actions against the Transit Development Company and the Nassau Electric Railroad Company, based upon claim 3 of the earlier patent, and claims 1 and 2 of the later patent, and having to do with a certain switch used as a part of the defendants' structure and known as the No. 14 type switch. The complaint in this suit recites the verdict and judgment of the jury, including the assessment of damages for six switching devices installed by the Transit Development Company upon the lines of the Nassau Company, and two additional devices upon one of the other lines of the Brooklyn Rapid Transit system. The complaint then contains the usual averments and prayers, including injunction and destruction of the devices.

Issue was joined by an answer denying the validity of the patent and generally denying information as to the various allegations of the complaint. The defendants denied also any community of purpose or act in any of the matters charged to be infringement. The defendants then admitted the maintenance and general result of the suit brought against the Transit Development Company and the Nassau Electric Railroad Company just referred to, and also set up the bringing of a second action, on or about July 11, 1911, against the same two defendants for such additional devices of the No. 14 type as had been installed or used since the judgment in the earlier action. The answer then alleges that (upon reference to a master in the second action, following a decree for injunction and accounting) not only had evidence been presented showing infringement by switches of the No. 14 type, but the plaintiff had attempted to claim and prove infringement by and damages for the installation and use of a changed form of switch known as the No. 15 type switch. This the plaintiff claimed was made up of non-patentable equivalents for the parts of the No. 14 switch, and sought to have the master include it as an infringement at the time of the accounting.

This the master refused to do, and application was made to the court therefor, which, in an opinion in (D. C.) 197 Fed. at page 566, upheld the action of the master. The intent of this decision was to compel the plaintiff to institute a new suit against such defendants as could properly be made parties, and to allow the trial of all issues which could be heard upon all testimony pertaining thereto which might be brought out upon the trial. The present action was thereupon begun, and an application for preliminary injunction was denied, as involving the same question which the court had refused to consider in the previous action, and as trial could be had substantially at once. *Cheatham Electric Switching Device Co. v. Transit Development Co.* (D. C.) 226 Fed. 495. Upon the trial the previous adjudica-

tion, of validity of the claim sued on, was recognized, and again upon consideration of the issues as urged by the new defendants the same result was reached with respect to claim 3 of patent No. 612,702. But the court then held that infringement of that claim was not shown by the type 15 switch. Opinion filed October 17, 1915.

The record of the case shows clearly that the witnesses for both parties treated the model presented in court, and known as the No. 14 type, as a mechanical embodiment of the plaintiff's structure. The defendants continued to object throughout the trial to any statement that the defendants were bound by the previous verdict or judgment as an adjudication against them, and to any use of this No. 14 device as a structure adjudicated to be an infringement of claim 3 of the first Cheatham patent. But no proof was offered and no contention apparently raised that if claim 3 of the first Cheatham patent were valid, and if the type 14 switch were the subject-matter of the action, there would be any reason for the court's directing a different judgment than that which had been the result of the first trial before the jury, and of the second action involving the No. 14 switch. The court therefore overruled the objections of the defendants and went ahead with the action, rendering its opinion to the effect that the defendants were not infringing by the use of the so-called No. 15 switch, but upholding the validity of the patent. Judgment was entered accordingly by the decree which has been vacated.

The plaintiff now contends that he is entitled upon the pleadings and upon the proof to a judgment in his favor against all the present defendants for the use of the No. 14 switch, within the period of six years, and that the action should be dismissed only in so far as it is based upon alleged infringement by the No. 15 switch. The plaintiff claims further that upon such a decree the matter should be sent to the master to take evidence as to the use by these present defendants of the No. 14 switch. An examination of the record shows that the No. 14 switches referred to had all been removed from the defendants' system prior to the time of the trial. They are the same as the switches for which the Transit Development Company has been held responsible in the preceding suit.

There appears to be no reason why the plaintiff should be given a judgment against two sets of defendants with respect to the use of the No. 14 devices, although as was said in the opinion in this case the various defendants are so united in interest that they might be held to have common knowledge of litigation affecting one of them. Nevertheless they are different in identity and may have different legal responsibilities. The issue of validity and infringement should not be disposed of against these new parties unless equitable relief is proper and a case is made out against them.

The defendants opposed the proposition that these defendants are *bound* by the adjudication against the Transit Development Company and the Nassau Company, but they also complicated their position by strenuously objecting to any evidence upon this trial as to the identity of use by the Transit Development Company and by different defendants in the present action, while at the same time insisting that

the judgment recovered in the previous action is a bar to an additional judgment in the present case.

Nevertheless the court cannot see that this affects the situation. If the plaintiff has a cause of action for damages against the present defendants, for their previous use of the No. 14 switch, and if his rights cannot be entirely protected by the judgment recovered in the suit against the Transit Development Company, he has an adequate remedy at law therefor, and cannot now turn the decision in favor of the defendants, upon the issue of infringement with respect to the No. 15 switch, into a judgment in equity with an accounting for damages based upon the acts of infringement for which no relief is shown to be necessary in equity, and for which apparently he has already a judgment that is adequate and in which judgment responsible parties are also bound by injunction to secure the same results.

The motion of the plaintiff for a decree in his favor is denied, and the decree as previously entered for the defendants may be settled upon notice.

MERGENTHALER LINOTYPE CO. v. INTERNATIONAL TYPESETTING
MACH. CO. (two cases).

(District Court, S. D. New York. December 28, 1914.)

Nos. 10-266, 10-311.

1. PATENTS Ⓒ129—SUIT FOR INFRINGEMENT—ESTOPPEL TO DENY VALIDITY.

Where a patentee, who has assigned his patent, is employed by an alleged infringer for the very purpose of designing a competing device which will, if possible, avoid infringement, there is such privity between employer and employé that, if infringement results, the employer is affected by the equitable estoppel of the employé to deny the validity of the patent, but may, like him, show the state of the prior art.

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

2. PATENTS Ⓒ90—ANTICIPATION—PRIOR ART—PENDING APPLICATIONS.

As between two patents, the applications for which were in the Patent Office at the same time, neither is prior art as against the other, although, if they are for the same device, there may be a contest as to priority of invention, and either patentee may carry the date of invention back of the date of filing his application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 113-120; Dec. Dig. Ⓒ90.]

3. PATENTS Ⓒ129—SUIT FOR INFRINGEMENT—EVIDENCE—ESTOPPEL.

A complainant is not estopped to attack a patent, when introduced by defendant as a part of the prior art, by the fact that it was one of those originally sued on, but abandoned.

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

4. PATENTS Ⓒ165—CONSTRUCTION OF CLAIMS—"CLAIM IS THE MEASURE OF THE INVENTION."

The statement in opinions that "the claim in a patent is the measure of the invention" is to be understood as applying to attempts to broaden claims beyond their language, and not as precluding a court from inquir-

ing whether the claim as written is warranted by the specification, drawings, and the prior art.

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

5. PATENTS ⚡328—VALIDITY—LINOTYPE MECHANISM.
The Cooney and Totten patent, No. 759,501, claim 11, for a magazine gate for linotype machines, *held void*, as too broad.
6. PATENTS ⚡328—VALIDITY AND INFRINGEMENT—LINOTYPE MECHANISM.
The Homans patent, No. 888,402, claim 14, for a magazine gate or matrix locking device for linotype machines, *held not infringed*.
7. PATENTS ⚡328—ANTICIPATION BY PRIOR USE—LINOTYPE MECHANISM.
The Kennedy patent, No. 586,337, claims 1 and 2, for a space-band buffer for linotype machines, *held void* for prior use of the device by others.
8. PATENTS ⚡328—VALIDITY AND INFRINGEMENT—LINOTYPE MECHANISM.
The Rogers patent, No. 619,441, for a vise jaw mechanism for linotype machines, claims 1 and 2, if valid, are narrow, and are not infringed by the device of the Homans patent, No. 1,107,758, claim 4 *held invalid*, as too broad.
9. PATENTS ⚡328—VALIDITY AND INFRINGEMENT—LINOTYPE MECHANISM.
The Champion patent, No. 719,436, and the Morehouse patent, No. 826,593, both relating to vise jaw mechanism for linotype machines, *held not infringed*.
10. PATENTS ⚡328—INVENTION—LINOTYPE MECHANISM.
The Rogers patent, No. 630,112, for a pi-stacker or sorts-holding attachment for linotype machines, *held void* for lack of invention, and also for prior use.
11. PATENTS ⚡328—VALIDITY AND INVENTION—LINOTYPE MECHANISM.
The Muelheisen patent, No. 718,781, claims 2 and 3, relating to magazine channels for linotype machines, *held not infringed*.
12. PATENTS ⚡328—INFRINGEMENT—LINOTYPE MECHANISM.
The Dodge patent, No. 797,412, claim 9, for a magazine supporting frame in linotype machines, *held not infringed*.
13. PATENTS ⚡328—INFRINGEMENT—LINOTYPE MECHANISM.
The Homans patent, No. 830,436, claim 7, for a magazine supporting frame for linotype machines, *held infringed* by the device of the Homans patent, No. 1,116,280.
14. PATENTS ⚡328—VALIDITY AND INFRINGEMENT—LINOTYPE MECHANISM.
The Kennedy patent, No. 797,436, claim 1, for a keyboard lock for linotype machines, conceding its validity, if narrowly construed, *held not infringed*.
15. PATENTS ⚡328—VALIDITY AND INFRINGEMENT—LINOTYPE MECHANISM.
The Hensley patent, No. 643,289, claims 1, 2, and 3, for a mold-resistant device for linotype machines, *held valid and infringed*.
16. PATENTS ⚡328—VALIDITY AND INFRINGEMENT—LINOTYPE MECHANISM.
The Dodge patent, No. 739,996, claims 1, 2, and 3, for a mold support for linotype machines, *held infringed*.
17. PATENTS ⚡328—INVENTION—LINOTYPE MECHANISM.
The Bedell patent, No. 787,821, claims 1, 2, and 3, for a gear wheel for actuating the second keyboard roll in linotype machines from the first, *held void* for lack of invention.
18. PATENTS ⚡328—INFRINGEMENT—LINOTYPE MECHANISM.
The Homans patent, No. 837,276, claims 1 and 9, for a knife-adjusting device in slug-trimming mechanism for linotype machines, *held not infringed*.
19. PATENTS ⚡328—INFRINGEMENT—LINOTYPE MECHANISM.
The Rogers patent, No. 925,843, claims 1, 2, 3, and 4, for a mold disc support for linotype machines, construed, and *held not infringed*.

20. PATENTS ⇄328—INFRINGEMENT—LINOTYPE MECHANISM.

The Bedell patent, No. 848,338, claim 4, for means, operative from the front of the machine, for disconnecting the ejector slide in linotype machines, is limited to the particular means specified, or its equivalent. As so limited, *held* not infringed.

21. PATENTS ⇄328—VALIDITY AND INFRINGEMENT—LINOTYPE MECHANISM.

The Rogers reissue patent, No. 13,489 (original No. 615,909), claims 6 and 7, for an elevator for linotype machines employing matrices with two characters each, and provided with a movable matrix supporting blade, are entitled to a liberal construction, and a broad range of equivalents. As so construed, *held* infringed.

22. WORDS AND PHRASES—"YIELDING"—"RESILIENT"—"SPRING-SUPPORTED."

The word "yielding," as used in a patent claim, is not the equivalent of "resilient," or "spring-supported," but may be applied to a part which is retractable at will.

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

In Equity. Suits by the Mergenthaler Linotype Company against the International Typesetting Machine Company. Decree for complainant in first case, and in part in second case.

There are enumerated in the pleadings as the subject of suit 28 patents, but only those hereinafter specifically considered were finally put in issue. Either by reference in the bills of complaint or by notice of particulars, complainant specified before trial the several claims of the patents relied upon and said to be infringed. At or immediately before hearing, many of these claims were withdrawn from the consideration of the court, and no evidence was given in support of any claims, except those hereinafter specifically mentioned.

Frederick P. Fish and Robert F. Rogers, both of New York City, and Odin Roberts, of Boston, Mass., for complainant.

Edmund Wetmore and Robert D. Eggleston, both of New York City, for defendant.

HOUGH, District Judge. There having been no formal discontinuance of these actions, either in respect of the patents as to which suit was practically abandoned, or as to the claims originally relied upon and then withdrawn, the defendant is entitled to a decree dismissing the bill as to said patents and said claims. Such dismissal will not be without prejudice, but will be general.

Complainant has for many years developed, improved, manufactured, and sold what are generically known as "Linotype Machines," originally constructed under the well-known Mergenthaler patents. It was so often said in argument and briefs that it may be here asserted that the basic and organization patents on composing machines have expired, and that, during the life of the patents which insured control of the business, every effort has been made by complainant to obtain by invention or purchase what are commonly known as improvement patents.

Mr. Dodge, who for many years has been the president of complainant, is himself a frequent patentee, and Messrs. Rogers and Kennedy

have contributed a good many inventions; Mr. Rogers especially having been for years in the employment of complainant, primarily as an inventor. Mr. Homans was likewise a frequent patentee, whose inventions (in so far as they related to linotypes) were apparently invariably assigned to complainant; but it does not appear whether he was regularly employed on a salary.

By these usual and proper methods complainant has acquired, and now owns, all the patents here in suit and some dozens of those put in evidence. As the result of what may be called syndicated invention of this kind, complainant possesses (as shown by the exhibits herein) a long line of subsidiary inventions or patents, each one covering some specific part of the standard Mergenthaler linotype, a machine used all over the world and exemplified by the exhibit referred to during the lengthy trial of these cases as the "No. 5." Upon the expiration, in 1912, of the latest patent regarded as basic and affecting such machines, the defendant company was organized, for the expressly avowed purpose of making (*inter alia*) a machine which at two-thirds of the price would be the equivalent of and do just as good work as the No. 5. I think it proven that, with some possible exceptions in small detail, defendant has succeeded in this effort, the result of which has been referred to during this litigation as "Exhibit 23," or the "Intertype."

As shown by its advertisements and publications of divers kinds, defendant used in producing Exhibit 23 the services of Mr. Homans, who has been held out to the world as the deviser or designer or organizer of linotype No. 5. Defendant has sought to induce the purchase of machines like Exhibit 23 by statements (in divers forms) that its machine had been designed by Mr. Homans, and such words have been used as the following:

"The Intertype (Exhibit 23) is the better machine because it was designed by the man who invented the Model 5 linotype; he put into the Intertype the result of seven years' experience with the Model 5."

It does not appear that Homans has become a shareholder or officer of defendant, nor does the evidence reveal the exact nature of his business relations; but it is in evidence and has been admitted that defendant induced Homans to terminate business relations with complainant, in order that he might make for it something that could be sold in competition with complainant's No. 5 without infringing the long line of secondary, subsidiary, or improvement patents owned by complainant, and to which Mr. Homans had made substantial contributions.

Before taking up the various patents in suit, it seems best to state generally my position on several questions of law which have been fully argued, even though the view taken as to invention and infringement may render some of these points inapplicable.

Estoppel as to Patents by Homans.

[1] Complainant asserts that defendant, though a corporation, is so associated and has so co-operated with Mr. Homans for the purpose of making and selling the thing (Exhibit 23) charged to be an infringement as to affect said defendant with an equitable estoppel, preventing

it from alleging invalidity of any patent by Homans affecting the lino-type and here in suit. This proposition is worked out from the admitted doctrine that a patentee who has sold his patent is estopped to deny its validity when pursued by his own assignee.

Homans is not a defendant here; no injunction is sought against him. He personally is not said to be an infringer, and defendant relies upon the cases of *Boston Lasting Machine Co. v. Woodward*, 82 Fed. 97, 27 C. C. A. 69, *Babcock & Wilcox Co. v. Toledo Boiler Works Co.*, 170 Fed. 81, 95 C. C. A. 363, and *Trussed Concrete Steel Co. v. Corrugated Bar Co.* (D. C.) 214 Fed. 393. The ground of decision in these cases is well stated by Putnam, J. (82 Fed. at page 98, 27 C. C. A. 70), thus:

"While a person occupying a subordinate position may be in privity with his principal, in the sense in which that word may properly be used in this connection, the reverse is not ordinarily true."

This means that, because Homans is an employé or subordinate, the defendant cannot be said to be in privity with him; and as Homans himself could not be enjoined in this suit, it is impossible to work out an equitable estoppel as against the corporation employing him, which is not technically in privity with him. As a piece of technique this statement is doubtless correct, but I cannot admit that equitable estoppel is to be limited to such narrow grounds.

The first question in each litigation is to decide the nature of the employment by an alleged infringer of the assignor patentee. If he is a mere subordinate, if he acts only under instructions, if he is not the brains of the infringing combination, it is obviously improper to promote him out of his place and treat the employer as the equal of the employé. But where a man who has assigned his patent is employed by an alleged infringer for the very purpose of avoiding (if possible) his own patent, and when the designing of such evasion is definitely committed to said patentee, it appears to me that such unusual relation between the employer and employé calls for an application of the equitable rule of which as yet no instance is found in the books.

Believing the circumstances shown here to be quite new, I am of opinion that they warrant the holding that this defendant, so far as its Exhibit 23 is concerned, is estopped from denying the validity of any patent granted to Homans assigned to the complainant, sued upon here, and said to be infringed by said exhibit. Such an estoppel, however, no matter against whom it may be upheld, is "limited in character, and [even] an assignor, when subsequently sued for infringing the assigned patent, may show the state of the art for the purpose of limiting its scope." *Babcock, etc., v. Toledo Co.*, supra, 170 Fed. at page 84, 95 C. C. A. 366; *Standard Plunger, etc., Co. v. Stokes*, 212 Fed. 941, 129 C. C. A. 461.

Copending Patents as Anticipations.

[2] It is thought to be plainly established in this circuit by controlling authority that as between two patents, the applications for which were in the Patent Office at the same time, neither is prior art as against the other; the reason for the rule being that, assuming each

applicant to be a person skilled in the art, neither could know of the other's confidential communication to the Commissioner of Patents contained in his application.

But this does not prevent a contest between two such patentees as to who was the original inventor; such contest, however, being predicated upon the assumption that the two patents are for the same device. Either or both of the patentees may by competent evidence carry the actual date of invention back of the assumed date, viz., the day when application was filed. *Sundh Electric Co. v. Interboro Rapid Transit Co.*, 198 Fed. 94, 117 C. C. A. 280; *Vacuum Engineering Co. v. Dunn*, 209 Fed. 219, 126 C. C. A. 313.

The Admissibility and Effect of Mergenthaler Patent 614,230.

[3] This patent is owned by complainant, and was originally sued upon, but abandoned. The complainant has introduced evidence to show the patent inoperative, and to this evidence defendant objected, on the ground that it was inconsistent for complainant to first sue on a patent and then attack it. I am of opinion that a conclusive answer to this contention is that defendant itself introduced the patent mentioned in order to show the state of the prior art. Whatever inconsistency might have resided in plaintiff's attacking its own patent was cured by the introduction of the document in evidence by defendant.

Construction of Claims.

[4] All of the patents here in suit relate to mechanical devices, possibly important in themselves, but in comparison to the aggregate of invention displayed by the linotype machines very small indeed. Each of them displays by diagram and describes in words a particular method of arriving at a certain result. Most of them contain in their specifications the cautionary statement that the applicant shows his preferred method, but that other methods of producing the same beneficial effect will occur to the skilled mechanic. The claims in suit are frequently, if not usually, for combinations, couched in very broad and general terms.

This condition is not infrequent, but it must be unusual for so many instances thereof to occur at a single hearing; and naturally, therefore, discussion has been acute as to the proper method of approaching, considering, and interpreting patent claims generally, and claims of the kind above described in particular. Complainant has insisted that its claims are to be taken literally, and that, if any given claim reads upon the device said to infringe, it is the duty of the court to instantly apply such language as is found in *National Enameling, etc., Co. v. New England, etc., Co.*, 151 Fed. at page 23, 80 C. C. A. 489:

"The rule is fundamental, in the construction of patents, that the claim in the patent is the measure of the invention. The specification may be referred to, to explain any ambiguity in the claim, but it cannot be referred to for the purpose of expanding or changing the claim."

And again in *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303, are found the words:

"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 language just quoted is from Justice Bradley's famous "Nose of Wax" decision; and it is curious to note that the citations made above, and many others relied upon by complainant, are from cases wherein the courts thought that the claims of the patent were so inartificially or insufficiently drawn as not to protect the real invention displayed by the specifications and drawings. The thought behind such remarks as those just cited is fully and acutely revealed by Wallace, J., in the National Enameling Case, *supra*, 151 Fed. at page 29, 80 C. C. A. 495:

"Courts lean towards reading into the claims of a patent such limitations as will save the real invention as disclosed by the specification and the prior state of the art. But when the claims are drawn in broad and nebulous terms, with the apparent purpose of enabling the patentee to monopolize an important industry, the courts should be slow in attempting to sustain their validity by narrowing them beyond the boundaries which are clearly warranted by the specification."

But cases frequently arise, and this is one of them, where contest rages around the proposition that the claim, though plain enough and clear enough, is much broader than the invention. In my opinion there is no doubt as to the law of interpretation in such instances. The phrase made so much of, "the claim in the patent is the measure of the invention," is to be understood in the light of known statute law and familiar practice. The claim is what the patentee (or his attorney) asserts to be the measure or description of the invention. To be sure, it can never be affixed to a patent grant until it has been approved by the Commissioner of Patents; but it by no means follows that such official approval gives to the claim a sacrosanct character. There is one question always open to investigation and capable of being put in many ways, namely: *Is the claim true?* Is it *true* that the invention is measured by the claim in suit?

If this could not be done, most patent litigations would cease, and the specifications of a patent would be useful only to the mechanic who wished to construct the patented device. Such expressions as "expanding" or "limiting" or "contracting" the claims of a patent are no more than expressions of dissatisfaction with judicial efforts to ascertain the "true meaning and intention of the parties when [the patents] were made and allowed," and in ascertaining such true meaning "the specification of a patent which forms a part of the same application as its claims must be read and construed with the latter." *Ottumwa, etc., Co. v. Christy, etc., Co.*, 215 Fed. 362, 131 C. C. A. 504.

Into that specification is read all the prior art as revealed by legal evidence, and it is by measuring the addition to the sum of human knowledge shown by the specification to have been contributed by the applicant that the truth—i. e., the true meaning of the claim—is to be discovered. Many a falsehood has passed the Patent Office in the shape of a claim; nor has all wisdom in discovering such falsehoods been found to reside in the courts, but each investigating authority in its turn, from the primary examiner to the Supreme Court, is but engaged in ascertaining one thing, *viz.*: What is the invention revealed,

not only by the claim (which, after all, is but an opinion), but by the specifications, drawings, prior art, and publications as interpreted by the aid of human experts?

I do not say it is the only method, but surely it is an orderly and legal method, of investigation, to first ascertain whether the mental processes, out of which every application for a patent must grow, rise to the dignity of invention; if invention is found, it must be assigned to one of those convenient categories justified by a species of secondary law, and called primary or secondary inventions. When the patent has thus been assigned to its rank, the investigator is ready to consider the question of equivalents. I do not think it necessary to fortify the foregoing statement with authorities, numerous as they are; and it has been made only to fairly put on record my own attempted mental processes in solving what are really two questions of fact—questions which in a jury trial are always left to the jury—namely, invention and infringement.

As to interpretation (or mind working), a good method of procedure in a case perfectly illustrative of the problem here presented is well shown by *Rose Mfg. Co. v. Cox Brass Mfg. Co.* (D. C.) 201 Fed. 930. This decision of Judge Hazel shows how a man of experience ordinarily operates, in respect of the interpretation of secondary patents. It is assumed, without further discussion, that all of the patents here involved are of a secondary nature.

One other statement or admission as to my own preferred method of investigating mechanical or design patents may at least assist criticism. Before it seems to me possible to measure invention, or declare the true intent and meaning of the parties, or form an opinion as to the truth or falsehood of the claims, or venture upon an interpretation thereof, it is obligatory to find out the *thing* that the alleged inventor has made, and to understand how that *thing* works, what result it produces, and how the same is reached. When this *thing* is ascertained, the normal limit of the invention is clearly seen.

The importance of the invention should next be judged from the prior art or the absence thereof. When the nature of the *thing* and its importance have been grasped, it is time enough to study the claim. If it is found that the claim covers a larger invention than is revealed to the eye by the *thing* constructed and shown, such claim can only be fully validated by a consideration of the importance of that thing in the light of the prior art; and thus the doctrine of equivalents is reached.

That doctrine itself is but the usual way of expressing the unity or severance of form and substance, so finely stated in *Winans v. Denmead*, 15 How. at page 343, 14 L. Ed. 717. The patents submitted for test in these actions, I shall treat in groups in the order in which evidence was taken; each patent or group relating to one especial device on the Intertype.

I. The Magazine Gate Patents.

These are Cooney and Totten, 759,501, with claim 11 in issue, and Homans, 888,402, with claim 14 in issue.

[5] The first of these patents informs us (without contradiction) that prior to Cooney's invention it had been the practice to hinge the "throat" or channel entrance permanently to the upper end of the magazine. It is vital to a successful linotype that magazines should be removable, so that as many different fonts of matrices may be used as business requires. The throat is rather a delicate portion of the magazine, which in other respects is solid and not easily injured. But when such throats were permanently fixed to magazines the whole apparatus had to be changed whenever it was desired to use a new font. This, as Cooney says, "added to the weight and to the labor of the attendant," and moreover the throat was liable "to fall out of position [and have] its partitions bent and rendered inoperative." The substance of Cooney's invention was to avoid the necessity of providing a throat or channel entrance for each magazine, and to put upon the linotype a permanent throat, which would serve for any number of magazines, with channels corresponding to those existing in the throat.

The most casual observation of a composing machine shows the great value of a device of this nature; but defendant's alleged infringement does not exist in violation of the claims which cover this substantial advance in the art. If a magazine without a throat was to be removed, it would naturally be tilted in the process of removal, and the matrices would tend to fall out. It was therefore necessary to provide some method of closing that end of the magazine where the throat was placed when in operative position. "For this purpose," says Cooney, "we extend a gate or guard across the upper end of the magazine." And he proceeds to show a gate consisting of a right angle of metal hinged at the angle and so arranged in connection with a spring affixed to the magazine proper as to cause one side of the angle to operate as a gate by pressure of the spring (through a lever) on the other side of the angle. When a new magazine was inserted, and the throat moved into operative position, a projection on the throat caught the gate and lifted it up against the pressure of the aforesaid spring. Taking away the throat permitted the gate to close again.

This device is covered (as an incident to the main invention) by several claims, but the only one in suit is in the following language:

"11. In a linotype machine, in combination with a removable magazine, a gate or guard movably connected to its upper end to prevent the accidental escape of the matrices when the magazine is separated from the machine."

[6] The Homans patent covers an entire linotype machine, and the object to be reached is to provide "a simple and inexpensive construction and arrangement under which two, three, or more magazines may be combined with a single composing mechanism in such manner that matrices may be delivered to any line from any one or more of the magazines, and also to provide mechanism by which the matrices may be returned," etc. As an incident of this machine it was thought desirable "to lock the matrices in the magazines of each pair when the magazine is to be removed from the machine."

In order to produce this result, Homans shows an apparatus by which projections upon a bar are made to underride the side ears of the lowermost matrices in the various columns or channels of each

magazine, thereby "locking the matrices within the magazine." It will be observed that this plan of operation does not contemplate merely closing one end of a channel or passage within which there may be one matrix or twenty, and Homans does not call his device a gate or guard; it is a "matrix locking device." His specific apparatus is covered in several claims, but the only claim in suit is as follows:

"14. In combination with a supporting frame and a removable magazine, a movable matrix locking device at the upper end of said magazine, and a spring whereby said bar is moved to confine the matrices as the magazine is moved from its operative position."

The Intertype is a single magazine machine, and is substantially like that for which Cooney's apparatus was devised. It shows a gate or guard normally held over the upper end of the magazine by ribs or slats of steel fastened to the gate itself and to the underside of the magazine. When the magazine is placed in operative position, this gate meets a detent or projection on the main frame of the magazine support. The magazine itself, being very heavy in comparison with the gate, assumes its normal position on the main frame; but the gate is depressed by the action of the detent and the springing or yielding quality of the steel slats which normally keep the gate in position.

It was not new to have a gate or guard at the end of a magazine. The only new thing done by Cooney was to interpose a pressure which would automatically open a gate as the magazine settled into operating position.

The bill is dismissed as to the Homans patent because I do not think that Homans shows a gate or guard at all. He invented a "matrix locking device," and in no true sense of that phrase as Homans used it is there any such device upon the Intertype.

The bill is dismissed as to the Cooney and Totten patent, because the invention shown, so far as the gate or guard is concerned, is so slight as not to justify or render true such a broad claim as No. 11. This claim will read upon any gate. It is thought doubtful whether the apparatus on the Intertype is the mechanical equivalent of what Cooney exhibits; but, even if it is, the invention of the patent in suit is so narrow as to render it necessary to confine its application to the specific device shown.

II. The Space-Band Buffer Patent.

[7] This is Kennedy, 586,337, with claims 1 and 2 in issue. Mr. Kennedy says that the essence of his invention "lies in a buffer located below the composing device, which serves the twofold purpose of checking the descent of the spacers, in order to relieve their ears from shock, and holding the spacers against a turning or twisting movement." It is not necessary to set forth the claims at length, and the spacer in use on the Intertype exactly corresponds to what Kennedy describes and is used on the linotype No. 5.

In my judgment the only defense to this action is a prior use in the office of the Philadelphia Times. It is admitted that proof of such use must be beyond a reasonable doubt. This is one of the instances where seeing and hearing witnesses in a patent suit is partic-

ularly valuable. After seeing and hearing especially the witness Roller, I am satisfied that he intended to tell the truth, and that when he said that he saw a device which (if it existed) was a complete anticipation on a linotype machine, and used it before the time that he left the employment of the newspaper in December, 1895, I am convinced that he did tell the truth.

As to this patent the bill is dismissed.

III. Vise Jaw Patents.

These are Rogers, 619,441, with claims 1, 2, and 4 in issue; Champinon, 719,436, with claims 3, 6, and 7 in issue; and Morehouse, 826,593, with claims 1 and 2 in issue.

[8] There is no evidence that any of these patents ever resulted in commercial machines containing devices exactly like those portrayed in the patents. The Rogers device is said to be present in principle in linotype No. 5, but physical representation goes no further. In all three instances the inventors assigned before issue to the complainant herein.

The vise jaw apparatus on the Intertype was designed by Homans, and is obviously the exact thing shown in a patent to him (No. 1,107,758). The arrangement of the left-hand vise jaw in any of the composing machines shown to me is a matter of considerable delicacy. There must be provided what has been called a "pinching" or "winking" movement, by which the jaw moves a microscopic distance to firmly grasp the matrices at the moment of presentation to the mold; but, if that firm grasp be not released, the matrices cannot be taken away by the second elevator for the purpose of redistribution. Consequently the jaw, which has so slightly advanced to pinch the matrices, must after the molding process is completed automatically retreat the same distance.

Since the utility of the linotype depends on its ability to print type lines of varying lengths, it is obvious that the vise jaws must be adjustable to a type line of any length within the capacity of the machine, and this must be effected without interfering with the above referred to pinching or winking process. That process, as above stated, is automatic, i. e., it takes place in the normal operation of the power actuated machine; but adjustment to the requisite length of type line must be done by special human action.

The operator sitting before the keyboard was formerly obliged to get up and go to one side or end of the machine in order to effect this change in vise jaw adjustment requisite for type line changes. Rogers' patent was not intended to relieve the operator from the necessity of rising from his seat, but it did provide a swifter and more easily operated method of changing the adjustment of the left-hand jaw, and is confessedly an improvement upon or rearrangement of the parts of the device shown in patent to Mergenthaler, 436,531, and specifically illustrated in Figure 17 thereof. (The same letters of reference are used throughout the two patents).

Rogers says (and all the evidence bears him out) that the essence of his invention resides "in combining with the sliding jaw and the

nut an *intermediate adjustable support by which the jaw may be sustained at different distances from the nut.*" He accordingly shows the same screw as that displayed in the prior Mergenthaler patent, but reduces its length and introduces for the sole purpose of regulating adjustment a rod or bar. He then sets forth the claims in suit, thus:

"1. In a linotype machine, the combination of a sliding jaw, a screw and nut supported thereby, and an adjustable connection between the nut and the jaw, substantially as described.

"2. In a linotype machine, a sliding jaw, a movable nut or support therefor, and an adjustable toothed connection between the jaw and nut."

"4. In a linotype machine, the combination of an adjustable jaw, a longitudinally adjustable rod or bar to support the same, and a locking device engaging said bar to hold the same in predetermined positions only, whereby the jaw may be speedily set for different standard measures."

The leading characteristic of claims 1 and 2 is the existence of an adjustable connection between the jaw and the "nut." The jaw is of course the vise jaw, and the "nut" (*m*¹³) is a piece of metal fast to the frame of the machine, which at once furnishes support to the rather long rod or bar (*A*), and likewise gives a place for regulating the adjustment of the same far superior to the process of the prior art, which consisted in unscrewing certain washers at the head of the regulating and supporting screw, thereby loosening the same and rendering possible the process of regulation.

The fourth claim is to my mind an example of an "untrue" claim. It will read (except for the word "speedily") upon the devices of the prior art, and particularly upon the Mergenthaler machine made under patent 436,531.

The Homans device, which is alleged to infringe, consists essentially of a rack bar extending from the jaw through what may be called a nut fixed in the frame. In that fixed nut (or in the frame of which the nut is a part) is a screw; but there is no screw from the frame to a nut, nor is there a bar from the nut to the jaw. I can see no similarity between Rogers' construction, as shown in the diagrams attached to his patent, and the defendant's device. The case for the complainant is summed up by a remark of Mr. Woodward (plaintiff's expert) in this form:

"The nut is stationary, but the screw moves and virtually performs the function of the nut in Rogers."

It seems to me that this is very far-fetched. In my opinion the Intertype does not infringe on the Rogers patent so far as claims 1 and 2 are concerned, and claim 4, not being justified by the conditions of the prior art, must be pronounced invalid. Put in its shortest form, my belief on this head is that Rogers did not invent the longitudinal adjustable rod or bar in combination with an adjustable jaw and a locking device; he only invented one particular form of such combination. Viewed most favorably for him, it may be said that he was the first to invent that form of the combination which embraced and showed adjustable connection between the nut and jaw. I doubt this; but, even if it be true, defendant does not infringe.

[9] It is not necessary to quote the claims of the Champion patent in suit. The patent may be shortly described as displaying a handle

conveniently connected with the bolt (or vertical pin *B*) of the Rogers patent, whereby that bolt could be raised so as to permit the movement of the bar which regulates the adjustment of the vise jaw. This handle or button was so placed as to be within reach of the hand of a seated operator. Champion then proceeded to claim in combination with the apparatus of Rogers "locking devices extended therefrom within reach of the operator at the keyboard." This claim, literally construed, would prevent anybody else, except Champion, regulating the left-hand vise jaw of a linotype machine through means reachable by a seated operator. An examination of Champion's device shows that it scarcely rises to the dignity of invention. He did not really invent nor think of anything else except the particular form of simple rock shaft and handle shown in his drawings and described in his specification. The patent must be limited to the apparatus shown, and, as so construed, is not infringed.

The Morehouse patent has not been dwelt upon in argument, and I do not think it necessary to say more than that, if the claims of Rogers have not been infringed by the Intertype, a fortiori those of Morehouse have not been violated.

The bill is dismissed as to all three of the patents concerned in this branch of the case.

IV. The Pi-Stacker Patent.

[10] This is Rogers, 630,112, with claims 1, 2, and 3 in suit. The following is an illustrative claim:

"2. A sorts-holding attachment for a linotype machine, comprising a stick or receiver, open at the top and front, a matrix feeding or assembling device at one end thereof, and a resistant to sustain the matrices as they are assembled in line."

The same enumeration of elements is put into combination claims numbered 1 and 3; but, whether stated technically as a combination or as an enumeration of parts of a machine, there is confessedly but one new element. As Mr. Woodward said:

"The new element is the open stick or holder and the feed device operating in that particular way."

He was then asked:

"Q. What particular way? A. Well, as a star wheel."

The rest of the evidence shows that the witness did not mean by this statement that star wheels were new, or that a star wheel operating to drive or place matrices in an open holder was new. In my judgment, this is a device of the narrowest kind; there was nothing new about it, except that Mr. Rogers ventured to eject his matrices from a well-known tube by a well-known star wheel into a stick or receiver which was "open at the top and front." But he did not quite dare to trust to gravity to keep the matrices in place when they had reached the open stick, for he left a recess between the bottom and back plates into which the lower ears of the matrices could fit. This recess was found unnecessary, for it is in evidence that this invention is on the linotype No. 5, and no such recess is discoverable. The re-

sult is that what the patentee did was to take the forward side or partial side off a perfectly familiar pi-stacker. In my judgment this was not patentable invention. It is rather curious to note that the only novelty discovered by Mr. Woodward and testified to by him about this patent was not even mentioned by Mr. Dodge when acting as attorney for Rogers, as shown by the file wrapper.

The foregoing renders it unnecessary to decide the question of prior use raised by the introduction in evidence of the Ott. Mergenthaler catalogue of 1898 and the replying evidence of Mr. Rogers to the effect that he really invented this pi-stacker long before any application for patent thereon was made. But it is plainly shown by the catalogue referred to that the very thing here patented was offered for sale before this application was filed by persons who did not think it worth while to ask for a patent thereon. I am of the same opinion.

The bill as to this patent is dismissed.

V. The Magazine Channel Patent.

[11] This is Muelheisen, 718,781, with claims 2 and 3 in suit. It is stated in argument that in the prior art:

"Although in some instances magazine channels were of different widths, they were generally located at the same intervals counting from center to center. The distributor was made to release the matrices at equal distances. In the earlier machines the reasons for the equal spacing notwithstanding differences in the width of the matrices was to permit the interchange of positions of matrices in the magazine and a consequent change in the keyboard arrangement. Therefore all of the channels had the same width, namely, that of the thickest matrices they had to accommodate, and the distributor rail was formed with combinations of the same extent, so as to co-operate with the channels described. When much thicker matrices came to be employed, and because of the standard construction of the magazine and the fixed length of the distributor rails neither could be extended without reorganizing the machine, Muelheisen conceived the idea of adapting the limited space to the much thicker matrices by varying the width of the channels, always from center to center, and of correspondingly varying the length of the distributing combinations on the bar."

I do not think that this is a description of what Muelheisen invented, for he says of his own thoughts that in machines—

"as heretofore constructed the upper ends of the magazine channels have been of uniform width, the plates at the entrances being spaced about a quarter of an inch apart. The teeth or ribs on the distributing rail were likewise arranged to drop a matrix at every quarter inch. I have discovered that by making the upper ends of the channels of varying widths to correspond with the thicknesses of their respective matrices 30 per cent. additional matrices may be included in a magazine of the construction and width now employed, and by modifying the present magazine entrance construction I am enabled to provide double the variety of matrices now available."

He then proceeds to show by drawings:

"Channel entrances of different widths, each being but slightly wider than the thickness of the matrix for which it is intended."

Muelheisen further states that he believes himself to be the first to provide an automatic distributor—

"adapted to distribute matrices into a magazine having channel entrances of different widths; * * * in the present invention the channel entrances or

throats are adjacent, being separated only by thin plates of uniform thickness. The matrices are lifted from the distributing rails when they are opposite the center lines of the entrances of their respective channels, and these center lines are unequally spaced; hence the unequal spacing of the distributor rails."

There is nothing in all this about the employment in an advancing art of thicker matrices. Muelheisen's real invention was his auxiliary distributing rails, by which he hoped to handle and redistribute in a given time more matrices than had ever been done before. And it is quite probable that his change in the relative size of either the throat entrances or the magazine channels was conceived as an assistance to the operation of his auxiliary distributing rails.

So far as shown here, no machine in existence embodies Muelheisen's whole idea; certainly the linotype No. 5 does not show even an unequally spaced distributor rail, nor magazine channels, nor entrances of unequal widths. Yet it is sought to subject the defendant to the claims in suit, one of which is as follows:

"In a linotype machine, in combination with matrices of different thicknesses, a magazine having entrances of different widths corresponding to their respective matrices, the distances from center to center of said entrances being unequal."

The other claim in suit is similar, except that it includes in the combination a distributor adapted to deliver matrices into channels of the kind described. In order to apply this patent to the Intertype, the claims relied upon must be wrested from their context and made to mean what Mr. Woodward said Muelheisen did mean when he expounded the patent:

"It was Muelheisen's invention to make the thickness of the walls between the channels, so to speak, of the same thickness, regardless of the thickness of the matrix, and by that he accumulated an additional distance by the side of the magazine with the same number of channels which he estimates at 30 per cent."

It is obvious that such an explanation as this cannot possibly apply to a magazine of the construction of the Intertype, and Figure 15 of the patent in suit seems clearly to indicate that Muelheisen was talking about a rectangular magazine. The result of the argument advanced must be this: Muelheisen's invention relates to a peculiar form of linotype, in the devising of which it may well have been advisable, if not imperative, to economize space in the magazines he intended to use. His claims must be understood as referring to what he had in mind; and while it is quite true that, if advantages are revealed in a patent, the patentee is entitled to all those advantages, whether he clearly saw them or not, it is not true that a peculiar form of construction, thought out only with reference to a particular machine, shall be forbidden to all persons who may wish to use it in other and different machines. The question is one of degree.

From the advertising matter of defendant it appears that by the unequal spacing of channel entrances and distributor bar "the largest characters have relatively as much space (in the channels) as the smallest ones," so that with "space equalized in channel entrance thick matrices have more time to drop." It is very doubtful on the evidence

whether this is any advantage at all; but it is perfectly plain that Muelheisen's real invention bears no relation at all to the Intertype, and in my judgment the incidental change from uniformity to dissimilarity in size of channel entrances on the part of the makers of the Intertype does not constitute an infringement. If this be not true, then what Muelheisen shows in respect of his change in relative sizes of entrances *standing by itself* does not constitute invention.

It is only when this detached portion of Muelheisen's thought is considered that anything like infringement can be suggested. Therefore it is a fair test to inquire whether Muelheisen could have patented this single thing separated from the rest of his elaborate device. I think he plainly could not. The bill is dismissed as to this patent.

VI. The Magazine Support Patents.

[12] These are Dodge, 797,412, with claim 9 thereof in suit, and Homans, 830,436, with claim 7 in suit. The removable magazines of such machines as the Intertype and the No. 5 are heavy, and when in operating position necessarily so raised upon a frame or bedplate as to make their removal a serious matter, unless they can be mechanically shifted into a position favorable for human exertion. Dodge shows a frame for a magazine which (so to speak) opens downward like some trapdoors, and he claims as follows:

"9. In a linotype machine, the combination of a main frame, a distributing mechanism thereon, a removable magazine arranged in receiving relation to the distributor, and a magazine sustaining frame hinged at the end remote from the distributor, to swing upward and downward."

Giving this claim its fullest scope, I am of the opinion that the magazine sustaining frame on the Intertype is not "hinged at the end remote from the distributor," nor does it "swing upward and downward"; therefore there is no infringement.

[13] Homans presents what he calls a sliding and tilting frame. He is talking about a double magazine machine, and he desired to remove (if necessary) one magazine at a time. He shows and describes a device which appears to me to be of a very ordinary mechanical variety, and the claim in suit founded thereon is as follows:

"7. In a linotype machine, the combination of a main frame, an inclined removable magazine, and a secondary frame to sustain the magazine in its operative position, said secondary frame movable bodily in an endwise direction rearward and downward, with the magazine thereon, whereby the removal and application of the magazine is facilitated."

The defense is noninfringement, and it is urged that the Intertype construction shows a movement of the magazine frame in an arc of a circle because the frame itself is supported by a rigid projection on its underside which is hinged to the main frame of the machine, whereas Homans' construction shows a motion, not circular, but "sliding and rolling" to the rear.

It seems to me that this difference is superficial. There is an obvious and generic difference between hinging a magazine frame like a door, as Dodge did, and obtaining a movement in an arc either of a circle or other more complex figure. The defendant's magazine frame

describes an arc, and so does Homans. I am inclined to think that there is full mechanical equivalence in the two motions. But, even if this be not quite true, the great difficulty with defendant's position is the total absence of any evidence in this case revealing the state of the prior art. The references do not seem to me to be worth comment, except to note that, of course, Dodge was prior art to Homans.

Doubt is resolved by observing that defendant's device is shown in Homans' own recent patent, 1,116,280, and I am therefore of opinion that this defendant is estopped from denying the validity of the Homans claim in suit, and, if its validity be admitted, I think infringement is proven. Complainant may take a decree on this patent.

VII. The Keyboard Lock Patent.

[14] This is Kennedy, 797,436, with claim 1 in suit. The purpose of this device is plain from the name applied to the patent in the course of trial. It is agreed that:

"It is old in typewriters to provide a bar which extends underneath the pivoted key levers which operate the type bars, which bar can be moved in the plane of action of those levers and lock them."

Mr. Kennedy says in his specification that his locking bar may be mounted in any suitable manner, provided it is adapted to engage and disengage the key bars (all the foregoing is old), and it may be operated by any suitable device extended forward within reach of the operator at the keyboard. Therefore the only new idea that the patentee had in mind was to bring the control of his locking device within reach of a person who was operating a very much larger machine than a typewriter; it being common knowledge that locking devices on a typewriter are within reach of the operator.

To put in practice his new idea Kennedy shows a finger lever arranged parallel with the keyboard and singularly like the similar levers of the typewriter art. The claim in suit is:

"1. In a linotype machine, a series of finger key levers *B*, in combination with the vertically guided shouldered bars *D*, connected with the respective keys, the transverse locking bar *E*, mounted to engage the shoulders of the vertical bars, and a device for operating said bar extending thence to the front of the keyboard, whereby the locking device located at the rear may be actuated by the operator sitting in front of the keyboard."

The defendant's apparatus does more than merely lock or unlock the keys. There is provided on the main frame of the machine a handle operating a cam which raises and lowers the lower end of the magazine, and thus permits the magazine either to rest upon, or prevents the magazine from resting upon, a rod which locks or unlocks the keys, according as the magazine is or is not in operating position.

The claim in suit will not read upon the defendant's device unless complainant is entitled to hold every one an infringer who by any method reachable from the operator's chair locks or unlocks the keyboard. The claim is entitled to no such construction, and, assuming that invention exists in the patent, it is not infringed, and as to this patent the bill is dismissed.

VIII. The Mold-Resistant Patent.

[15] This is Hensley, 643,289, with claims 1, 2, and 3 in suit. In my judgment defendant has offered no evidence which constitutes a defense to this patent. Hensley shows as the method of producing his result an indentation in the periphery of a cam. The Intertype contains the cam, and the cam has the indentation.

It is said, and I think with probable truth, that the machine will function without this indentation in the cam; but it does not follow that it will always do so, and Hensley pretends to have invented nothing more than a measure of precaution to prevent the machine, when heated and running fast, from injuring the matrices through the momentum of the mold. It is also said that, in machines more recent than Exhibit 23, the characteristic indentation of the periphery has been abandoned. Nevertheless infringement is shown by the existence of No. 23, and the complainant may take a decree upon this patent.

IX. The Mold-Support Patent.

[16] This is Dodge, 739,996, with claims 1, 2, and 3 in suit. The problem of this patentee is presented by the fact that the mold is fitted to the mold disc. It corresponds to an aperture or slot in the disc, and must be fastened to the disc. The pressure applied to separate a slug from the mold "tends to loosen or displace the mold in relation to the disc," which must necessarily be the case when power is applied, not equally over the whole disc surface, but specially at the place where the built-up mold is made fast.

The patentee stated that his invention lay "in providing firm supports against which the *mold as a whole* may be seated and sustained during the ejection of the slug." Of the claims in suit, Nos. 2 and 3 may be said to be confined to supports specifically bearing upon the mold proper; but claim 1 reads thus:

"In a linotype machine a mold and a slug ejector in combination, with means for rigidly supporting the mold against the thrust of the ejector."

The file wrapper of this patent shows that Mr. Dodge was confined by the Office to a banking against or supporting of the mold, as distinct from a support given to the disc itself. Mr. Woodward volunteered the statement that this patent "does not cover an abutment broadly for supporting the mold disc."

Defendant does not support the mold disc, nor do his abutments bear upon the mold proper; but he has constructed what may be called mold supports, which are themselves fastened to the disc, as is the mold. I am able to see no difference between putting pressure directly upon the mold, and putting the same pressure upon something else which supports the mold, provided that that something else is not the disc.

The molds of both complainant and defendant are fastened to (and in that sense supported by) a mold disc. Defendant's mold supports are themselves fastened to the mold disc. If defendant's mold supports were integral with the mold, they might cease to be supports; but they would function in exactly the same way as they do now, and

the abutments would then press on the mold and be plainly infringements. I think they are infringements as they stand, and complainant may take a decree on all three claims.

X. The Gear Wheel Patent for Keyboard Rolls.

[17] This is Bedell, 787,821, claims 1, 2, and 3 in suit. The subject-matter here involved is a change in the actuation of the keyboard rolls from belt driving for each roll separately to the actuation of one roll by a belt and the connection of roll No. 2 with roll No. 1 by a gear wheel.

This is one of those questions as to which discussion gives no light. Confessedly belt driving and gear wheel driving are all old. It did not require any adaptation of either system to make it applicable to this part of a linotype machine. Undoubtedly the adaptation of a well-known device to suit the purposes of a special art has often been held to constitute invention; but it is not shown that there was any such adaptation here. The gear wheels on the linotype function exactly the same as they do anywhere else; both styles of driving were open to the world, and I am wholly unable to perceive that it required anything more than ordinary mechanical skill to do what Bedell did.

The bill as to this patent will be dismissed.

XI. The Knife-Adjustment Patent.

[18] This is Homans, 837,276, with claims 1 and 9 in suit. The purpose of the device set forth herein is to adjust a slide containing a knife which will trim the slugs, the molding of which is one of the main purposes of a composing machine.

This knife must be adjusted to suit slugs of different sizes. Admittedly knives wherewith to trim slugs and divers methods of adjusting them are old. Homans shows what is alleged to be an advance on Meistrell, 578,065, in that he exhibited a "tapered form of the slide," which permitted "the slide to be clamped very securely in the exact position required."

Claim 9 in suit has not been explained by the evidence, and is drawn in careful correspondence to the exact device shown by Homans in his specification. I think it is plain that this claim has not been infringed.

Claim 1 is much broader, and is as follows:

"1. In a slug-trimming mechanism for linotype machines, the combination of the movable knife, its supporting slide guided in the frame, means for adjusting the slide to predetermined positions, and independent means for clamping the slide in the required positions."

Of the elements last above enumerated the movable knife, the supporting slide, and means for clamping the slide were all old; but the phrase "means for adjusting the slide to predetermined positions" is broad enough to read upon anything that will function in the manner indicated by the quoted phrase. What Homans shows is a wheel which regulates the position of the knife within certain limits, and such position is shown by an indicator which corresponds to markings

upon the wheel. It is obvious that, since the wheel actuates a screw, the adjustment is most exact, and the position of the knife can be regulated with microscopic fineness. Therefore Homans' "means for adjusting the slide to predetermined positions" (as shown in this patent) seem to me of great theoretical excellence, and I think it strange that, so far as the evidence goes, this plan of operation has never been reduced to practice nor become commercial.

The Intertype employs an entirely different principle. The knife can be set in 25 positions. These positions are determined by fastening the lever to the knife slide by means of a pin thrust through some one of these 25 holes. I am convinced that there is not the slightest mechanical equivalence between what Homans shows in the patent in suit and what he did in designing the Intertype. I am also clear that the invention of the patent was (in the light of the prior art) so narrow that neither Homans nor any assignee of his was ever entitled to claim and own all "means for adjusting the slide to predetermined positions."

Nor does the doctrine of estoppel go far enough to prevent Homans using, even as against his own patent, an inferior and wholly different method of construction. It is held that neither claim 1 nor claim 9 is infringed, and the bill will be dismissed as to this patent.

XII. The Disc Support Patent.

[19] This is Rogers, 925,843, with claims 1, 2, 3, and 4 in suit. As composing machines became more elaborate, and probably of more varied capacity, it became advisable to leave—

"the entire face of the mold disc and mold exposed or uncovered, so that the projecting end of the mold liner and the mold-tightening screws will meet with no obstruction as the wheel revolves."

Mr. Rogers observed that it had been customary to strengthen or support the front of the disc against the thrust caused by the passage of the slug past the rear trimming knife, and this had been accomplished by placing near the front of the disc a banking piece bearing against the front face thereof. He exhibits in this patent a method of providing this necessary support without encumbering the face of the disc thereby, and thus characterizes his own invention:

"I believe it to be wholly new to support a mold disc against forward movement by a *support at the rear*, and this I claim broadly in any form the equivalent of that herein shown."

What is "herein shown" is a variety of flanges at the rear of the mold disc wheel, against which, or fitting into which, is a support or strengthening piece deriving rigidity (ultimately) from other portions of the machine not necessary here to mention. The Intertype shows no such flange or flanges as Rogers exhibits, and infringement cannot be found upon any reasonable construction of claims 2, 3, and 4, which specifically rest upon the existence of such "annular flange."

Claim 1 is as follows:

"In a machine of the class described the mold disc having an annular surface, *in combination with a rear support engaging said surface* to prevent the disc from swinging facewise; the face of the disc being wholly uncovered as described."

The entire uncovering of the disc face is a result. The question is always: What means does the patentee show of accomplishing that result? He does it by a *rear support* engaging an "annular surface." The Intertype has a completely uncovered wheel disc face; but I do not think that it has a "rear support" in any just sense of that phrase.

The theory of the complainant is (as stated by Mr. Woodward) that the term "rear" means that:

"The support is back of the front surface of the mold wheel; it is to the rear of the front surface of the mold wheel, so that the mold wheel remains entirely unobstructed."

But (as above stated) Mr. Rogers could not patent an unobstructed mold wheel face, and his patent is not infringed unless there is a rear support. The Intertype succeeds in having such unobstructed mold wheel face by cutting away that portion of the face which is nearest the teeth, thus making an annular surface in the shape of a circle around the outer portion of the disc wheel. Against this resultant annular surface is put the support or banking. It is wholly in front of the wheel proper.

It does accomplish the same result as Mr. Rogers shows, but it does it in a wholly different way, and in my judgment it is not applied at the rear or from the rear or to the rear of the mold disc wheel. In other words, the construction of the patent claimed by the complainant, viz. that *rear* means in rear of the face of the mold disc, is rejected. In my judgment the old style of linotype (No. 1) which is in evidence exhibits the principle of the Intertype construction, and I am inclined to think that the same thing is shown in the Mergenthaler linotype catalogues of 1892 and 1900, extracts from which are in evidence as Defendant's Exhibits 55 and 56.

The bill will be dismissed as to this patent.

XIII. The Ejector Slide Disconnection Patent.

[20] This is Bedell, 848,338, with claim 4 in suit. The claim above mentioned is as follows:

"4. In a linotype machine, the ejector slide movable forward and backward, the actuating cam, connections from the cam to the slide, *and means operative from the front of the machine for effecting instantaneous disconnection and release of the slide at will*, whereby the operator at the front of the machine is enabled to move the slide forward at will without changing the position of the cam."

The italicized portion of this claim is the new element of the combination. Undoubtedly the claim will read on the Intertype, because it shows a method operative from the front of the machine for disconnecting the slide. The mechanism shown by the patentee is extremely simple, and so is that of the Intertype. By both it is made possible to effect the desirable disconnection from the front of the machine. The sole question is whether by the claim in suit Mr. Bedell succeeded in preventing (during the life of his patent) all other persons by any device whatever from disconnecting ejector slides without going to the back of the machine for that purpose, no matter how such disconnection might be accomplished.

I can add nothing more in justification of my belief that nothing but a pioneer invention of the most obvious kind is entitled to such a range of equivalents as would accomplish such a repression of ingenuity in others. The claim in suit must be confined to the device exhibited, or to a near mechanical equivalent thereof. No such equivalency is shown, and the bill is dismissed as to this patent.

The foregoing thirteen issues cover all the matters actually litigated in docket No. 10-311.

XIV. The First Elevator Blade Patent.

[21] This is Rogers' reissue 13,489, with claims 6 and 7 in suit, and is the only patent as to which evidence was given in docket No. 10-266.

Composing machines based upon Mergenthaler patents became a commercial success when provided with fonts of matrices wherein each matrix possessed the capacity of forming one letter or figure only. There were, however, machines producing printing slugs in moderately successful operation contemporaneously with the earlier forms of the modern linotype.

Such machines used matrices of a character differing radically from those provided for either the No. 5 or the Intertype. For example the Monoline, made under the Scudder patent, 506,198, and the Mergenthaler "band" device, made under patent 313,224. These systems did not use circulating matrices in the sense in which that phrase is applicable to the linotype and Intertype. Each shows comparatively few matrices, each having upon it either an entire alphabet or a considerable part of the same.

In order to arrange such multi-letter matrices so as to produce a printing slug, it was obviously necessary to severally support them in positions that would bring the letters of the words intended to be printed in a common line; and such letters could not, of course, always be formed by matrical recesses occupying identical positions on the several matrix bars. It may be said that this necessary arrangement of these lengthy matrix bars was accomplished (in such machines as those last mentioned) by the advancement of a bar or blade fitting into an appropriate recess in the matrix body.

When the linotype came into use, employing small matrices fed out of a magazine and returning thereto for use again, it was obviously desirable to economize in the number of matrices used by putting more than one character upon each matrix. Most obvious utility (for example) rested in the style of matrix shown to the court, on which the same letter or figure is repeated, one in roman type, the other in italic.

From the evidence herein Mr. Dodge, who was at once an inventor, a patent solicitor, and the president of the plaintiff company, was the first to think out the advantages to be derived from a system of circulating matrices of the plural letter variety. In his patent, 449,872, he disclosed matrices with two characters, but with the idea, not of varying the alignment of the matrices, but of casting two slugs at once.

I entirely agree with the complainant in the statement that the "fore-runner of the plural font system" is Mr. Dodge's patent, 547,633. This very interesting conception shows as perfected what, so far as the court is informed, is the modern matrix, and it also discloses means for assembling such matrices in the composing receptacle at varying heights, so that (for example) a line can be printed partly in roman and partly in italic. The line thus assembled by Dodge passes into the first elevator, and is presented to the mold, and the slug is cast; and there Dodge stopped. He discloses no means whatever of leveling his now unevenly arranged line of matrices, or getting them into the second elevator, and so on the road to redistribution.

I share the surprise manifested by several witnesses herein that so experienced and skillful a person as Mr. Dodge should have so limited, if not killed, the utility of his own concept. It has been suggested in argument that Mr. Dodge either (1) overlooked the question of distribution, or (2) intentionally failed to disclose means for leveling matrices, or (3) that he considered it a matter of mere mechanical skill, not worthy of his personal attention, to present to the world a means of leveling and distribution. Whether any of these hypotheses is correct cannot be affirmed; but he certainly did not long remain inactive, for his own patent having issued in October, 1895, he wrote in June, 1897 (in his capacity as president of complainant), to Mr. Rogers, and directed him to "fit a machine experimentally in accordance with my patent, 547,633. * * * You will, of course, feel at liberty to modify the details as may seem necessary. The main idea is to see whether we can assemble the matrices readily."

I am convinced by the testimony of Rogers himself that he produced in the summer of 1897, a workable device which rendered possible leveling and redistribution of double character matrices, and that such device went into commercial use in the printing establishment of Appleton & Co. in the early part of December, 1897. His application for a patent was filed March 25, 1898, and resulted in No. 615,909, granted December 13, 1898, of which the patent in suit is a reissue.

It may be said here that I perceive no reasonable objection to the granting of this reissue. There had been a misnomer in the patent as issued, whereby second elevators were spoken of, whereas first elevators were clearly meant. It has not been denied that this was a mistake which prejudiced no one, and it was properly corrected by the reissue.

In producing the result which Mr. Dodge had commanded, and in doing what amounted to a perfecting of Dodge's partial success, Rogers produced an invention whereof (as he says) the essence is:

"(1) In the employment of a *yielding or spring-supported bar* to sustain the matrices in the first elevator; and (2) in the employment of means for automatically effecting the retraction of the bar."

He then claims as covering the invention thus summarily described:

"(6) In a linotype machine employing matrices with two characters each, an elevator *N*, provided with a movable blade to sustain part or all of the matrices above their normal position.

"(7) In a linotype machine the first elevator provided with a movable ma-

trix supporting blade in combination with means for automatically retracting the same."

It is not denied that both of these claims read directly upon the Intertype. The defense is that the claims are larger than the invention, whether that assertion be viewed from (a) the state of the prior art, or (b) the language of Rogers' specification.

The argument from the prior art is based principally upon a study of the Monoline and the Mergenthaler band machines, plus another Mergenthaler variant (which may be called the inclined table machine), shown in Mergenthaler patent, 614,230. Of these references it seems to me enough to say that 614,230 has been shown conclusively as wholly inoperative. This condition results from the demonstrated fact that if power sufficient to position the matrix supporting blade is furnished, that power renders the functioning of the blade in the manner desired and asserted by Mergenthaler impossible.

But, even if this were not true, all three of these machines do no more than to exhibit the possibility of supporting an indented body on a retractable blade, which, when withdrawn, permits gravity to operate. This seems to me so obvious that the mere employment of a retractable blade would hardly seem to rise to the dignity of invention. But, even if invention there resides, one is as far as ever from solving the question of how to realign, not heavy matrix bars, but light, single matrices, in such wise as to permit their passage from the first to the second elevator in an arrangement different from that in which the first elevator received them.

I do not think that the prior art so far as disclosed materially narrowed the field of invention, because that art had dealt with a kind of matrix or matrix bar so utterly different from the small circulating pieces of metal used by the linotype and the Intertype as to leave for Mr. Rogers almost, if not quite, a new field for human ingenuity.

Reverting for a moment to the hypothesis above enumerated as to the state of Mr. Dodge's mind after getting his own patent of 1895, it may be added that, after seeing and briefly hearing Mr. Dodge in this case, I am quite seriously impressed with the belief that he did not show means for realigning and distributing his double character matrices solely because he did not know how to do it. And the fact that he did not know is to me a substantial piece of evidence that it was something that demanded serious thought on the part of some one, and that (whatever others may have done) Mr. Rogers contributed that thought has not been denied herein.

The argument for narrowing the scope of the claims based upon the language of the specification itself is to me more persuasive and more difficult to answer. As above noted, Rogers stated that the essence of his invention lay in the employment of a "yielding or spring-supported bar," he shows in his drawings a bar positioned by spring pressure, and retraction is effected by pressure upon the spring positioned lever or latch—which by said pressure is caused to remove from the upward positioned matrices the support which determined said position—and that support is a bar or blade.

If this bar or blade is examined in an idle machine it may be pressed

back by the fingers, and it is unquestionably not only spring-supported, but yielding in the sense of being resilient; i. e., when it is pressed back by one's fingers it returns to its original position when the fingers are removed. The Intertype shows a construction wherein no spring is employed; the bar or blade cannot be pressed back in an idle machine by any pressure, but is positively retracted.

[22] These facts give rise to the argument that Rogers' words "yielding" and "spring-supported" must be considered synonymous, so that any device, however productive of the same result, which does not employ a spring-supported blade, is not an infringement. That no such limitation was in Rogers' mind is matter of positive proof herein, for the device which he made in the fall of 1897 and employed in the Appleton shop has been produced and satisfactorily identified. It is the exact mechanical equivalent—indeed, almost the mechanical counterpart—of what the defendant is doing, in that it has a retractable blade positively actuated, and not spring-supported, nor resilient.

There has been one litigation (and in this circuit) which largely raged around the meaning of the word "yielding"—Palmer v. Jordon Machine Co. (C. C.) 186 Fed. 496 (see especially page 501), reversed in 192 Fed. 43 (see especially page 44), 112 C. C. A. 454. The same patent was considered again in Palmer v. Superior Mfg. Co. (D. C.) 203 Fed. 1003, and again there was a reversal in 210 Fed. 452, 127 C. C. A. 284. It may at least be said of the litigation thus reported that the appellate court gave a very generous interpretation to the word "yielding."

In my opinion Rogers is entitled to quite as generous treatment. There was no sense in the expression "yielding or spring-supported," if both adjectives meant the same thing. He had demonstrated that a spring support was not necessary, and it is, I think, no more than a fair view, even of the specification language, to interpret the phrase above quoted disjunctively, and to apply to the word "yielding" the meaning of retractable at will.

But, even if I am in error in believing that "yielding" may be so interpreted in the light of the prior art as to apply to defendant's device, it is, I think, plainly true that even if the blade or bar of the Intertype's first elevator is not yielding, and is not spring-supported, it is the plain mechanical equivalent of the preferred embodiment of Rogers' invention, and as such is an infringement, even if Rogers is to be confined to the mechanical equivalents, not of what he claims, but what he shows in his patent papers.

There remains to notice but an alleged prior use subsequently embodied in a patent to Harvey, 618,348. This patent was in the office at the same time as Rogers', and to it must be applied the doctrine to which I gave adherence at the beginning of this memorandum. That doctrine is perhaps here unimportant, for I am further of opinion that by positive and satisfactory evidence Rogers has carried back the date of his invention to the summer of 1897.

Harvey is dead, and the evidence in support of his prior use certainly does not rise to the dignity of producing conviction beyond a reasonable doubt. The best that can be said for it is that Harvey put

his plan into operation "in 1897," and that is very far from producing certainty as to invention before *the summer* of 1897.

The complainant may take a decree on this patent, concerning which it may be added that I consider it more of an invention and better entitled to a broad range of equivalents than any other of the devices as to which evidence has been introduced in this rather protracted litigation.

In the case docketed as 10-311, the complainant has (so far as this court is concerned) so slightly succeeded that no costs will be awarded. In that docketed as 10-266, complainant will take the usual decree, with costs.

DICKS PRESS GUARD MFG. CO. et al. v. BOWEN.

(District Court, N. D. New York. January 22, 1916.)

1. PATENTS ⇨291—SUITS FOR INFRINGEMENT—PARTIES—APPEARANCE.

Judicial Code (Act March 3, 1911, c. 231) § 48, 36 Stat. 1100 (Comp. St. 1913, § 1030), provides that in suits for infringement of patents the District Court shall have jurisdiction in the district of which the defendant is an inhabitant, or in any district in which it shall have committed acts of infringement and have an established place of business. Section 50 (section 1032) provides that when there are several defendants, and one or more of them are neither inhabitants of nor found within the district and do not voluntarily appear, the court may proceed with the suit as between the parties properly before it. Complainant brought a patent infringement suit in New York against a user of an alleged infringing device manufactured by the G. Co., a Wisconsin corporation. Before suit the papers were submitted to the G. Co., and it wrote complainant that they wanted to be heard upon the subject of infringement and that, if complainant would send them a copy of its bill, they would have their attorneys appear at the injunction hearing. Wisconsin attorneys also wrote complainant's attorney, that they were instructed by the G. Co. to appear and attend the hearing on the motion for an injunction. A preliminary injunction was granted, and affirmed on appeal. The G. Co. assumed the defense, and as to the appeal the Wisconsin attorneys wrote complainant's attorney that their firm would argue the case, that no copies of complainant's brief need be sent to local attorneys who had appeared for defendant, and one of such local solicitors entered his appearance in the Circuit Court of Appeals. A motion for rehearing was made in the Circuit Court of Appeals, and the Wisconsin attorneys sent a copy of the petition to complainant's attorney. *Held*, that the G. Co.'s voluntary appearance on the hearing and on the appeal, and its open and avowed assumption of the defense, authorized it to be made a party to the record, though it could not have been sued originally in New York.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⇨291.]

2. PATENTS ⇨302—PRELIMINARY INJUNCTION—PERSONS BOUND.

The G. Co., having appeared and openly and avowedly assumed and conducted the defense, was bound by the order granting the preliminary injunction, which was final during the pendency of the suit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 471; Dec. Dig. ⇨302.]

In Equity. Suit by the Dicks Press Guard Manufacturing Company and another against George W. Bowen, doing business as the Bowen

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

Manufacturing Company. On motion by complainant to have the Geuder, Paeschke & Frey Company made a party defendant. Motion granted.

This is a motion by the complainant above named to have the Geuder, Paeschke & Frey Company, a corporation of the state of Wisconsin, doing business at Milwaukee, Wis., declared a party defendant and made a party defendant on the record in the above-entitled action, and subject to the jurisdiction of this court therein, on the grounds that it has in fact and legal effect in writing consented to such action, made itself an actual party by consenting in writing to be treated as a party defendant, by appearing and actually and openly and avowedly assuming and conducting the defense thereof in this jurisdiction thus far in all proceedings had in the cause, which consist of bringing the action, a motion in court by complainant for an injunction pendente lite, the hearing of same, the granting of such an order and entry thereof, and an appeal from same to the Circuit Court of Appeals, the argument of such appeal in that court, the affirmance of such order and the filing of the remittitur in this court, and in all of which proceedings the said Geuder, Paeschke & Frey Company appeared and took part by its duly authorized attorneys, Arthur E. Parsons and Parsons & Bodell, of Syracuse, N. Y., said company, through said attorneys and Flanders, Bottum, Fawsett & Bottum, actually conducting the defense of such motion, and also such appeal to and in the Circuit Court of Appeals. Service of this motion was made upon Arthur E. Parsons and Parsons & Bodell, the New York solicitors of said Geuder, Paeschke & Frey Company, employed by Flanders, Bottum, Fawsett & Bottum, its Wisconsin solicitors, and no one appears to oppose the motion.

Frederick P. Randolph, of New York City, for complainant.

Arthur E. Parsons and Parsons & Bodell, all of Syracuse, N. Y., for defendants, but not appearing on this motion.

RAY, District Judge (after stating the facts as above). [1] So far as I am aware this is a novel application, but in the absence of opposition and opposition here I see no reason why the motion should not be granted. December 30, 1914, the said Geuder, Paeschke & Frey Company wrote the president of the complainant, Dicks Press Guard Manufacturing Company, as follows:

"Mr. Max H. Fischer c/o Dicks Press Guard Mfg. Co., 41 Park Row, New York City—Dear Mr. Fischer: I thank you very much for the papers submitted to me, and I have had the matter gone over by my attorney since his return. You kindly gave me until January 2d for consideration, but, having made up our mind, we hasten to return the papers to you. We think that we ought not to be considered to be infringers of your patent, and, feeling that way, we want to be heard by the court upon the subject. If you will, therefore, file your bill and send us or our attorneys a copy of the same after it is filed, together with the order to show cause after it is issued by the court, we will have our attorneys appear in the action and take up the motion for an injunction before the court. Our attorneys will, under our instructions, do this as soon as it is practicable for them to prepare our answering affidavits, which are in hand, and arrange for an appearance before the court. We understand from you that the date of this appearance will be made reasonable for both parties, which, as far as our side is concerned, we engage. Our attorneys are Messrs. Flanders, Bottum, Fawsett & Bottum, Pabst Building, Milwaukee, Wisconsin, and we inclose their card. Kindly acknowledge receipt.

"Very truly yours

Chas. A. Paeschke."

The same day, December 30, 1914, Messrs. Flanders, Bottum, Fawsett & Bottum wrote Mr. Randolph, the complainant's attorney, as follows:

"Mr. Frederick P. Randolph, No. 41 Park Row, New York City—Dear Sir: We have lately had submitted to us a proposed bill of complaint, order to show

cause, and accompanying affidavits in the matter between the Dicks Press Guard Manufacturing Company and M. H. Fischer v. George W. Bowen. If you will send us a copy of this bill and accompanying affidavits and order to show cause as soon as the papers are filed and a proper date fixed, we are instructed by our clients, Messrs. Geuder, Paeschke & Frey Company, of this city, to appear for the defendant and attend the hearing upon your motion for an injunction. Your draft of the order to show cause did not indicate the place of hearing nor the time. We are not strenuous about service of the notice. You can serve the papers upon us by mail and we will admit service, but it will be necessary for us to have a reasonable time to get our affidavits in shape after notice of the time and place of hearing. We would think ten days would be amply sufficient for this purpose. As we understand it, this is a contest with friendly disposition on both sides, but with radical difference upon the question of infringement in the views of the parties. We expect to conduct our side of this contest with entire courtesy towards you.

"Very truly yours, Flanders, Bottum, Fawsett & Bottum."

The defendant is a user of the alleged infringing device. Geuder, Paeschke & Frey Company is the maker. January 8, 1915, the complainants here filed their bill in equity to restrain alleged infringement of the patent referred to, and made a motion in this court for a preliminary injunction, which was granted. An appeal to the Circuit Court of Appeals was taken, and October 23, 1915, Messrs. Flanders, Bottum, Fawsett & Bottum wrote complainants' attorney as follows:

"Frederick P. Randolph, Esq., 41 Park Row, New York City, New York—Dear Sir: We acknowledge the receipt of your letter of the 20th instant, acknowledging receipt of three copies of our printed brief for defendant-appellant in the Dicks Press Guard Mfg. Co. et al. v. Bowen case, and note that you will mail copies of your brief for plaintiffs-respondents to Parsons & Bodell. As the writer, Mr. Dennett, and our Mr. E. H. Bottum, will argue the case in the Court of Appeals, kindly send us copies of your brief, and you need send no copies to Parsons & Bodell. We are handling the case ourselves though we had to employ local solicitors under the rule in the Northern district, and had Mr. Parsons enter his appearance in the Court of Appeals at the time he was personally in New York and filed the record and docketed the case.

"Yours truly, Flanders, Bottum, Fawsett & Bottum."

Thereafter such appeal was heard and the order granting the preliminary injunction was affirmed. A motion for reargument was made, and in reference thereto Messrs. Flanders, Bottum, Fawsett & Bottum wrote complainants' attorney as follows:

"Milwaukee, Wis., Jan. 6, 1916.

"Frederick P. Randolph, Esq., 41 Park Row, New York City, N. Y.—Dear Sir: We are sending you herewith a copy of defendant-appellant's petition for rehearing in the case of The Dicks Press Guard Manufacturing Company and Maximilian H. Fischer Complainants-Appellees, v. George W. Bowen, Doing Business under the Name of Bowen Manufacturing Company. We are also sending you three extra copies for your use under separate cover.

"Yours truly, Flanders, Bottum, Fawsett & Bottum."

January 12, 1916, the motion for reargument was denied. On the hearing for preliminary injunction, the argument of the appeal, and motion for reargument the said Geuder, Paeschke & Frey Company was represented, and in fact conducted and controlled the defense. The question presented is: Can a corporation, alleged infringer and maker of the alleged infringing device, resident of another state, where it conducts its business, be made a formal party defendant on the record in a suit for infringement brought in this state, New York, when

it has voluntarily come into the case brought against a seller or user, or both, and, as here, openly and avowedly assumed and conducted the defense, and shown and declared its appearance by letters and the receipt of papers in the case. Such corporation could not have been sued in this state and district, as it is a nonresident and not within the jurisdiction. Sections 48 and 50, Judicial Code. But it could have come in voluntarily and accepted service, or it could have voluntarily appeared, had it been named as a party on the record, and by appearing would have waived the question of jurisdiction of the person and would have submitted itself to the jurisdiction of this court, even though a nonresident of the district and state. Section 50, Judicial Code.

[2] Is not this the effect of its voluntary appearance on the hearing and on the appeal, and its open and avowed assumption of the defense, coupled with the letters quoted? Having appeared and openly and avowedly assumed and conducted the defense thus far, it is bound by the order made, which is final during the pendency of the action. May not all this be evidenced by making the corporation a defendant on the record? And may not it be held to its appearance by now formally making it a party? It would seem plain that the court ought to know what parties, either complainant or defendant, are before it and entitled to be heard, and that the record itself should show this. One of the most vicious things connected with a litigation, either civil or criminal, is the operation of influences from and the recognition of interested persons not appearing as parties on the record. Those who are to be heard at all and recognized in bringing out and considering the merits of a controversy should be parties of record, and personal appearance by attorney and participation in the litigation ought to be treated as equivalent to a *formal* written appearance in the case. In *Eagle Mfg. Co. v. Miller et al.* (C. C.) 41 Fed. 351, it was held:

"On a bill to restrain the infringement of a patent, it appeared that the defendants were merely the agents of a corporation which manufactured the machine which it was alleged was an infringement of complainant's patent. Complainant filed an amendment to the original bill making such corporation a party defendant, but no subpoena was issued or served on the corporation, nor did it enter appearance or answer the bill. *Held*, that the decree should nevertheless run against such corporation, and be binding on it in all respects."

In *Bidwell et al. v. Toledo Consol. St. R. Co.* (C. C.) 72 Fed. 10, Judge Ricks held that a nonresident corporation could not be made a party defendant from the mere fact it had assumed and participated in the defense. But here the Geuder Paeschke & Frey Company not only has done this, but it promised *in writing* so to do and *in writing* named its attorneys, and then on the appeal these attorneys *wrote* to complainants' attorney:

"As the writer, Mr. Dennett [of Flanders, Bottum, Fawsett & Bottum], and our Mr. E. H. Bottum will argue the case in the Circuit Court of Appeals, kindly send us copies of your brief and you need send no copies to Parsons & Bodell. *We are handling the case ourselves, though we had to employ local solicitors under the rule in the Northern district, and had Mr. Parsons enter his appearance in the Court of Appeals at the time he was personally in New York and filed the record and docketed the case.*"

Here we have an explicit acknowledgment in writing of authority in Mr. Parsons and of an appearance on the appeal and that the corporation filed the appeal. In the letter of January 6, 1916, we have a written acknowledgment that the attorneys for Geuder, Paeschke & Frey Company are moving and acting in the case. What is all this but an appearance in writing? Here we have much more than an active, open, and avowed assumption of the defense by mere acts. This is not a case where a nonresident corporation improperly served, etc., comes in for a special purpose, as to move to set aside informal or improper service, but a case where it voluntarily comes in to defend on the merits and for all purposes.

It seems to me that the Geuder, Paeschke & Frey Company has voluntarily appeared in this litigation within the meaning of the Judicial Code, and that it should be made a party on the record.

The motion is granted.

WITZEL et al. v. BUTLER BROS.

(District Court, S. D. New York. May 25, 1915.)

PATENTS ⇨328—VALIDITY AND INFRINGEMENT—WIRE MATTRESS.

The Witzel reissue patent, No. 13,125 (original No. 921,494), for a wire mattress having its sides extended and turned up at right angles to form a side guard to prevent the hair mattress from spreading, claim 23, *held* valid and infringed. Claims 19, 20, 22, and 24 *held* not infringed.

In Equity. Suit by Charles J. Witzel and the Englander Spring Bed Company against Butler Bros., for infringement of reissue patent, No. 13,125 (original No. 921,494), for a spring mattress, granted June 28, 1910, to Charles J. Witzel. On final hearing. Decree for complainants on one claim, and for defendant on others.

See, also, 221 Fed. 947, 137 C. C. A. 517. Decree modified, 229 Fed. 426, — C. C. A. —.

C. A. Weed, of New York City (Livingston Gifford and John R. Nolan, both of New York City, of counsel), for plaintiffs.

Samuel E. Darby, of New York City (Charles Neave, of New York City, of counsel), for defendant.

LEARNED HAND, District Judge. The record presented upon this hearing does not seem to me at all different from that presented on the application for preliminary injunction. The two patents now relied on for anticipation—Hoey, 671,068, and Peters, 195,641—were both before the Circuit Court of Appeals. Indeed, the only evidence suggested as new is that Hoey's patent, or rather an adaptation of it, which is urged to be the same thing, was in fact practicable. That proof was not necessary, because, being a United States patent, it would be taken as practicable unless the contrary appeared. No substantial sales of this form of Hoey, if it be such, have been shown, hardly over 100, and the sales of the plaintiff's mattresses have been very large. I need not attribute the whole of those sales to this

single patent, but the fact remains that it has had a very wide acceptance; it is fair to suppose that the patented feature has lent some part of its popularity to the whole mattress.

Upon such a record I should in an ordinary case have no hesitancy in granting a final decree to follow the preliminary order which had passed the Circuit Court of Appeals. If the case was strong enough to support a preliminary injunction, it was because there was no dispute and no reasonable doubt about the plaintiff's right; a fortiori the same record would support a final decree where doubts must be answered, and not resolved against the moving party. Yet there are some expressions in the opinion which have caused me to hesitate in this instance. The question is whether the Circuit Court of Appeals did not give to the words "longitudinal tension" in claim 19, and those based upon it, the meaning "tension under springs." The plaintiff urges that this phrase was certainly not so understood in the Patent Office, where it was made the basis of an interference between Manchee and Witzel, and then abandoned by Manchee, not because inapplicable to his patent, but because anticipated by Witzel himself, among others. The examiner not having told Manchee who was the other party in interference, he did not know that he was dealing with a reissue of Witzel himself. In further proof of the meaning of the terms "longitudinal tension" and "tension," the plaintiff urges that the same examiner allowed the three Manchee claims with just those terms, where they obviously could not mean anything but the tension of the side members arising from the inherent elasticity of the metallic web itself. I should have been ready to accept this argument, and regard all the claims based upon claim 19 as infringed, especially in view of the contrast between the phrase mentioned, and that used in the earlier claims, "coiled springs" or the like, except that the Circuit Court of Appeals was certainly not of this opinion, but regarded the phrase in question as limited by the disclosure to a means for producing such tension by something independent of the native elasticity of the metallic web. Claim 23 alone omits the phrase, and I find that no other claim in suit is infringed.

However, claim 23 was held to cover the defendant's mattress verbally, and the verbal interpretation was held to control, since nothing was shown in the prior art upon that record which required any limitation. Against the possibility that a hearing might make a difference the court suggested that this verbal interpretation would yield to any prior art which might press too closely upon the verbal interpretation to allow its validity. It was therefore intimated that a prior art might be shown which would affect the result; "more light on the subject may be obtained at final hearing." The final hearing has now been had, and has not thrown any more light upon the subject, except as I have indicated, which is quite irrelevant to the result. Precisely the same references are now introduced, and they were obviously more potent before than they are now, for nothing new has been discovered about their operation. Under such circumstances it is clear that the question is not open to me as to whether I think Hoey fulfills the suggestion of a possible prior art which might require a limitation of claim 23,

or whether it constitutes invention to substitute a vertical metallic web for a single strand with vertical wires at intervals. That question having once been decided upon the motion for preliminary injunction, the matter is no longer open here; it can be raised only by way of reargument in the Circuit Court of Appeals.

An interlocutory decree will pass declaring claim 23 valid and infringed and granting an injunction, but dismissing the complaint as to all the other claims in suit for noninfringement. No costs.

GRAND RAPIDS SHOWCASE CO. v. STRAUS et al.

(District Court, S. D. New York. December 13, 1915.)

PATENTS ⇐325—SUIT FOR INFRINGEMENT—PROCEDURE.

Where the defendant in an infringement suit pleads a large number of patents as anticipations, he will be required, on application of complainant, to file a bill of particulars specifying which of such patents he seriously relies on, under penalty of being taxed with the costs, whether successful or not, in case it appears that he has not complied with the order honestly and in good faith.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 607-612; Dec. Dig. ⇐325.]

In Equity. Suit by the Grand Rapids Showcase Company against Jesse I. Straus and others. On motion by complainant for bill of particulars. Motion granted.

This is a motion made by the plaintiff for a bill of particulars of the defendants' defense. The cause is the regular suit in equity for an infringement of a patent, and the defendants set up in their answer by way of anticipation between 40 and 50 patents under the following allegation: That the patentees were not the original inventors, but that, on the contrary, prior to their supposed invention, the thing patented had been described in each of the following letters patent: Then followed 36 United States patents and 5 British patents. Later the defendants added by an order 2 more United States patents, and again 8 more, so that in all the answer contains as anticipations 46 United States patents and 5 foreign patents. Correspondence between the parties ensued, and the defendants eventually, at the request of the plaintiff, gave the plaintiff a list of 30 United States patents in all, which they said they should refer to upon the trial of the case, but which list was given without prejudice to their right to include additional patents. This motion is to compel the defendants to state which of the 30 patents so disclosed they mean to rely on. It is therefore by way of further particularization of the defendants' actual intention.

Nathan Heard and Maurice M. Moore, both of Boston, Mass., for plaintiff.

Charles S. Jones, of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). It is of much importance, if possible, to get the practice in this respect into a clearer condition than it is at present, and for uniformity this decision has been made after consultation with all of the judges in this district and bears their approval. The plaintiff is not concerned with the patents which the defendants mean to put in

to show the prior state of the art. This motion is directed only to compel them to elect which they mean to use as anticipations of the patent. The decision is not to be understood to go further than the facts of the case at bar.

It is impossible under the statute to prevent the defendant from pleading as many patents in anticipation as he desires, but it is obviously preposterous to suppose that the invention has actually been patented by anything like the number of patents here pleaded. I recognize that the question of anticipation is bound up in the question of interpretation and that the defendant must have some latitude until he knows what view the court will take of the plaintiff's invention; but a good excuse should not pardon a bad practice. With every latitude the number of patents which can serve as anticipations must be very limited. It is proper, therefore, for the plaintiff in a case such as this to call on the defendant to declare in advance which patents he seriously contends to be anticipations, and the court will so direct the defendant.

If this order carry no sanction, however, it will not be effective, and the only sanction can be in costs. If, at the conclusion of the case, the judge who tries it is satisfied that the defendants could, without any reasonable danger to themselves, have cut down the patents on which they rely for anticipation below the number given to the plaintiff in response to the order, the court will either deprive the defendants of costs or award costs against defendants, notwithstanding their success. If the plaintiff is successful in the suit, the order can have no sanction; but, as the order will be made before the suit is determined, and as the defendants probably think they will win, the chance of losing the costs should operate as a real motive in their choice. The question whether defendants should be deprived of costs, or whether the plaintiff shall get costs, will depend upon the extent to which the trial judge thinks the defendants have not tried honestly to comply with the terms of the order. If he believes that the defendants' inclusion of too many patents was the result merely of unreasonable timidity, he will deprive defendants of their costs; if he thinks that the defendants were unwilling to make any honest effort, or wished to embarrass the plaintiff's preparation for trial, he will award costs to plaintiff. This practice will be followed by the judges of the Southern district until further notice. Whether the same practice will be followed in respect of patents introduced to show the prior state of the art will remain open until the case is presented.

I may add that I have already noted a number of instances where counsel have frankly and willingly set forth the anticipations upon which they relied. This course has been taken in a spirit of co-operation with the court, to assist in making the present equity rules successful in practice, and I believe the bar will be glad to aid this simplification of equity trials.

TUCKER et al. v. WILLIAMSON, Internal Revenue Collector, et al.

(District Court, S. D. Ohio, E. D. December 7, 1915.)

No. 50.

1. STATUTES ⌘217—CONSTRUCTION—EXTRINSIC AIDS TO CONSTRUCTION.

In construing an act of Congress, while the court may not recur to the views of individual members expressed in debate, nor consider the motive which influenced them in voting, it may consider the history of the times to ascertain the reason for the legislation and under appropriate circumstances the mode in which particular language was introduced into the law as shown by the journals and records.

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

2. POISONS ⌘2—HARRISON NARCOTIC ACT—CONSTRUCTION.

Harrison Narcotic Act Dec. 17, 1914, c. 1, § 2, 38 Stat. 786, makes it unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in the act, except in pursuance of a written order of the person receiving the same on a prescribed form, a copy of which order shall be preserved by both seller and buyer for two years, subject to inspection, etc., but provides in section 2a that registered physicians, dentists, and veterinary surgeons who in the course of their professional practice "shall have been employed to prescribe for the particular patient receiving such drug" shall be exempted from such requirement, but shall "keep a record of all such drugs dispensed or distributed, * * * except such as may be dispensed or distributed to a patient upon whom such physician * * * shall personally attend." *Held* that, under such provisions, a physician is not prohibited from dispensing or distributing in the course of his professional practice and without a written order a narcotic to a patient employing him because of the fact that he does not personally attend such patient, but that in such case he is required to keep the prescribed record.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 1; Dec. Dig. ⌘2.]

3. PHYSICIANS AND SURGEONS ⌘6—"PRACTICE OF MEDICINE"—STATUTORY DEFINITION.

Under Gen. Code Ohio, § 1286, a person who examines patients, diagnoses their diseases, and then prescribes and sells his own proprietary remedies is engaged in the practice of medicine, although his ostensible and apparent motive may be the sale of his medicines, and he is subject to the laws of the state regulating such practice.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. ⌘6.]

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

4. POISONS ⌘2—HARRISON NARCOTIC ACT—CONSTRUCTION.

The provisions of Harrison Narcotic Act Dec. 17, 1914, exacting a license as a condition for the sale, dispensing or distribution of drugs are not an exercise of the police power, but are for the purpose of revenue, and such license is a mere form of imposing a tax, and implies nothing more than that the licensee shall not be subject to the penalties of the act.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 1; Dec. Dig. ⌘2.]

5. POISONS ⌘2—HARRISON NARCOTIC ACT—CONSTRUCTION—VALIDITY OF DEPARTMENTAL REGULATIONS.

While the Harrison Narcotic Act of December 17, 1914, permits a physician in the course of his professional practice to dispense and distribute the mentioned narcotics to a patient by whom he is employed to prescribe,

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

without being subject to the prescribed regulations, although he does not personally attend such patient, the act must be construed with reference to the known usages and modes of practice in the profession, in which the prescribing for patients without personal examination is the rare exception and not the rule; and under the provisions of section 1, requiring the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury to "make all needful rules and regulations for carrying the provisions of this act into effect," the Commissioner has authority to prescribe what shall constitute "personal attendance" and "professional practice" by a physician within the meaning of the act, and a regulation which denies the right of registration and exemption to one who, although a licensed physician, does not see most of his patients, who bases most of his prescriptions on their written statements sent to him through the mails, and who prescribes the same remedy for all alike, is within the power conferred and valid.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 1; Dec. Dig. ☞2.]

In Equity. Suit by Nathan Tucker and William B. Robinson against Beriah E. Williamson, Collector of Internal Revenue for the Eleventh District of Ohio, and others. On motion to dismiss bill. Motion sustained.

A motion is made to dismiss the bill, whose averments, as far as need be noted, are as follows: Both of the plaintiffs are graduates of medical schools. Each is a member of his county and state medical society. One has been engaged for 48 years as a physician in lawful practice, and the other for 19 years. Both are duly licensed to practice medicine in Ohio, and each has registered as required by the act of Congress of December 17, 1914, known as the Harrison Narcotic Law. Each has paid the special tax required by that law. In the course of their professional practice only they have been and are prescribing for, dispensing and distributing to various patients, numbering many thousands, and residing in various states, a certain medicine prepared by them for the relief of asthma and hay fever, which medicinal preparation contains cocaine. They do not personally attend all of their patients for and to whom they thus prescribe, dispense, and distribute such preparation, but in most instances prescribe for such patients and dispense and distribute such medicinal preparation to them upon the written statements of such patients to plaintiffs, describing and setting forth their respective symptoms and conditions. Since March 1, 1915, and for many years prior thereto, plaintiffs have kept a complete record showing the amount of all the drugs mentioned in section 1 of the act in question, dispensed or distributed, the date thereof, and the name and address of each patient to whom such drugs have been dispensed or distributed, and still keep such record as required by the act. The amount of cocaine in each dose does not exceed .001 of a grain. The preparation is distinctly alkaline. The greater per cent. of cocaine used in it is in the form of the decomposition products of cocaine, and not as cocaine per se; such cocaine being denatured as to its habit-forming or habit-satisfying qualities. As partners and jointly the plaintiffs, by means of the order forms prescribed by the act, have in their possession cocaine, for the sole purpose of its use, sale, and distribution by them and each of them in the lawful practice of their profession as physicians, and have made and preserved duplicates of such orders upon the form issued for that purpose by the Commissioner of Internal Revenue. Their medicinal preparation must be kept for a suitable length of time to perfect the same as a useful medicine for the treatment of asthma and hay fever patients. If the supply now on hand should be seized and destroyed, it will prevent them from continuing to prescribe for and treat their patients, and will cause irreparable loss to them and each of them. The collector of internal revenue for this district, and other internal revenue officers, acting under the instruction of the Commissioner of Internal Revenue, dated June 10, 1915, will, unless restrained by the court, seize and forfeit all of the medicinal preparation and

all medicines containing cocaine now in the possession of the plaintiffs, and will recommend to the district attorney the names of the plaintiffs for indictment and prosecution. The plaintiffs, on September 10, 1915, were notified by the Acting Commissioner of Internal Revenue that their practice of sending out a preparation containing cocaine to patients which such physicians have never seen is considered by such Commissioner to be an illegitimate practice of medicine, and in direct violation of the intents and purposes of the Harrison Anti-Narcotic Law, particularly of section 2, and should be stopped, and that a copy of his notification had been furnished to the district attorney and the revenue agents. The plaintiffs are engaged in the practice of their profession as physicians, conducted according to law, and are prescribing for and dispensing and distributing to their patients the above-named medicinal preparation, and have a large and valuable practice among such patients, and, if the orders of the Commissioner of Internal Revenue are enforced against them, they will suffer irreparable injury, loss, and damage, unless the defendants (the internal revenue collector and other revenue officers whose names are unknown) are restrained from seizing and forfeiting the plaintiffs' medicines, drugs, and medicinal preparation now in their possession and adapted to, needed for, and used in the treatment of their patients. It is charged that the proposed acts of the defendants will be illegal, unauthorized, and in violation of the Constitution and laws of the United States, and of plaintiffs' rights, and that the act in question is unconstitutional and void as applied to the plaintiffs or either of them in connection with their practice as physicians, in that it attempts to regulate the prescribing, dispensing, and distributing of the drugs mentioned in it within the state of Ohio. The order of the Commissioner of June 10, 1915 (hereinafter mentioned), is also alleged to be without authority of law and void, in that (1) it holds that a physician can prescribe such drugs only when he personally attends upon his patients in the course of his professional practice; (2) it attempts to invest the collector of internal revenue with a power of discrimination as to the registration of certain named persons; (3) it holds that, if parties secure registration, such registration may be null and void, and does not protect them from prosecution for the use of the prohibited drugs mentioned in the act, upon the claim that the registration was obtained through misrepresentation or fraud; (4) the order attempts to authorize and direct the collector and other internal revenue officers to seize and forfeit prohibited drugs in the possession of citizens of the United States within the district; (5) it directs the collector and other internal revenue officers to recommend persons to the district attorney for indictment and prosecution; (6) it directs the collector and other internal revenue officers to seize and proceed to forfeit drugs prescribed or distributed on receipt of mail orders received from patients, or which are designed to be so prescribed and distributed. The prayer is for a restraining order and for ultimate injunctive relief.

Section 1 of the act provides, with certain exceptions which need not now be noted, for the registration and the payment of a special tax of \$1 by "every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or cocoa leaves or any compound, manufacture, salt, derivative, or preparation thereof." Cocaine is one of the specified salts. Failure on the part of any such person so to register or pay the special tax is specifically declared to be unlawful. The word "person" is made to include a partnership. The provisions of existing revenue laws relating to the special tax, so far as applicable, including the provision of section 3240, R. S. U. S., are extended to the special tax imposed by the act. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is required to make all needful rules and regulations for carrying the provisions of the act into effect. The first paragraph of section 2 makes it unlawful for a person to sell, barter, exchange, or give away any of the drugs mentioned in the act, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. It further requires the person who accepts such order to preserve the same, and also the person who gives it (if it be accepted) to preserve a

copy of the same, for a period of two years in such a way as to be readily accessible to inspection of any officer, agent, or employé of the Treasury Department duly authorized for that purpose; but section 2 (a) declares that nothing contained in the section (and consequently the foregoing provisions also relating to the preservation of orders and copies of orders) shall apply to the dispensing or distribution of any of such drugs by a physician registered under the act in the course of his professional practice only: Provided, that such physician keeps a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom the drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician shall personally attend—such record to be kept for two years from the date of the dispensing or distributing of such drugs, subject to inspection as above provided. Section 2 (d) provides for the sale of blanks by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and the sale of them by collectors of internal revenue. It requires collectors, before delivery of any such blanks, plainly to write or stamp on them the name of the purchaser, and declares it to be "unlawful for any person to obtain by means of said order form any of the aforesaid drugs for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." Section 4 first declares in comprehensive language who may not send, ship, carry, or deliver any of the drugs mentioned in the act, and then excepts from such broad provision "any person who shall deliver any such drug which has been prescribed or dispensed by a physician * * * required to register under the terms of this act, who has been employed to prescribe for the particular patient receiving such drug." Section 7 provides that all laws relating to the assessment, collection, remission, and refund of internal revenue taxes, including section 3229, R. S. U. S. (Comp. St. 1913, § 5952), so far as applicable to and not inconsistent with the provisions of the act in question, are extended and made applicable to the special tax imposed by it. Section 8 specifies the persons as to whom it shall be presumptively unlawful to have any of such drugs in his possession. The section is then made inapplicable (1) "to any employé of a registered person;" (2) "to a nurse under the supervision of a physician * * * registered under this act, having such possession or control by virtue of his employment or occupation and not on his own account;" or (3) "to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician * * * registered under this act." Section 9 imposes on violators of the law, upon conviction, a fine of not more than \$2,000, or imprisonment for not more than five years, or both, in the discretion of the court.

The ruling announced by the Commissioner of Internal Revenue and the Secretary of the Treasury on June 10, 1915, and of which complaint is made, is, in substance, as stated in this paragraph, and is as follows: The limitation of registration to certain named persons indicates the vesting of a power of discretion in collectors of internal revenue as to who shall register and from whom the special tax may be received. Persons not legitimately engaged in the exercise of their trade or profession cannot legally register under the terms of the act. From the express language of the act, a physician can register and dispense the drugs embraced in the act "in the course of his professional practice only." He can prescribe such drugs when he "has been employed to prescribe for the particular patient receiving such drugs," and upon whom he "shall personally attend in the course of his professional practice only." Such prescriptions must be made "in the legitimate practice of his profession," and then only when "employed to prescribe for the particular person (patient) receiving such drugs." The duties of collectors of internal revenue do not end, under the provisions of the act, with simple registration. If parties secure registration through misrepresentation or fraud, such registration is null and void, and does not protect them from prosecution for the illegal use of the drugs, and it is the duty of collectors, when such cases are discovered, to investigate the same, and, when the law has been violated in line with the foregoing, to seize and proceed to forfeit the prohibited drugs illegally in posses-

sion of such parties, and recommend such persons to the district attorney for indictment and prosecution. The collectors were informed that the foregoing "has special application to those persons who, registering as physicians, prescribe or distribute narcotic drugs or preparations on receipt of mail orders received from so-called patients, or who, under the laws of the state or under municipal regulation, are not permitted to practice medicine."

Vorys, Sater, Seymour & Pease, of Columbus, Ohio, for plaintiffs.
Stuart R. Bolin, U. S. Dist. Atty., of Columbus, Ohio, for defendants.

SATER, District Judge (after stating the facts as above). To determine all of the points argued may result in the decision of matters not altogether germane to the issue presented. The facts well pleaded are admitted by the motion. If they do not state a cause of action, the motion must prevail.

Most of the plaintiffs' business is a mail order business. Whether the mails or express companies are utilized in transmitting their preparation to patients does not appear, but the employment of one or both of such agencies is obviously necessary. The preparation is sent to all alike. A "preparation" is something which is of use, or believed by the prescriber or user fairly and honestly to be of use, in curing, alleviating, or palliating or preventing, some disease or affection. *Dodge & Olcott v. U. S. (C. C.)* 130 Fed. 624, 625. The bill does not state in what manner plaintiffs are compensated, whether by the receipt of fees, as is usual with medical practitioners, or merely by payment for the preparation forwarded, nor does the bill show that the partnership of which plaintiffs are members has registered under the Narcotic Law.

[1] In the argument of the case, reliance was placed on the utterances of members of the Senate when the bill was under consideration. In construing the act the court may not recur to the views of individual members in debate, nor consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. In construing it, however, the court may with propriety recur to the history of the times in which it was passed. This is frequently necessary to ascertain the reason as well as the meaning of the particular provisions in it. *U. S. v. Union Pac. R. Co.*, 91 U. S. 72, 79, 23 L. Ed. 224; *U. S. v. Freight Ass'n*, 166 U. S. 290, 318, 319, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Hudson v. Chicago, St. P., M. & O. Ry. Co. (D. C.)* 226 Fed. 38. Under appropriate circumstances, the legislative intent may be ascertained and carried out by a recurrence to the mode in which particular language of an embarrassing nature was introduced into a law as shown by the journals and records (*Blake v. National Banks*, 23 Wall. 307, 319, 23 L. Ed. 119), and to inform the court of the exigencies calling for the enactment of the law and the reason for inserting given provisions. *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 473, 12 Sup. Ct. 55, 35 L. Ed. 821. The act is a revenue measure. The large and increasing number of persons addicted to the use of cocaine, and its demoralizing and de-

structive effect on them, abundantly justifies the restrictive conditions imposed on those who qualify to conduct business under the law.

[2] Counsel have presented the bill, which in a modified form became the present act, as it was ordered to be printed on August 18, 1914, by the House of Representatives, with the amendments of the Senate numbered. When the bill went to the Senate after it had passed the House, the proviso is section 2 (a) read as follows:

"Provided, however, that such physicians, dentists, or veterinary surgeons shall personally attend upon such patient."

The Senate struck out the words "however" and "personally attend upon such patient," and by amendment the proviso was made to read as appears from the discussion in the Senate (Cong. Rec. vol. 51, p. 6788):

"Provided, that such physician, dentist, or veterinary surgeon shall have been specially employed to prescribe for the particular patient receiving such drug or article: and provided further, that such drug shall be dispensed in good faith and not for the purpose of avoiding the provisions of this act."

The words "specially" and "or article" were subsequently eliminated by the Senate. The bill later went to a committee of conference, consisting of three managers on the part of the House and five on the part of the Senate. On December 10, 1914, the committee reported and recommended (Cong. Rec. vol. 52, pp. 97, 98, 99) that the House recede from its disagreement to the Senate amendment No. 8 (being all the proviso following the words "that such physician, dentist, or veterinary surgeon shall") and agree to the same with an amendment as follows:

"Strike out all the matter inserted by said amendment and insert in lieu thereof the following: 'Keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this act.'"

The recommendation thus made was adopted by both legislative bodies, and the bill as thus amended became section 2 (a) of the act in question. The statement of the House managers, made to the House of Representatives, in explanation of the effect of the action agreed upon by the conferees and recommended in the report, is as follows:

"Amendment No. 8: This amendment as redrafted does not require the personal attention of a physician, dentist, or veterinary surgeon to dispense or distribute any of the aforesaid narcotics, but, in case there is not personal attention on the part of the physician, dentist, or veterinarian, a record showing the amount of the drug dispensed or distributed, the date, the name and the address of the patient to whom such drug was dispensed or distributed, must be kept for a period of two years, subject to inspection by the officers, agents, and employes of the Treasury Department, and by the state, territorial, district, municipal, and insular officials named in this act. Physicians, dentists, and veterinary surgeons will not have to keep a record of the quantity of the drug administered, etc., when in personal attendance upon their patients."

The construction thus placed upon section 2 (a) is not controlling, but the foregoing shows how such section came to be made a part of the law. The exemption authorized by the bill, as it passed the House, from the requirements of the first paragraph of section 2, extended only to instances of personal attendance on patients. That provision was rejected and in lieu thereof the exemption was extended, by the agreement of the conference committee and the approval of both branches of Congress, so as to include not only cases of personal attendance on the part of the physician, but also those cases in which there is no personal attendance, providing a record is kept in such latter instance of the drug or drugs dispensed. There was thus somewhat of an enlargement of the instances of exemption from the requirements of the first paragraph of section 2 as to the preserving of orders and duplicates of the same, but there was added the duty of preserving a record in case of dispensing or distributing when not in personal attendance on the patient. The proviso must be interpreted as it now stands, not as it stood when the bill came to the Senate from the House. *U. S. v. Delaware & Hudson Co.*, 213 U. S. 366, 414, 29 Sup. Ct. 527, 53 L. Ed. 836; *Dr. J. L. Stephens Co. v. U. S.*, 203 Fed. 817, 823, 122 C. C. A. 135; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 57, 15 Sup. Ct. 508, 39 L. Ed. 601; *Cooper v. Richmond* (C. C.) 42 Fed. 697, 700, 8 L. R. A. 366; *Sutherland, Stat. Const.* (2d Ed.) § 351. So interpreting it, it must be held that a physician is not required to keep a record of the drugs dispensed or distributed in good faith, or to preserve the orders received or the duplicates of the same, when in the course of his professional practice he is in personal attendance on his patients.

[3] In view of section 1286, G. C. Ohio, the plaintiffs are engaged in the practice of medicine. Under the state rule, if a person examines patients, diagnoses their diseases, and then prescribes and sells his own proprietary remedies, he is practicing medicine, notwithstanding his ostensible and apparent motive may be the sale of his medicines. *Taylor's Law in Relation to Physicians*, 39; *State v. Van Doren*, 109 N. C. 684, 14 S. E. 32; *Wharton & Stillé's Med. Jur.* vol. 3, § 452. The tendency on the part of the states is to extend rather than to restrict the definition of the term "practicing medicine" (*Taylor, supra*, 39), and for the manifest purpose of protecting their citizens and rendering amenable to law all practitioners who violate its provisions or are guilty of imposition or other reprehensible conduct.

[4] Legislation by the states regarding the practice of medicine is a valid exercise of the police power. *Hawker v. N. Y.*, 170 U. S. 189, 191-193, 18 Sup. Ct. 573, 42 L. Ed. 1002; *Reetz v. Michigan*, 188 U. S. 505, 506, 23 Sup. Ct. 390, 47 L. Ed. 563; *Collins v. Texas*, 223 U. S. 288, 32 Sup. Ct. 286, 56 L. Ed. 439; *Meffert v. State Board of Medical Registration*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, affirmed 195 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350. The exaction by the national government, however, of a license, as a condition for the sale, dispensing, or distribution of drugs, like that for the sale of intoxicating liquor, is not an exercise of the police power, but is for the purpose of revenue. *Re Heff*, 197 U. S. 488, 505, 25 Sup. Ct. 506, 49 L.

Ed. 848. A license to dispense the drugs named in the act must be regarded as nothing more than a mere form of imposing a tax, and as implying nothing more, except that the licensee shall not be subject to the penalties of the law if he pays such tax and conforms to legal requirements. License Tax Cases, 5 Wall. 462, 471, 18 L. Ed. 497.

[5] The only physician that may under section 2 (a) lawfully dispense or distribute the drug in question is one who is registered and who acts in the course of his professional practice only. He may not—section 2 (d)—obtain it by means of the prescribed order forms for any purpose other than the use, sale, or distribution of it in the legitimate practice of his profession. That he must in each instance in which he dispenses or distributes the drug be employed to prescribe for the particular patient receiving such drug is necessarily implied from the pertinent provisions of the act and the purpose to be accomplished by it. He may not engage in the business of selling, unless he sells it in filling his own prescriptions, for the sale of it is, generally speaking, the part of the druggist. He must act strictly within the line of actual employment in a legitimate and professional practice only, in which (adopting the definition of the practice of medicine as found in *Underwood v. Scott*, 43 Kan. 714, 23 Pac. 942) he personally judges (diagnoses) the nature, character, and symptoms of the disease, determines the proper remedy for it, and prescribes the application of the remedy to the disease. Personal investigation precedes and personal supervision accompanies the prescribing. The remedy is to be adapted to the disease and wants of the particular patient. That a physician may not prescribe for other than the particular patient that employs him and that is to receive the drug follows from the language and import of sections 4 and 8. The proviso of section 4 makes lawful the sending, shipping, carrying, or delivery of the drug (1) by common carriers engaged in transporting it, and (2) by any employé (acting within the scope of his employment) of any person who shall have registered and paid the special tax; but that section, when it treats of physicians, deals only with the delivery of the drug and permits its delivery by a person (an individual) only when it has been prescribed or dispensed by a registered physician who has been employed to prescribe for the particular patient who is to receive such drug. The law contemplates that there shall be no promiscuous or covert passing around of the drug to persons who have not employed the physician and received it on his prescription. The proviso of section 8, whose validity and scope need not now be considered, makes possession of the drug by an unregistered person who has not paid the tax, other than an employé of a registered person, or a nurse under the supervision of a registered physician, presumptive evidence of a violation of the act, unless such possessor shall have obtained a prescription made in good faith from a registered physician.

The regulation promulgated by the Treasury Department that a physician must be actually absent from his office and in personal attendance upon a patient in order to come within the exemption of section 2 (a) accords with the design that a physician shall maintain supervision over the patient for whom he prescribes. One of the defi-

nitions of "attend" (Latin, "attendere"), given in Webster's International Dictionary is: "To visit professionally, as a physician." The Department thus places (and, I am disposed to think, rightfully so) a more restricted meaning on personal attendance than the courts have placed on medical attendance—it being held that to constitute the latter it is not requisite that the physician should attend the patient at his home and that an attendance at his office is sufficient. *Cushman v. Insurance Co.*, 70 N. Y. 72; *Gilligan v. Royal Arcanum*, 26 Ohio Cir. Ct. 42, 43. It is by personal attendance that the greater part of the business of a regularly practicing general practitioner is done. The personal attendance clause, therefore, covers the majority of all of the cases in which the drug is dispensed or distributed by such a physician. Its effect is to increase the inconvenience and difficulty, and even the expense, of procuring the drug. In harmony with this view is the provision of section 2 (b), which does not permit the filling of prescriptions unless they are written and signed and dated as of the day on which they are signed. The refilling of prescriptions is not permissible. If, instead of personal attendance on a patient by the physician, the patient calls on the physician at his office for treatment, in which event such physician is required to make a record of the drugs mentioned in the act which he dispenses or distributes, the opportunity is afforded of personally diagnosing, studying, supervising, and prescribing for such patient. If a regularly practicing physician may prescribe without seeing his patient, it is in occasional instances only.

The responsibility cast upon the physician is great and the law consequently exacts of him a high degree of integrity—practices which are both professional and legitimate. Even a layman knows that the diagnosis of diseases has in recent years assumed increased and increasing importance for the purpose of determining and removing their causes. The ascertainment of the blood pressure, the analysis of the blood, urine, and stomach contents, the employment of the X-ray and of other appliances and modes of examination for the determination of the physical condition of patients, are so usual and so much more assuring than a patient's recital of what may be merely subjective symptoms, that skillful and conscientious physicians have come to use, and intelligent people have come to expect, an exacting of the full history of each case and the use of scientific methods in determining the presence or absence of disease and its stage of advancement. Such methods enable the physician to work with greater precision to remove the causes of disease. If he acts only on the patient's statement, however honestly made, he may be misled, or treat a symptom and not the disease itself, whether that statement be oral or in writing, and if in writing, and the patient be not seen at all, the prescription sent may not only be an inappropriate remedy, but may reach another for whom the physician did not intend it and of whom he never heard.

In the enactment of legislation the law-making body may take into account the advance of learning, and provide for the public health and safety by such reasonable and proper measures as increased knowledge may suggest (*State v. Gravett*, 65 Ohio St. 289, 300, 62 N. E.

325, 55 L. R. A. 791, 87 Am. St. Rep. 605), and may impose new conditions as prerequisite to the practice of medicine as new modes of treating disease are discovered. The statute must be construed with reference to known usages and modes of transacting business (*Shoemaker v. Goshen Township*, 14 Ohio St. 569, 584), as well as the history of the times (*Preston v. Bowder*, 1 Wheat. 115, 120, 121, 4 L. Ed. 50), and for the benefit of the community at large (*Allen v. Little*, 5 Ohio, 66, 72). Although a revenue measure, the provisions of the act defining who may practice under it tend to reduce to a minimum (if it does not wholly eliminate) the number of prescriptions for unfortunate cocaine addicts which are not made in cases of personal supervision, when the patient calls on the physician or the physician on the patient. The physician must, if practicable, prescribe with reference to knowledge personally acquired by seeing his patient. To prescribe, in most instances, for absent patients, on their written statements describing their respective symptoms and conditions, and in every instance to send the same medicinal preparation—a sort of proprietary medicine—is to reverse the policy of the law, make an exception the rule, open the door to fraud, and frequently to furnish treatment which may be hurtful or wholly ineffectual. That the purpose of the law may not fail, the act forbids the registration of and imposes penalties upon physicians who engage in other than legitimate and professional practice, and has cast, or at least has attempted to cast, upon the Commissioner of Internal Revenue and the Secretary of the Treasury the power of defining in what such practice consists.

The provisions of the act that are directed toward physicians are also made applicable to dentists and veterinary surgeons. A veterinarian, as defined by the Century Dictionary, is:

“One who practices the art of treating diseases and injuries of domestic animals, surgically or medically.”

It would seem that no veterinarian can legitimately or in the course of his professional practice only prescribe for a human being, because his patients are domestic animals. The veterinarian of necessity almost always treats his patients when away from his office and when personally attending them. The advance made in dentistry in recent years requires the giving of prescriptions to a considerable extent in dental surgery and for the removal of the causes of diseases of the teeth and mouth, but cases of dental surgery are usually treated at the hospitals, although prescriptions for the removal of the causes of disease are ordinarily given at the dentist's office, and of these a record must be kept. If classifying dentists and veterinarians with physicians is a fact to be considered in construing the act, it does not require a modification of the views above expressed, for the reason that personal examination into and personal supervision of each case is necessarily the rule, and prescribing for a patient in his absence is the exception.

If the above conclusions be correct, that the law contemplates prescribing or distributing of the drugs mentioned in the act only in case of the personal attendance of physicians on their patients, or of the personal visits of patients to their physicians, save in exceptional in-

stances, does a physician engage in "the legitimate practice of his profession," or prescribe the drug "in the course of his professional practice only," who does not see most of his patients, who bases most of his prescriptions on their written statements sent to him through the mails, and who prescribes the same remedy for all alike? Who determines what practices are legitimate and professional? The law does not in express language state; but does it do so by necessary implication? The deference to be paid to a departmental ruling and construction of the law is defined in *Smythe v. Fiske*, 23 Wall. 374, 382, 23 L. Ed. 47; *U. S. v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *Nunn v. Wm. Gerst Brewing Co.*, 99 Fed. 939, 942 (C. C. A. 6) 40 C. C. A. 190; *Swift & Co. v. U. S.*, 105 U. S. 691, 695, 26 L. Ed. 1108; *Fairbank v. U. S.*, 181 U. S. 283, 310, 311, 21 Sup. Ct. 648, 45 L. Ed. 862; *Merritt v. Cameron*, 137 U. S. 542, 552, 11 Sup. Ct. 174, 34 L. Ed. 772; 26 Cyc. 1602 et seq.

The act of May 9, 1902 (32 Stat. 193, c. 784), providing inter alia for the inspection and regulation of the manufacture and sale of certain dairy products, and amending the act of August 2, 1886 (24 Stat. 209, c. 840), defining "butter" and imposing a tax upon and regulating the manufacture, sale and importation of oleomargarine, adopted section 20 of the Oleomargarine Act, which section provides that:

"The Commissioner of Internal Revenue with the approval of the Secretary of the Treasury may make all needful regulations for the carrying into effect of this act."

The only difference between the language of that section and that of the last paragraph of section 1 of the Harrison Narcotic Law is that the latter uses the word "shall" where the former uses the word "may." Section 4 of the act of 1902 defines adulterated butter to be:

"Any butter in the manufacture or manipulation of which any process or material is used with the intent or effect of causing the absorption of abnormal quantities of water, milk or cream."

The act does not define what quantity of water, milk, or cream is abnormal, but the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated a regulation that butter containing 16 per cent. or more of water, milk, or cream should be classified as adulterated butter under the act. The validity of that regulation was involved in *Coopersville Co-operative Creamery Co. v. Lemon*, 163 Fed. 145, 89 C. C. A. 595 (C. C. A. 6). Judge (later Mr. Justice) Lurton, speaking for the Circuit Court of Appeals, after alluding to the provisions of the act under consideration and to sections 161, 251, and 3447, R. S. U. S. (Comp. St. 1913, §§ 235, 870, 6349), said:

"Looking to the character of duties imposed upon the Commissioner of Internal Revenue, and the various provisions of law authorizing the promulgation of regulations in carrying out the plain purposes of the law, we entertain no serious doubt that this regulation was authorized."

The similarity of the instant case to that considered by the Circuit Court of Appeals is such as to make the *Lemon Case* controlling on this court. A statement of the reasons for holding the regulation

as to mail orders and professional practices now under consideration to be neither the delegation of legislative nor a grant of judicial power would be a reiteration of Judge Lurton's elaborate opinion. In *Reetz v. Michigan*, 188 U. S. 505, 507, 23 Sup. Ct. 390, 391 (47 L. Ed. 563), Mr. Justice Brewer quoted with approval from *People v. Hasbrouck*, 11 Utah, 291, 39 Pac. 918, as follows:

"The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise 'judicial power,' as that phrase is commonly used, and as it is used in the Organic Act, in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are no wise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of equalization in determining, for purposes of taxation, the value of property. The ascertainment * * * of qualifications to practice medicine by a board of competent experts, appointed for that purpose, is not the exercise of a power which appropriately belongs to the judicial department of the government."

See also *Meffert v. State Board of Medical Registration*, *supra*; *France v. State*, 57 Ohio St. 1, 47 N. E. 1041; *Wharton & Stillé's Med. Jur.* § 434.

That "unprofessional" has been held to be synonymous with "dishonorable" (*State v. Med. Examining Board*, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575), does not militate against the establishment of another standard by which to test professional conduct and the right to practice medicine. This precise point was ruled in *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623. See also *Hawker v. N. Y.*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002. Session Laws of the various states and the reports of decided cases abound with illustrations of legislative enactments which impose new and added qualifications on those who engage in the practice of medicine. A summary of the laws touching that subject enacted in Ohio down to 1897 is found in 57 Ohio St. at pages 8, 9. For the purpose of increasing the national revenue, Congress declared that physicians who register and pay a designated tax may, on certain conditions, dispense or distribute certain drugs in the treatment of their patients, which, wrongfully used, are highly destructive of life and usefulness, and which, rightfully used, are often highly serviceable. It was willing to forego any advantages which might result to the government from the receipt of such tax rather than to permit the dispensing and distribution of such drugs by physicians who did not meet the prescribed conditions. That the exercise of the power to increase the revenues may operate to produce a result which the states may obtain by the exercise of the police power is immaterial. Congress established a board, as it were, with powers akin to those of a board of medical examiners, or a board of school examiners, or a board of equalization, to determine what applicants possess the requisite qualifications for registration and practice under the Narcotic Law. In unmistakable language it indicated that their practice must be legitimate and professional. It did not prescribe, as it might have done,

the standard of qualifications. It did, however, what under the authority of the Lemon Case it was altogether competent for it to do; it declared that the practice which should confer upon or deny the physician the right to register and dispense the specified drugs must be legitimate and professional. It was the design of Congress that standards of professional qualifications should be provided to render the law effective for accomplishing its purpose. The regulation fulfills the purpose of the law, and it cannot therefore be said to be an addition to it. *U. S. v. Antikamnia Co.*, 231 U. S. 654, 667, 58 L. Ed. 419, Ann. Cas. 1915A, 49.

The fact is not overlooked that in *U. S. v. 11,151 Pounds of Butter*, 195 Fed. 657, 115 C. C. A. 463, the Eighth Circuit Court of Appeals had under consideration the same statute and regulation which was under review in the Lemon Case and reached an opposite conclusion; but that fact does not relieve this court from adherence to the law as announced by the appellate court of its own circuit, or from expressing its own view that the regulation of June 10, 1915, as to the point now under consideration, is valid. It follows from the foregoing that collectors of internal revenue should, in licensing physicians, enforce the departmental regulation against those doing a mail order business, as fully as any other valid regulation promulgated by constituted authority, and that physicians permitted to practice under the act who conduct their business in an illegitimate or unprofessional manner, subject themselves to the penalties of the law.

In the Lemon Case it was said that, if the regulation there under consideration had not the force of law as a conclusive determination of fact, it nevertheless furnished a working rule for the guidance of officers and the information of manufacturers, and, on the trial of a manufacturer of butter, from whom the tax was exacted on butter alleged to have more than 16 per cent. of water in it, a court will commit no error if it submits to a jury the question as to whether such a percentage of water is abnormal. It would not, therefore, be error for a trial judge, should he elect so to do, to determine, in a case triable to himself, or to submit to a jury, in a proper case, for its determination, the question of fact whether an accused party's methods of doing business debar him from practice under the law.

Reliance is had by plaintiffs on the averment that the greater part of the cocaine used in their preparation is in the form of the decomposition products of cocaine, and not as cocaine per se, and that the cocaine is denatured as to its habit-forming and habit-satisfying qualities. The statute, however, runs against the dispensing of the drug by a person not duly authorized to do so. There is no exemption on account of the form in which the drug exists or is prescribed.

If the right claimed by the government to seize and forfeit any of the enumerated drugs in the possession of violators exists, it is due to the extension (section 1, par. 4) to the special tax named in the act of some applicable statutory provision of some other law relating to special taxes. Such right is not conferred by the act itself, nor by sections 3163, 3164, 3224, or 3453, R. S. U. S. (Comp. St. 1913, §§ 5883, 5884, 5947, 6355)—the only statutory provisions to which atten-

tion has been directed—nor by any other statute that has come under my observation.

The plaintiffs are therefore entitled to a temporary injunction against the seizure and forfeiture of the cocaine in their possession, but in no other respect. *Phila. Co. v. Stimson*, 223 U. S. 605, 619, 620, 32 Sup. Ct. 340, 56 L. Ed. 570; *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 108, 110, 23 Sup. Ct. 33, 47 L. Ed. 90; *Magruder v. Belle Fourche Valley Water Users' Ass'n*, 219 Fed. 72, 78, 79 (C. C. A. 8), 135 C. C. A. 524. The motion to dismiss is overruled. If the government elects to waive its claimed right to a seizure and forfeiture of the drug, the motion will be sustained, and the bill dismissed.

Following the announcement of the above opinion, the district attorney and the collector of internal revenue stated in open court that the latter had not been instructed to seize and forfeit the cocaine or preparation in the possession of the plaintiffs, and had at no time had, and does not now have, an intention to do so. For this reason, the motion to dismiss is sustained, and the bill is dismissed.

PITTSBURGH MELTING CO. v. BALTIMORE & O. R. CO. et al.

(District Court, W. D. Pennsylvania. January 17, 1916.)

No. 12.

1. FOOD ↻3—MEAT INSPECTION—STATUTORY PROVISIONS—APPLICATION.

Act June 30, 1906, c. 3913, 34 Stat. 674, for the purpose of preventing the use in interstate or foreign commerce of meat and meat food products unfit for human food, provides for the examination and inspection of animals before being allowed to enter into any slaughtering or similar establishment in which they are to be slaughtered, and the meat and meat food products thereof used in interstate or foreign commerce, and excludes from such commerce meat food products not so inspected and passed. Plaintiff manufactured tallow oil, used in making soap, glycerine, dynamite, and for other industrial and commercial purposes from the fat of slaughtered beef cattle. It was made from all parts of the animal, and not from the fat from particular parts, as is used in oleo oil, intended to be used in the manufacture of oleomargarine. Plaintiff's tallow oil was not sold to manufacturers of oleomargarine, and was not used or intended to be used in such manufacture, though it might be so used, and when shipped was conspicuously marked with the words "Tallow Oil" and "Inedible." *Held*, that plaintiff and its product were not within the provisions of the act.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 3, 4; Dec. Dig. ↻3.]

2. STATUTES ↻219—CONSTRUCTION—PRACTICAL CONSTRUCTION.

When the intention of a statute is doubtful, the construction placed upon it for many years by those charged with executing its provisions may be resorted to in aid of its true construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. ↻219.]

3. FOOD ⚡3—MEAT INSPECTION—DEPARTMENTAL REGULATIONS—VALIDITY.

Act June 30, 1906, relative to the inspection of meat and meat products, authorizes the Secretary of Agriculture to make such rules and regulations as are necessary for the efficient execution of its provisions. Thereunder the Secretary adopted regulations specifying as products subject to the act and such regulations carcasses and food and meat products derived from cattle, sheep, swine, and goats which are "capable of being used as food by man," and also required shippers of inedible foods to furnish a certificate certifying among other facts that the fat is not capable of being used as food by man. *Held*, that the Secretary exceeded his authority in making such regulations, as the power to make rules and regulations for the efficient execution of the provisions of the act gave him no power to add any provision to the act, and by the terms of the statute the meat and meat food products subject thereto are articles eaten by man, proper for human consumption, and fit for human food.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 3, 4; Dec. Dig. ⚡3.]

4. CONSTITUTIONAL LAW ⚡62—LEGISLATIVE POWERS—DELEGATION TO EXECUTIVE OFFICERS.

Congress cannot delegate legislative power to any executive officer.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. ⚡62.]

In Equity. Suit by the Pittsburgh Melting Company against the Baltimore and Ohio Railroad Company and another. Decree for plaintiff.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., for plaintiff.

Wm. Watson Smith, of Pittsburgh, Pa., for defendant Baltimore & O. R. Co.

E. Lowry Humes, U. S. Dist. Atty., of Pittsburgh, Pa., for defendant Totten.

ORR, District Judge. This suit in equity is before the court for decision after trial. The controversy involves a construction of that portion of the act of Congress entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1907," approved June 30, 1906 (34 Stat. 674), which is commonly known as the Meat Inspection Amendment. Particularly it involves the question whether the plaintiff and the plaintiff's products are within the provisions of that act, and the question whether or not the Secretary of Agriculture has not exceeded his power in the adoption of certain new regulations intended to become effective on November 1, 1914. The immediate reason for filing the bill, as appears in the testimony, was the refusal by the Baltimore & Ohio Railroad Company to accept a shipment of tallow oil, because of notice to it by the defendant C. E. Totten, who was an inspector of the Bureau of Animal Industry of the Department of Agriculture, that the shipment offered by the plaintiff was not accompanied by a certificate in the form required by the regulations of November 1, 1914. This brief statement of the case was supported by the evidence at the trial from which are found the following facts:

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

[1] The plaintiff is a corporation of Pennsylvania, and owns and operates a plant for the manufacture of tallow oil (sometimes known as "oleo oil"), stearine, tallow, cracklings, stock, and grease in the city of Pittsburgh. It and its predecessors have been in business for more than 78 years. Its plant is connected by means of a railroad siding with the railroad of the defendant railroad company. The defendant railroad company is a corporation of the state of Maryland, and is a common carrier operating a line of railroad from various points, including, among others, from Pittsburgh to New York.

The plaintiff in 1881, or thereabouts, began the manufacture of oleomargarine, and continued in that business for five or six years, until the Legislature of Pennsylvania passed an act forbidding the manufacture of that substance. Plaintiff then ceased such manufacture, and thereafter operated its plant for the sole production of tallow or oleo oils, stearine, grease, tallow, cracklings, and stock, until the present time, using the machinery and equipment which had formerly been used by it in the manufacture of oleomargarine. Plaintiff does not sell or ship tallow or oleo oil, or any of its product, to any manufacturer or dealer in oleomargarine. It sells its product to manufacturers of soap, railroad companies, oil companies, steel companies, and others. Among its customers are Fairbanks & Co., W. & H. Walker, Colgate & Co., Swift & Co., the Westinghouse Air Brake Company, and various railroad companies. It ships a very large portion of its oil to Holland, Sweden, and other foreign countries.

Tallow or oleo oil is used not only for making soap, but for the production of glycerine, dynamite, and for other industrial and commercial purposes, including the manufacture of oleomargarine. It is the product of the fat of slaughtered beef cattle. The fat from which the plaintiff manufactures its oil is collected by its wagons, which visit various establishments in Allegheny county in the state of Pennsylvania, where beef cattle are slaughtered, or slaughtered animals are sold for meat. In the selection of these fats the plaintiff uses care and endeavors to select the best and purest. It uses the fat from all parts of the animal, and not the fat from particular parts only of the animal.

Oleo oil, which is intended to be used and is used in the manufacture of oleomargarine, is taken from particular parts of the carcass of the animal. Plaintiff's oil is not denatured. In plants which are inspected by inspectors appointed by the Department of Agriculture the process of denaturing is applied only to fats from condemned carcasses or fats which have fallen upon the floor, or perhaps have received some similar treatment. It is not practicable to denature tallow oil without impairing in some degree its value. While the evidence disclosed that its value for lubricating or illuminating purposes would not be affected, and perhaps for some of the coarser products or industrial operations, yet the court is satisfied that denaturing would affect the value of the oil for some of the purposes for which it is used, as in the manufacture of the finer soaps, tooth powders, and other pharmaceutical preparations. Neither oleo oil or tallow oil is sold by wholesale or retail grocers as a common article of food. While the evidence discloses the fact that some people have eaten both at

times, yet the fair conclusion from the testimony is that neither is a food. There was no evidence that any person had ever eaten any of plaintiff's product.

Plaintiff's oil is sold in the market as tallow oil. It is not sold in the market as oleo oil, at prices for which oleo oil sells. The prices for oleo oil are higher than the prices of tallow oil. The oil which plaintiff ships in interstate and foreign commerce is shipped in tierces, upon which, in addition to other markings, there are conspicuously placed the words "Tallow Oil" and "Inedible." There was no evidence in the case that plaintiff, by correspondence or otherwise, had at any time led any one to believe that the oil shipped by it was edible. Nor was there any evidence in the case that the plaintiff by subterfuge had at any time intended or attempted to evade the provisions of the law.

On or shortly after October 1, 1906, at which time the act of Congress now under consideration went into effect, the Department of Agriculture established at the plant of the plaintiff a system of inspection, whereby the entire operation of the plant was under the direction of an inspector assigned by the Bureau of Animal Industry, and thereafter for several years no operations were carried on at the plant of the plaintiff, except under the direct supervision of such inspector or inspectors. The mode of inspection during that period was as follows: The fat, after it was collected by wagons from various establishments in said county and delivered to plaintiff's plant, was inspected by the inspector by looking at it and smelling it. During the process of manufacturing the oil, the inspector made observations as to the temperature maintained in boiling the fat. When the oil was ready for shipment, the inspector further inspected it by tasting and smelling it. In addition to the inspection of the product itself, the inspector maintained a general supervision over the condition of the plant. Although plaintiff was advised that its plant was not subject to the provisions of the act of Congress, known as the Meat Inspection Amendment, it submitted to the same because the mode of inspection was deemed to be reasonable.

On or about May 10, 1907, the plaintiff was informed by the Bureau of Animal Industry that the Department of Agriculture had adopted a regulation whereby the mode of inspection theretofore maintained at plaintiff's plant would be discontinued, and whereby the plaintiff would not be permitted to use in the manufacture of tallow oil fat obtained from animals slaughtered at other than official establishments as determined by the regulations of the Department; such establishments being those at which official inspection under the act of Congress was maintained. The mode of inspection adopted by said Bureau, pursuant to said regulations was as follows: The driver of each wagon delivering fat to plaintiff's plant was required to obtain from each person from whom he obtained such fat and to deliver to the Bureau's inspector, a certificate stating that the fat was from the carcasses of beef cattle, which had been slaughtered at one of said official establishments. After the receipt of such information the plaintiff declined

to accede to the requirements of such new regulations, and thereupon the government withdrew its inspection from plaintiff's plant.

After the withdrawal of the inspection, the plaintiff shipped its product as "inedible" only, and so marked it in accordance with the rules and regulations adopted by the Secretary of Agriculture, which became effective April 1, 1908, and continued to ship its product until July, 1910, when an inspector notified the Baltimore & Ohio Railroad Company not to carry a certain shipment to one of plaintiff's customers in Rotterdam, Holland. Plaintiff then filed its bill in equity in this court against said railroad company and C. E. Totten, the government inspector, to restrain the enforcement of such notice, and to permit such shipment to go forward, which proceedings were subsequently discontinued by reason of the disposition of the indictment hereinafter mentioned.

At or about the same time that the bill in equity was filed the said government inspector caused an information to be made against the plaintiff and its general manager, upon which an indictment was obtained, charging them with unlawfully offering to said railroad company a meat food product for transportation from Pittsburgh and thence to Rotterdam. In that case a verdict was rendered for the defendants. From that time until January 15, 1915, the plaintiff, without complaint or objection on the part of the defendant Totten, or the said Bureau of Animal Industry, continued to make shipments of oil in interstate and foreign commerce, as an inedible fat, labeling each tierce containing the same with the word "Inedible," and delivering to the carrier certificates in the following form, namely:

	Date, 19...
Name of common carrier	
Consignor	
Point of shipment	
Consignee	
Destination	

I hereby certify that the following described fat is inedible and is not intended for food purposes, and that the said fat is of such a character or is intended for such a use that denaturing is impossible or will render said fat unavailable for the desired industrial use.

Kind of Product.	Amount of Weight.
.....
.....
	(Signature of Shipper.)
	(Business Occupation of Shipper.)
	(Address of Shipper.)

On January 15, 1915, the plaintiff delivered to the defendant railroad company a certain car loaded with 100 tierces of said oil for shipment over the railway of said company to New York, in the state of New York, and thence by steamer sailing from the port of New York on January 28, 1915, to Rotterdam, Holland. The end of each of said tierces was painted white, and there was conspicuously stenciled or burned thereon "tallow Oil," the true name of the product contained therein, and also the word "Inedible."

On January 20, 1915, the plaintiff executed and delivered to said railroad company the following certificate:

January 15, 1915.

	Inedible Fat.	
Name of common carrier		Baltimore & Ohio Railroad Co.
Consignor		Pittsburgh Melting Company.
Point of shipment		Pittsburgh, Pa.
Consignee		Daniel Loeb.
Destination		Rotterdam, Holland.

I hereby certify that the following described fat is inedible and is not intended for food purposes, and that the said fat is of such a character or is intended for such a use that denaturing is impossible or will render said fat unavailable for the desired industrial use.

Kind of Product.	Amount and Weight.
.....Tallow.....Bbls.Lbs. Gross.	
100 tcs. Tallow Oil	44,300 lbs Gross.
	Name of Shipper: Pittsburgh Melting Company.

The consignee named in the certificate last mentioned is a dealer in oils and grease. The defendant Totten notified the defendant company not to transport the shipment of oil described in said certificate. The defendant company immediately notified the plaintiff of the notice served on it by the defendant Totten. Thereupon the bill in this case was filed and a preliminary injunction was issued against the defendants.

In view of the facts thus found, are the plaintiff and its products within the provisions of the act of Congress? The act declares that its purpose is to prevent "the use, in interstate or foreign commerce as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome or otherwise unfit for human food." It directs the Secretary of Agriculture to cause to be made by inspectors, appointed for that purpose, as thereafter provided, "an examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine and goats to be prepared for human consumption at any slaughtering, meat-canning, salting, packing, rendering or similar establishment in any state, territory, or the District of Columbia, for transportation or sale as articles of interstate or foreign commerce." It provides that "the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food, shall be marked, stamped, tagged or labeled as 'Inspected and Passed,' " and that "all carcasses and parts thereof of animals found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food" shall be marked, stamped, tagged or labeled as "Inspected and Condemned." It authorizes the inspectors to reinspect carcasses or parts thereof to determine whether, since the first inspection, the same had become unsound, unhealthful, unwholesome, or in any way unfit for human food, and if upon such examination the carcasses or parts thereof should be found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food, they are to be destroyed for food purposes by the said establishment, in the presence of the inspector. The act further provides "that for the purpose hereinbefore set forth, the Secretary of

Agriculture shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering or similar establishment," and gives them full access to the establishment at all times, by day or night.

The act excludes from its provisions animals slaughtered by any farmer on the farm, and sold or transported as interstate or foreign commerce, and retail butchers and retail dealers in meat and meat food products supplying their customers, with the proviso that the Secretary of Agriculture is authorized to maintain the inspection provided for in the act, at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, notwithstanding such inspection and that the persons operating the same may be retail butchers, and retail dealers or farmers, and where the Secretary of Agriculture shall establish such inspection then the provisions of the act shall apply, notwithstanding such exception. The act contains highly penal provisions for the punishment of those who violate the same by fine or imprisonment or both.

The clear purpose of the act is to prohibit selling and offering for transportation, in interstate or foreign commerce, all meat food products which are unsound, or unfit for human food. To express it more briefly, the intent of the act is to prevent the sale of unwholesome food. It relates solely to establishments which are engaged in the preparation of meat and meat food products for interstate or foreign commerce. It cannot be pretended that there is any express provision in relation to establishments which do not pretend to manufacture or prepare meat or meat food products for interstate or foreign commerce. It is urged, however, upon the part of the government that because the tallow oil of the plaintiff cannot be distinguished from the oleo oil manufactured by the establishment, to which the act plainly applies, and because it might be used by some as a food, that therefore it is a meat food product within the meaning of the act.

If we accept as common knowledge historical facts, and accept also the correctness of the position of the government on this point, then the tallow candles which have been relished by Arctic explorers and their associates, and the salted hides which were so carefully apportioned and distributed to the defenders at the siege of Londonderry, were meat food products. In a civilized community, nothing can so destroy the desire for a manufactured product as an article of food as to have the same marked conspicuously "Inedible." The manufacturer of oleomargarine would not receive into his establishment tierces of oil so marked, except under cover of night. The mere fact, however, that some one might use the product of the plaintiff contrary to plaintiff's intention, and in fraud and deception of the public, ought not of itself to be a cause for subjecting the plaintiff to the highly penal provisions of the act without express words and merely by implication.

[2] If, however, the conclusion be not correctly found from the provisions of the act itself, and if the act be a doubtful expression of the intent of Congress with respect to such establishment as the plaintiff's, aid in the true construction of the act may be found in the construc-

tion placed upon it for many years by those charged with executing its provisions. Authority for this is found in *Fairbanks v. United States*, 181 U. S. 283-308, 21 Sup. Ct. 648, 658 (45 L. Ed. 862), where Mr. Justice Brewer said:

"An examination of the opinions * * * will disclose that they may be grouped in three classes: First, those in which the court, after seeking to demonstrate the validity or the true construction of a statute, has added that, if there were doubt in reference thereto, the practical construction placed by Congress, or the department charged with the execution of the statute, was sufficient to remove the doubt; second, those in which the court has either stated or assumed that the question was doubtful, and has rested its determination upon the fact of a long-continued construction by the officials charged with the execution of the statute; and, third, those in which the court, noticing the fact of a long-continued construction, had distinctly affirmed that such construction cannot control when there is no doubt as to the true meaning of the statute. * * * From this résumé of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful."

[3] By the act Congress authorized the Secretary of Agriculture to make from time to time such rules and regulations as are necessary for the efficient execution of the provisions thereof. The Secretary of Agriculture adopted regulations covering meat inspection which became effective April 1, 1908, and section 8, page 7, of these regulations reads as follows:

"Sec. 8. *Meat Food Products*. Par. 1. A meat food product, within the meaning of the Meat Inspection Act and of these regulations, is considered to be any article of food intended for human use, which is derived or prepared, in whole or in part, from any edible portion of the carcasses of cattle, sheep, swine or goats, if the said edible portion so used is a considerable and definite portion of the finished food."

Over six years afterwards the Secretary of Agriculture adopted certain other regulations which became effective November 1, 1914.

"Regulation I.

"Par. 21. *Meat Food Product*. Any article of food, or any article which enters into the composition of food for human consumption, which is derived or prepared, in whole or in part, from any portion of the carcass of any cattle, sheep, swine or goat, if such portion is all or a considerable and definite portion of the article, except such articles as organo-therapeutic substances, meat juice, meat extract, and the like, which are only for medicinal purposes and are advertised only to the medical profession."

"Par. 22. *Meat and Products*. Carcasses, parts of carcasses, meat, products, food products, meat products, and meat food products of, or derived from, cattle, sheep, swine and goats, which are capable of being used as food by man."

It will be noticed specially that the word "capable" has been inserted in the definition last adopted. There is, in the latter definition, an attempt by the Secretary of Agriculture to define what shall con-

stitute a meat or meat food product. The power given him to make rules and regulations for the efficient execution of the provisions of the act does not give him power to add any provision to the act or to remove any part therefrom. It does not authorize him to say what is or what is not a meat food product, because the meaning of the words as found in the act is clear. The meat and meat food products which the act requires to be inspected must be such as are articles eaten by man, "proper for human consumption," and "fit for human food."

[4] That Congress cannot delegate legislative power to any executive officer is clear under all the authorities. *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; and *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267. In *United States v. Eaton*, 144 U. S. 677-687, 12 Sup. Ct. 764, 767 (36 L. Ed. 591), Mr. Justice Blatchford, delivering the opinion of the court, used this language:

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 Am. & Eng. Enc. Law, 642; 4 Bl. Com. 5. It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargarine Act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such a manner as to become a criminal offense punishable under section 18 of the act; particularly when the same act, in section 5, requires a manufacturer of the article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require, and does not impose, in that section or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article."

In all those cases, as well as in others which could be cited, the distinction is carefully preserved between the power of an executive officer to make rules and regulations for the enforcement of an act which authorizes the same and the power to add to or take away from the act itself. Among the regulations adopted by the Secretary of Agriculture, and intended to take effect November 1, 1914, was the requirement of a certificate by the shipper that he should sign a certificate found in regulation 25, section 12, of which the following is the form:

Date, 191..

Inedible Fat.

Name of carrier
 Consignor
 Point of shipment
 Consignee
 Destination

I hereby certify that the following described fat is not capable of being used as food by man, is suitable only for industrial purposes, is not for food purposes, and is of such a character or for such a use that denaturing is impracticable. I further certify that there is now on file with the Secretary of Agriculture a declaration by the establishment in which said fat was prepared,

or from which it is offered for shipment, in compliance with section 6 of regulation 4 of the regulations of the Secretary of Agriculture governing meat inspection.

Kind of Product.	Amount and Weight.
.....
.....
.....
 (Signature of Shipper.)
 (Business Occupation of Shipper.)
 (Address of Shipper.)

By that certificate the shipper is required to say that his inedible food is *not capable of being used as food by man*. "Capable" is the word that is specially objectionable in the definition, as well as in the certificate described in the later regulations. It requires the plaintiff to certify to what is not true. His product is capable of being used as food by man, just as the tallow candles and the salt hides were capable of being so used. Even the denatured product of the establishments which are subject to the inspection provided by said act are capable of being used as food by man, although they have been treated, or as it is called denatured, by the addition of a substance derived from petroleum, "Power Distillate."

So far as the evidence goes in this case, Power Distillate affects the taste as well as the value of the product of which it is a part. However, tallow oil so treated can perhaps support life as well as the product of the plaintiff, and is as capable of being used as food by man as the product of the plaintiff, although, perhaps, with less gratification to the consumer. It seems, therefore, that the Secretary of Agriculture has exceeded his authority by the regulations intended to become effective on November 1, 1914, in that such regulations tend to broaden the scope of the act of Congress.

It follows, therefore, that the act of the defendant Totten, notifying the defendant company not to transport the shipment of oil described in the certificate tendered to it, was not justified, and that the particular shipment of oil which was the immediate cause of the filing of the plaintiff's bill, and the other shipments of a like character when marked in the same way and when accompanied by similar certificates, should be received and carried by the carrier.

A decree may be presented in conformity with the prayers of the bill.

COCA-COLA CO. v. J. G. BUTLER & SONS.

(District Court, E. D. Arkansas, W. D. February 7, 1916.)

No. 1857.

1. TRADE-MARKS AND TRADE-NAMES ⚡1—INFRINGEMENT—DECEPTION OF PUBLIC.

The protection given by law to trade-marks has for its object the protection of the owner in his property, and the protection of the public from deception, by reason of a misleading claim that the article bearing the trade-mark is the article manufactured by the owner of the trade-mark, when in fact it is but a substitute.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 1, 3; Dec. Dig. ⚡1.]

2. TRADE-MARKS AND TRADE-NAMES ⚡57—INFRINGEMENT—DECEPTION OF PUBLIC.

The use of any simulation of a trade-mark which is likely to induce common purchasers, exercising ordinary care, to buy the article to which the trade-mark is affixed, thereby indicating that it is the product of the owner of the trade-mark, is unlawful, and will be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 65; Dec. Dig. ⚡57.]

3. TRADE-MARKS AND TRADE-NAMES ⚡68—UNFAIR COMPETITION—USE OF TRADE-MARK.

Plaintiff, a manufacturer of a syrup constituting the principal ingredient of a beverage sold at soda fountains and in bottles, made up the syrup in two forms—one for sale through jobbers for soda fountains, and one intended for use in bottling and sold by it only to bottlers selected, designated, and licensed by it, and authorized to use thereon its distinctive tops and labels bearing its trade-mark—there being some differences in the two syrups, on account of the different purposes to which they were to be put. It guaranteed its product to be wholesome and uniform, as well as its cleanliness and excellence of manufacture, and maintained an elaborate system for the inspection of the plants of its licensed bottlers. Defendant purchased from jobbers the syrup intended for soda fountain use, and used it in manufacturing a bottled preparation which it was selling under the name of plaintiff's product, using the tops and labels prepared by plaintiff for its product. *Held*, that this constituted unfair competition, and would be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. ⚡68.]

4. TRADE-MARKS AND TRADE-NAMES ⚡67—RIGHT TO MONOPOLY—STATUTORY PROVISIONS.

The monopoly given the owner of a trade-mark by the trade-mark laws is not forbidden by the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209), or any other act of Congress.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. ⚡67.]

5. MONOPOLIES ⚡17—SALES OF GOODS—DISCRIMINATION.

Where the manufacturer of a syrup, used as the principal ingredient in a beverage and sold by it only to bottlers licensed by it, guaranteed the purity and quality of the beverage by using distinctive tops and labels on its bottles, and to protect itself against claims for damages on the guaranty maintained a system of inspection of the plants of its licensed bottlers, it did not violate the Sherman Act, as its requirements were reasonable and beneficial to the public, in view of its responsibilities and

the right of purchasers to obtain the identical article which they desired to buy.

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

6. MONOPOLIES ⚡17—SALES OF GOODS—DISCRIMINATION.

The refusal of such manufacturer to sell its syrup for bottling to a party other than its licensed bottlers, and to permit such party to use its trade-mark in connection with the bottled product, was not a violation of Clayton Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731, providing that it shall be unlawful to sell goods for use or resale, or to fix a price therefor, or discount or rebate from such price on the condition that the purchaser shall not use the goods of a competitor, where the effect may be to substantially lessen competition or to create a monopoly in any line of commerce, in view of the possibility of adulteration and the hardship to the manufacturer of maintaining such supervision over the bottling as it deemed necessary, if required to sell to every intending purchaser.

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

In Equity. Suit by the Coca-Cola Company against J. G. Butler & Sons. Decree for plaintiff.

The plaintiff seeks to enjoin the defendants, who constitute a mercantile firm, doing business under the firm name of J. G. Butler & Sons, from using, in connection with the manufacture, advertising, offering for sale, or sale of any beverage, the words "Coca-Cola," or any like word or words, and in any other manner infringing upon the plaintiff's rights as owner of the trade-mark "Coca-Cola," and also seeks an accounting of the damages sustained by it, by reason of the unlawful use of its trade-mark.

The material allegations in the complaint are: That the plaintiff is now, and has been ever since 1892, manufacturing and marketing a syrup for making a beverage sold to the public under the name of "Coca-Cola." That it became vested with and entitled to the sole and exclusive right to use that trade-mark, which has been duly registered in the United States Patent Office on May 14, 1892, under the provisions of the Act of Congress of March 3, 1891, c. 565, 26 Stat. 1106. That on April 22, 1905, registration of the said trade-mark was again allowed by the Commissioner of Patents under the Act of Congress approved February 20, 1905, c. 592, 33 Stat. 724. That it has manufactured and marketed, and is now manufacturing and marketing, two kinds of said syrup—one designed and adapted for making a beverage by mixing with carbonated water at soda fountains in the presence of the purchaser, which is intended for immediate consumption, and is a fountain drink, and is well known to the public. The other kind is designed and adapted to be used, and is used, for manufacturing a carbonated beverage put up and sold for consumption in bottles; each of them being sold by the plaintiff in distinctive packages, bearing its trade-mark name on distinctive labels. That it has at all times insured and safeguarded the manufacture and bottling of said carbonated bottled beverage made from its "Coca-Cola" bottling syrup, by selecting, designating, and licensing the bottlers using the said bottling syrup, and inspecting and supervising the manufacture, carbonating, and bottling of said beverage by said bottlers, so as to safeguard and insure the purchasers and consumers of said bottled product as to the quality, purity, and character thereof, and has under such circumstances and conditions, and none others, allowed and permitted the use of the name "Coca-Cola," as the trade-mark therefor, and as plaintiff's guaranty of the authenticity of the said carbonated and bottled beverage, and plaintiff's supervision, inspection, and approval thereof, and responsibility therefor. So that in connection with a bottled drink the name "Coca-Cola" is plaintiff's guaranty of genuineness and fidelity that such drink is properly made of proper materials, and is plaintiff's assur-

ance of cleanliness and excellence of manufacture, carbonating, bottling, and sale, and is so relied upon by the purchasers and the public. That it has expended large sums of money in advertising to the public that its beverage, under its trade-name, can be had at fountains and in bottles, and that the bottled product which is offered to the public in bottles, with plaintiff's trade-mark name "Coca-Cola," applied to the bottled beverage, means to the public a beverage produced wholly under conditions which plaintiff supervises and controls, and one guaranteed throughout by plaintiff to be so produced, and to be wholesome, palatable, and uniform, and is so understood by the public. It is then charged that the defendants have put upon the market in bottles a product somewhat resembling in taste and appearance the plaintiff's bottled "Coca-Cola," but which is not plaintiff's bottled "Coca-Cola," and had applied to the crown of the bottles containing said defendant's product, and upon labels attached to the bottles, the name "Coca-Cola," as the trade-mark name therefor, without plaintiff's permission or authority; that by reason thereof the public is being deceived into the belief, contrary to the fact, that the product of the defendants is the bottled product guaranteed by the plaintiff, as aforesaid.

The answer of the defendants pleads that they are not sufficiently informed as to some of the allegations that are set out in the complaint, and therefore demand strict proof thereof. They deny that they have put upon the market in bottles any product resembling in taste and appearance the plaintiff's bottled "Coca-Cola," but allege the truth to be that the article they have put on the market is the genuine, identical article and product known as "Coca-Cola." They admit that they have applied to the crowns of the bottles containing such product, and upon labels attached thereto, the name "Coca-Cola," but deny that it was done without authority. They allege that they purchased said product for the identical purpose to which they have applied the same, from individuals and corporations who were the lawful owners thereof, and authorized to sell the same to these defendants for the purpose of retailing the same, bottled and carbonated as "Coca-Cola," and therefore they deny that the result of this use by them has been to deceive the public into the belief, contrary to the fact, that the product of the defendants is the product guaranteed by plaintiff to be properly made of proper materials, and made, carbonated, and bottled under the plaintiff's authority and supervision. They then plead that the plaintiff, by adopting a system of exclusive contracts, has undertaken to divide the country, and especially the territory in which the defendants are operating, into districts, whereby they have agreed to sell to such persons and corporations alone, and exclusively thus contracted, which was done for the purpose of establishing and maintaining a monopoly in the sale of said product, and preventing and destroying competition in the sale thereof, among the different purchasers, and have refused and still refuse to sell and furnish such product or commodity to the defendants upon the same terms and conditions and at the same price as they are furnishing and selling this commodity to other purchasers thereof, all of which it is charged is for the purpose and object of lessening the competition and creating a monopoly in the sale of said syrup, in violation of the laws of the United States.

The cause was submitted upon an agreed statement of facts. From this it appears: That the plaintiff is the owner of the trade-mark "Coca-Cola," and it has been used by it and its predecessor in title since May, 1886. That it was duly registered as a trade-mark in the United States Patent Office, in conformity with the laws of the United States, as set out in the complaint. That it has advertised the same throughout the United States and in foreign countries; and that over \$10,000,000 have been expended by the plaintiff in advertising it. That it is made up for the public in two forms, as alleged in the complaint. That the following differences, among others, are made between the syrup "Coca-Cola" manufactured to be used at fountains and that to be sold in bottles: In 1,250 gallons of the finished product the bottler's syrup contains 1,000 pounds more sugar than the other. It has 10 per cent. more coloring matter, to wit, caramel. It contains more phosphoric acid, and some percentage less of caffeine, than does the syrup made to be used at soda fountains. The fountain syrup contains 28 pounds of caffeine to 1,250 pounds

of the finished product, while that used in the bottler's syrup contains only 25 pounds of caffeine to 1,250 pounds. That the plaintiff in its sales system has two methods by which the product is sold:

First. The system by which the syrup manufactured for fountain sale is sold to jobbers and dispensers, to be sold from the soda fountain; the jobbers selling it to the dispensers under a contract that the plaintiff will supply it only in the original package, that the jobber is not to sell or offer for sale as "Coca-Cola" any imitation of or substitute therefor, and upon compliance with the terms of the contract plaintiff will allow certain rebates to the jobber, depending upon the quantity bought, provided that the sales have been to dispensers only, and none to bottlers, or for the purpose of carbonating in bottles. The dispensers' contract, which he is required to sign, obligates him that, when "Coca-Cola" is asked for, he will only supply "Coca-Cola" as manufactured and furnished by the plaintiff, not to sell or offer for sale as "Coca-Cola" any imitation of or substitute therefor, and if he complies with these terms he is to receive a rebate, depending upon the quantity bought by him. The plaintiff does not enter into a dispenser's contract directly, but only through the jobber. The fountain syrup is never sold for the purpose of bottling, and is not made or intended for the purpose of having the same bottled.

Second. The syrup made for bottling purposes is sold to two corporations—one "The Coca-Cola Bottling Company," and the other "Coca-Cola Bottling Company." This sale is made under and by virtue of contracts entered into between the plaintiff and the bottling companies. There was an original contract, which was later amended. The original contract was made on the 21st day of July, 1899, and by this contract the bottling company obligated itself to establish in the city of Atlanta, Ga., a bottling plant for the purpose of bottling this syrup, with carbonic acid and water, and to prepare and put up in bottles, or other receptacles, a carbonated drink containing a mixture of "Coca-Cola" syrup, and water charged with carbonic acid gas under a pressure of more than one atmosphere; the syrup to be in proportions of not less than one ounce to eight ounces of water. It also obligates itself to keep on hand a sufficient quantity to supply the demand in all the territory embraced in the agreement; that it is to buy all the "Coca-Cola" syrup from the plaintiff, upon the terms set forth, and it is not to buy any substitute therefor, or other syrup or substances, nor attempt to use or imitate in any article prepared by them "Coca-Cola" syrup. The plaintiff is also to furnish all necessary labels and advertising matter at its own cost. The right to use the name "Coca-Cola" and all the trade-marks and designs for labels then owned and controlled by the plaintiff, and the right to vend such preparation, or mixture, bottled or put up in bottles, in the United States, except the six New England states and the states of Mississippi and Texas, is granted to them exclusively; but the right to use the name, trade-mark, and labels is to apply only to the carbonated mixture described, and is not to apply to the soda fountain business.

This contract was later amended by requiring the bottling company to buy all of the "Coca-Cola" syrup necessary to comply with the agreement directly from the plaintiff; not to sell, or in any way dispose, without the written consent of the plaintiff, of any "Coca-Cola," except after it is carbonated and bottled. The labels and advertising matter furnished by the plaintiff are to be paid for by the bottling company at what the actual cost and freight expense may be. By another amendment made to these contracts on April 24, 1915, the provision whereby the bottling company was to purchase the syrup directly from the plaintiff was amended by eliminating the condition that the bottling company is to buy all the "Coca-Cola" necessary from the plaintiff. It also eliminates from the former contracts those provisions by which the bottling company obligated itself not to use any substitute, or substitutes, or to attempt to use or imitate "Coca-Cola" syrup, and in lieu thereof the bottling company agreed not to manufacture, deal in, sell, offer for sale, use, or handle, nor attempt to do so, either directly or indirectly, any product that is a substitute for or imitation of "Coca-Cola." By another provision in this last amendment to the former contracts the plaintiff selects the bottling company as its sole exclusive customer and licensee, for the purpose of bottling

"Coca-Cola" in the territory heretofore acquired by it, and it agrees not to sell its fountain syrup to any one, when it knows that such syrup is to be used for bottling purposes; that under these contracts the bottling companies are not permitted to bottle the syrup manufactured for fountain purposes; that the two bottling companies have, with the approval of the plaintiff, given the right to certain local companies, which are established in different localities, for the purpose of bottling the bottling syrup of the plaintiff; that such a contract was made with the Little Rock Coca-Cola Bottling Company, for certain territory, which includes the town of Russellville and county of Pope, where the defendants are carrying on the business sought to be enjoined by this proceeding.

It is further stipulated that the plaintiff sets the standard by which its product is to be bottled, and by a system of inspection and supervision inspects and supervises the bottling of its product, wheresoever made; that it requires that its bottled product shall be bottled, using certain proportions, that the plants must be kept clean, and the cases and bottles sent out in a sanitary and presentable manner, a close supervision being kept over the character of the goods sent out; that a minute inspection is maintained in regard to the character, purity, and wholesomeness of the bottled "Coca-Cola." The bottling companies have no connection in any way, shape, or manner with the sale of the fountain product. This supervision and inspection extends to all plants that bottle "Coca-Cola," no matter where situated. The difference between these two products arose from the fact that it developed, in the process of bottling, that the product, when bottled, stood for a longer time after its carbonation than did the syrup used at the fountains, and therefore, in order to provide for this contingency, a difference had to be made in the bottled product, and further that the character of the trade was best supplied by making a specific syrup for the particular purpose of bottling; that the syrup is not consumed by the public, only after being mixed with the proper proportions of water; that the system of supervision and inspection exercised by the plaintiff and the parent bottling companies consists of the following:

In order to see that the product is bottled in a certain manner, and that the business is properly conducted, a system of supervisions has been organized by the plaintiff, known as the "Inspection Department." This inspection department has a competent man at the head, whose duty it is to divide up the territories in such a manner that they can be covered advantageously by the inspectors. Five inspectors in this department operate in the Southern States. The head inspector routes these different inspectors and follows them up. A report is required from these inspectors from each different plant visited. Samples of the product are taken from the plant, which product is tested in the plant, to see whether or not the product conforms to the standard established; these inspectors being trained men. The inspectors are equipped with gas test gauges and hydrometers and other instruments to enable them to determine whether or not the product is being put up according to instructions. They carry other gauges and other things to test each machine used by the bottling plant, to determine whether or not the machines are throwing the proper amount of syrup into each particular bottle. Samples are taken of the product, both before and after the process of carbonation. These samples are forwarded to the head inspector at Atlanta, where they are chemically examined, and if any difference appears they must immediately make the changes necessary to bring them to the standard prescribed by the plaintiff. If necessary, the chemical expert and a member of the advisory board are sent to make personal investigations of the plant.

The water used in the carbonating is chemically tested, and the sanitary condition of the plant is investigated, the latter being one of the main questions considered at all times. The question of carbonation in making the bottled product is given strict attention by the inspectors and chemical experts; proper carbonation depending upon the machinery, the kind of water, and the temperature of the water used. As warm water cannot be carbonated, the bottling plants are required to install cooling plants to get the proper carbonation. The proper amount of carbonic acid gas, not only

gives the product life, but helps to preserve it against deterioration, and thereby preserves the standard of the product. This supervision and inspection is carried on in each and every bottling plant.

It is further stipulated that the defendants have not been given a contract, nor express permission, directly or indirectly, to bottle either product of the Coca-Cola Company, nor use the trade-mark "Coca-Cola." Notwithstanding this fact, the defendants are engaged in the manufacture and bottling of beverages, and are bottling and putting upon the market a product, a bottle of which is filed as evidence. The syrup used in making up this product by the defendants is the fountain syrup manufactured by the Coca-Cola Company, and which they obtain in the course of trade from jobbers or retailers who have purchased the fountain product of the Coca-Cola Company, and they bottle it without permission or authority from the plaintiff, and apply the trade-mark "Coca-Cola" thereto, by using the tops and labels of the plaintiff on the product, without authority from any one authorized to give it. These purchases are made from parties who are the lawful owners thereof, and who sell the same to the defendants in the due course of trade. The plaintiff, as well as the bottling companies, have refused to sell to the defendants the syrup for the purpose of bottling, although the defendants offered to purchase and pay therefor, and objected to their using the trade-mark "Coca-Cola" in connection with their bottled product, or to do anything to the plaintiff's syrup for the purpose of reselling or using the same.

Moore, Smith, Moore & Trieber, of Little Rock, Ark. (Reed & Rogers, of Chicago, Ill., and Candler, Thomson & Hirsch, of Atlanta, Ga., of counsel), for plaintiff.

Mehaffy, Reid & Mehaffy, of Little Rock, Ark., for defendants.

TRIEBER, District Judge (after stating the facts as above). It is not disputed by the defendants that the plaintiff is the lawful owner of the trade-mark "Coca-Cola," that it is an asset of great value, and that the defendants are bottling, offering for sale, and selling a bottled preparation, under the name of "Coca-Cola," using the tops and labels prepared by the plaintiff for the preparation bottled under its supervision, and furnished by it to those who are engaged in bottling it, under its authority or license, and that these tops and labels indicate to the public that it is the plaintiff's preparation, made under its supervision and guaranteed by it. Although counsel have argued many important questions, there are only two issues, which under the allegations in the bill, answer, and agreed statement of facts are necessary for the determination of this case:

(1) That the preparation bottled by the defendants is made of syrup made and sold by the plaintiff, and that it was purchased by the defendants for the identical purpose to which they have applied the same, and from parties who were the lawful owners thereof by purchase from the plaintiff, but not from the plaintiff, nor from its authorized vendees.

(2). That by its manner of doing business, as is fully set out in the agreed statement of facts, the plaintiff seeks to establish an unreasonable monopoly in restraint of trade, and therefore in violation of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, known as the "Sherman Act," and the amendments thereto, and the Act of October 15, 1914, c. 323, 38 Stat. 730, and known as the "Clayton Act."

[1, 2] In determining the issues in this case it is important to keep in mind the well-established principle of law that the protection given

by law to trade-marks has a twofold object: To protect the owner in his property, and to protect the public from being deceived by reason of a misleading claim that the article bearing the trade-mark is the article manufactured by the owner of the trade-mark, when in fact it is not, but a substitute. The use of any simulation of a trade-mark, which is likely to induce common purchasers, exercising ordinary care, to buy the article to which the trade-mark is affixed, thereby indicating that it is the product of the owner of the trade-mark, is unlawful and will be enjoined. *McLean v. Fleming*, 96 U. S. 245, 251, 24 L. Ed. 828; *Kann v. Diamond Steel Co.*, 89 Fed. 706, 711, 32 C. C. A. 324, 329; *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 24, 34, 104 C. C. A. 464, 474.

[3] As the plaintiff, according to the allegations in the complaint and the agreed statement of facts, in addition to selling its product, guarantees it to be wholesome, palatable, and uniform, as well as its cleanliness and excellence of manufacture, carbonating, and bottling, and for that purpose maintains a very elaborate system of supervision, it would not only be an imposition on the public, who purchase the bottled preparation, but may cause great damage to the plaintiff, if permitted.

If a person buying the bottled preparation, which has all the indicia of having been put up under the plaintiff's supervision and guaranty, the tops and labels on the bottles giving assurance of that fact, should sustain an injury by reason of the fact that it was improperly prepared, was unclean, contained unwholesome ingredients, had insufficient carbonic acid gas for its preservation, and by reason thereof is unfit as a beverage, or for any other cause, due to the negligence of plaintiff's licensed bottler, is injured, the plaintiff may be liable to heavy damages. Having assumed this guaranty of its bottlers, the plaintiff not only has the right, but it is its duty, to take such steps as are necessary, by a proper system of inspection, to guard the public, as well as itself, against this danger. The well-recognized rule of law is that the manufacturer of any article of food, drink, or drug intended for consumption, or of any dangerous articles, may be liable to the ultimate purchaser and consumer for negligence causing an injury, although there is no direct contractual relation between them, such an action resting on tort, and not on contract. *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453; *Standard Oil Co. v. Murray*, 119 Fed. 572, 57 C. C. A. 1; *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, 57 C. C. A. 237, 240, 61 L. R. A. 303; *Riggs v. Standard Oil Co. (C. C.)* 130 Fed. 199; *Keep v. National Tube Co. (C. C.)* 154 Fed. 121; *Ketterer v. Armour (D. C.)* 200 Fed. 322; *Mazetti v. Armour*, 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213, Ann. Cas. 1915C, 140; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Statler v. Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063; *Wellington v. Oil Co.*, 104 Mass. 64; *Roberts v. Brewing Co.*, 211 Mass. 449, 98 N. E. 95; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909; *Peterson v. Standard Oil Co.*, 55

Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625; *Tomlinson v. Armour & Co.*, 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923; *Dixon v. Bell*, 5 Maul. & Sel. 198.

The fact that the syrup used by the defendants is that manufactured by the plaintiff, assuming that it had been made for bottling purposes, is immaterial, for the syrup, although the principal ingredient of the finished product, is only one of several used for the preparation, when offered to the consumer. To maintain the reputation, and consequently the favor of the consuming public, it is important to the manufacturer of the preparation bearing its trade-mark that it should be wholesome, palatable, clean, and free from all impure and dangerous substances, regardless of the fact whether it was bottled by itself and sold by it directly to the consumer, or through its licensees. In this case the bill charges, and the agreed statement of facts admits, that the plaintiff manufactures two different syrups, one for bottling and the other for fountain trade; that the syrup for bottling purposes differs in several material respects from that intended for the fountain trade; that the bottler's syrup contains more sugar, has 10 per cent. more caramel for coloring purposes, contains more phosphoric acid, and less caffeine than the fountain syrup; and these two syrups are put up and sold in distinctive packages.

The authorities are numerous that, when a manufacturer of only one article of food and drink sells it in bulk, and also puts it up in bottles, the latter bearing a distinctive trade-mark, a purchaser of the article in bulk will be guilty of unfair competition, and enjoined, if bottling it and affixing the manufacturer's distinctive labels upon the goods bottled by him. *Krauss v. Peebles Co.* (C. C.) 58 Fed. 585, 592; *People v. Luhrs*, 195 N. Y. 377, 89 N. E. 171, 26 L. R. A. (N. S.) 473; *Hennessy v. White, Cox*, Manual Trade-Mark Cases, 377; *Browne on Trade-Marks*, §§ 910, 759, and authorities there cited. One of the reasons given for this rule is that, "unless the manufacturer can control the bottling, he cannot guarantee that it is the genuine article prepared by him." To this may be added that he cannot tell whether it is bottled in so careful a manner as is essential to the preservation of the article and the maintenance of its good reputation. This rule, of course, applies with much greater force when there are two varieties manufactured by the same party and sold under the same trade-mark, but intended to be placed on the market for different purposes, as is the case in the instant cause. *Russia Cement Co. v. Katzenstein* (C. C.) 109 Fed. 314; *Cook & Bernheimer v. Ross* (C. C.) 73 Fed. 203; *Thomas G. Plant Co. v. May Mercantile Co.* (C. C.) 153 Fed. 229; *McIlhenny v. Hathaway* (D. C.) 195 Fed. 652; *Gillott v. Kettle*, 3 Duer (N. Y.) 624; *Spalding v. Gamage*, 32 R. P. C. 273; *Sebastian on Trade-Marks*, page 159; *Hopkins on Trade-Marks*, page 275. A case almost identical with the facts in this case is *Charles E. Hires Co. v. Xepapas* (C. C.) 180 Fed. 952.

In *Powell v. Birmingham* (Yorkshire Relish Case) 14 R. P. C. 730, it was testified that the difference between the two articles under consideration was only a pinch of salt, and the court held that, even in the case of such a small difference, the defendant had not proven

the identity of their product with the plaintiff's. Of what benefit would a trade-mark be, if one buying the article protected by it were permitted to adulterate it, or given an opportunity to do so, and then offer it to the public as the genuine article, protected by the trade-mark? The greatest value of a trade-mark is the reputation established by the excellence of the article, and the knowledge and appreciation of that fact by the consuming public. An article without any merit can derive no benefit from a trade-mark, and only a temporary benefit from the most extensive advertisement. It is like the value of a "good will" in an established going concern. It depends upon the successful operation of the business. Without that there is no value to it. Who would pay for the good will of a business conducted at a loss? The court is clearly of the opinion that, upon the facts in this case, the defendants are guilty of unfair competition.

[4] Do the facts show a violation of the Sherman Act against monopolies and stifling competition? The trade-mark laws, like the patent laws, give the owner a monopoly which neither the Sherman Act nor any other act of Congress forbids. It would be a paradox to say that the exercise of a right, expressly granted by law, is unlawful.

[5] Counsel for defendants rely on *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, and *Coca-Cola Co. v. Bennett* (D. C.) 225 Fed. 429. What was decided in the *Dr. Miles Medical Company Case* was that the manufacturer of an unpatented proprietary medicine cannot, after an absolute sale of the article, fix the prices for future sales. The court, in its opinion in that case, holds that the restraint of trade must be determined by the particular circumstances of the case, and the nature of the principles which are involved in it, and whether it is reasonable or unreasonable. In *Coca-Cola Co. v. Bennett*, there was no question of unfair competition claimed by the plaintiff, which is the cause of complaint in this case. Nor was there any claim in that case that the plaintiff guaranteed the purity, cleanliness, wholesomeness, and quality, by using its distinctive tops and labels on its bottles, and that, for the purpose of protecting itself against claims for damages on that guaranty, it maintains a system of supervision and inspection, as set out in the agreed statement of facts herein. Nor did it appear in that case that the defendants used for bottling the syrup intended for soda fountains, and which was not suitable for that purpose. The court also found that the defendants made the preparation in the identical manner contemplated by the parties. That case is therefore not applicable. In view of the responsibilities of the plaintiff and the right of the purchasers to obtain the identical article, which they desire to buy, the requirements of the plaintiff are reasonable, and in the end beneficial to the public.

[6] Are plaintiff's acts in violation of the "Clayton Act"? That act provides (section 3):

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or

other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

This act is invoked by the counsel for the defendants, in view of the agreed statement of facts that:

"The plaintiff, as well as the bottling companies, through whom its syrup is sold to the retail dealer, have refused to sell to the defendants the syrup for the purpose of bottling, although the defendants offered to purchase and pay therefor, and objected to their use of the trade-mark 'Coca-Cola,' in connection with their bottled product."

Whether that act is to be construed so as to compel one to sell his wares or manufactures to any one applying therefor cannot be determined in this case, as this is not an action to obtain relief of that nature, and is therefore not involved. Any one interested in that question may consult *Union Pacific Coal Co. v. United States*, 173 Fed. 737, 97 C. C. A. 578, and *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.* (D. C.) 224 Fed. 566, affirmed 227 Fed. 46, — C. C. A. —.

The issue in this case, as has been hereinbefore set forth, is whether one purchasing one of the ingredients of a preparation, although it be the chief one, can use it, without permission of the manufacturer, in such a manner that it may injuriously affect the manufacturer, the intending purchaser having the means to adulterate it, and by the use of the trade-mark and name of the manufacturer sell it to the public as the genuine article. It would, although not impossible, certainly be a great hardship on the plaintiff, if it were required to permit its preparation to be bottled in every community throughout the United States, no matter how small the purchases for that community may be, and maintain such supervision over the bottling as under its system it maintains and deems necessary. By confining its sales to bottling companies doing business in cities so centrally located as to be able to supply the demand for its syrup, and at the same time enable it to supervise the bottling under its system, it does all which can be reasonably expected of it, and the law demands. The plaintiff, like all other manufacturers and dealers, is no doubt anxious to extend its trade as much as possible, and self-interest, if nothing else, will induce it to permit its preparation to be bottled in as many places as the trade, and its own interests, will justify.

The court is of the opinion that the defendants are guilty of unfair competition, and that the business of the plaintiff, as conducted, is not in violation of any of the "anti-trust acts" of the United States. A decree granting a permanent injunction in conformity with the prayer of the bill may be prepared and submitted to the court for approval.

WESTERN UNION TELEGRAPH CO. v. LOUISVILLE & N. R. CO.

(District Court, N. D. Georgia. December 30, 1915.)

No. 67.

1. COURTS ⇨274—UNITED STATES COURTS—DISTRICT IN WHICH SUIT SHOULD BE BROUGHT.

Under Judicial Code (Act March 3, 1911, c. 231) § 57, 36 Stat. 1102 (Comp. St. 1913, § 1039), relative to ordering absent defendants to appear and plead in suits to enforce any legal or equitable lien upon or claim to real or personal property within the district where the suit is brought, a suit by a New York telegraph corporation to enjoin a Kentucky railroad corporation from removing or interfering with the telegraph company's lines on the right of way within the Northern District of Georgia was maintainable in that district, as it involved a claim to an easement in land or right to occupy land.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. ⇨274.]

2. COURTS ⇨276—UNITED STATES COURTS—WAIVER OF OBJECTIONS TO ACTION IN WRONG DISTRICT.

In an action in the Northern district of Georgia by a New York corporation against a Kentucky corporation, defendant waived its right to object that the suit was not brought in the proper district by appearing and filing a motion to dismiss the case on the merits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. ⇨276.]

3. TELEGRAPHS AND TELEPHONES ⇨11—USE OF RAILROAD RIGHTS OF WAY—CONSTRUCTION OF CONTRACTS.

The A. Railroad Co., owning telegraph lines on its right of way, conveyed such lines to the W. Telegraph Co., and entered into a working agreement with it respecting the use and maintenance of such lines. The A. Co. subsequently conveyed all of its property to the L. Railroad Co. Some time prior thereto a contract had been made between the L. Co. and the W. Co. whereby the L. Co., so far as it legally might, granted and agreed to assure to the telegraph company an exclusive right of way on and along the line, lands, and bridges of all roads then or thereafter owned, leased, controlled, or operated by it, for the construction and use of such lines of poles and wires as the telegraph company might require. The contract stated that it was intended to cover and embrace all railroad lines then owned, leased, controlled, or operated by the L. Co., and also any branches thereafter constructed or any other railroads that might be acquired by it. *Held*, that the A. Co.'s road, having been acquired by the L. Co. during the existence of the agreement, was embraced within the contract, and the contract was operative with respect thereto.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 7; Dec. Dig. ⇨11.]

4. TELEGRAPHS AND TELEPHONES ⇨11—USE OF RAILROAD RIGHTS OF WAY—CONSTRUCTION OF CONTRACTS.

A contract between a railroad company and a telegraph company provided that the railroad company, so far as it legally might, thereby granted and agreed to assure to the telegraph company an exclusive right of way on and along the railroad's lines for the construction and use of such lines of poles and wires as the telegraph company might require, together with the exclusive right to maintain offices in its depots for telegraph business. It further provided that it should supersede prior agreements between the parties, and should continue in force for 25 years, and thereafter until the expiration of one year after written notice had been given by one party to the other of a desire or intention to terminate it.

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

Held, that the agreement gave the telegraph company no irrevocable or perpetual right in and upon the railroad right of way, but simply the right to use and occupy such right of way until the expiration of the contract, and after the expiration of the 25 years either party had a right to terminate the contract by giving notice.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 7; Dec. Dig. ☞11.]

5. EMINENT DOMAIN ☞105—JURISDICTION—COURTS OF EQUITY.

Where a railroad company had notified a telegraph company to remove its lines from the railroad right of way and vacate the right of way after the expiration of a contract between the companies authorizing the telegraph company to use and occupy the right of way, a court of equity had no power to condemn the property and fix the amount of compensation to be paid to the railroad company by the telegraph company.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 448-450, 456; Dec. Dig. ☞166.]

In Equity. Suit by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. On motion to dismiss. Motion granted.

W. L. Clay, of Savannah, Ga., and Dorsey, Brewster, Howell & Heyman, of Atlanta, Ga., for plaintiff.

Henry L. Stone, of Louisville, Ky., and Tye, Peeples & Jordan, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This is a bill filed by the Western Union Telegraph Company, a citizen of the state of New York, against the Louisville & Nashville Railroad Company, a citizen of the state of Kentucky, and the case is now heard on a motion to dismiss, which has the same effect as a demurrer under the old practice and before the new equity rules were adopted.

[1, 2] The question of jurisdiction is raised at the threshold of this case, but I think that objection to the plaintiff's proceeding is without merit. In the first place, I think it is a claim to an easement in land, or right to occupy land, whatever the plaintiff's claim may be exactly, and, being a claim to a right to occupy land, it is either realty or personalty and within this district. So it seems to me to come within the very terms of section 57 of the new Judicial Code, which is a codification of Act March 3, 1875, c. 137, 18 Stat. 472. But, even if this were not true, I think the defendant has waived that right by its appearance and filing its motion to dismiss the case on the merits.

In *Eldorado Coal & Mining Co. v. Mariotti*, 215 Fed. 51, 131 C. C. A. 359, the Circuit Court of Appeals for the Seventh Circuit had this question before it, and the second headnote of the decision will be sufficient to show what was held. That is as follows:

"Judicial Code (Act March 3, 1911, c. 231) § 51, 36 Stat. 1101 (U. S. Comp. St. Supp. 1911, p. 150), provides that except as otherwise provided 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 diversity of citizenship, suit shall be brought only in the district of the residence of either the plaintiff or defendant. *Held*, that where a federal court had jurisdiction of the subject-matter, defendant's right to object on the ground that the suit

was brought in the wrong district was one of privilege and might be and was waived by a general appearance to demur to the merits."

In *Adler Goldman Commission Co. et al. v. Williams et al.* (D. C.) 211 Fed. 530, Judge Trieber, in the District Court for the Western District of Arkansas, held the same way, as shown by the third head-note to that case, which is as follows:

"In a suit in a United States District Court between citizens of different states to set aside alleged fraudulent conveyances, defendants waived their objections to the bringing of the suit in a district in which none of the parties resided, by moving to dismiss not only on that ground, but also for insufficiency of the bill, since the diversity of citizenship gave some United States court jurisdiction, and the defendant by pleading to the merits in effect appeared generally and waived all special privileges in respect to the particular court in which the action was brought."

Both of these cases cite *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, which is the authority mainly relied upon for these decisions. This *Moore Case* followed *In re Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, in which it was thought a different rule may have been laid down, but which the court, in the *Moore Case*, settled, the Chief Justice, who delivered the opinion in the *Wisner Case*, dissenting, and the *Moore Case* is now, I think, accepted as final and conclusive on this question.

I think the jurisdiction of the court in this case exists, and the objection to the jurisdiction of the court must be overruled.

The object of the bill and the issues presented are similar in many respects to those considered and disposed of in the case of *Western Union Telegraph Company v. Atlanta & West Point Railroad Company et al.*, 227 Fed. 465, recently by this court. An opinion was filed by the court here in that case, and a decree entered dismissing the bill.

The controversy is as to the right of the Western Union Telegraph Company to occupy the right of way of the Louisville & Nashville Railroad Company on its line from Marietta, Ga., through Blue Ridge, to the Tennessee state line, and on its branch line leading from Blue Ridge, Ga., to Murphy, N. C., from Blue Ridge, Ga., to the North Carolina state line.

The history of the railroad and the telegraph company, and their relation to each other, seems to be as follows:

The Marietta & North Georgia Railroad Company was in the hands of the United States court for this district, and was sold in 1896, and the purchaser became incorporated as the Atlanta, Knoxville & Northern Railway Company. Prior to February, 1898, the line of telegraph had been constructed along this railroad from Marietta to Blue Ridge, and thence along the two branches just mentioned to the Tennessee and North Carolina state lines, respectively, so far as material here; one of the lines really extending to Knoxville, Tenn., and the other to Murphy, N. C. These lines of telegraph became the property of the Atlanta, Knoxville & Northern Railway Company some time prior to February 9, 1898.

In February, 1898, the Atlanta, Knoxville & Northern Railway Company, in consideration of the sum of \$19,000 paid to it by the Western Union Telegraph Company, conveyed to the telegraph company all of

the telegraph lines from Marietta to Blue Ridge, and thence along the two branches to the state lines referred to. On February 11, 1905, the Atlanta, Knoxville & Northern Railway Company conveyed all of its railroad properties to the Louisville & Nashville Railroad Company.

On June 18, 1884, a contract had been entered into between the Louisville & Nashville Railroad Company and the Western Union Telegraph Company, in which it was recited that:

"Whereas, the operation of the telegraph company's lines along the various railroads owned, controlled, or operated by the railroad company, has been conducted under the provisions of an agreement between the parties hereto, dated May 14, 1880, which agreement provides that it may be terminated on one year's written notice after July 1, 1885; and whereas, it is desirable that a new agreement should be entered into between the parties hereto:

"Now, therefore, for and in consideration of the covenants and agreements herein contained, the parties hereto mutually agree as follows: This contract is intended to cover and shall embrace all the railroad lines now owned, leased, controlled, or operated by the railroad company, which are as follows: [Then, setting out a number of railroads then owned, leased, controlled, or operated, it further provides:] And this contract is also intended to cover, and it shall include, any branch or branches that may be constructed by the railroad company or other railroad or railroads that may be acquired by it, either by lease or purchase, or that may be controlled or operated by it during the existence of this agreement, should it be lawfully competent to include it or them."

The second paragraph of the contract provides as follows:

"The railroad company, so far as it legally may, hereby grants and agrees to assure the telegraph company, the exclusive right of way on and along the line, lands, and bridges of all roads now owned, leased, controlled, or operated by said railroad company, or which it may hereafter own, lease, control, or operate, for the construction and use of such lines of poles and wires or underground wires for commercial or public uses or business as the telegraph company may require, together with the exclusive right to maintain offices in its depots for commercial telegraph business, and the railroad company will not transport men or materials, for the construction or operation of any line of poles and wire or wires for other lines in competition with the lines of said telegraph company party hereto, except at and for the railroad company's regular local tariff rates, nor will it furnish for such competing line or lines any facilities or assistance which it may lawfully withhold nor stop its trains, nor distribute material therefor at other than regular stations: Provided, always, that in protecting and defending the exclusive grants conveyed by this contract the telegraph company may use and proceed in the corporate name of the railroad company, but shall indemnify and save harmless the railroad company from any and all damages, costs, charges, and legal expenses incurred therein or thereby."

The contract proceeds then with a number of stipulations between the parties in reference to the construction and the maintenance of the telegraph lines and the use of the same, and a number of things that the telegraph company was to do and that the railroad company was to do, stipulating in this way on to and through the tenth paragraph of the agreement. The eleventh paragraph of the agreement provides:

"It is mutually understood and agreed that the telegraph lines and wires covered by this contract shall form a part of the general system of the telegraph company, and as such in the department of commercial or public telegraph business shall be controlled and regulated by it, the telegraph company fixing and determining all tariffs for the transmission of messages and all

connections with other lines. The railroad company further agrees that its employes shall transmit all commercial telegraph business offered at its offices over the lines of the telegraph company party hereto and shall account to the telegraph company exclusively for all such business and the receipts thereon as provided herein. No employe of the railroad company shall, while in its service, be employed by any other telegraph company than the telegraph company party hereto. The provisions of this agreement shall supersede said agreement hereinbefore mentioned and all other agreements between the parties hereto or their respective predecessors in ownership or control of their respective properties; and the provisions of this agreement shall be and continue in force for and during the term of twenty-five (25) years from and after the first (1st) day of July, 1884, and thereafter until the expiration of one year after written notice shall have been given by one of the parties hereto to the other of a desire or intention to terminate the same, and in case of any disagreement concerning the true intent and meaning of any of said provisions the subject of such difference shall be referred to three arbitrators, one to be chosen by each party hereto, and the third by the two others chosen and the decision of such arbitrators, or a majority thereof, shall be final and conclusive: Provided, that, should the lease or control of any railroad now held by the railroad company terminate before the expiration of the twenty-five years hereinbefore specified, this contract shall not cover such railroad after the termination of such lease or control, unless the same should be renewed within the said term of twenty-five years, or unless the owner or lessee of such railroad shall ratify this agreement, and should the railroad company cease from any cause to own any railroad or branch herein mentioned, this contract shall continue to apply to such railroad or branch if the telegraph company shall so elect, the railroad company agreeing that, in case it shall part with the ownership or control of any railroad it will require the purchaser or lessee thereof to accept the obligations and benefits of this agreement, if the telegraph company shall elect to continue to apply this agreement to such road: Provided, however, and it is hereby expressly stipulated and agreed that if any of the provisions of this agreement shall be found unusually burdensome or oppressive to either party, such party after having given ninety (90) days' written notice to the other may propose such amendments or changes to this agreement as it may deem just and equitable and consistent with the general tenor of this agreement. In case the parties hereto shall not be able to agree upon such proposed amendments or changes, the same shall be referred to and settled by arbitrators in the manner hereinbefore provided, it being understood and agreed that the powers of such arbitrators shall not extend to making either wholly or substantially a new contract, but simply to the relief of either party from any provisions complained of, which experience under the agreement shall have proved to be inequitable, and the operation of which may not now be foreseen by the parties hereto. The decision of such arbitrators shall be binding upon the parties hereto and shall thereafter stand as a part of this agreement without further act of the parties, unless modified or amended by some future decision of arbitrators as herein provided."

This contract appears to have been properly executed by the parties and to have gone into effect. There had been an agreement between the Western Union Telegraph Company and the Atlanta, Knoxville & Northern Railroad Company, dated February 16, 1898, in which it was recited that:

"Whereas, the telegraph company has, by conveyance of even date herewith, purchased the telegraph lines along the railway company's road from Knoxville, Tenn., to Marietta, Ga., and from Blue Ridge, Ga., to Murphy, N. C., said purchase having been made on condition that a working agreement be entered into between the parties hereto covering said railroads and said telegraph lines, and any extensions or branches of said railroads, and any railroads hereafter owned, leased, or controlled by the railway company party hereto."

And it then provides for various things to be done by the parties to the contract, none of which seems to me to be material in determining the questions now before the court.

The important questions are, first, when the Louisville & Nashville Railroad Company acquired this property, did the contract theretofore made between it and the Western Union Telegraph Company become operative as to these properties and the telegraph lines thereon? and, second, if it did, what is the meaning of the contract between the parties?

[3] It is perfectly clear to me that the contract between these parties was intended to cover lines then owned, leased, or operated by the Louisville & Nashville Railroad Company on which the telegraph company then had lines, and any lines of railroad which should thereafter be acquired by the railroad company. The language of the contract is too plain to be misunderstood. It is this:

"This contract is intended to cover and shall embrace all the railroad lines now owned, leased, controlled, or operated by the railroad company. [Then naming a number of lines and proceeding:] This contract is also intended to cover; and it shall include, any branch or branches that may be constructed by the railroad company or other railroad or railroads that may be acquired by it, either by lease or purchase, or that may be controlled or operated by it during the existence of this agreement, should it be lawfully competent to include it or them."

It seems to me entirely clear that this contract, at the time it was made, was deemed for the mutual benefit of the parties. It was intended by the railroad company to give to the telegraph company the right to construct and operate its lines and system along and upon its right of way as to all of the railroads it then owned, controlled, or operated, under lease or otherwise, or that it should thereafter own, control, or operate, during the existence of this agreement, and the telegraph company agreed, as to any lines of telegraph it might have then or might thereafter have on any such railroads, that they should be subject to and come within this contract.

The railroad line now in controversy is certainly a railroad that was acquired by the Louisville & Nashville Railroad Company, by purchase, during the existence of the agreement, and, if so, it is clearly embraced within the contract, and the telegraph company agreed that it should be by accepting, agreeing to, and legally executing the contract.

[4] What was granted by the railroad company to the telegraph company under this contract is as follows:

"The railroad company, so far as it legally may, hereby grants and agrees to assure the telegraph company, the exclusive right of way on and along the lines, lands, and bridges of all roads now owned, leased, controlled, or operated by said railroad company, or which it may hereafter own, lease, control, or operate, for the construction and use of such lines of poles and wires or underground wires for commercial or public uses or business as the telegraph company may require, together with the exclusive right to maintain offices in its depots for commercial telegraph business."

This right, whatever it may be, was to exist for 25 years from and after the 1st day of July, 1884, and thereafter until the expiration of one year after written notice was given by one of the parties to the

other of its desire to terminate the same. The 25 years expired on the 1st day of July, 1909. After that either party had a right to give to the other written notice, and the party to whom the notice was given would have one year in which to make other arrangements.

In 1905, according to the allegations of the bill, the telegraph company constructed a line of telegraph on or along the right of way of defendant's railroad from Junta, in Bartow county, northwardly through the counties of Bartow, Gordon, and Murray, to the northern boundary line of Georgia, and thence northwardly to Knoxville, Tenn., and since said construction of said line it has been continuously maintained and operated, and the telegraph company has been in possession and control of it. As to this new line, which was along a piece of railroad then being built by the railroad company, the plaintiff claims a perpetual, irrevocable, assignable easement or right to construct, maintain, and operate the same upon or along said railroad and right of way of defendant, and the claim is that the plaintiff has continuously, from the time of building said telegraph line until the time of the filing of this bill, been, and still is, in possession of said line and of said easements, rights, and franchises.

There is an additional telegraph line, according to the bill, from Cartersville, Ga., to Junta, Ga., a distance of $1\frac{3}{10}$ miles, which is along the right of way of the Western & Atlantic Railroad. This telegraph line, built in 1905, was during the existence of the contract between the plaintiff and defendant, and comes within, and is subject to and controlled by, that contract. Therefore what has been said with reference to the main line clearly applies to this line, because it is unquestionably within the terms of the contract.

The bill alleges that:

"On or about August 5, 1912, defendant notified your orator that on and after August 17, 1912, the use and occupation of its railroad rights of way or any part thereof, including its said right of way in Georgia, and its stations, buildings, and offices, including those in Georgia, by your orator as and for a telegraph line, would be without its permission and against its will and consent, and notified your orator to vacate defendant's railroad rights of way, buildings, offices, stations, and premises, and to commence to remove therefrom immediately after August 17, 1912, and not later than September 1, 1912, all of your orator's telegraph lines, and all poles, wires, crossarms, batteries, instruments, appliances, and fixtures appurtenant or belonging thereto, and to complete the removal thereof prior to December 1, 1912, and that, failing to vacate defendant's right of way and premises, or in the event of your orator's failure or refusal to remove therefrom your orator's poles, crossarms, wires, batteries, instruments, appliances, and other fixtures, or any part thereof, prior to December 1, 1912, as demanded, that then and in that event defendant would take possession, appropriate, and use all and singular the said poles, crossarms, wires, batteries, instruments, appliances, and other fixtures, or so much thereof as may, on or after December 1, 1912, be or remain on defendant's rights of way or premises, including those in Georgia, and both use, operate, maintain, or otherwise dispose of the same as defendant's own property, and refuse to longer permit your orator to remove or use the same in any manner or for any purpose."

The plaintiff here claims the same rights under the act of Congress of July 24, 1866, that it claimed in the Atlanta & West Point Case above referred to. It is unnecessary for me to go over that again,

as I have stated my views about it fully in the opinion filed in that case.

[5] The plaintiff also prays that, if it finds against the right of the plaintiff to continue to occupy the right of way of the railroad company, this court will find what would be reasonable compensation for it to pay the defendant for the purpose of obtaining an irrevocable, assignable, and perpetual easement or right in, upon, along, under, through, or over defendant's right of way and property for the purpose of maintaining, reconstructing, repairing, and operating its telegraph lines now upon and along said right of way. The prayer in this respect is that the court, in some proper way, condemn the property and fix the amount of compensation to be paid to the railroad company by the telegraph company.

It has already been determined by this court in the Atlanta & West Point Case that a court of equity has no such power. The opinion expressed then is entertained now, and the court is therefore unable to take any such action as is prayed in this respect. All that it appears necessary to determine here is whether or not the property in question, when it came to be owned by the parties to the contract of 1884, came within that contract, and whether that contract must control.

I think the contract does control, and that it only gave to the telegraph company the right to remain upon the right of way of the railroad company until the expiration of the contract. It does not give to the telegraph company any irrevocable, assignable, and perpetual right in and upon the railroad company's right of way, as claimed, but gives it simply the right to use and occupy the right of way until the expiration of the contract. The railroad company clearly had the right to give the notice when it did in 1912, the period of time fixed by the contract having expired, and its right to give this notice and to insist upon compliance therewith must be sustained.

The bill showing upon its face that no relief thereunder can be granted, and the defendant having filed a motion to dismiss, upon which the case is now heard, the motion to dismiss should be granted, and a decree may be taken to that effect.

In re KNOX AUTOMOBILE CO.

(District Court, D. Massachusetts. August 18, 1915.)

No. 19064.

1. CORPORATIONS — 308 — OFFICERS — SALARIES — POWERS OF BOARD OF DIRECTORS.

M. was the treasurer of a corporation whose business had been very prosperous during the year ending August 1, 1910. By the company's custom, salaries were fixed by the directors in January, but ran for one year from the preceding August. In January, 1911, M. demanded an increase in salary from \$12,000 to \$25,000, and the issuance to him of stock in the corporation previously authorized, but not issued, because of extraordinary services rendered by him during the preceding year. The directors objected, and the matter was left in abeyance and not settled

↪ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.
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until August 2, 1911, after the expiration of the salary year. At that time M., to whom the company was then largely indebted, took the position that the company could either meet his terms or get another treasurer and arrange for payment of his indebtedness. The company was in no position to take this last alternative, and the directors, after considering the matter carefully, honestly and disinterestedly decided that it was best for the company to comply with M.'s demand, and it was voted to pay the \$25,000 demanded and issue the stock in "part payment for his services to the company during the year." The corporation was not then insolvent, and did not become bankrupt for about 17 months thereafter. With the knowledge of the directors M. continued to draw salary at the increased rate until his death in the following June. The board of directors in office in January, 1911, did not go out of office until the following October. *Held*, that it was not beyond the powers of the directors to act in the matter after the expiration of the salary year, their own term of office not having expired.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. ⚡308.]

2. CORPORATIONS ⚡308—OFFICERS—SALARIES—VALIDITY OF PAYMENT.

As M. was acting for himself in the transaction, and the corporation was adequately represented by its board of directors, the contract, after it had been executed by M., could not be set aside, and his estate charged with the difference between his original salary and the increased salary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. ⚡308.]

3. CORPORATIONS ⚡316—OFFICERS—DEALINGS WITH CORPORATIONS.

While the vote referred to the stock as payment for past services, it was demanded and granted as the price of M.'s future assistance and financial support, and was not a bonus or gift.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401, 1402, 1404-1406, 1408, 1409, 1412-1414; Dec. Dig. ⚡316.]

4. BANKRUPTCY ⚡339—CORPORATIONS ⚡308—OFFICERS—DEALINGS WITH CORPORATIONS.

Assuming that, because of M.'s fiduciary relation to the company, he had no right to acquire its obligations to such an extent as to give him power to coerce it into meeting his demands, the contract was merely voidable, and not void, and continued in force until the company rescinded it and offered to return what it had received thereunder, and an objection by creditors to the allowance of M.'s claim against the bankrupt estate of the corporation, without offsetting the value of the stock and the increase in salary, was not such a rescission; the corporation being no party to the proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. ⚡339; Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. ⚡308.]

5. CORPORATIONS ⚡314—OFFICERS—DEALINGS WITH CORPORATIONS.

The treasurer of a corporation took up its matured obligations for borrowed money with his personal funds and turned them over to the corporation in exchange for its note for the amount thereof plus a commission of 5 per cent. taken by him on the loan. The commission in question would have been reasonable and proper if paid to a third party, and a similar commission had been paid to third parties on loans previously obtained. Eight of the nine directors of the corporation learned of the transaction while the company was still operating, but neither they nor anybody on behalf of the company ever objected, and the company never rescinded the transaction, nor took any steps to do so, prior to becoming bankrupt, though the transaction was disclosed by its books. *Held*, that while, as the treasurer represented both himself and the corporation in the

transaction, it was voidable at the option of the company, it was ratified, and could not be set aside.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393-1398, 1400; Dec. Dig. ⚡314.]

6. CORPORATIONS ⚡314—OFFICERS—DEALINGS WITH CORPORATIONS.

Officers of a corporation are not precluded from loaning money to it, so long as they deal fairly with it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393-1398, 1400; Dec. Dig. ⚡314.]

7. BANKRUPTCY ⚡339—CLAIMS—OBJECTIONS—RIGHT OF CREDITOR TO OBJECT.

After the appointment of a trustee in bankruptcy, objections to claims should be made and review proceedings, if advisable, taken by him, or, if he declines to act, by creditors proceeding in his name by order of the referee, and individual creditors should not be recognized in such matters.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. ⚡339.]

In Bankruptcy. In the matter of the Knox Automobile Company, bankrupt. On review of an order of the referee. Referee's order affirmed.

See, also, 210 Fed. 569.

Charles H. Beckwith, of Springfield, Mass., for creditor offering proof of debt.

Tyler, Corneau & Eames, of Boston, Mass., for creditors objecting to proof.

MORTON, District Judge. This is a petition by the Charles C. Lewis Company and other creditors of the Knox Automobile Company for review of an order made by Mr. Referee Bosworth allowing certain claims of Sutton et al., as administrators of the estate of Alfred N. Mayo, deceased, in the sum of \$927,945.56. The case comes upon the referee's certificate, accompanied by the exhibits and a transcript of the testimony before him.

The claims are based principally on eight notes, of \$100,000 each, made by the bankrupt and held by the claimants. The notes were given for money loaned by Mr. Mayo to the bankrupt, and their validity is not disputed. The controversy here presented concerns certain alleged offsets which, it is contended by the objecting creditors, should be allowed in favor of the bankrupt against the claim on the notes. These alleged offsets arise, speaking generally, out of certain payments of money and property made by the bankrupt to Mayo while he was its treasurer. Three principal items are involved:

(1) Payments to him as salary, or bonus, in excess, it is contended, of what he was entitled to receive, amounting to about \$24,769.

(2) Stock in the bankrupt company improperly transferred to him, it is alleged, amounting at par value to \$5,300 preferred and \$136,400 common.

(3) Commissions taken by him on loans of \$800,000 from him to the bankrupt, aggregating \$40,000.

[1, 2] Considering first the item of salary:

The salary year of the company ran from August 1st to August 1st. The salaries were, by custom of the company, generally fixed by the directors in January following the beginning of the salary year; i. e., the salaries from August 1, 1910, to August 1, 1911, would be fixed in January, 1911. Mayo became treasurer of the company in January, 1909, and thereafter, while not controlling the stock, was undoubtedly the dominant personality in its management. Prior to August, 1910, his salary had been \$12,000 per year. During the latter part of 1909 and the early part of 1910 large extensions of the plant had been made on his initiative and under his general direction. At this period the company, which had failed and reorganized in 1907-08, appears to have been very prosperous. Its book profit for the year ending August 1, 1910, was \$337,771; its book surplus, \$466,596. Although it had incurred a substantial indebtedness in connection with the extension of its plant, it began the year on August 1, 1910, in excellent condition.

When the directors came to fixing salaries in January, 1911, for the year which had begun the preceding August and was to end August 1, 1911, Mayo demanded an increase from \$12,000 to \$25,000 and the preferred and common stock now in question. This stock had been authorized in connection with the reorganization, but had never been issued. He based this demand at that time principally on extraordinary services rendered by him during the past year. The directors objected; the matter was left in abeyance and was not finally settled until August 2, 1911. The year for which the salary was being fixed had at that time expired. It is suggested that the directors had thereby lost power to act in the matter. But the board of directors did not go out of office until the following October; it was the same as in January. It was its duty to act on this matter of salary; and it could do so at any time during its term of office.

At a meeting of the board held on August 2, 1911, Mr. Mayo, to whom the company was then indebted to a large amount, took the position that the company could either meet his terms or get another treasurer and arrange to pay his indebtedness when it matured. The company's business had been unsuccessful during the year ending August, 1911, and it was in no position to take the latter alternative. The directors, after considering the matter carefully, honestly, and disinterestedly, decided that it was best for the company to comply with Mr. Mayo's demands, which was accordingly done. The vote as passed at that time is set out at length in the referee's certificate. The \$25,000 so voted was paid, and the stock was duly issued to Mr. Mayo. No vote as to salaries for the year from August, 1911, to August, 1912, appears to have been passed by the directors in January, 1912; and Mayo continued to draw salary at the rate of \$25,000 per year until his death on June 26, 1912. The difference between \$12,000 per year and \$25,000 per year from August 1, 1910, to June 26, 1912; constitutes the first item of offsets alleged.

The objecting creditors contend that the vote of August 2d did not fix the salary at \$25,000, and that the \$25,000 payment under it should

be regarded as a gift, or bonus, for past services. It is true that the vote itself does not expressly state that the \$25,000 was voted as salary; the language of the vote is, "part payment for his services to the company during the year." But Mayo had demanded that amount of salary; the directors understood that they were dealing with a question of salary; no other action fixing Mayo's salary for the year ending August, 1911, was ever taken; the \$25,000 was understood by Mayo and by the directors to be voted as salary; he continued to pay himself at that rate to the knowledge of the directors, without any objection being raised until his death. (Referee's Certificate, p. 6.) The \$25,000 does not seem to me to have been a bonus for past services, but to have been salary for the year ending August 1, 1911, the amount of which had been left undetermined since the preceding January on account of the inability of the directors and Mayo to agree about it.

No misrepresentation, and no fraud, unless Mayo's coercive action be so regarded, entered into the agreement between him and the company as to his salary. He stated his terms, and the directors, however reluctantly, agreed to them. There is no finding that his services were not, under the circumstances, worth the amount demanded. On the contrary, the learned referee explicitly finds that "this salary of \$25,000 a year * * * was fair and proper compensation for his (Mayo's) services," etc. (Certificate, p. 6.) The corporation was adequately represented by its board of directors, between whom and Mayo the agreement was finally reached. Of the nine directors, seven, besides Mayo, approved of the transaction. This item differs from the commission hereafter considered, in that Mayo was not, as treasurer, representing the corporation in contracting with himself as an individual. The corporation was not at that time insolvent; and the bankruptcy petition was not filed for about 17 months thereafter.

It is difficult to see upon what grounds the plaintiffs, who appear here only as creditors of the Knox Company, who have proved claims in the bankruptcy proceedings, have any standing to object to the transaction, which, it seems to me, could properly be assailed, if at all, only in proceedings between the corporation and Mayo. The respondents have not raised this point, however, and assuming, as the parties do, that the objecting creditors have such standing, it does not seem to me that the learned referee's findings on this matter were erroneous, nor that, after the contract has been executed by Mayo, this court ought to attempt to set it aside, and to charge his estate with the difference between his original salary of \$12,000 and the increased salary of \$25,000.

[3] As to the stock: In connection with his demand for an increase of salary, Mayo also demanded that the corporation should turn over to him the common and preferred stock above referred to. The directors were at first opposed to granting this demand. The stock payment and the increase of salary were considered together, and formed in effect a single transaction. As upon the salary question, so in this matter, Mayo did not undertake to represent the corporation. That was done by the board of directors, who, as above stated, acted honestly,

faithfully, and disinterestedly for it. It is clear that they, and probably the corporation itself, against objection, did not have power to give this stock to Mayo as a bonus or gift for past services. It does not seem to me that any such motive really influenced their action. Mayo took the same position as to this stock that he did as to the salary, viz., that the company could either comply with his terms or he would sever his connection with it and expect its obligations to him, and perhaps its notes which he had placed, to be paid when they matured in the following November. In other words, while he said that he was entitled to the stock for what he had done, and the vote refers to it as payment for past services, it was in reality demanded by him as the price of his future assistance and financial support to the company, and was transferred to him in order to obtain them, and not as a bonus or gift. It is not alleged that the directors acted fraudulently, and there is no suggestion in the evidence that they did so, nor is there any finding that the bargain was an imprudent one for the company. The transfer of the stock was effected at or about the time when the \$25,000 was fixed and paid as salary. The company was not then insolvent, and did not fail for many months thereafter.

[4] It was suggested by counsel for the objecting creditors that Mayo, holding a fiduciary relation to the company, had no right to acquire its obligations to such an extent as gave him a coercive power, that his whole conduct with relation to the salary and stock was therefore fraudulent, that the directors acted under unjustifiable coercion, and that the corporation was not bound by their assent. It does not appear that Mayo acquired the notes and obligations of the company with any such purpose. The company did receive his assistance and financial support, so that he carried out his part of the bargain. He could not have been compelled to furnish such assistance and support, except upon terms acceptable to him. Even if this objection be sound, the result would be that the contract was voidable, not void, and continued in force until the company rescinded it and offered to return what it had received thereunder, *Warren v. Para Rubber Co.*, 166 Mass. 97, at page 101, 44 N. E. 112; *Parker v. Nickerson*, 137 Mass. 487, at page 497. This objection is not such a rescission; the company is not a party to these proceedings. The questions arising on a rescission cannot be settled here. I therefore conclude that no offset is chargeable against the Mayo claim upon the stock transaction.

[5] As to the commissions: In November, 1911, the Knox Company had matured obligations for borrowed money amounting to \$753,000, some of which were held by Mayo personally, but a large amount of which were held by banks. Mayo took up these obligations with his personal funds. He turned over to the Knox Company \$753,000 face value of its notes, and \$7,000 in cash, a total of \$760,000; and he took from it in return its notes for \$800,000, which forms the basis of the claim by his estate. These notes are drawn with interest to follow. The deduction of \$40,000 made by Mayo was not for interest, but for a commission of 5 per cent. taken by him on the loan. In this transaction, unlike the two preceding ones, nobody except Mayo seems to have acted for the company. He was, therefore, as treas-

urer of the company, dealing with himself as an individual. The same difficulty as to the right of these creditors to object and to take review proceedings exists in this instance as in the two preceding ones; but I pass it by, so far as possible, and consider the question, as it was presented by both parties, on the merits. This transaction was unquestionably voidable at the option of the company. Cases *infra*. Eight of the nine directors seem to have learned of it while the company was still operating; and neither they nor anybody on behalf of the company ever objected to what Mayo had done. The company never rescinded the transaction, nor took any steps to do so. The notes were duly entered on the books, and the whole transaction was there disclosed. The evidence well supports the referee's finding of ratification by the directors.

[6] The amount charged by Mayo as commission was the same per cent. that as treasurer of the company he had paid to certain banks in 1910 on the loans from them which he subsequently took up. The referee has found that the commission was not excessive and "would have been reasonable and proper" if paid by Mayo to a third party. The objecting creditors do not contend that the commission was *per se* excessive, or would have been improper if agreed to by Mayo as treasurer in a contract between the company and somebody else. They urge that Mayo himself had no right to make any profit on a transaction with the company. In this contention, as the cases cited below show, they overstate the law. If the company chose to rescind the contract it could do so; but it would still have to pay Mayo what was fair and reasonable for making the loan. The notes were not paid when they became due in the fall of 1912. The trustee stated at the hearing on these matters that the estate would pay in the neighborhood of 25 per cent. If so, Mayo not only made no profit out of his dealings with the company, but his estate stands to lose more than \$500,000 by reason thereof. Officers of a corporation are not precluded from loaning money to it, so long as they deal fairly with it. *Wyman v. Bowman*, 127 Fed. 257, 277, 62 C. C. A. 189 (C. C. A. 8th Cir.); *Union Pacific R. R. v. Credit Mobilier*, 135 Mass. 367, 377. The other directors evidently did not then think that in making the loan, and charging the commission in question thereon, Mayo dealt unfairly by the company, and the result certainly does not indicate that he did so. It not appearing that the contract has been rescinded by the company, or that it was *per se* fraudulent, it follows that no offset from the claim is allowable in respect of said commissions.

[7] At the time when these objections to the Mayo claim were heard, a trustee had been appointed. Therefore he represented the estate. Objections to claims should have been made, and review proceedings, if advisable, have been taken by him, or, in case he declined to act, by creditors proceeding in his name by order of the referee. The practice followed of recognizing individual creditors in such matters, after the appointment and qualification of the trustee, is improper and objectionable, for the reasons stated in *Re Lewensohn*, 121 Fed. 538, 57 C. C. A. 600 (C. C. A. 2d Circuit), where the point was carefully considered and decided. As the point was not suggested by the

respondents, and as the case was prepared at considerable length, I have considered it, as far as possible, on its merits.

The order of the referee is affirmed.

ILLINOIS CENT. R. CO. v. MISSISSIPPI RAILROAD COMMISSION et al.

YAZOO & M. V. R. CO. v. SAME.

(District Court, S. D. Mississippi. April 14, 1914.)

1. TAXATION ⚡498—ASSESSMENT—POWER OF COURTS TO RESTRAIN.

A court of equity has power to enjoin the taxing authorities of a state from systematically and intentionally overvaluing the property of one class of property owners as compared with that of another class, though the discrimination is due to the fact that the property of the latter is undervalued, and although the valuation of the two classes is by different taxing boards, and both made under a constitutional provision requiring all property to be assessed at its true value; but where the state authorities act in good faith, with the intention of making the assessment on the same basis as that applied to other classes of property, their action is not subject to collateral review by the courts for an error of judgment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 913-919; Dec. Dig. ⚡498.]

2. COMMERCE ⚡69—TAXATION ⚡47—PRIVILEGE TAXES ON RAILROAD COMPANIES.

The privilege tax imposed on railroad companies by Act Miss. March 16, 1912 (Acts 1912, c. 102), is not invalid, as an additional property tax, because the amount is determined by the mileage of the road within the state and its gross earnings, in accordance with which the roads are classified for the purpose of fixing the rate, but, inasmuch as it prohibits under penalty and without exception the operation of a railroad in the state for any purpose without first paying the tax and obtaining a license, it is unconstitutional and void, as imposing a tax on interstate commerce and on the doing of government business.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113-119; Dec. Dig. ⚡69; Taxation, Cent. Dig. §§ 104-114; Dec. Dig. ⚡47.]

In Equity. Suits by the Illinois Central Railroad Company and by the Yazoo & Mississippi Valley Railroad Company against the Mississippi Railroad Commission and others. On motion for preliminary injunction. Denied in part, and granted in part.

Mayes & Mayes, of Jackson, Miss., Charles N. Burch and H. D. Minor, both of Memphis, Tenn., and R. V. Fletcher and Blewett Lee, both of Chicago, Ill., for complainants.

Geo. H. Ethridge, Asst. Atty. Gen., of Mississippi, for defendants.

Before SHELBY, Circuit Judge, and NILES and GRUBB, District Judges.

GRUBB, District Judge. The applications of the two plaintiffs were submitted together for decision, and the questions presented by each are identical. In each instance, an injunction is sought by the plaintiff railroad company against the Mississippi Railroad Commission

and its three members to prevent them, as the state board for the assessment of railroad property and privileges for taxation: (1) From certifying to the county tax officials the valuation of the property of the plaintiffs, as arrived at by the Commission, upon the ground that the plaintiff's property had been intentionally overvalued, as compared with the taxable property of other owners; and (2) from certifying to the auditor of public accounts and the chancery clerks of the counties through which plaintiff's roads run their findings as to the classification of the plaintiffs as a step in the collection of the privilege tax imposed upon railroad companies by chapter 102 of the Acts of Mississippi of 1912, approved March 16, 1912.

[1] 1. With reference to the ad valorem property tax, we think the authorities establish the right of a court of equity to enjoin the taxing authorities of a state from systematically and intentionally overvaluing the property of one class of property owners as compared with that of another class, though the discrimination is due to the fact that the property of the latter is itself undervalued, and although the valuation of the two classes is by different taxing boards, and that this principle prevails, even though the Constitution of the state requires all property to be assessed at its true value, as well as to be assessed at its uniform value. This principle is sustained by the cases of *Taylor v. L. & N. R. R. Co.*, 88 Fed. 350, 31 C. C. A. 537, and *Central R. R. Co. v. Jersey City (D. C.)* 199 Fed. 237. Equality and uniformity are the essentials of true value in matters of taxation, and a system of valuation of property owned by one class, the effect of which is to produce inequality and discrimination with reference to similar property owned by other classes, does not tend to arrive at true values, though it may ascertain actual values as to one class. The problem of taxation being to distribute the burden of raising the amount of revenue required for governmental purposes equitably among all taxpayers, the proportion of value to rate is immaterial to the taxpayer, since the product of the two factors must always be the same, whatever their relative proportions in the case of each taxpayer, to produce the required aggregate. If the rate decreases, the value must proportionately increase, and vice versa; otherwise, the total tax would not remain constant. The thing of importance to the taxpayer is that he pay the same rate as all other taxpayers, and that his property be valued on the same basis as other taxpayers, so that of the aggregate burden exacted from all owners he will pay only his proportionate and just share. For this reason uniformity and equality in the valuation of all property of the same class is a greater consideration in assessing property for taxation than is the ascertainment of the absolute and true value of the property assessed.

If the proceedings before the Railroad Commission of Mississippi, and the evidence introduced upon the hearing of these applications, had shown an intentional and systematic overvaluation of the plaintiff's property, as compared with that of individual taxpayers throughout the counties of the state, the application would be entitled to favorable consideration. However, the record of the proceedings had before the

Railroad Commission, introduced in evidence upon the hearing, is convincing that there was no intentional overvaluation of the plaintiffs' property, as compared with the property of other owners throughout the state. It shows an attempt in good faith upon the part of the Commission to assess the plaintiffs' property upon the same basis of value as was used in the assessment of other property in the various counties of the state. In the course of these proceedings the president of the Commission said:

"Then, in pursuance to that line of argument—in stating these things, I refer to myself, because I haven't had a chance to consult my colleagues, but it seems to me that the only thing for you to do is to come before this Commission with an open hand, and give us as nearly as you can the true value of your property, and leave it to us then to decide what we shall make, what reduction we shall make from the true value, so as to harmonize with the other property of the state."

In reply to this statement of the president of the Commission, one of the attorneys for the plaintiffs said:

"Now, Doctor, right here, I want to take you up on that proposition. I say I am perfectly willing to accept that kind of a trade. Now, we have tried to show by these figures what the true value of the property is; now, I am perfectly willing to risk it to this board, which I know is well qualified to judge what the other property is assessed, take the state over, take Mr. Wilson's district, and Mr. Edwards' district, and your district, what is the fair value and roll value, and then take the statement that we make as to the fair value, which we ask you to believe until you have something to the contrary."

These statements show that the Railroad Commission, at least, undertook to assess the plaintiffs' property on the same basis of valuation as prevailed throughout the state, as to that of other taxpayers, and this with the assent of counsel for the plaintiffs. In addition, the evidence of two of the commissioners upon this hearing was to the effect that their purpose and endeavor in making the assessment was to value the plaintiffs' property upon the same basis of valuation as was adopted by the local assessors for all other property in the various counties of the state. They testify that the third commissioner adopted the same method. One of the commissioners differed from the remaining two in the results arrived at, but only because his judgment as to the proportion between actual and assessed value in relation to other property differed from that of his fellow commissioners. The endeavor of all the commissioners seems to have been to arrive at the proper percentage to its actual value that other property was returned for taxation throughout the state, and to adopt the percentage so ascertained by them as the basis for reducing the actual value of the plaintiffs' property to its taxable value. There was, therefore, no intentional overvaluation of plaintiffs' property. If overvalued at all, it was because of the erroneous judgment of a majority of the Commission, and this would be an error not subject to correction collaterally by us. The truth seems to be that all the commissioners were endeavoring to assess the plaintiffs' property at the same proportion of its true value as was all other property throughout the state. The

commissioners differed as to the extent that other property in the state was undervalued; each being governed somewhat by the variant practices in this respect in the part of the state comprising his district, and so differed as to the extent the plaintiffs' property should be reduced from its actual value. The record shows that there was no uniformity in this respect in the counties of the state. In some counties property was returned at 75 per cent. of its actual value, and in some as low as 20 per cent. of that value. There was, therefore, room for honest difference of opinion amongst the commissioners. We see no reason for attributing their conclusion to intentional overvaluation. If there was overvaluation at all, it would seem from the record that it should be attributed to an error of judgment, which we have no power to correct. *Coulter v. L. & N. R. R. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615.

It is true that the Railroad Commission refused to consider the consideration of the 25 last transfers tabulated from 68 counties of state as evidence tending to show the percentage of value adopted in those counties for taxable values. The admissibility of such evidence is at least doubtful. *Coulter v. L. & N. R. R. Co.*, 196 U. S. 609, 610, 25 Sup. Ct. 342, 49 L. Ed. 615. In any event the rejection of this evidence by the Commission would be error merely, and would not be ground for collaterally assailing the order of assessment. It is clear from the record that the Commission did undertake to arrive at the proper result through other evidence, and through the commissioners' knowledge of assessments in the different counties of their respective districts, and did not reject the principle of undervaluing railroad properties, so as to equalize true value to the customary assessed value of other property, but, on the contrary, adopted this principle, in good faith, as the correct one, however erroneously they may have applied it.

For these reasons, we think this case is ruled by the case of *Coulter v. L. & N. R. R. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615, and that no injunction against the certification of the ad valorem tax should be granted. If there was a probability of a different conclusion being reached upon final hearing, we might be inclined to preserve the status until then, in spite of our present conclusion; but the merits of the plaintiffs' case have been fully presented upon this hearing, through the affidavits, oral evidence of the commissioners, and the record of the proceedings before the Commission, and it is not likely to be, in any material respect, changed upon the final hearing.

[2] 2. The plaintiffs also seek injunction to restrain the Railroad Commission from certifying the classification of the plaintiffs' railroads for the purpose of the collection of the privilege tax, enjoined upon them by chapter 102, Acts 1912. The plaintiffs contend that this privilege tax is in conflict with article 1, section 8, of the federal Constitution, as being a regulation of interstate commerce and with the Fourteenth Article of Amendments, in that it deprives the plaintiffs of their property without due process of law and in denial of equal protection of the law.

As much of chapter 102 as is germane to this inquiry is set out in the margin.¹ It is an amendment of section 3856 of chapter 114 of the Mississippi Code of 1906. Section 1 of the act provides for the classification of railroad companies, for the purpose of levying privilege taxes, into five classes, and levies privilege taxes, at varying amounts per mile, according to class, upon all railroad companies operating in the state. Section 2 provides that the Railroad Commission shall annually, and before the first Monday of August, classify the various railroads according to their charter and their gross earnings, and that the privilege taxes shall be paid before the 1st day of December, and that the findings of the Commission shall be certified to the auditor of public accounts and the chancery clerks of the counties through which each road runs, and that any person, natural or artificial, who shall exercise any of the privileges taxed, without first paying the tax or procuring the tax or license, as required by law, shall be subjected to the pains and penalties imposed by section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law. Section 3 provides that the act shall take effect and be in force from and after its passage. Section 3894 of the Code of 1906 provides that any person or corporate body who shall exercise

¹ Section 1. *Be it enacted by the Legislature of the state of Mississippi*, that section 3856 of chapter 114, of the Code of 1906, levying privilege taxes on railroads be, and the same is hereby, amended so that for the purpose of levying a privilege tax on railroads such railroads are divided into five classes, first, second, third, narrow gauge and levee district, and privilege taxes are levied on them as follows:

On each railroad of the first class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted)	\$ 45.00
On each railroad of the second class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted)	25.00
On each railroad of the third class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted)	10.00
On each narrow gauge railroad, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted)....	2.50
On that part of each levee district railroad of the first class, with the levee district or districts, on which levee taxes are paid, per mile	20.00
On that part of each railroad of the second class, within the levee district or districts, on which levee taxes are paid, per mile.....	15.00
On that part of each railroad of the third class within the levee district or districts, on which levee taxes are paid, per mile.....	7.50
On that part of each narrow gauge railroad within the levee district or districts, on which levee taxes are paid per mile.....	2.50

Sec. 2. The Railroad Commission shall, annually, on or before the first Monday in August, classify the several railroads according to their charter, and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December, and the findings of the said Railroad Commission shall be certified to the auditor of public accounts and the chancery clerk of the county through which each road or roads run; and any person or persons, natural or artificial, who shall exercise any of the privileges taxed herein, without first paying the tax and procuring the tax or license, as required by law, shall be subjected to the pains and penalties imposed by section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law.

Sec. 3. That this act take effect and be in force from and after its passage.

any of the privileges taxed by law in this state without first paying the tax and procuring the license, as required, shall on conviction be fined not less than an amount equal to five times the tax imposed on such privileges, or shall be imprisoned in the county jail not more than six months, or both by such fine and imprisonment.

The plaintiffs contend that the privilege tax is in conflict with the Constitution of the United States upon five different grounds. We find it necessary to consider the first and fifth only. The other grounds are based on the fact that the amount of tax is measured by the mileage of the taxed road, and that the rate is dependent upon its gross earnings. We think, however, that these are mere methods of measuring the amount of the tax, and do not constitute a direct tax on the gross earnings or business of the plaintiffs. Nor do we think the fact that the franchises of the plaintiffs are taxed also as property justifies the interposition of the court, upon the ground that the plaintiffs are subjected thereby to a double burden of taxation.

The first ground is based upon the argument that the act imposing the tax does not differentiate between intrastate and interstate commerce, but taxes the doing of both indiscriminately. The fifth ground is based upon the argument that the taxes imposed by the statute are levied in part upon the business in transportation of the mails, troops, munitions of war, and other property of the United States; that the plaintiffs, by virtue of section 3694 of the Revised Statutes of the United States (Comp. St. 1913, § 6810), are constituted post roads; and that in the handling of governmental business they are agencies of the United States, and nontaxable for that reason.

The privilege taxed by the act is the business of operating a railroad. Any person or corporation who exercises this privilege, without first paying the tax and procuring the license, is subjected to the prescribed penalties. There is no restriction as to the character of business taxed to be deduced from the language of the act. The operation of a railroad by any one and for any purpose is inhibited until the tax is paid and the license secured. Any one who exercises the privilege of operating a railroad for any purpose, without first paying the tax and procuring the license, is liable to the penalties prescribed. The language of the act is inclusive enough to prohibit the operation of a railroad engaged in exclusively interstate commerce. The Supreme Court of Mississippi has not as yet construed the act, so as to make its provisions inapplicable to interstate commerce or government business. If its language contained sufficient ambiguity to admit of such a construction, in order that the act might prevail, rather than be destroyed, it should be so construed. The language of the act, however, is general in its terms, contains no exceptions, and is not ambiguous. This being true, and in the absence of authoritative construction by the Supreme Court of Mississippi, it must be given construction consistent with its language.

In the case of *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311, the Supreme Court said:

"It is urged that a portion of the telegraph company's business is internal to the state of Alabama, and therefore taxable by the state. But that fact

does not remove the difficulty. The tax affects the whole business, without discrimination."

In the case of *Allen v. Pullman Co.*, 191 U. S. 171, 179, 24 Sup. Ct. 39, 41 (48 L. Ed. 134), the Supreme Court said:

"In the later act [that of 1887] it is exacted for * * * doing business in the state. This business consists of running sleeping cars upon railroads not owning the cars, and is precisely the privilege to be paid for under the first act, neither more nor less. In neither act is any distinction attempted between local or through cars or carriers of passengers. The railroads upon which the cars are run are lines traversing the state, but not confined to its limits. The cars of the Pullman Company run into and beyond the state, as well as between points within the state. The act in its terms applies to cars running through the state as well as those whose operation is wholly intrastate. It applies to all alike, and requires payment for the privilege of running the cars of the company, regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the state. There is no decision of the Supreme Court of Tennessee limiting the act in its operation to intrastate traffic. It is true that the comptroller has sought to restrain the operation of the law by imposing the tax for two years upon cars running between Nashville and Memphis, and between Nashville and Chattanooga for two years, and fixing one car in each year as the proportion of local business done on interstate cars for two years. But this action does not conclude the state in taxing for other years, and the action taken by the comptroller does not limit the terms of the law affecting interstate commerce. * * * We are of opinion that taxes exacted under the act of 1887 are void as an attempt by the state to impose a burden upon interstate commerce."

In the case of *Williams v. Talladega*, 226 U. S. 404, 419, 33 Sup. Ct. 116, 119 (57 L. Ed. 275), the Supreme Court said:

"We have * * * an ordinance which taxes, without exemption, the privilege of carrying on a business a part of which is that of a governmental agency, constituted under a law of the United States and engaged in an essential part of the public business—communication between the officers and departments of the federal government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily affects the whole, and makes the tax unconstitutional and void."

In the case of *Oklahoma v. Wells Fargo Co.*, 223 U. S. 298, 302, 32 Sup. Ct. 218, 220 (56 L. Ed. 445), the Supreme Court said:

"Whether the statute could be construed as separable, of course, would be ultimately for the state court in any event. * * * But we see no possible construction on which it could be upheld without being so remodeled that it would be a mere speculation whether the Legislature would have passed it in the new form. * * * Neither the court below nor this court can reshape the statute simply because it embraces the elements that it might have reached if it had been drawn with a different measure and intent."

The following cases are also in point: *Postal Telegraph-Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; *International Text-Book Co. v. Peterson*, 218 U. S. 664, 31 Sup. Ct. 225, 54 L. Ed. 1201; *A., T. & S. F. R. R. Co. v.*

O'Conner, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050.

From them the conclusion is irresistible that a state statute exacting of one engaged in interstate commerce and governmental business a license for the privilege of doing business, in general terms and without expressly exempting from its terms interstate and governmental business, and which has not been construed to do so by the court of last resort of the state of its enactment, is to be construed as exacting a license for engaging in all business, including interstate commerce and governmental business, as to persons or corporations so engaged, and void as to them, though so measured as not to come in conflict otherwise with the Constitution. Under the language of the act of Mississippi, railroad companies could be prosecuted for exercising the privilege of doing a railroad business without taking out a license, though they were engaged in business purely of an interstate and governmental character, and there has been no contrary construction of this act in this respect by the Supreme Court of Mississippi.

The cases of *Baltic Mining Company v. Massachusetts* and *S. S. White Dental Manufacturing Company v. Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, are distinguishable from this case, as they were in fact distinguished from the cases of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, and *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, by the Supreme Court, in that the corporations in the latter cases were chartered to engage in interstate commerce, their interstate and intrastate business was conducted inseparably, and they had no option, being public service corporations, to decline to engage in either. This was not true of the corporations involved in the former case. They were mining and manufacturing companies, not public service corporations, and clothed with the right to confine their operations to such classes of business as they saw fit, and it was held that their intra and inter state business was conducted separately, so that an excise tax on an establishment for the doing of their business in Massachusetts was not a tax on interstate commerce. Distinguishing the cases then under consideration from the cases cited, the Supreme Court said (231 U. S. 85, 86, 34 Sup. Ct. 18, 58 L. Ed. 127):

"Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. In the Kansas cases the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character. In the *Western Union Telegraph Company Case*, the company had a large amount of property permanently located within the state and between 800 and 900 offices constantly carrying on both state and interstate business. The *Pullman Company* had been running a large number of cars within the state, in state and interstate business, for many years. There was no attempt to separate the intrastate business from the interstate business by the limitations of state lines in its prosecution. * * * In the cases at bar the business for which the companies are chartered is not of itself commerce. True it is that their products are sold and shipped into interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce and are entitled to the protection of the

federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a state to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business quite separate from its interstate transaction; that local and domestic business, for the privilege of doing which the state has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved."

It seems clear that the plaintiffs in this case, being common carriers engaged in interstate transportation by rail, are in the category with the Pullman Company and the Western Union Telegraph Company, public service corporations engaged in interstate commerce, the Kansas cases, rather than that of the Baltic Mining Company, a copper mining and selling company, and the S. S. White Dental Manufacturing Company, a company engaged in the manufacture and sale of dental goods, the cases from Massachusetts, and are not subject to the distinguishing features of the corporations to which attention was directed by the Supreme Court in the cases from Massachusetts.

Following the previous cases, we are impelled to hold that the privilege tax, including as it does all business to the plaintiffs both interstate and governmental, is void, and that an injunction should issue to restrain the Railroad Commission from certifying to the auditor of public accounts and to the chancery clerks of the counties through which the plaintiffs' roads run their findings as to the classifications of the plaintiffs for the basis of rating with respect to the privilege tax.

SHELBY, Circuit Judge (concurring in part). I concur in that part of opinion and the decree in which the court refuses to enjoin the ad valorem tax.

UNITED STATES v. COYLE.

(District Court, N. D. New York. January 24, 1916.)

1. CRIMINAL LAW Ⓒ321—PROCEEDINGS BEFORE GRAND JURY—PRESUMPTIONS.
In the absence of proof or evidence that improper or illegal evidence was used before the grand jury to secure an indictment, the presumption is that the proceedings before the grand jury were regular in all respects.
[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. Ⓒ321.]
2. BANKRUPTCY Ⓒ97—EXAMINATION OF BANKRUPT—TIME OF EXAMINATION.
In involuntary cases, a bankrupt may be examined on oath touching his estate and property, and the disposition thereof by him prior to an adjudication.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 139; Dec. Dig. Ⓒ97.]
3. BANKRUPTCY Ⓒ95—POWERS OF COURTS OF BANKRUPTCY—APPOINTMENT OF SPECIAL MASTER.
A court of bankruptcy is a court of equity, and as such has power to appoint a special master to take evidence, and these special masters may

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

be standing masters in chancery or appointed pro hac vice in particular cases.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 132, 140, 145; Dec. Dig. Ⓒ95.]

4. BANKRUPTCY Ⓒ97—EXAMINATION OF BANKRUPT—AUTHORITY OF SPECIAL MASTER.

A referee in bankruptcy, appointed as special master to examine an alleged bankrupt prior to the adjudication touching his property and his disposition thereof, had full power and authority to administer the oath and conduct the examination.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 139; Dec. Dig. Ⓒ97.]

5. BANKRUPTCY Ⓒ242—STATUTORY PROTECTION—PROSECUTIONS FOR PERJURY.

Bankr. Act July 1, 1898. § 7, cl. 9, c. 541, 30 Stat. 548 (Comp. St. 1913, § 9591), requiring the bankrupt at such times as the court may order to submit to an examination concerning the conducting of his business, etc., but providing that no testimony given by him shall be offered in evidence against him in any criminal proceeding, does not render the bankrupt immune from a prosecution for perjury committed upon such an examination.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 399-401; Dec. Dig. Ⓒ242.]

6. BANKRUPTCY Ⓒ486—PERJURY—NATURE AND CONDITION OF PROCEEDING—NECESSITY OF ISSUE.

Where by order of the bankruptcy court a bankrupt is required to attend before it, or a special master appointed by it, and submit to an examination concerning his property, there is a sufficient issue to support a charge of perjury based on false testimony on such examination.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 904; Dec. Dig. Ⓒ486.]

7. BANKRUPTCY Ⓒ486—PERJURY—ELEMENTS OF OFFENSE—MATERIALITY OF TESTIMONY.

On an examination of an alleged bankrupt concerning his property and the disposition made of it by him, prior to an adjudication, a question asked him as to whether he had by cash, check, or otherwise, transferred, paid, or set over, or in any manner placed in the possession of his wife or son, any money other than that to which he had testified, was clearly pertinent, and his willfully false testimony in answer thereto would support a charge of perjury.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 904; Dec. Dig. Ⓒ486.]

8. BANKRUPTCY Ⓒ494—PERJURY—INDICTMENT—SUFFICIENCY.

A indictment charged that an alleged bankrupt, while being examined before a special master concerning his property, was asked whether he had, by cash, check, or otherwise, transferred, paid, or set over, or in any manner placed in the possession of his wife or son, any money other than that to which he had testified, that he answered in the negative, and that this answer was false and untrue, in that he had paid to his son the sum of \$450, as he well knew. *Held*, that the indictment was not bad and insufficient because of its failure to show that the bankrupt's attention was called to the payment of the \$450; it not appearing that the parties interested in the examination had any knowledge of such payment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. Ⓒ494.]

9. BANKRUPTCY Ⓒ494—PERJURY—INDICTMENT—SUFFICIENCY.

The indictment was not defective, because of its failure to show that the money was transferred, set over, or given to the son for the purpose of giving him legal possession or ownership thereof, as the disposition of

the money was material, and there was a transfer, payment, or setting over of the money, or placing of it in the son's possession, if it was transferred to him for the purpose of concealing it from creditors, or having him hold it pending the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. Ⓒ494.]

10. BANKRUPTCY Ⓒ486—PERJURY—ELEMENTS OF OFFENSE—FALSITY OF TESTIMONY.

If the bankrupt had given his son a check for \$450, which had been cashed, he transferred, paid, set over, or in some manner placed the money in the son's possession, and his answer to the question was untrue.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 904; Dec. Dig. Ⓒ486.]

11. BANKRUPTCY Ⓒ494—PERJURY—INDICTMENT—SUFFICIENCY.

In determining the sufficiency of the indictment, the words used by the bankrupt in giving his testimony and found in the indictment must be given their ordinary meanings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. Ⓒ494.]

Patrick H. Coyle was indicted for perjury committed before George B. Russell, special master in a bankruptcy proceeding. On demurrer to the indictment. Demurrer overruled.

Harry V. Borst, Asst. U. S. Atty., of Amsterdam, N. Y.
D. C. Burke, of Oneida, N. Y., for defendant.

RAY, District Judge. The indictment charges that Patrick H. Coyle, of Oneida, N. Y., on the 15th day of December, 1915, at the city of Oneida, in the Northern district of New York, took an oath before George B. Russell, special master duly appointed by the court in bankruptcy, and then and there acting as such, that he would testify truly in the matter of Patrick H. Coyle, alleged bankrupt. The pendency of the proceeding is alleged, and the fact that the said Russell had authority to administer the oath. The indictment then charges that while being so examined and giving evidence before the said special master in the said proceeding, and in violation of section 125 of the Criminal Code of the United States of America (Act March 4, 1909, c. 321, 25 Stat. 1111 [Comp. St. 1913, § 10295]), said Coyle—

"did willfully and contrary to said oath testify and state to the following question, to wit, 'Have you since October 24, 1915, by cash, check, or otherwise transferred, paid, or set over or in any manner placed in the possession of your wife Mrs. Coyle, or your son, Frederick Coyle, any money whatsoever, except the \$150 and the \$75?' the answer, 'No sir,' which said answer, testimony and statement of the said defendant Patrick H. Coyle was and is a material one for the purpose of ascertaining the assets of the said Patrick H. Coyle and the disposition of the same, and which said answer, testimony, and statement was false and untrue, in that he, the said defendant, Patrick H. Coyle, theretofore and on the 15th day of November, 1915, paid to his son Frederick J. Coyle the sum of \$450, as he, the said defendant Patrick H. Coyle, then and there well knew," etc.

[1] The grounds of the demurrer are that the bankruptcy court had no jurisdiction to grant an order for the examination of Patrick H. Coyle before he was adjudicated a bankrupt; that the court had no jurisdiction to grant an order for his examination touching the mat-

ters regarding which the indictment charges the defendant gave false testimony; the special master was not empowered by law to examine the defendant regarding said matters; there is no provision of law authorizing the appointment of a special master to examine an alleged bankrupt prior to his adjudication; that the matter in regard to which the bankrupt was interrogated was immaterial and foreign to the purpose of the inquiry; that the defendant is granted immunity under section 7, clause 9, of the Bankruptcy Act on account of any testimony he may give upon an examination in bankruptcy; the facts charged in the indictment are insufficient and do not state a crime; and improper and illegal evidence was used before a grand jury to secure the indictment. No proof or evidence has been offered or presented to the court that either improper or illegal evidence was used before the grand jury to secure the indictment. The presumption is that the proceedings before the grand jury were in all respects regular.

[2-5] It has been decided several times that the bankrupt in involuntary cases may be examined on oath touching his estate and property and the disposition thereof by him prior to his adjudication. It has also been decided many times that the court in bankruptcy is a court of equity and has the powers of a court of equity, and this carries with it the power of appointing a special master to take evidence in aid of the court, and these special masters may be standing masters in chancery or appointed *pro hac vice* in particular cases. In this case the reference was to one of the referees in bankruptcy as special master, and he had full power and authority to administer the oath and conduct the examination. 3 Remington on Bankruptcy (2d Ed.) sections 2626 and 2821, and cases there cited. The bankrupt was directed to appear and submit to examination and he did so. It was his duty to make truthful answers to questions put to him. If, while under examination and bound to make truthful answers to questions put to him pertinent to the matters under investigation, he had made disclosures showing that he had committed a crime on some prior occasion, he would have been immune, as the evidence given in the bankruptcy proceeding could not be used against him on a prosecution for the commission of that crime. The Bankruptcy Act, however, which requires the bankrupt to submit to an examination, does not permit him to give false testimony regarding his estate or property and its whereabouts or the disposition thereof, and then claim immunity from a prosecution for perjury committed while so testifying. *Glickstein v. United States*, 222 U. S. 139, 32 Sup. Ct. 71, 56 L. Ed. 128, where the Supreme Court held that:

"It is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity in the absence of the most express and specific command to that effect."

And the court in the same case also held that the sanction of an oath and the imposition of a punishment for false swearing are inherently a part of the power to compel the giving of testimony, and are included in that grant of authority, and are not prohibited by the immunity as to self-incrimination. The court said:

"Of course this proposition is essentially the resultant of the first, since unless it be well founded the first also must be wanting in foundation. This must be the result, as it cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful. In other words, this is but to say that an authority which can only extend to the licensing of perjury is not a power to compel the giving of testimony. Of course these propositions being true, it is also true that the immunity afforded by the constitutional guaranty relates to the past and does not endow the person who testifies with the license to commit perjury."

The court in that case expressly approves *Edelstein v. United States*, 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236, and *Wechsler v. United States*, 158 Fed. 579, 86 C. C. A. 37, and expressly disapproves *In re Marx et al.* (D. C.) 102 Fed. 676, and *In re Logan* (D. C.) 102 Fed. 876. In *Daniels v. United States*, 196 Fed. 459, 116 C. C. A. 233, it is expressly held by the Circuit Court of Appeals, 6th Circuit, that:

"The provision of Bankruptcy Act July 1, 1898, § 7a (9), c. 541, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424) that no testimony given by a bankrupt on his examination 'shall be offered in evidence against him in any criminal proceeding,' has reference only to crimes committed previous to the giving of such testimony, and not to any criminal proceeding based on a crime inherent in the bankrupt's examination, and in a prosecution for perjury committed during the examination the alleged false testimony not only may be given in evidence, but any other testimony of defendant given in the examination which is relevant to the issue and tends to establish the falsity of that on which the prosecution is based."

[6] This court cannot approve or follow *United States v. Rhodes* (D. C.) 212 Fed. 518, wherein it holds that because the examination of a bankrupt being examined as to his property and the disposition thereof is *ex parte*, and one where there is no issue perjury cannot be assigned on the alleged falsity of the testimony so given. The bankrupt may be required by order of the court to attend before it or a special master appointed by it and submit to examination as to his property, its whereabouts and the disposition which has been made of it. The bankrupt is required to answer and give truthful answers so far as he answers at all, and there is an issue sufficient in law for the foundation of a charge of perjury in case the bankrupt willfully and knowingly gives false testimony regarding matters pertinent to the inquiry being made.

[7] The question put to the bankrupt was clearly pertinent. It related directly to the disposition by the bankrupt of certain of his property and to the question whether or not certain of his property was in the possession of himself or others. The indictment charged that the question was a material one for the purpose of ascertaining the assets of Coyle and the disposition of the same. The answer was that he had not, by payment of cash, check, or otherwise transferred, paid, or set over, or *in any manner* placed in the possession of his wife or of his son, any money whatsoever, excepting certain moneys mentioned. The indictment charges that on the 15th day of November, 1915, the defendant, Patrick H. Coyle, had paid to his son, Frederick J. Coyle, the sum of \$450, as he, the said defendant, Patrick H. Coyle,

then and there well knew. And the indictment charges that this false testimony was given willfully and contrary to the oath taken.

It must be held, I think, that the disposition made by the bankrupt of his property is a pertinent inquiry, when examined either before or after adjudication, and if, when examined on this subject, the bankrupt willfully and knowingly and contrary to his oath testifies falsely regarding such disposition, it must be that a charge of perjury will lie. When the bankruptcy proceeding is pending, whether it be voluntary or involuntary, the bankrupt himself is a party as are the creditors to a proceeding pending in court, and it is not essential that some issue shall have been framed by allegations made by the one party and denied by the other. The petitioning creditors, if the proceeding be involuntary, the general creditors, if the proceeding be voluntary and the receiver have the right to examine as to the property and assets of the bankrupt and the whereabouts thereof, and it is not necessary that there should be a formal allegation made that certain property exists, or is in the hands of the bankrupt, or has been transferred by him, and that such allegations should have been denied prior to such examination and in order that a charge of perjury will lie, if false testimony on the subject is given.

[8] It is contended by the defendant that this indictment is bad and insufficient, in that it fails to show that the attention of the bankrupt was called to the particular payment of money, \$450, mentioned in the indictment. But it does not appear that the interested parties conducting the examination had any knowledge of such payment, and how can it be said that it was their duty to call the attention of the bankrupt to a disposition of property or money made by him and which was peculiarly and solely within his knowledge and that of his son. It would appear from the allegations of the indictment that the defendant was seeking to conceal from his creditors or those representing them the payment in question. It does not appear from the indictment that any trick was being practiced upon the bankrupt. He knew whether or not within the time mentioned he had disposed of or transferred any of his money by check or otherwise. His creditors may have known and may not have known. There is no presumption that they did know.

[9] The defendant also contends that the indictment should show that the \$450 was transferred or set over or given to the son for the purpose of giving to the son legal possession or ownership of the money transferred by the check. This contention cannot be sustained. If the bankrupt by check or otherwise transferred \$450 of his money to his son for the purpose of concealing it from his creditors, or having him hold it pending the bankruptcy proceedings, or paying it back to the bankrupt, the bankrupt retaining title, the fact of this disposition of the money being concealed, it was material, and there would have been a transfer or payment or setting over of money, or a placing in the possession of the son money of the bankrupt.

[10] The defendant also contends that the question propounded to the bankrupt called merely for a conclusion of law and that every proposition embraced in the question could have been answered in the negative and the answer be perfectly truthful, although there may have

been an actual change of money or its equivalent from the defendant's hands to the hands of the son. The defendant argues, therefore, that on the face of the indictment it is clear that no perjury was committed, even if the answer given was untrue and \$450 had been paid by check to the son by the bankrupt within the time mentioned. With this contention this court cannot agree. If the bankrupt had transferred by check, or paid by check, or set over by check, or in any manner placed in the hands of his son, Frederick Coyle, \$450 of his money, or any other sum, prior to his bankruptcy and within the time mentioned, it was a material fact, and one peculiarly within the knowledge of the bankrupt, and if he did within the time mentioned give a check for \$450 to the son, which had been cashed, then he had either transferred, or paid, or set over, or in some manner placed in the possession of his son money. The bankrupt could not say that such payment was neither a transfer, nor payment, nor setting over, nor the placing of money in the possession of the son.

[11] The defendant also contends that, if the answer had been the other way, it would have been truthful, inasmuch as the meanings of the words "transfer," "paid," "set over," and "possession" are equivocal and uncertain, and might include the act done and might not. In giving effect to this indictment we must take it as it reads and give to the words found in it and to the words used by the bankrupt in giving his testimony their ordinary meanings.

In the judgment of this court the indictment is good and charges an offense, and the demurrer must therefore be overruled.

In re LOUIS J. BERGDOLL MOTOR CO.

(District Court, E. D. Pennsylvania. January 22, 1916.)

No. 4742.

BANKRUPTCY — 341 — CLAIMS — IMPLIED CONTRACTS — LIABILITY FOR LABOR AND MATERIALS.

The bankrupt was a dealer in automobiles manufactured by a corporation formed to take over the manufacturing part of the business formerly conducted by the bankrupt. The claimant was a manufacturer of automobile accessories and represented itself to have designed an electric starter. The bankrupt thought well of this starter, and advertised that such starter would be used on its cars, though the starter was then defective and in an experimental stage. As the substitution of another starter would have been a source of embarrassment, efforts were made to get the starter into shape, and finally a sample was furnished the bankrupt, and a written agreement was executed in the form of a contract for the sale of 750 starters at a specified price. The claimant at that time, however, had no faith in the starter and no thought of making starters of that description, and continued to direct its energies towards designing a satisfactory starter. It submitted a blueprint of a new starter, which would have involved changes in the make of the automobile, and negotiations, correspondence, and conferences continued for some time, during all of which time the bankrupt was insistently calling for starters. Nothing was ever done towards construction beyond the experimental ex-

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

pense to which the claimant was subjected, and the referee, treating the contract as lacking a subject-matter and mutually abandoned, allowed the claimant for the work and materials supplied in its experimenting on a quantum meruit basis. *Held*, that this was as favorable to the claimant as it had any right to expect, and came nearer to doing justice than any other award, though the bankrupt's liability at all was not beyond doubt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 516, 528; Dec. Dig. 341.]

In Bankruptcy. In the matter of the Louis J. Bergdoll Motor Company, bankrupt. On petitions for review of an order of the referee. Referee's order modified, and petitions dismissed.

See, also, 225 Fed. 87.

Sidney E. Smith, of Philadelphia, Pa., for claimant.

Joseph W. Catharine, of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. It is extremely difficult to so analyze the transactions between the parties concerned in these reviews as to enable any one to evolve an intelligible theory of the claimant's case or the bankrupt's defense. The transaction can be best characterized as a muddle. It is almost impossible to find a starting point. If we start with the claim as presented, we have this view of the situation of the parties. The claimant agreed to supply and the bankrupt to take 750 starters for automobiles at the agreed price of \$175 each. The deliveries were to be made at the rate of 25 per month, beginning in November, 1912. None of the starters was actually supplied. Each party to the contract accuses the other of its breach. The only possible view to be taken of the legal rights of the parties to the contract suggested by this statement of the case and the defense is that the rights of each turn upon the finding of which was responsible for the breach and award damages accordingly.

It is difficult to take this view in favor of the claimant, because of the obstruction presented by the fact that no breach on the part of the bankrupt is set up until February, 1913, after the claimant had been in default for two months' deliveries. The solution of the problem suggested by these facts is in turn also rendered difficult of acceptance by the raising of the question whether the default in performance of the contract by the claimant was not due to the acts of the bankrupt. The way out of the muddle found by the referee seems to have been in effect to disregard the contract as one lacking in the essential element of having a subject-matter, or as having been mutually abandoned by the parties, and referring their respective rights and responsibilities to the test of those arising out of transactions which in effect were that the claimant did certain work and supplied materials at the request of the bankrupt without any agreement as to compensation or price (except a \$175 sample starter), and, in consequence, to be paid for on a quantum meruit basis. He has accordingly awarded the claimant the sum of \$15,672.33.

The correctness of the figures of the award is not very loudly challenged, except that the amount should be reduced by \$2,000, the admitted value of certain materials included, but which the claimant re-

tained and used for its own purposes. The referee has found the above-stated sum after making the deduction, but apparently this is an error and the sum found by him should be reduced to \$13,672.33, as the \$2,000 was intended to be deducted, but was seemingly overlooked. The figures found by the referee differ slightly from the proofs, but no point is made of this difference. In the view we have taken of the case this finding is quite as favorable to the claimant as it had any right to expect, and its complaint that it should have been awarded a larger sum is without merit. The trustee takes the position that nothing should have been awarded the claimant. To make clear the basis for the award made by the referee a statement of facts at some length is necessary.

The bankrupt was incorporated for the purpose, and at first carried on the business, of a manufacturer of and dealer in automobiles. Subsequently its manufacturing department was given up, and that part of its plant sold, and another corporation was formed for the purpose and in fact took over the manufacturing part of the business which had been conducted by the bankrupt. This second corporation is known as Bergdoll Machine Company. Thereafter these corporations dealt with each other as entirely independent business concerns. The bankrupt confined its activities to the sale of automobiles, which were made for it by the Bergdoll Machine Company and others. The Bergdoll Machine Company manufactured for the bankrupt and others. As the same persons were largely interested in both companies, the business relations were closer and more trustful than they doubtless would otherwise have been, and for all practical purposes the manufacturing work was in fact done much as it would have been done if done by a manufacturing department of the bankrupt's business. The claimant is in the business of supplying specialties. It designs and makes parts and accessories of cars. It represented itself to have designed and to have ready for use an electric starter to be applied to automobiles. The bankrupt heard of the claimant's starter and thought well of it. The automobile sales business has its seasons. The season of 1913 really began in September, 1912. Its 1913 model of cars was required to be supplied to its customers within a reasonable time after the car was ordered. It was not to be expected that any one would buy until he had first seen the type of car he was purchasing. Much preliminary work was, in consequence, necessary to prepare for the work of the salesman. The particular car to be put out during the season must be advertised and exploited by means of the usual sales literature. To be described it must have been previously designed and contracts placed for constructing it in all its parts. This included the starter used on the car.

The bankrupt and the claimant were moved by like impulses to get together. The bankrupt wished to secure the use of claimant's starter. They had a common interest in advertising it as a feature of bankrupt's make of car. The starter had at least one defect. It was liable to become inoperative when the car was run at low speed. This defect the claimant thought could be overcome. The automobile season opened too soon to afford time to perfect the starter. Before it had

been fully tried out the bankrupt put out its literature. In this the car was exploited as equipped with this particular make of starter. With an optimism which charitably may perhaps be deemed excusable in an advertiser, the starter was described as one which had been selected after the most exhaustive and thorough-going trial tests. These tests had proved the starter to be the very best, and, because it was the best, had been adopted and incorporated in the Bergdoll car. The real fact was that the starter was still in the experimental stage, and its advertised merits belonged to the realm of prophecy rather than history. The efforts to whip the starter into shape lasted through the summer of 1912. By June the bankrupt had given up all hope of being supplied with starters and decided to adopt another make. The substitution of another in place of the one of which so much had been made was a source of embarrassment. The bankrupt was hence easily led into a renewal of its hope of getting this starter. The efforts to get it into shape were renewed, and were continued well into the autumn. Finally a sample starter was brought into being and supplied to the bankrupt. The automobile company was already behind time in having its advertised car ready for inspection and show. Everybody concerned in having the season's business a success became anxious and clamorous for cars to be turned out. As a result the sample starter was declared by the bankrupt to be acceptable, and the parties were in accord as to the price and the minimum number of starters to be taken by the bankrupt. This readiness of the parties to agree was on October 10, 1912. A written agreement was then drawn up and executed about October 24 or 26, 1912. It was antedated October 10, 1912. By its terms it called for the sale and purchase of at least 750 starters at the price of \$175, each to be delivered from time to time during the several months following. The contract followed the printed form in use by the claimant with certain changes. The contract in form contemplated the sale of an existing or at least a known thing of standard make. There was in fact no such thing, and no description or specification of what the thing to be manufactured was, unless the sample starter is written into the contract.

The necessities of the bankrupt induced it to believe the sample starter to be a starter which would answer its purposes. The claimant, however, as the referee finds and as is the undoubted fact, had no faith in the starter as it was, and no thought of making starters of that description. In consequence of this attitude, nothing was done toward manufacturing any special make of starter, but the whole energy of claimant was directed toward designing another type of starter. The first thing it did was to submit a blueprint of the new starter. The change involved changes in the make of the automobile, and prolonged negotiations were begun and protracted correspondence and conferences were entered into in the effort to design a make of starter which would meet the bankrupt's needs. This went on until February, 1913, when, a change of management in the Motor Company having taken place, the negotiations were definitely broken off. During the whole period the bankrupt was insistently and almost frantically calling for starters, and the claimant was replying with

requests to have an agreement reached as to dimensions of parts, type of clutch, and other details of construction, and, later, for a machine to test and try out the starters. In the end nothing was done toward construction beyond the experimental expense outlay to which the claimant was subjected. The business consequence to each company was disastrous, and insolvency can be certainly and directly, if not wholly, traced to these transactions as the cause. Nothing but evidence of turmoil and an interminable tangle can be found by delving into the particulars of these transactions. These broad facts do, however, stand out in clear relief. There was no contract worthy of the name in the sense of an express contract. The written agreement bearing date October 10, 1912, is really nothing more than an expression of good faith on the part of the parties in the expression of what each was willing to do. The transaction in substance was this:

The claimant had designed a starter which, if used on cars which were run at a high speed, was a good starter. Its defect was that, if the car was operated at such low speed as it might be if run by a timid or even cautious driver, the starter would not work. Both parties wished to deal with each other, and there was a common belief the defect in the starter could be overcome. Dallying with this hope the bankrupt tied its make of car to the use of this starter. Its whole season's business was gone unless the starter could be used. The parties collaborated to produce a successful starter. The bankrupt believed it had been found in the sample starter. The claimant knew it had not as yet been found, but still believed it would be. The parties, therefore, agreed upon the price and deliveries, but not upon the starter. The bankrupt expected to receive the sample starter. The claimant expected to furnish an as yet unfound starter which would be acceptable to the automobile company. The bankrupt was in such urgent need of some starter that it would have accepted any which could have been made to answer the purpose. It was willing to make any changes in its car which would aid in producing results. The claimant never had a thought of making the sample starters under the contract. It never made any preparations to carry out that contract, and was never in a position to have done so. It could not do so, for the very sufficient reason that it had not found the starter which was to be made by it and used by the bankrupt. Whatever contract there was between the parties was, so far as affects their present rights, an implied contract. Its substance was the direction in effect, if not in words, of the bankrupt to the claimant:

"Go ahead and make starters for us, and for whatever your labors are fairly worth and whatever your reasonable expenses are we will pay you."

In other words, it was the same as if they had done the work in a department of their own plant. The only difference was that in case starters had been constructed the obligations of the parties would have been translated into the terms of a sale and purchase at the agreed price and for the agreed minimum number. That the bankrupt assumed liability for the expense of the experimental work is by no means beyond doubt; but the referee, after a most patient hearing and exhaustive inquiry, has so found, and we do not feel justi-

fied in disturbing this finding. This conclusion is accompanied with the feeling that no other award than that made by the referee would come nearer to doing justice to the parties. Neither of them stood, or indeed has a right to stand, on its strict legal rights growing out of any express contractual relations, because no such standing ground can be found without shutting our eyes to the presence of unjust consequences.

The findings of the referee are approved, and the order made allowed, except the amount thereof is reduced to \$13,672.33, and the petitions for review are each and both dismissed.

THE PORT JOHNSON TOWING CO. NO. 7.

(District Court, E. D. New York. June 29, 1915.)

COLLISION ⚓95—TUG AND TOW—FOG.

A tug passing around the Battery and across the East River to Brooklyn after dark in a fog, which was dense in places and lighter in others, *held* in fault for a collision with a tow of 12 barges on hawsers passing up from Staten Island, upon evidence showing that she heard the fog whistles of the towing tug, indicating that she had a tow, and later alarm whistles, in time to have avoided the collision, but assumed that the tow was alongside. The towing tug *held* not in fault for proceeding under the weather conditions, as there was little or no fog when she started.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. ⚓95.]

In Admiralty. Suits for collision by A. J. & J. J. McCullom, Incorporated, and by Edward J. Phalen against the steam tug Port Johnson Towing Co. No. 7. Decrees for libelants.

Foley & Martin, of New York City, for libelants.
Carpenter & Park, of New York City, for claimant.

CHATFIELD, District Judge. On December 2, 1914, the records show the day to have been cloudy and without much wind, with more or less fog until 4:15 p. m. Rain began about 6:10 p. m., while the fog and light rain lasted until 10 o'clock in the evening. From 4:15 to 6:10 a condition of dense fog, in spots or localities, was reported all over the city. The towboat *Nellie Tracy* left Staten Island about 2 p. m. with a fleet of 12 loaded coal boats upon two hawsers 25 fathoms in length. The first two tiers consisted of 4 boats each. Another tug, the *Walter Tracy*, whose captain was generally in charge of the work, brought the tow part way across the harbor, when the *Nellie Tracy*, which in the meantime had procured coal, took up the towing, and the *Walter Tracy* took one of the barges from the third tier and ran ahead, so as to land it at Pier 5 in the East River. The *Walter Tracy* arrived at Pier 5 a little after 5 p. m., when another tugboat, the *Reichert*, was off Pier 6. Both boats heard alarm whistles from the *Nellie Tracy*, then somewhere off the upper end of Governor's Island in the Buttermilk Channel.

The witnesses upon the Walter Tracy and the Reichert testify that at this distance, some 2,500 feet, they could see the lights of the tow, and that it was misty and hazy, but that the fog was not dense. The captain of the Nellie Tracy testified that he could see some lights upon the New York shore and the lights upon both Governor's Island and the Brooklyn shore, and that he saw a boat, later proving to be the Port Johnson Towing Co. No. 7, about 700 feet away, nearly midway between Governor's Island and the ferry slips on the Manhattan shore, and headed upon a course a little east of south, which would take it astern of the Nellie Tracy, but not so as to clear the tow. The captain of the Tracy minimizes the fog conditions which were present, and also states that the No. 7 was abaft his port beam; but upon locating the positions upon the chart and upon giving further explanation, he has shown that the No. 7 was in fact some distance ahead of the Tracy, but several hundred feet to port at the time.

The captain of the Tracy had been blowing fog whistles at intervals, as was necessary, but at the time says he gave no fog whistles, as he could see the lights and the No. 7. Instead of fog whistles, he shortly after blew an alarm whistle and slowed down his tow. These are the alarm whistles which evidently were heard by the boats up around Pier 5. At about the same time a city ferryboat, headed for the Hamilton avenue slip in Brooklyn, had run across the East River close to the Atlantic avenue ferry slips, and in thick fog was starting to work down the Brooklyn shore. This ferryboat was on a trip which was scheduled to leave New York at 5:15 p. m. Just off the Atlantic Ferry slip it nearly came into collision with a tugboat, the Catherine Moran, which had left the Erie Depot in Jersey City at 5:10 p. m. and had thus proceeded a little over two miles when, without seeing the Hamilton avenue ferryboat and intending to make the south side of the Atlantic avenue ferry, the captain of the Moran found himself almost in collision with the ferryboat and at a point where he subsequently ran in upon the north side of the Atlantic ferry. The captains of the ferryboat and of the Moran fix this occurrence at between 5:25 and 5:30 p. m., and the captain of the Moran saw nothing of the Tracy or her tow. The captain of the ferryboat, however, proceeding immediately thereafter, passed a boat which was proceeding up the Buttermilk Channel with a tow, which he recognized as the Nellie Tracy from her peculiar whistle, just as the ferryboat was off Baltic street. This would be substantially the place fixed as that of the collision, and as the Nellie Tracy, after the collision, proceeded on up the river, it would appear that the ferryboat went by the Tracy and her tow, either just before or just after the collision itself, and at a time when the Tracy was blowing signals.

It may be assumed that on a December evening, between 5 and 6 o'clock, with such conditions of rain and fog, darkness would increase rapidly, and that dense fog might affect the ferryboat close in by the Brooklyn shore, more than the boats which were a little further out in the stream. But there can be no question that the conditions were such that care in navigation was necessary, and that fog signals were required wherever the thick dense fog settled over a limited area

or enveloped a moving boat. All of the captains testify that in the Hudson river lights could be seen a considerable distance, and it was not until they approached or rounded the Battery that difficulty was experienced.

The No. 7 left Gansevoort street, New York, according to her captain, at 5:10 p. m. At that time the fog was light, so that he could see across the Hudson River. He therefore left the captain of the other watch in charge of the boat and went to supper, coming out from the supper room just as the No. 7 came in collision with the Tracy's tow. He testifies that the boat reached the Battery at 5:25 p. m.; his engineer fixes the time of starting at least 10 minutes earlier, and there may have been a difference in clocks upon the boat. But the captain, as they rounded the Battery, realized that the No. 7 was blowing fog whistles every minute, and he also heard the Tracy's fog whistles sounded, one long and two short, for two or three times, and apparently then went on deck. The collision occurred, and he then heard the Tracy blowing what he assumed were whistles to attract the attention of the men upon the barges. He had the searchlight of the No. 7 then turned upon the barges, but the fog was at that point so dense that the searchlight did not scatter it so as to give clear vision. Upon the arrival of the Walter Tracy, the No. 7 proceeded to a point just below the Hamilton ferry slip in Brooklyn, where it had been headed for the purpose of getting water.

The pilot of the No. 7 and also the deckhand, who had been called into the pilothouse and was actually handling the wheel at the time, testified that as they came around the Battery the fog was very dense, that they saw nothing of the Tracy and her tow, and that no lights could be seen in the fog at any substantial distance from the boat. In some way they appreciated the whereabouts of a Staten Island ferryboat, which was starting out and for which they waited, passing under her stern. Both of these witnesses, and also the deckhand who was on watch upon the No. 7, testify that they heard the whistles from the Tracy with a tow, but saw no lights until the alarm whistles, which were just at the time of collision, and after the No. 7 had given a signal to reverse, or had actually reversed, her engines. It appears that the No. 7 can be reversed very quickly, and has a steam steering gear, so that she can be turned quickly. She is a very large and powerful tug of but moderate speed, and when light is capable of making about 10 knots an hour. According to the testimony of her witnesses, she had been making good speed down the Hudson, but upon coming around the Battery she had been reduced, when running into the fog, to about 25 or 30 revolutions a minute, so that she was not going more than 3 miles an hour just before the collision. The blow was a severe one, as the No. 7 struck and severed the hawser leading from the port barge in the first tier of her tow, then struck that barge, and, continuing across the bow, ploughed into the second barge of the tier. The forward motion of the tow and the weight of the No. 7, combined with her headway, explains the force of the collision, and makes it unnecessary to suppose that her speed was greater than that which is testified to.

The No. 7 charges fault on the part of the Tracy in navigating in the fog with a large tow upon hawsers. The pilot and deckhand at the wheel of the No. 7 both testify that they heard the whistles of the Tracy. The captain of the No. 7 heard these whistles even when he was at supper, and thus absolves the Tracy from responsibility for failure to give whistle signals, but contradicts the captain of the Tracy, who, according to his recollection, had not found it necessary to give whistles because of the fog for some distance preceding his arrival at the point of collision. Both the captain and the helmsman upon the No. 7 testify that they heard the whistles of the Tracy broaden off upon their port side and away from their port bow, and that they assumed, for some reason or other, that the Tracy had a boat alongside, instead of upon a hawser, as they understood and appreciated the signals to mean that the Tracy was in charge of a tow. The man at the wheel testifies that just before the collision he put his helm to starboard to avoid a ferryboat coming from Brooklyn, and his testimony would indicate that this maneuver carried the No. 7 further up the river and across the course of the Tracy, when otherwise the No. 7 might have proceeded under a port helm on such a course as to pass the Tracy's tow port to port. The positions of the boats upon the chart would indicate that any appreciation on the part of the No. 7 as to the position of the Tracy and her tow would have caused the No. 7 to pass down closer to Governor's Island and astern of the tow before crossing to Brooklyn.

The Tracy charges fault on the part of the No. 7 in so navigating as to strike the tow after hearing the signals indicating the presence of the tow, when without stopping and in the fog the No. 7 kept on her course until the time of collision. If the witnesses upon the No. 7 had not heard the Tracy's signals, and if it appeared from the evidence that the Tracy had been running in the fog without giving signals, under such conditions that her lights could not be observed, then negligence on the part of the No. 7, even though she were compelled to swing to port, so as to avoid the Brooklyn ferryboat, would not be so evident. If the Tracy had not seen the No. 7, and had depended upon whistle signals in a fog, then her blowing of alarm signals and stopping would have been entirely consistent. But her witnesses testify that, having *seen* the No. 7, apparently in a position where navigation signals might have been given, the Tracy blew an alarm signal, and acted as if she were proceeding in a fog.

It seems to be necessary to hold from these conflicting statements that the Tracy was not negligent generally in proceeding with a tow of this sort under the conditions which prevailed up to the time of reaching the Buttermilk Channel, and that the conditions generally upon the river were not such as to justify an assumption that every tow would be alongside and not on hawser. At the point in question the Tracy seems to have actually run into the dense fog which was prevailing along the Brooklyn shore, and even though toward New York lights could be seen, and though the Tracy could see the No. 7, it is possible and probable that the Tracy and her tow were in more dense fog than was the No. 7.

Under these circumstances there would seem to be no negligence at all on the part of the Tracy, and if the conditions were such that navigation signals were possible, or that navigation by courses should control the boats, the No. 7 was bound to keep out of the way. If the Tracy was in a fog, then her blowing of an alarm whistle or sounding of fog whistles, which were heard by the No. 7, and which were heard even at a point where the Tracy was broadening out upon the No. 7's port side, put upon the No. 7 the obligation of stopping or at least ascertaining the position of the Tracy's tow before attempting to cross to Brooklyn. If the presence of the Brooklyn ferryboat and the density of the fog prevented the No. 7 from appreciating the nearness of the Tracy and her tow, then the fault would be that of the No. 7. Upon the entire case the fault must be held to lie with the No. 7 and not with the Tracy.

Counsel for the No. 7 have cited such cases as *The Chicago*, 146 Fed. 979, 77 C. C. A. 225, and *The Express*, 212 Fed. 673, 129 C. C. A. 208, as authority for its proposition that the Tracy and her tow should not have proceeded under such weather conditions. But the voyage in question was not undertaken when danger from the fog was evident, as was disapproved in the cases cited. Nor did a situation develop requiring the tow to stop and tie up before the No. 7 appeared. The rule established in the *City of Lowell*, 152 Fed. 593, 81 C. C. A. 583, would not have prevented the present accident, for this was not caused by the movement of the Tracy, although if the Tracy had stopped, the blow might have been less harmful. *The No. 4*, 161 Fed. 847, 88 C. C. A. 665; *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053. So, also, the rule stated in *The Bayonne*, 213 Fed. 217, 129 C. C. A. 560, requiring navigation with caution, under article 16 of the Inland Rules (Comp. St. 1913, § 7889), did not require the Tracy to do anything other than as she did do, and whether the ordinary rules of navigation, or article 16, applied, it was the No. 7 which should have used caution. *The City of New York*, 49 Fed. 956, 1 C. C. A. 483; *New York, Ontario & Western Ry. Co. v. Cornell Steamboat Co.*, 193 Fed. 380, 113 C. C. A. 306, as well as *The Express* (supra), and the case of *Howard v. Jersey Central Railroad Co.*, 221 Fed. 625, 137 C. C. A. 349, establish the rule that a boat in a tow is not bound to blow fog signals or navigation signals unless it is evident that some imminent danger is unwittingly approaching.

Upon the whole case it must be held that the fault was with the No. 7, and that no fault existed on the part of the Tracy.

In re JOSEPHSON et al.

(District Court, D. Oregon. January 3, 1916.)

No. 2661.

1. BANKRUPTCY ⇨409—DISCHARGE—DENIAL—FAILURE TO KEEP BOOKS.

Bankruptcy Act July 1, 1898, c. 541, § 14b (2), 30 Stat. 550 (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 partnership, which subsequently became bankrupt, kept no record of its business, except that afforded by cash register sales slips, and no record of its indebtedness to wholesale houses from whom they purchased stock, except by filing the invoices or bills for reference. *Held*, that the intent to conceal their true financial condition might be deduced from the facts and circumstances, and, as a man must be presumed to intend the natural consequences of his acts, it sufficiently appeared by inference that the failure to keep books was with the purpose of concealing their financial condition.

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

2. BANKRUPTCY ⇨407—DISCHARGE—DENIAL—FALSE STATEMENT TO OBTAIN CREDIT.

A partnership, which subsequently became bankrupt, on February 7, 1913, made a statement in writing to a creditor to obtain credit, in which it was stated that the liabilities of the partnership were \$20,563 and that there was a net surplus of \$33,204. Obligations aggregating \$7,150 to the wife and sister-in-law of one of the partners and certain other persons were not included, and in the schedules as filed the total indebtedness was shown to exceed \$49,000, while up to and including April 23, 1914, additional claims were filed, making the total indebtedness over \$58,000. *Held*, that the financial statement was grossly inaccurate, and it might be inferred from the facts and circumstances that the statement was made knowingly and with the view of obtaining credit through a deceitful 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—DENIAL—"FALSE" STATEMENT TO OBTAIN CREDIT.

Under Bankruptcy Act, § 14b (2), providing for the denial of a discharge where the bankrupt has obtained money or property on credit upon a materially false statement in writing made by him for the purpose of obtaining credit, the statement, to be "false," must be false with the knowledge of the party making the statement and with the view of deceiving or misleading.

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

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

4. BANKRUPTCY ⇨407—DISCHARGE—GROUNDS FOR DENIAL.

A partnership's failure to keep books of account with intent to conceal its financial condition, and a false statement in writing made by it for the purpose of obtaining credit, did not prevent a discharge of one of the partners, who was not active in the business, did not know what was being done, and was not cognizant of the making of the statement, or the manner in which the books were kept.

[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 Hannah Josephson and others, individually and as partners under the firm name of Josephsons, bankrupts. On objections to the discharge of the bankrupts. Discharge denied as to two of the partners, and granted one of the partners.

E. B. Hermann, of Roseburg, Or., for bankrupts.

A. N. Orcutt, of Roseburg, Or., and Sidney Teiser, of Portland, Or., for trustee and objecting creditors.

WOLVERTON, District Judge. This matter comes up on objections to the discharge of the bankrupts; the bankrupts consisting of Hannah Josephson, Sam S. Josephson, and Julien Josephson, doing business under the firm name of Josephsons. Specifications were filed by Pontiac Shoe Manufacturing Company, Dougherty Shoe Company, and Krausse Bros. The specifications set forth that the bankrupts obtained property on credit, through material false statements in writing made to each of the above-named firms, and to the firm of Bradshaw Bros., and that, with intent to conceal their true financial condition, the bankrupts have destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained.

The cause was referred to C. L. Hamilton, referee in bankruptcy, to hear and take the testimony and to report his findings and recommendations. This the referee has attended to, and has reported recommending that a discharge be not allowed as to each of the members of the firm. The report shows, among other things, that in the management of the firm's business Julien Josephson had charge of the correspondence, paying bills, etc., and that Sam S. Josephson had charge of the sales department, but that both were actively engaged in carrying on and transacting the business of the firm; that Hannah Josephson was not an active member of the firm, and had been absent for the greater portion of the time for the past four years prior to closing the business, and knew little of the affairs of the firm, and was not actively engaged in carrying on the business thereof.

[1] As it relates to the keeping of books, the referee makes this finding:

"That about two years previous to their closing business they discontinued doing a general credit business and went onto a cash basis, and from that time on until they filed their petition in bankruptcy the only record of the business kept was that afforded by a daily balance system, as shown by the National Cash Register sales slips. A record of their indebtedness to wholesale houses from whom they purchased stock was kept by filing the invoices or bills for reference, and prior to closing business they entered up these invoices or bills in a book, for the purpose of referring to their creditors in making up the schedules in bankruptcy, and after entering up said bills in the book they were either mislaid or destroyed."

This finding, read in connection with the evidence, shows its intentment to be that, prior to closing the business—that is, when it was found that bankruptcy was the inevitable result—they entered up these invoices, etc.; so that there was no entering up of the invoices or bills in any book during the continuance of the business. Now, the question arises whether, under Bankruptcy Act, § 14b (2), the bankrupts have, with intent to conceal their financial condition,

destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained.

The intent spoken of in this clause of the act need not be proven by absolute showing that the party, in failing to keep books, designed to conceal assets or fail to disclose the state of his business; but it may be deduced from all the facts and circumstances in the case and thus ascertained and determined. The well-established rule is often invoked in determining the intent, namely, that a man must be presumed to intend the natural consequences of his act. Now, from the findings of the referee it would appear that this firm kept absolutely no books at all, and the only record that they had for reference was the register record of cash receipts. The invoices showing the purchases were simply filed for reference, but during the course of the business, no record—book record or otherwise—was made of these bills, so that there were absolutely no books by which the condition, financial or otherwise, of the firm could be ascertained or kept; and I think the inference is so strong as to admit of no cavil that this firm failed to keep books with the purpose of covering their assets, so that they might not be definitely known to their creditors, or to those whose business it might become to look into their financial condition. This conclusion is borne out upon authority. See *In re Newbury & Dunham*, 209 Fed. 195, 126 C. C. A. 207; *In re Goldich* (D. C.) 164 Fed. 882.

[2] As it relates to the charge of obtaining money or property on credit upon a material false statement in writing, the claim that such credit was obtained from Pontiac Shoe Manufacturing Company, Dougherty Shoe Company, and Bradshaw Bros. has not been proven. But it is shown that the firm, acting through Julien Josephson, made a statement in writing to Krausse Bros., on February 7, 1913, in which they stated that their stock of merchandise on hand at the time amounted to \$33,467, and that their other personal property, real estate, and fixtures amounted to \$20,300, and that their liabilities were \$20,563, leaving a net surplus of \$33,204; that the following claims for indebtedness existing at the date of making such statement were not included therein, namely: Mrs. Vera Josephson, wife of Julien Josephson, \$1,500; Mrs. P. A. Kerr, sister-in-law of Julien Josephson, \$1,500; H. Little, \$3,000; H. Wollenberg, \$750; and Jos. Micelli, \$400—aggregating \$7,150. The referee makes this further finding:

That "in the schedules as filed the indebtedness is given as unsecured claims, \$28,786.99; secured claims, \$20,590—making a total indebtedness of \$49,376.99. In addition to the above, there has been filed and allowed, up to and including the 23d of April, 1914, additional unsecured claims amounting to \$9,597.56, making the total indebtedness \$58,974.55."

This latter finding relates to the showing made at the time of filing the schedule in the bankruptcy court, and from this finding it appears that there was a grossly incorrect statement of the financial condition of the firm made to Krausse Bros., and the question arises whether this act upon the part of the bankrupts will defeat their right of discharge. That the statement was incorrect and misleading there is no shadow of doubt, but whether it was false in the sense of the

statute is a legal question, to be determined upon a proper construction of the law.

[3] The word "false" must be construed to mean false with the knowledge of the party making the statement, and further with the view of deceiving or misleading. Such a construction has been given to it by the Circuit Court of Appeals for the Third Circuit. *Gilpin v. Merchants' Nat. Bank*, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023. See, also, *In re Arenson* (D. C.) 195 Fed. 609, 612. But in this case, as in the previous, where the party has failed to keep books with intent to conceal, etc., the intent may be deduced from all the facts and circumstances attending the transactions; and, so applying the law, I am convinced that the statement to Krausse Bros. was made knowingly, and with the view of obtaining credit through a deceitful statement made.

[4] I am therefore impelled to affirm the finding and recommendation of the referee as it relates to the partners Julien Josephson and Sam S. Josephson; but as Hannah Josephson was not active in the business, and knew nothing of what was being done, and especially was not cognizant of the making of the false statement or the manner in which the books were kept, she should be granted her discharge, and such will be the order of the court.

UNITED STATES v. KING et al.

(District Court, D. Massachusetts. October 23, 1915.)

No. 953.

1. MONOPOLIES ⇨31—CRIMINAL PROSECUTIONS—SUFFICIENCY OF INDICTMENT.

An indictment alleged that defendants entered into a conspiracy that they should appoint an executive committee, that the executive committee should constitute a listing committee, that the listing committee should cause a list of undesirable persons to be prepared and published, and that defendants should thereafter refuse to have any further business dealings with such blacklisted persons, that the defendants did appoint a listing committee, that in pursuance of the conspiracy and to effect its object the committee blacklisted a person named, and defendants refused to deal with him, thereby restraining him from carrying on interstate trade. *Held*, that this sufficiently alleged that the conspiracy was actually entered upon and engaged in, and the use of the word "should" did not render it insufficient in this respect.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⇨31.]

2. INDICTMENT AND INFORMATION ⇨125—MONOPOLIES—CRIMINAL PROSECUTIONS—DUPLICITY.

Such indictment was not bad for duplicity, as charging both a conspiracy in restraint of trade and an actual restraint of trade, as the overt acts described were alleged in support of the charge of conspiracy, and not as separate crimes.

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

3. INDICTMENT AND INFORMATION ⇨86—REQUISITES AND SUFFICIENCY—ALLEGATIONS AS TO VENUE.

An indictment for a conspiracy in restraint of trade alleged that at Boston, in the district of Massachusetts, the defendants therein named

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

unlawfully, etc., entered into a conspiracy therein described, and that, in pursuance of such conspiracy and to effect its object, they did certain acts. *Held* that this sufficiently alleged a crime committed by each of the defendants within the district of Massachusetts.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 230-243; Dec. Dig. Ⓒ86.]

4. MONOPOLIES Ⓒ31—CRIMINAL PROSECUTIONS—SUFFICIENCY OF INDICTMENT.

Interstate shippers of an especially desirable variety of potato formed a shippers' association, the members of which made 75 per cent. of all interstate shipments of such potatoes. The association acted through a committee, which was authorized to determine whether any person producing, receiving, or dealing in such potatoes was undesirable. Persons adjudged undesirable were put on a black list, which was circulated among the members, who were forbidden under a penalty from having any business dealings with blacklisted persons. The black list was also circulated among nonmembers, dealing in potatoes as buyers, sellers, commission merchants, or otherwise, and such nonmembers were notified that, unless they ceased dealing with blacklisted persons they would be blacklisted, and members of the association would no longer deal with them. An indictment for a conspiracy in restraint of trade did not state the object of the association or the reasons for which persons were blacklisted. *Held*, that on demurrer it must be assumed that these reasons were legitimate, and hence the indictment did not show that defendants were not within their rights in forming the association, blacklisting persons, and agreeing that the members would not deal with such blacklisted persons, but that in going outside its own membership and attempting to coerce nonmembers from dealing with those blacklisted it was an illegal conspiracy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. Ⓒ31.]

5. MONOPOLIES Ⓒ17—COMBINATIONS PROHIBITED—BOYCOTTS—SECONDARY BOYCOTTS.

Where it was intended to restrain the trade of the blacklisted persons, the "secondary boycott," or attempt of the members of the association to coerce nonmembers into refraining from dealing with blacklisted persons, was illegal under the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1913, §§ 8820-8830]), regardless of defendants' purpose or motive as no purpose or motive could make such action justifiable or such restraint legal.

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

6. MONOPOLIES Ⓒ31—CRIMINAL PROSECUTIONS—SUFFICIENCY OF INDICTMENT.

Where an indictment against the members of a potato shippers' association, the members of which controlled 75 per cent. of an especially desirable variety of potatoes, for conspiracy in restraint of trade, alleged that persons engaged in buying, selling, or dealing in such potatoes could not obtain sufficient quantities to meet their legitimate demands unless potatoes were supplied to them by such members, it sufficiently appeared that it was intended to restrain the trade of persons blacklisted by the association, as the refusal to do business with them would restrain their trade, and the intent must be presumed from the act itself.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. Ⓒ31.]

Carl C. King and others were indicted for a conspiracy in restraint of trade. On demurrer to the indictment. Demurrer overruled.

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

George W. Anderson, U. S. Atty., and Leo A. Rogers, Asst. U. S. Atty., both of Boston, Mass.

Herbert Parker, of Boston, Mass., for defendants.

MORTON, District Judge. This is an indictment for a conspiracy in restraint of trade under the Sherman Act. The defendants have demurred, and have assigned many causes of demurrer, which fall into two groups, viz. those which relate to the language of the indictment, and those which relate to its subject-matter.

[1] As to the objections based on the alleged insufficiency or inaccuracy of the language:

The defendants contend that the indictment does not allege that a conspiracy was actually entered upon and engaged in. This argument is based principally upon the use of the word "should" in that part of the indictment which undertakes to describe the conspiracy. It alleges that the defendants unlawfully and knowingly entered into a conspiracy in unreasonable restraint of trade, which conspiracy was, in substance, that the defendants "should appoint" an executive committee, that such executive committee "should constitute" a listing committee, that said listing committee "should cause" a list of undesirable receivers to be prepared and published, that all the members of the association "should thereafter refuse to have any further business dealings" with the blacklisted persons, etc. The indictment then goes on to allege that the defendants constituted said listing committee, and, "in pursuance of said conspiracy and to effect the object thereof," did blacklist one McLatchy, and that the remaining members of the association refused to deal with him, thereby restraining him from carrying on interstate trade.

It is thus explicitly alleged that the defendants engaged in a conspiracy that they should do certain things, and that they did certain acts in carrying it out. An agreement is not infrequently stated in the form, "It was agreed that the parties should do," etc. Such language means, as I understand it, that the agreement was actually made. The indictment is to be taken as a whole, and in the fair meaning of the words used; so considered, it sufficiently charges that the defendants entered into the conspiracy which is described. To apply the test suggested in the defendants' brief, it seems to me plain from the indictment "that the combination or agreement between the alleged conspirators had developed from the mere contemplation of a tentative plan into a definite, initiated, operative course of action."

[2] The defendants also contend, rather inconsistently, perhaps, that the indictment is bad for duplicity, because it charges both a conspiracy in restraint of trade and an actual restraint of trade. It is, however, clear that what the indictment charges is a conspiracy, and that the overt acts described in it are alleged in support of that charge, and not as separate crimes.

[3] In the case of Doyle, it is further argued that the indictment does not allege any criminal act committed by him in this district. It does, however, explicitly state that, "at Boston, in said district of Massachusetts, said defendants [i. e., King, Hovey, Powers, Doyle, and

Sylvester] unlawfully, knowingly, and feloniously entered into a conspiracy with each other," etc. This, in connection with the rest of the indictment, sufficiently alleges a crime committed by Doyle in this district.

Coming to the substance of the charge, the indictment, as I construe it, describes the following business situation:

[4] An especially desirable variety of potato is grown in Maine, which is well known under the name of Aroostook county potatoes. There is an extensive interstate trade in them. Persons interested in that trade formed an association called the Aroostook Potato Shippers' Association. Seventy-five per cent. of all interstate shipments from Maine of Aroostook county potatoes were made by members of this association. It acted through a committee. The committee was authorized to determine whether any given person who carried on the business of producing, receiving, or dealing in such potatoes was "undesirable." The basis upon which this determination was to be made does not appear. The persons adjudged "undesirable" were thereupon put on a black list. This black list was circulated among the members of the association, and they were forbidden by its by-laws, under a penalty, from having any business dealings with a blacklisted person. The black list was also circulated among persons dealing in potatoes, either as buyers, sellers, commission merchants, or otherwise, who were not members of the association; and such persons were notified that, unless they ceased dealing with the blacklisted person, members of the association would not longer deal with them, and they themselves would be blacklisted. Is such an association legal under the Sherman Act?

Persons have a right to associate for the purpose of advancing their own interests by discriminating against other persons, if such discrimination is based upon proper and legal grounds, e. g., failure to pay bills due to members of the association (*Brewster v. Miller*, 101 Ky. 368, 41 S. W. 301, 38 L. R. A. 505), and is not merely coercive and arbitrary, as in *Martell v. White*, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; nor for the purpose of restraining interstate trade, as in *Eastern States Lumber Association v. U. S.*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788.

The object of the Aroostook Association is nowhere described in the indictment; and there is no allegation of any purpose or intent by its members or by the defendants to restrain trade. The reasons for which it blacklisted persons are not stated; they do not appear to have related to the sale or purchase of commodities or to interstate commerce; they may have been, and on this demurrer must be assumed to have been, legitimate. It does not appear that the defendants were not within their rights in the formation of their association, in giving its officers the right to blacklist, and in agreeing that members would not deal with blacklisted persons. Up to a certain point, the situation described is not legally different from that which arises when the executive officers of a labor union declare a strike against a certain employer to obtain shorter hours, higher wages, or some

other legitimate end. A strike is merely an agreement by all the members of the union not to do business with that employer.

[5, 6] But the defendants' association did not confine its activities to its own members and their relations to such persons as from time to time might be placed upon its black list. It went further, and contemplated that the black list, made by its executive committee, should be circulated among nonmembers as well as members, and that outsiders should be notified that they, too, must refrain from doing business with the persons who had been blacklisted by the association, or they, too, would be blacklisted. This was referred to in argument as "a secondary boycott." If done with the intent to restrain trade with the victim and thereby to coerce him, it is exactly what was outlawed by the Supreme Court in the Danbury Hatters' Case, *Lawlor v. Loewe*, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341. If an intent to restrain trade is apparent from the indictment, it need not be explicitly alleged. This was decided in *U. S. v. Patten*, 226 U. S. 525, 543, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325. When an association controlling 75 per cent. of a certain commodity refuses to do business with any given dealer in it, its action so clearly and naturally restrains his trade that an intent to do so must, I think, be presumed from the act itself. In this case it is explicitly alleged that persons engaged in the business of buying, selling, or dealing in Aroostook county potatoes could not obtain sufficient quantities of such potatoes "to meet the legitimate demands of their several businesses unless in some part Aroostook county potatoes are supplied to them by the persons, aforesaid members of the Aroostook Potato Shippers' Association." The indictment thus alleges a conspiracy in restraint of trade of such character as to warrant an imputation of an intent to accomplish that result.

The final question is whether the restraint appears to have been unreasonable or illegal. As before stated, the indictment is wholly silent as to the grounds upon which the blacklisting was done, or the purpose of it. If a secondary boycott is ever legal, it must be assumed to have been so in this instance; but I think it never is. In *Pickett v. Walsh*, 192 Mass. 572, at page 588, 78 N. E. 753, at page 760 [6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638], it was held that "organized labor's right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute"; and in *Plant v. Woods*, 176 Mass. 492, at page 502, 57 N. E. 1011, at page 1015 [51 L. R. A. 339, 79 Am. St. Rep. 330], it was said: "The defendants might make such lawful rules as they pleased for the regulation of their own conduct, but they had no right to force other persons to join them." See, too, *Cornellier v. Haverhill Shoe Manufacturers' Association*, 221 Mass. 554, 109 N. E. 643 (Supreme Judicial Court, Massachusetts, September, 1915).

Under the Sherman Act the right of combination is certainly not greater than at common law.

"In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had re-

ported a wrong to himself, which grievance, when brought to the attention of others, it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act, and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in *Loewe v. Lawlor*, supra.

"The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe Co. v. United States*, 175 U. S. 211, 241, 242 [20 Sup. Ct. 96, 44 L. Ed. 136]."

Day, J., Eastern States Lumber Association v. U. S., 234 U. S. 600, at 612, 34 Sup. Ct. 951, at 954 [58 L. Ed. 1490, L. R. A. 1915A, 788].

The association may have had the right to blacklist persons for legal and sufficient causes and objects, and to compel its members to refrain from dealing with them. But it had no right to endeavor to enforce its judgments by insisting that outsiders also obey them or else be blacklisted. No purpose or motive could make such action justifiable or such restraint legal. It follows that the restraint of trade described in the indictment was of an illegal character

Demurrer overruled.

LAUGHTER & FISHER v. McLAIN, Fire and Police Com'r, et al.

(District Court, W. D. Tennessee, W. D. January 22, 1916.)

No. 714.

1. EVIDENCE ⚡29—JUDICIAL NOTICE—STATUTES.

The United States District Court for the Western District of Tennessee takes judicial notice of the laws of Tennessee establishing public schools.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 36, 37, 39, 43-46, 48; Dec. Dig. ⚡29.]

2. EVIDENCE ⚡10—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.

The court will take judicial notice that there are several schoolhouses, both public and private, wherein school is kept, within four miles of a particular place of business in the city of Memphis.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 9-14; Dec. Dig. ⚡10.]

3. COMMERCE ⚡8—INTERSTATE COMMERCE—OPERATION OF STATE LAWS.

The Wilson Law (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [Comp. St. 1913, § 8738]) provides that intoxicating liquors transported into any state, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival therein be subject to the operation and effect of the laws of the state enacted in the exercise of its police powers, to the same extent as though such liquors had been produced in such state. The Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. 1913, § 8739]), entitled "An act divesting intoxicating liquors of their interstate character in certain cases," prohibits the shipment or transportation of intoxicating liquors from one state or territory to another state or territory which are intended by any person interested therein to be received, possessed, sold, or used in violation of any law of such state or territory. Acts Tenn. 1909, c. 1, § 1, makes it unlawful to sell intoxicat-

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

ing liquors as a beverage within four miles of any schoolhouse where school is kept. Plaintiff was receiving intoxicating liquors from other states at its place of business in Memphis, and reselling them at such place of business to purchasers residing in other states directly or by mail, telegraph, or telephone. *Held*, that this business was not protected by the federal Constitution or laws relating to interstate commerce, but was subject to the laws of the state enacted in the exercise of its police powers, as though Congress had never been granted or exercised the power to regulate interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ¶ 5.]

In Equity. Suit by Laughter & Fisher against W. T. McLain, Fire & Police Commissioner of the City of Memphis, and another. Stay vacated, and temporary injunction denied.

Frank S. Elgin and A. B. Galloway, both of Memphis, Tenn., for plaintiffs.

Chas. M. Bryan, of Memphis, Tenn., for defendants.

McCALL, District Judge. This case is before me upon the original and amended bills, filed by Laughter & Fisher against W. T. McLain, fire and police commissioner, and O. H. Perry, chief of police, of the city of Memphis, Tenn., and the answer to the bill. The relief prayed for is that an injunction issue, restraining the defendants from interfering with or obstructing the interstate shipping business of the petitioners, and from in any other way or manner interfering, molesting, or otherwise disturbing the petitioners in the conduct of their business, and for general relief.

It appears from the bill that the plaintiffs have procured from the government the proper internal revenue tax stamps, as required by law, as wholesale and retail liquor dealers, doing business at No. 520 South Main street, Memphis, Tenn., and are engaged in the interstate shipment of intoxicating liquors, and that they have complied with all the regulations and requirements of the United States, especially in reference to the interstate sale and shipment of liquors, that their business is exclusively interstate commerce, and that they are not engaged in the sale, or offering for sale, liquors or intoxicating beverages within the city of Memphis, state of Tennessee.

Notwithstanding these facts, it is alleged that the defendants, as officers of the city of Memphis, have forcibly and without authority closed and fastened the doors of the plaintiff's place of business, and have refused to allow said doors to be opened, or for plaintiffs to remain in their place of business, or in any way or manner operate any kind or character of business, in connection with their interstate shipment of liquors.

The answer of the defendants denies that they have attempted to interfere with the plaintiffs, in carrying on business in interstate commerce, and deny that the plaintiff is so solely engaged. Section 1, chapter 1, Acts of the Legislature of Tennessee of 1909, provides:

"That it shall not hereafter be lawful for any person to sell or tittle * * * intoxicating liquors, including wine, ale, and beer, as a beverage, within four miles of any schoolhouse, public or private, where a school is kept, whether the school be then in session or not, in this state, and that any

one violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine for each offense of not less than fifty dollars nor more than five hundred dollars and imprisonment for a period of not less than thirty days nor more than six months."

[1, 2] The court takes judicial notice of the laws of Tennessee, establishing public schools, and also of the fact that within four miles of the plaintiff's place of business at No. 520 South Main street in Memphis, there are several schoolhouses, both public and private, wherein schools are kept. Hence it follows that if the plaintiffs are selling, and conducting the business of dealing in, intoxicating liquors at their said place of business, they are doing so in violation of the law of Tennessee, and are subject to the penalty of that law, unless they are protected therefrom by virtue of the interstate commerce clause of the federal Constitution.

[3] This bill is filed upon the theory that the plaintiffs, being engaged in interstate commerce, are entitled to the protection guaranteed to them under article 1, section 8, clause 3, of the Constitution of the United States, and the acts of Congress pursuant thereto, it being alleged in the bill that they sell only in interstate commerce and in the original package, and to support this contention, reliance is had on *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, and subsequent holdings of the Supreme Court of the United States, in line therewith.

Assuming that plaintiff's contention would be sound, nothing else appearing, we are confronted with the Act of Congress of March 1, 1913, chapter 90, volume 37, Statutes at Large, part 1, page 699, known as the Webb-Kenyon Act, and entitled "An act divesting intoxicating liquors of their interstate character, in certain cases." It is therein provided that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind, from one state, territory, etc., into another state, territory, etc., which said spirituous, vinous, malted, fermented, or other liquors is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, or territory, etc., is prohibited.

Conceding that prior to this act intoxicating liquors could be shipped into Tennessee, and here resold in interstate commerce, under the commerce clause of the Constitution, and the rulings made thereunder, by the Supreme Court of the United States, the question arises, can such business be legally conducted, in a state wherein it is a violation of law to sell the articles of commerce mentioned in the Webb-Kenyon Act, the purpose of the said act, as stated in the caption being, "An act divesting intoxicating liquors of their interstate character in certain cases."

The cases mentioned in the act, wherein intoxicating liquors are divested of their interstate character, is shipping it into a state wherein it is a violation of the law of such state to receive, possess, sell, or in any manner use said articles.

We have seen that the plaintiffs state in their bills that they re-

ceived intoxicating liquors, for the purpose of reselling them in interstate commerce, but if such intoxicating liquors have been divested of their interstate character, by the Webb-Kenyon Act, how is it possible for the plaintiffs to successfully invoke the protection of the interstate commerce clause of the Constitution?

In the Act of Congress of August 8, 1890, chapter 728, 26 Statutes at Large, 313, known as the Wilson Law, it is provided:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Thus it appears from the Webb-Kenyon Act, *supra*, that intoxicating liquors are divested of their interstate character, if it be intended to use them in any manner in violation of any law of the state, and the shipment of articles mentioned therein into Tennessee with such intent, is prohibited. From the Wilson Law, it appears that when such articles are shipped into Tennessee, they are subject to the protection and effect of the laws of Tennessee. In *re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572. Hence we conclude that the stock of intoxicating liquors in the place of business of the plaintiffs in Memphis, Tenn., was divested of its interstate character when shipped into Tennessee in violation of law, and it was here subject to be dealt with under the laws of the state enacted in the exercise of its police powers, with the same force and effect as though the power to regulate commerce among the several states had never been granted to Congress, or as though Congress had never undertaken to regulate commerce among the states by legislation.

From this it would seem to follow that intoxicating liquors originating outside of this state, and placed in interstate shipment, destined to a point within this state, are subject to the laws of Tennessee from the time they cross the state line hitherward, until they shall have been transported outside the boundaries of the state, provided such intoxicating liquors are destined to a point in Tennessee, with the intention of any person interested therein that they were to be received, possessed, sold, or used in any manner in violation of the laws of Tennessee. *State of West Virginia v. Adams Express Company*, 219 Fed. 794, 135 C. C. A. 464, and cases there cited. *Adams Express Co. v. Kentucky*, 238 U. S. 190, 35 Sup. Ct. 824, 59 L. Ed. 1267, Ann. Cas. 1915D, 1167, decided Jan. 14, 1915.

Since it clearly appears that the plaintiffs had received and possessed intoxicating liquors in Memphis, and were not only offering but were engaged in selling them at their place of business, to purchasers residing in other states, directly, or by money orders received through the mails, or by telegraph or telephone orders, we are of the opinion, for the reasons stated, that they are not protected by the federal Constitution, and laws of Congress relating to interstate commerce.

It was insisted for the plaintiffs that the character of sales made by

them is ruled by the case of *State v. Kelly*, 123 Tenn. 560, 133 S. W. 1011, 36 L. R. A. (N. S.) 171, and this insistence seemed to have been acquiesced in by counsel for the defendants. In that case the court held that although the sale of intoxicating liquors was made by Kelly at Chattanooga, Tenn., to certain New York purchasers, it was made upon an order received by him through the United States mails, and hence was a sale in interstate commerce, for making which, therefore, Kelly was not amenable to the laws of Tennessee. It is only necessary to say that the Kelly Case was decided more than two years prior to the passage of the Webb-Kenyon Act, and at a time, therefore, when intoxicating liquors in Tennessee possessed all the attributes of an article of interstate commerce.

There being no federal question involved, and it appearing that plaintiffs and defendants are all citizens of Tennessee, this court is without jurisdiction to grant the injunctive relief prayed for.

An order will be entered vacating the stay order heretofore made and denying the temporary injunction prayed for.

AMERICAN SUGAR REFINING CO. v. McFARLAND et al.

(District Court, E. D. Louisiana. January 17, 1916.)

No. 15285.

1. CONSTITUTIONAL LAW ⇨240—**MONOPOLIES** ⇨10—**EQUAL PROTECTION OF THE LAWS—CLASSIFICATION.**

Act La. No. 10 of 1915, regulating the business of refining sugar, provides that any person engaged in the business of refining sugar within the state, who shall systematically pay in Louisiana a less price for sugar than he pays in any other state, shall be prima facie presumed to be a party to a monopoly or combination in restraint of trade or commerce, and upon conviction thereof subject to a fine of \$500 a day for the period during which he is adjudged to have done so, and that the business of refining sugar within the meaning of that act is thereby defined to be that of any concern that buys or refines raw or other sugar exclusively, or that refines raw or other sugar from sugar taken on toll, or that buys and refines more raw or other sugar than the aggregate of the sugar produced by it from cane grown and purchased by it. *Held*, that the discrimination between the sugar refiners to which it applies and buyers of sugar not engaged in refining, or refiners of sugar not engaged in refining in Louisiana, or not buying or refining more sugar than the aggregate of that produced from cane grown and purchased by them, or not buying sugar in any other state, is such a denial of the equal protection of the laws to the refiners to which it applies as to render the statute invalid and unenforceable, as it makes the fact of one's ownership of property in Louisiana the test of criminality, and makes an arbitrary selection of the parties who shall be subjected to its penal provisions, without regard to any difference between their delinquency and that of others.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 692, 693, 697-699; Dec. Dig. ⇨240; Monopolies, Cent. Dig. § 9; Dec. Dig. ⇨10.]

2. INJUNCTION ⇨105—**SUBJECTS OF RELIEF—ENJOINING ENFORCEMENT OF STATUTE.**

A sugar refining company, within the class to which Act La. No. 10 of 1915, regulating the business of sugar refining, applies, is entitled to injunctive relief against the enforcement of such statute.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. ⇨105.]

3. INJUNCTION ⇨21—GROUNDS FOR DENIAL—COMING INTO COURT WITH UNCLEAN HANDS.

That a sugar refining company, seeking injunctive relief against the enforcement of a statute regulating the business of buying and refining sugar, and arbitrarily discriminating between parties engaged in such business, has in the past been guilty of alleged harmful and lawless practices in the conduct of its business, is not ground for denying injunctive relief, as such relief will not protect it from the consequences of any past misconduct, or enable it in the future to do anything which it has not a right to do.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 19; Dec. Dig. ⇨21.]

In Equity. Suit by the American Sugar Refining Company against William N. McFarland and others. On application by complainant for an interlocutory injunction. Injunction granted.

This cause came on to be heard on the application of complainant for an interlocutory injunction during the pendency of the suit at this term and was argued by counsel, and thereupon, upon consideration thereof, and for the written reasons on file, it is ordered, adjudged, and decreed as follows, viz.: That the defendants, and each of them, be and they are hereby enjoined and restrained, during the pendency of this suit and until a final decree herein, from enforcing or attempting to enforce, or causing to be enforced or attempted to be enforced, against the American Sugar Refining Company, the complainant herein, the provisions of Act No. 10 of the Extraordinary Session of the General Assembly of Louisiana of 1915, and any and all regulations which may be formulated or promulgated thereunder. Done and signed at New Orleans, this 17th day of January, 1916.

Joseph W. Carroll, George Denegre, and Hugh C. Cage, all of New Orleans, La., and James M. Beck, of New York City, for complainant.
Ruffin G. Pleasant, Atty. Gen., of Louisiana, and Donelson Caffery, of New Orleans, La., for defendants.

Before WALKER, Circuit Judge, and NEWMAN and FOSTER, District Judges.

PER CURIAM. [1] This suit brings into question the validity of an act of the Legislature of Louisiana, approved June 10, 1915, which purports to regulate the business of refining sugar and to prohibit certain irregularities and practices in that business.

"Unless the Legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency this statute cannot be sustained. * * * Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." *Gulf, Colorado & Santa Fé Railway v. Ellis*, 165 U. S. 150, 159, 17 Sup. Ct. 255, 258 (41 L. Ed. 666).

"A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different

thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates." *Connolly v. Union Sewer Pipe Company*, 184 U. S. 562, 22 Sup. Ct. 431, 46 L. Ed. 679.

As to what constitutes arbitrary selection, as distinguished from legal classification, see, also, *Watson v. Maryland*, 218 U. S. 173, 30 Sup. Ct. 644, 54 L. Ed. 987. That the statute in question is a case of arbitrary selection of those who are sought to be made the victims of the penalties it prescribes, in the absence of any "fair reason for the law that would not require with equal force its extension to others whom it leaves untouched," we think is demonstrated by a statement of its methods of selecting those engaged in the sugar trade who are to be subject to its provisions, and of distinguishing them from others engaged in the same business whom it leaves untouched. A prime object of the statute, plainly disclosed by its provisions, is to prevent only particularly described persons or corporations engaged in the business of refining sugar in Louisiana from systematically paying in Louisiana a less price for sugar than they pay in other states, and to force them into the practice of paying as much for sugar bought by them in that state as they pay in any other state, by subjecting their refineries to seizure and sale if they discontinue the purchase of sugar in Louisiana in the way contemplated by the act. The statute provides:

"That any person engaged in the business of refining sugar within this state who shall systematically pay in Louisiana a less price for sugar than he pays in any other state shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine of five hundred dollars a day for the period during which he is adjudged to have done so." Act La. No. 10 of 1915, § 7.

This provision is the heart of the statute. Other provisions are but means for enforcing the requirement of this one. If this provision is stricken out, the statute is practically inoperative. Another section of the statute provides that:

"The business of refining sugar within the meaning of this act is hereby defined to be that of any concern that buys or refines raw or other sugar exclusively, or that refines raw or other sugar from sugar taken on toll, or that buys and refines more raw or other sugar than the aggregate of the sugar produced by it from cane grown and purchased by it."

This exempts from the operation of the act any one engaged in the purchase of sugar, though he is also engaged in the business of refining sugar, if he does not carry on that business in Louisiana, and exempts him, though he may carry on that business in Louisiana, if in doing so he does not buy and refine more raw or other sugar than the aggregate of the sugar produced by him from cane grown and purchased by him. One engaged in Louisiana in the business of sugar refining, as defined by the statute, may, if he does not buy sugar in any other state, systematically pay in Louisiana a less price for sugar than

any one else pays in any other state, without subjecting himself to the adverse prima facie presumption and penalties prescribed by the act. One engaged in the business of purchasing sugar, if he is not also engaged in the business of refining, may, without violating the act, systematically pay in Louisiana a less price for sugar than he pays in any other state. One who is engaged in the sugar refining business anywhere else in the world, except in the state of Louisiana, may, without subjecting himself to any of the penal consequences provided for by the act, systematically pay in Louisiana a less price for sugar than he pays in any other state. We cannot conceive of any fair reason for exempting such a person from the operation of the act, and at the same time subjecting to its penal provisions one whose situation and conduct are exactly the same in every particular, except that his refinery is located in Louisiana, while the exempt person's refinery is located elsewhere. The result is to make the fact of one's ownership of property in Louisiana the test of the criminality of his conduct in buying a commodity in that state. We take it that a purpose of the statute was to prevent a practice resulting in the undue depreciation of the price of a commodity of the state. But the statute undertakes to prevent such a practice only in the case of certain buyers, leaving beyond the reach of the prohibition other buyers whose practices may be identical and equally harmful in their tendencies. A discrimination between two buyers of a commodity of a state, which results in imputing criminality to the conduct of one of them in making his purchases if he owns property or carries on another business in the state, while exactly the same conduct of another is left free of such an imputation, though he owns the same kind of property or is engaged in the same business, but not in the same place, is not based on any difference between the conduct of the one and that of the other. Those who are attempted to be subjected to the penal provisions of the act are determined by an arbitrary selection, wholly without regard to any difference between their delinquency and that of others whom the statute leaves untouched. This is such a denial of the equal protection of the law as renders the statute invalid and unenforceable.

[2] The case is one warranting relief by injunction. *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.

[3] The suggestion has been made that, even though the statute in question is an invalid one, a court of equity should not stay the enforcement of it against the plaintiff, because it comes into court with unclean hands, in that in its conduct of the business in which it is engaged it has been guilty of harmful and lawless practices. As the granting of the relief sought cannot be made the means of protecting the plaintiff from the consequences of any misconduct of which it may have been guilty, or of enabling it in the future to do anything which it has not a right to do, we are not of opinion that the doors of a court of equity properly may be closed to the plaintiff because of some former delinquency on its part with reference to which the aid of the court is not asked or given. The wrong of a plaintiff which may be invoked to defeat his claim to equitable relief must have an imme-

diate and necessary relation to the equity for the enforcement of which he prays. *Talbot v. Independent Order of Owls*, 220 Fed. 660, 136 C. C. A. 268.

The conclusion is that an interlocutory injunction should issue as prayed for; and it is so ordered.

UNITED STATES v. CURTIS.

(District Court, N. D. New York. February 7, 1916.)

1. POISONS ⤷4—CRIMINAL OFFENSES—SALES BY DEALERS.

Harrison Narcotic Law (Act Dec. 17, 1914, c. 1) § 2, 38 Stat. 785, provides, relative to opium or coca leaves, or any compound or preparation thereof, that it shall be unlawful to sell any of such drugs, except in pursuance of a written order of the person to whom the article is sold, but that nothing contained therein shall apply to the distribution of any such drugs to a patient by a physician registered thereunder in the course of his practice, provided that such physician shall keep a record of all such drugs dispensed, nor to the sale of any of such drugs by a dealer to a consumer under a written prescription issued by a physician registered thereunder. *Held*, that a physician who issues a prescription for an unusually large amount of the drugs, which prescription shows on its face that the quantity prescribed is unreasonable and unusual, or a dealer who fills such a prescription or order issued by a physician, is guilty of an offense, unless the prescription indicates the necessity for such an unusual quantity.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 2; Dec. Dig. ⤷4.]

2. POISONS ⤷4—CRIMINAL OFFENSES—SALES BY DEALERS.

Under Harrison Narcotic Law, § 6, providing that the provisions of that act shall not apply to the sale of preparations and remedies not containing more than two grains of opium, provided they are sold as medicines and not to evade the intent of that act, the sale or dispensing of large and unusual quantities of the drugs, unaccompanied by explanation as to the necessity therefor, is the sale and dispensing thereof for the very purpose of evading the intent of the act, and unlawful.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 2; Dec. Dig. ⤷4.]

3. POISONS ⤷9—CRIMINAL PROSECUTIONS—INDICTMENT.

Harrison Narcotic Law, § 1, makes it unlawful for any person required to register thereunder to sell any of the drugs to which that act applies without having registered and paid the special tax therein provided for. Section 8 makes it unlawful for one who has not registered and paid the special tax to have in his possession or under his control any of such drugs, and provides that such possession or control shall be presumptive evidence of a violation of that section, and also of a violation of section 1. An indictment charged that in violation of section 1 defendant unlawfully sold, dispensed, and distributed morphine sulphate tablets as a dealer to a consumer. *Held*, that this was equivalent to charging that he had them in his possession, and hence an offense was charged; but, as the offenses were charged as violations of section 1, proof of registration and the payment of the special tax would be a complete defense.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. ⤷9.]

Frederick W. Curtis was indicted for alleged violations of the act of Congress approved December 17, 1914, and known as the "Harrison Narcotic Law." On demurrer to the indictment. Demurrer overruled.

Harry V. Borst, Asst. U. S. Atty., of Amsterdam, N. Y.
E. Deane Vincent, of Troy, N. Y., for defendant.

RAY, District Judge. The indictment was found and filed January 10, 1916, and contains two counts. The first count charges that Frederick W. Curtis on or about the 2d day of March, 1915, at the city of Troy, Northern district of New York, in violation of the provisions of section 1 of the act of December 17, 1914, and the acts amendatory thereof and supplemental thereto,

"did unlawfully, wrongfully, and knowingly sell, dispense, and distribute to Mrs. J. McCullough 100 quarter-grain tablets of morphine sulphate, the said morphine sulphate tablets being a compound, manufacture, salt, derivative, and preparation of opium, and which said morphine tablets were sold, dispensed, and distributed by the said Frederick W. Curtis as a dealer to a consumer under and in pursuance of a written prescription issued by a physician registered under the said act, and which said prescription did not indicate that the said morphine sulphate tablets were for the treatment of an addict or habitué to effect a cure, or for a patient suffering from an incurable or chronic disease, and which said 100 quarter-grain morphine sulphate tablets were more than was necessary to meet the immediate needs of the patient, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The second count of the indictment charges that the said defendant, at the city of Troy, in the Northern district of New York, on or about the 4th day of March, 1915, and at divers times between the said 4th day of March, 1915, and the 22d day of November, 1915, in violation of the said act, plainly referring to it,

"did unlawfully, wrongfully, and knowingly sell, dispense, and distribute 10,900 quarter-grain morphine sulphate tablets to Mrs. J. McCullough, said morphine sulphate tablets being a compound, manufacture, salt, derivative, and preparation of opium, and which said morphine sulphate tablets were sold, dispensed, and distributed by the said Frederick W. Curtis as a dealer to a consumer under and in pursuance of 109 written prescriptions issued by a physician, and which said written prescriptions were each for 100 quarter-grain morphine sulphate tablets, and which said prescriptions did not indicate that the said morphine sulphate tablets were for the treatment of an addict or habitué to effect a cure, or for a patient suffering from an incurable or chronic disease, and which said 109 prescriptions did not show a decreasing dosage or reduction of the quantity prescribed, and which said prescriptions were for a quantity more than was necessary to meet the immediate needs of a patient, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The defendant, Frederick W. Curtis, demurs to this indictment and to each count thereof on the ground:

That "the acts of defendant averred in said indictment as constituting a crime against the peace and dignity of the United States of America are not prohibited by any law of the United States of America. That the acts of defendant averred in said indictment as a crime against the peace and dignity

of the United States of America violated no law of the United States of America."

[1] The question presented, therefore, is: May a dealer in the narcotic drugs mentioned in the statute knowingly sell, dispense, and distribute on a written prescription issued by a physician duly registered under the act, at one time and under one prescription, 100 quarter-grain tablets of morphine sulphate, such prescription not indicating that the said morphine sulphate tablets are for the treatment of an addict or habitué to effect a cure, or for a patient suffering from an incurable or chronic disease; it being known to the seller that such quantity of 100 quarter-grain morphine sulphate tablets are more than are necessary to meet the immediate needs of the patient holding the prescription and to whom the tablets are sold?

If a dealer without violating the law may do this, then, to a customer holding the prescription of a physician which does not indicate that the morphine tablets are for the treatment of an addict or habitué to effect a cure, or for a patient suffering from an incurable or chronic disease, and knowing that the quantity prescribed or called for by the prescription is more than is necessary to meet the immediate needs of the patient, he may sell and deliver or dispense and distribute any amount of such drug, provided only the amount sold, dispensed, or distributed is called for by the prescription. In short, there is no limitation on the amount that may be sold, dispensed, and distributed by the dealer, provided the amount sold or distributed is called for by the prescription issued by the registered physician.

I am not impressed with the contention of the learned counsel for the defendant that this indictment does not charge the commission of an indictable offense under the provisions of the act referred to. It is quite true that the act does not prescribe or limit in terms the amount in weight or quantity of opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, which may be sold, dispensed, or distributed by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under the act. It is also true that the act does not in terms limit in weight or quantity the amount of such drugs which a physician, dentist, or veterinary surgeon registered under the act may prescribe in the course of his professional practice only. However, it is self-evident, I think, that by section 2 of the act Congress has made it an offense and 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. It is provided that nothing contained in section 2 shall apply to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act "in the course of his professional practice only," provided that the physician, etc., shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, etc. Subdi-

vision "b" of section 2 also provides that nothing contained in section 2 shall apply—

"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," etc.

It is plain, it seems to me, that it was the purpose of Congress to limit the quantity of these drugs that may be sold or dispensed by a dealer under and pursuant to a written order issued by a physician, and to limit the amount and quantity to such an amount and quantity as is or ought to be called for by a prescription issued by the physician "in the course of his professional practice only." Section 2 says in terms that nothing contained in this section shall apply:

"(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."

And then follows a proviso that the prescription shall be dated and signed and that the prescription shall be preserved, etc. Is it reasonable or probable that Congress intended that physicians may prescribe unlimited quantities and that dealers may fill such prescriptions? Section 1 of the act contains this provision:

"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."

Treasury Department regulation 2172, issued by the Treasury Department, dated March 9, 1915, and signed by David A. Gates, Acting Commissioner of Internal Revenue, and approved by W. G. McAdoo, Secretary of the Treasury, contains the following:

"Fraudulent Prescriptions.—A druggist, when receiving a prescription for any of the drugs coming within the scope of this law, should carefully scrutinize such prescription, and where he has reason to believe that the same is forged, or that the quantity of drug prescribed is unusually large, he should, before filling such prescription, satisfy himself that the same is genuine and properly prepared. Every druggist should know the signature of the reputable, legitimate physicians in his locality, and should he fill a fraudulent prescription he would be liable to prosecution."

A prescription, even if issued by a physician, which on its face calls for an unusually and unreasonably large quantity of the drug, is fraudulent of course, as it bears internal evidence that it is not issued in good faith and that it is not a prescription. Treasury Department circular No. 2200, dated May 11, 1915, says:

"While the law does not limit or state the quantity of any of the narcotic drugs that may be so dispensed or prescribed at one time, it does provide that it shall be unlawful to obtain by means of order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof in the 'conduct of a lawful business in said drugs or in the legitimate practice of his profession'; further, that all preparations and remedies containing narcotic drugs coming within the scope of this act are 'sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this act'; and it is further provided that it shall be unlawful for any person not registered to have in his possession or under his control any of the drugs, preparations, or remedies 'which have

not been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this act.'

"Therefore where a physician, dentist, or veterinarian prescribes any of the aforesaid drugs in a quantity more than is apparently necessary to meet the immediate needs of a patient in the ordinary case, or where it is for the treatment of an addict or habitué to effect a cure, or for a patient suffering from an incurable or chronic disease, such physician, dentist, or veterinary surgeon should indicate on the prescription the purpose for which the unusual quantity of the drug so prescribed is to be used. In cases of treatment of addicts these prescriptions should show the good faith of the physician in the legitimate practice of his profession by a decreasing dosage or reduction of the quantity prescribed from time to time, while, on the other hand, in cases of chronic or incurable diseases such prescriptions might show an ascending dosage or increased quantity. Registered dealers filling such prescriptions should assure themselves that the drugs are prescribed in good faith for the purpose indicated thereon, and, if there is reason to suspect that the prescriptions are written for the purpose of evading the intentions of the law, such dealers should refuse to fill same."

This is a construction of the law and of its meaning, intent, and purpose. It shows what is and what is not a prescription, and what sort of an order a registered dealer, holding a license showing he has paid the special tax, under the law, may fill. I am of the opinion, and hold, that a physician who issues a prescription for an unusually large amount of these drugs, or of any one of them, and which prescription shows on its face that the quantity prescribed is unreasonable and unusual, is guilty of an offense under the law, unless such prescription indicates the necessity therefor; and I am also of the opinion, and hold, that the dealer who fills such a prescription or order issued by a physician is guilty of an offense under the law. If not so, then, as already stated, physicians may prescribe unlimited quantities, and druggists may fill the prescriptions with impunity, and thus many of the evils sought to be remedied by the enactment of the so-called Harrison Narcotic Law will be augmented, instead of being remedied.

[2] Section 6 of the act provides that:

"The provisions of this act shall not be construed to apply to the sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium: * * * Provided, that such remedies and preparations are sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this act."

It is evident to my mind that the sale, distribution, giving away, or dispensing of large and unusual quantities of these drugs, unaccompanied by explanation as to the necessity therefor, are sales and dispensing of the drug for the very purpose of evading the intentions and provisions of the act and therefore unlawful.

[3] Section 8 of the act provides:

"That it shall be unlawful for any person not registered under the provisions of this act, and who has not paid the special tax provided for by this act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section 1 of this act."

Both counts of the indictment under consideration charge that the defendant, Frederick W. Curtis, "did unlawfully, wrongfully, and

knowingly sell, dispense, and distribute * * * morphine sulphate tablets," and that he sold and dispensed same as a dealer to a consumer, etc. This is equivalent to charging that he had these drugs in his possession. In *United States v. Wilson* (D. C.) 225 Fed. 82, it was held:

"Harrison Anti-Narcotic Law Dec. 17, 1914, § 8, establishes the rule of evidence that, upon proof that a defendant was producing, importing, manufacturing, dealing in, dispensing, selling, distributing, or giving away, as mentioned in section 1, cl. 1, opium or coca leaves, and that a narcotic was found in his possession, he is presumptively guilty of violating the act, that then the burden of proof is upon defendant to show affirmatively that he is not one of the class mentioned in section 1 as being required to register, or, if so, that he had registered and paid the special tax."

If this be good law, then this indictment charges an offense, for it clearly charges that the defendant had the drugs in his possession at the time mentioned in the indictment, else he could not have sold, dispensed, and distributed them to the person named in the indictment. If in point of fact the defendant had registered and paid the special tax, then proof of such facts on the trial of the indictment will be a complete defense, and result in the acquittal of this defendant, inasmuch as both counts charge a violation of section 1 of the act, while the particular counts specified constitute an offense under and a violation of section 2 of the act, as the defendant is not within the exception of subdivision "b" of such section.

As I understand the purpose of the pleader, there should be a new indictment, and the one under consideration should be dismissed. I am familiar with the holding in *United States v. Friedman* (D. C.) 224 Fed. 276, but am unable to agree with the learned judge who decided that case.

ORVIG DAMPSKIBSELSKAP ACTIESELSKABET v. NEW YORK & BERMUDEZ CO. et al.

ACTIESELSKABET NEPTUN v. SAME.

(District Court, E. D. New York. August 18, 1915.)

WITNESSES ⚡306—CONSTITUTIONAL PRIVILEGE—CORPORATIONS—"PERSON."

A corporation is not a "person," within the meaning of the word as used in Const. U. S. Amend. 5, and cannot refuse to answer interrogatories attached to a libel in admiralty on the ground that its answers may tend to incriminate it.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1058-1060; Dec. Dig. ⚡306.

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

In Admiralty. Suit by the Orvig Dampskibsselskap Actieselskabet and by the Actieselskabet Neptun against the New York & Bermudez Company and the Hamburg-Amerikanische Packetfahrt Actien Gesellschaft. On objection by the second defendant to answering certain interrogatories attached to the libel. Objection overruled.

Ralph James M. Bullowa, of New York City, for libelants.
Haight, Sandford & Smith, of New York City (Edward Sandford and Wharton Poor, both of New York City), for respondents.

VEEDER, District Judge. The respondent Hamburg-Amerikanische Packetfahrt Actien Gesellschaft objects to answering certain interrogatories attached to the libel, "upon the ground that for the respondent to answer any of such interrogatories might tend to incriminate it." It appears that the respondent is now under indictment in the District Court for the Southern District of New York charged with conspiracy in connection with the very matters concerning which the libelant seeks to obtain information from the respondent under the interrogatories mentioned. It is clear that any direct answer to the interrogatories might incriminate the respondent. Hence the sole question before the court is whether the respondent, as a corporation, may invoke the privilege.

Apparently this court is precluded from considering this question upon principle by the reasoning, if not by the actual decision, of the Supreme Court in *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, and companion cases decided on the same day, particularly *Nelson v. United States*, 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673. In *Hale v. Henkel*, where, in a proceeding under the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209), an officer of a corporation refused to testify or to produce books and papers on the ground of self-incrimination, the court held that so far as the witness was concerned personally he was protected by the immunity provision of that act, and that he could not set up the privilege of the corporation. Obviously, the privilege could be claimed for a corporation only through its officer. The reasoning of the court is adverse to such right:

"But it is further insisted that, while the immunity statute may protect individual witnesses, it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a 'person' within the meaning of this amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employes. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. * * * If, whenever an officer or employe of a corporation were summoned before a grand jury as a witness, he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books

and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights. Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."

Further on the court said:

"Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the state of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures."

The opinion of the majority of the court was delivered by Mr. Justice Brown. Mr. Justice Harlan and Mr. Justice McKenna delivered separate concurring opinions. The former, while concurring "entirely in what is said in the opinion of the court * * * as to the scope of the Fifth Amendment to the Constitution," added:

"In my opinion, a corporation * * * cannot claim the immunity given by the Fourth Amendment; for it is not a part of the 'people,' within the meaning of that amendment. Nor is it embraced by the word 'persons' in the amendment."

Mr. Justice McKenna concurred in the judgment, "but not in all the propositions declared by the court":

"There are certainly strong reasons for the contention that, if corporations cannot plead the immunity of the Fifth Amendment, they cannot plead the immunity of the Fourth Amendment. The protection of both amendments, it can be contended, is against the compulsory production of evidence to be used

in criminal trials. Such warrants are used in aid of public prosecutions (Cooley, *Constitutional Lim.* [6th Ed.] 364), and in *Boyd v. United States*, 116 U. S. 616 [6 Sup. Ct. 524, 29 L. Ed. 746], a relation between the Fourth Amendment and the Fifth Amendment was declared. It was said the amendments throw great light on each other, for the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. *Boyd v. United States* is still recognized, and if its reasoning remains unimpaired, and the purpose and effect of the Fourth Amendment receives illumination from the Fifth, or, to express the idea differently, if the amendments are the complements of each other, directed against the different ways by which a man's immunity from giving evidence against himself may be violated, it would seem a strong, if not an inevitable, conclusion that, if corporations have not such immunity, they can no more claim the protection of the Fourth Amendment than they can of the Fifth."

Mr. Justice Brewer, with whom the Chief Justice concurred, dissented:

"The immunities and protection of articles 4, 5, and 14 of the Amendments to the federal Constitution are available to a corporation so far as in the nature of things they are applicable. * * * The fact that a state corporation may engage in business which is within the general regulating power of the national government does not give to Congress any right of visitation or any power to dispense with the immunities and protection of the Fourth and Fifth Amendments."

In *Nelson v. United States*, supra, Mr. Justice McKenna, speaking for the court, said in considering the third contention of the plaintiff in error:

"That the evidence, documentary and oral, required to be produced, was in the nature of incriminating evidence, which the witnesses and the defendants are privileged from furnishing to the plaintiff under the provisions of the federal Constitution and the well-recognized principles of equity procedure. This contention asserts rights personal to the plaintiffs and rights of the corporation defendants in the suit. The basis of both rights is the protection of the Fourth and Fifth Amendments to the Constitution of the United States. * * * The extent of the immunity [privilege?] and its application to corporations was considered in *Hale v. Henkel* and *McAlister v. Henkel* [201 U. S. 90, 26 Sup. Ct. 385, 50 L. Ed. 671], and decided adversely to the contention of plaintiffs in error."

The varying expressions of opinion in *Hale v. Henkel*, supra, were commented upon by the Circuit Court of Appeals for the Third Circuit in *Cassatt v. Mitchell Coal & Coke Co.*, 150 Fed. 32, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99, where, however, the question under consideration was not involved. But in the case of *International Mining Co. v. Pennsylvania R. R. Co.*, 152 Fed. 557, it was held by the Circuit Court for the Eastern District of Pennsylvania, upon the authority of *Hale v. Henkel*, supra, and *Nelson v. United States*, 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673, that a corporation may not refuse to produce its books in an action against it to recover damages or penalties for a violation of the Interstate Commerce Act (Act Feb.

4, 1887, c. 104, 24 Stat. 379), on the ground that the evidence therein may incriminate it. Judge Holland expressed the opinion that the question had been practically disposed of by *Hale v. Henkel*. Inasmuch as I am of that opinion, the respondent will be directed to answer the interrogatories.

Although the order of July 29, 1915, as signed, gives the libelant leave to "amend the first interrogatory propounded to both respondents," the judge's memorandum on the respondent's exceptions shows that he referred to subdivision (d) of that interrogatory only. The respondent will be directed to answer subdivision (d) of the first interrogatory propounded to both respondents as amended; as to the remainder, (e) to (o), the respondent's exceptions are sustained.

TULLY et al. v. TRIANGLE FILM CORP. et al.

(District Court, S. D. New York. February 2, 1916.)

1. COPYRIGHTS ⇨81—SUITS FOR INFRINGEMENT—PARTIES.

Under equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), providing that all persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, where the author of a copyrighted drama assigned the right to produce and present it upon the stage by a company of players, reserving all other rights, including the moving picture rights, the licensee was not a proper party to a suit for infringement of the copyright by producing a motion picture play, though this production would be financially injurious to the licensee by diverting persons who might see the play from doing so, as the interest referred to in the rule means an interest in law, and does not include a possible injury for which a person has not retained for himself any right or redress.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. ⇨81.]

2. EQUITY ⇨149—MISJOINDER OF PARTIES PLAINTIFF—EFFECT.

In a suit in equity, the misjoinder of a party plaintiff having no interest, and to whom no relief can be granted, renders the complaint multifarious and devoid of equity, and requires the dismissal of the complaint.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 368-370; Dec. Dig. ⇨149.]

3. COPYRIGHTS ⇨82—SUITS FOR INFRINGEMENT—EXHIBITS.

Under the express provisions of Supreme Court rule 2 (29 Sup. Ct. xlviii), in a suit for infringement, a copy of the work alleged to be infringed should accompany the complaint, or its absence should be explained.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. ⇨82.]

4. COPYRIGHTS ⇨82—PLEADING—AMENDMENT—TERMS.

Where, in a suit for infringement of a copyrighted drama, an incorrect copy of the work was filed with the complaint, whether this required that plaintiff should, as a condition of amendment, be compelled to pay certain expenses incurred by defendants, was a matter that could be dealt with on the trial, when the trial judge could determine whether the differences between the copyrighted work and the manuscript submitted to the court were of real importance, or only of minor consequence, and it would not be determined on a motion to dismiss.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. ⇨82.]

In Equity. Suit by Richard Walton Tully and another against the Triangle Film Corporation and others. Bill dismissed.

House, Grossman & Vorhaus, of New York City (Alfred Beekmann, of New York City, of counsel), for plaintiffs.

Walter N. Seligsberg and J. Hampden Dougherty, Jr., both of New York City, for defendants.

MAYER, District Judge. The suit as alleged in the first paragraph of the complaint is one arising under the Copyright Law of the United States (Act March 4, 1909, c. 320, 35 Stat. 1075 [Comp. St. 1913, §§ 9517-9584]). The plaintiffs charge defendants with infringement of a copyrighted drama known as "A Bird of Paradise." Defendants move to dismiss the bill because of a misjoinder of parties plaintiff and a failure to comply with rule 2 of the United States Supreme Court (29 Sup. Ct. xlviij).

The bill alleges, in substance, that the plaintiff Tully, as the author and originator, composed and wrote a dramatic composition under the name of "A Bird of Paradise," and thereupon and in conformity with the Copyright Law obtained a copyright of which he is the sole owner. It is further alleged:

"Third. That thereafter the said Richard Walton Tully duly transferred and assigned to the complainant Espladian Producing Company the sole and exclusive right, license, and privilege to produce and present the said dramatic composition in the United States and Canada upon the stage by a company of players, reserving all other rights of every name and nature in and to the said dramatic composition unto himself, including the right to produce and present the same in motion picture photo play form, and that the complainants herein are jointly interested as aforesaid in the said dramatic composition, and all and singular the right, title, and interest thereof, and in the conduct and result of this action."

Finally, it is set forth that defendants have infringed and are infringing the copyright by the production of a motion picture photo play entitled "Aloha Oe."

[1] From the foregoing it will be seen that the Espladian Producing Company is the exclusive licensee to produce the play "upon the stage by a company of players," and that all other rights, such as motion picture rights, remain in and were reserved by Tully, the author. When, therefore, the Espladian Producing Company became such licensee, it did so with the knowledge that Tully at any time and at any place could produce a so-called motion picture photo play, and if Tully could do this then, of course, any licensee of his could do the same. It seems to me entirely clear that the Espladian Producing Company has no right or interest in respect of the presentation by motion pictures of "A Bird of Paradise." Equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) provides:

"All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs. * * * Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join he may for such reason be made a defendant."

Of course, the interest referred to in the rule means an interest in law. It cannot mean anything else, and certainly cannot mean a pos-

sible injury for which a person has not retained for himself any right or redress. *Gaumont Co. v. Hatch* (D. C.) 208 Fed. 378, does not present the same state of facts as the case at bar; for in that case two owners of a moving picture film (lessor and lessee) were joined as plaintiffs, whereas here the Espladian Producing Company has no interest whatever in the motion picture rights.

It is urged that the production by the defendants of a motion picture presentation of a copyrighted work is and will be financially injurious to the Espladian Producing Company, by diverting persons who might see the play from attending the theater, so as to go instead to the less expensive motion picture play. But that suggestion is quite beyond the point, and, even if plaintiffs are right in what they think may be the injury inflicted and continuing, the Espladian Producing Company cannot complain, because that was one of the probabilities to be contemplated when Tully reserved the motion picture rights.

[2] The misjoinder of a party plaintiff having no interest, and to whom no relief can be granted, renders the complaint multifarious and devoid of equity, and therefore the complaint must be dismissed.

[3] A rather important question of practice has arisen in this case, which I will refer to for the information of the bar. Under section 25 of the Copyright Law, it is provided:

"Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States."

In pursuance of the authority thus conferred, the Supreme Court adopted, among others, rule 2, as follows:

"A copy of the alleged infringement of copyright, if actually made, and a copy of the work alleged to be infringed, should accompany the petition, or its absence be explained; except in cases of alleged infringement by the public performance of dramatic and dramatico-musical compositions, the delivery of lectures, sermons, addresses, and so forth, the infringement of copyright upon sculptures and other similar works and in any case where it is not feasible."

The practical value of this rule is well demonstrated in this case. A motion for preliminary injunction was made on the complaint and various affidavits, but a copy of the work alleged to be infringed did not accompany the complaint, nor was any excuse set forth to explain the failure to submit such a copy. Later a document was submitted which purported to be a copy of the copyrighted work. After investigation by defendants in the office of the Librarian of Congress, it was found that this copy was not accurate, and it is claimed that the differences between the copy submitted to the court and the copyrighted work on file are material, so as to go essentially to the questions which will ultimately come up for decision. Of course, I do not at this time know the merits of this claim; but the point is that the court has not had before it a copy of the work alleged to have been infringed. This situation was not, in any manner, the fault of counsel, but was due to an error (possibly inadvertent) on the part of one of the plaintiffs.

But the foregoing incident illustrates rather strikingly the importance and necessity of the Supreme Court rule. A copy of the

work alleged to be infringed should accompany the complaint, or, as the rule says, its absence be explained. It sometimes happens that redress by injunction in cases of this kind must be speedily obtained in order to prevent irreparable injury, and that the plaintiff may not have at hand a copy of the manuscript, whereas he can describe, for all practical purposes, the substance of the subject-matter of his copyrighted work; but the rule must be followed, and, if the work cannot be produced, satisfactory reasons for its absence must be presented.

Of course, as the rule points out, in cases of alleged infringement of certain kinds, the production of the alleged infringement is excepted, for the obvious reason that such production is either not possible or not practicable. I think that a hard and fast rule should not be laid down as to the penalty for failure to comply with rule 2. In some instances such failure would call for the dismissal of the complaint, and in other instances an opportunity should be accorded by the court, upon such terms as may seem proper, or upon no terms at all, to amend the complaint, so that it may be accompanied with the copyrighted work. In the case at bar the question is not of any practical importance, except in fixing terms upon which the process and pleading of plaintiffs may be amended.

[4] The defendants urge that certain expenses should be paid as a condition of amendment. That situation can be dealt with on the trial of the suit, when the trial judge can determine whether the differences between the copyrighted work and the manuscript submitted to the court were of real importance, or only of minor consequence.

The motion to dismiss the bill is granted, with leave to plaintiff Tully to amend the process and bill, and with the question of costs and disbursements reserved until the trial of the suit. Under the heading of disbursements thus reserved for further consideration will be included those to which the defendants have been put in sending telegrams from California, as well as those incurred in Washington.

Settle on two days' notice.

TEPEL v. COLEMAN et al.

(District Court, M. D. Pennsylvania. December Term, 1914.)

No. 203A.

1. CORPORATIONS Ⓒ537—INSOLVENCY—CAPITAL STOCK AS LIABILITY.

The capital stock of a corporation is not a liability to be taken into account in determining whether a corporation is solvent, as stockholders do not stand on an equal footing with creditors, and their rights are subordinate to the rights of creditors, especially in view of Bankruptcy Act July 1, 1898, c. 541, § 1a (15), 30 Stat. 544 (Comp. St. 1913, § 9585), providing that a person shall be deemed insolvent within that act whenever the aggregate of his property, exclusive of any conveyed, etc., with intent to defraud creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2150; Dec. Dig. Ⓒ537.]

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

2. CORPORATIONS ⚡376—INDEBTEDNESS—PURCHASES OF STOCK—"PROPERTY."

Under Const. Pa. art. 16, § 7, and Act Pa. April 17, 1876 (P. L. 32) § 4, prohibiting corporations from issuing stock or bonds except for money, labor done, or money or property actually received, and providing that all fictitious increases of stock or indebtedness shall be void, where a corporation purchased its own stock and issued a bond secured by a mortgage in payment thereof, the bond and mortgage were void, as the stock of the corporation was not "property" that would enlarge the assets of the corporation and be available for creditors, and the debt created was therefore fictitious.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. ⚡376.]

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

3. CORPORATIONS ⚡544—CAPITAL STOCK AS TRUST FUND.

Under the law of Pennsylvania the capital stock of a corporation is a trust fund for the payment of company debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2162-2169; Dec. Dig. ⚡544.]

4. BANKRUPTCY ⚡143—TRANSFERS BY BANKRUPT—CAPITAL STOCK AS TRUST FUND.

Under the rule recognized in Pennsylvania that the capital stock of a corporation is a trust fund for the payment of debts, where a corporation owing debts, some of which had not been paid when it subsequently became bankrupt, purchased its own stock and executed a bond secured by a mortgage therefor, the mortgagees were not entitled, as against creditors and the trustee in bankruptcy, to insurance money on certain of the mortgaged property, as until the mortgage was paid the capital stock was not paid for, and the transaction amounted only to an agreement to redeem the stock, and the mortgagee stockholders were therefore attempting to seize capital stock to the prejudice of the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. ⚡143.]

In Equity. Suit by Fred W. Tepel, trustee in bankruptcy of the West Branch Box & Lumber Company, against John J. Coleman, individually and as trustee, and others. Decree for plaintiff.

A. R. Jackson and M. C. Rhone, both of Williamsport, Pa., for plaintiff.

N. M. Edwards and Wm. R. Deemer, both of Williamsport, Pa., for defendants.

WITMER, District Judge. The plaintiff, trustee in bankruptcy of the West Branch Box & Lumber Company, here seeks cancellation of a bond and mortgage, dated May 5, 1913, given by the corporation to John J. Coleman, trustee, in trust for himself and the other defendants, for the sum of \$9,915.56, now in custody of this court, being the proceeds of six policies of fire insurance, covering the mortgaged premises and certain personal property of the bankrupt, which sum was paid into court upon an adjustment of the fire loss subsequent to the adjudication in bankruptcy.

The action is brought under section 70c of the Bankruptcy Act.

The facts are: The West Branch Box & Lumber Company is a corporation chartered under the laws of Pennsylvania on the 26th day of

January, 1911, with an authorized capital stock of \$40,000. Stock was subscribed for, paid by, and issued as follows: John Coleman, \$5,000; John J. Coleman, \$5,000; C. H. McLaughlin, \$1,500; John Lush, \$2,500; E. W. Cole, \$5,000; and William J. Campbell, \$1,000—with the exception that McLaughlin yet owed at the adjudication the sum of \$400 on his stock for which the corporation had his note. The stock continued to be owned and held by the above parties, without change, until the 5th day of May, 1913. From the inception of the company to this date John Coleman was president of the corporation, Hartman was its general manager and treasurer, and the directors were John Coleman, Hartman, Bright, McLaughlin, and Campbell.

The company began business on January 1, 1911, having about that time purchased from John Coleman a box manufacturing plant, located outside the city limits of Williamsport, this district. It continued to operate the plant until February 13, 1914, on which day the plant and all books of the corporation were destroyed by fire. February 27, 1914, the company was adjudicated an involuntary bankrupt.

The company paid John Coleman \$30,000 for the plant, but this did not include any lumber in the yard. It paid a dividend the first year, but at the annual stockholders' meeting for the year 1912, held in January, 1913, the general manager, Hartman, read a statement showing a loss for the year just closed. Whether the loss was \$2,500 or \$10,000, Hartman, in his deposition on behalf of the defendants, was unable to say. About the time the corporation began business it borrowed \$10,000 on first mortgage from the Board of Trade of the City of Williamsport. At the time of the annual stockholders' meeting mentioned, this mortgage had been reduced to \$7,000; but on February 27, 1913, the company again borrowed the \$3,000 paid. The old mortgage was satisfied and a new one taken for the sum of \$10,000. This mortgage, and the bond secured thereby, remained a debt for the full amount at the date of adjudication. At the time of making application for this new loan, February 1, 1913, the corporation rendered a financial statement to the Board of Trade, and Hartman testified that the condition of the company remained about the same May 5, 1913.

For some time prior to the annual meeting of January, 1913, it was known by some of the directors that no dividend would be declared for the year 1912, for the reason that none was earned, and, when Hartman read the statement for the year's operation showing a loss, the Colemans, father and son, together with D. J. Bright, three of the defendants, criticized the management and complained about the failure to earn dividends. After considerable discussion, Hartman offered to take over the stock of any dissatisfied stockholder on par. John Coleman agreed to sell, but wanted security which Hartman could not furnish. The meeting adjourned without any definite action taken. Before the meeting adjourned, however, John Coleman suggested to Hartman, Campbell, and McLaughlin:

"Why don't you give a second mortgage on the plant and, for that, we will return the stock to the company?"

The parties acting upon this proposition, on May 5, 1913, the stock was delivered by the vendor stockholders to the corporation, and the

latter executed and delivered a second mortgage on the real estate, buildings, and fixtures or machinery in the plant, for \$15,500 real debt, in favor of John J. Coleman, trustee, to secure a bond of the company in favor of said trustee for a like amount. The mortgage was recorded in Lycoming county, Pa., on May 13, 1913, and no payment was made on account by the bankrupt. This mortgage required the mortgagor to carry at least \$12,000 fire insurance on the buildings for the benefit of the mortgagee. This amount was in force at the time of the fire, but of the \$9,915.56 paid into court thereof the sum of \$479.41 was on stock and personal property. The policies contained the usual loss clause, "Loss, if any, first payable to John J. Coleman, trustee, as his mortgage interest may appear." Four policies were issued and indorsed January 1, 1914, while two others were issued September 23 and 24, and indorsed January 2, 1914.

Immediately before this second mortgage was given to Coleman, trustee, the corporation owed, exceeding the Board of Trade mortgage, \$18,049.15, and of this it owed \$13,127.53 at its adjudication. Exclusive of the amount in controversy, the assets of the corporation will not pay the costs of administration.

[1] Coming now to the law of the case, be it said that much evidence was taken upon the question of corporate solvency on May 5, 1913; but the view taken by the court eliminates the necessity of deciding this question. It may be said in passing, however, that the court is of the opinion that capital stock is not a liability to be taken into account in determining whether a corporation is solvent. There does not seem to be any case wherein this precise question has been raised and decided.

"A stockholder is not, by virtue of the fact that he holds the stock, a creditor of the corporation whose stock he holds. The rights of the stockholders are all subordinate to the rights of the creditors of the corporation. The stockholders are not entitled to any of the assets of the corporation or its property until all just debts due by the corporation are paid. The stockholder does not stand on an equal footing with creditors and is not jointly entitled with them to the fund. His claim begins only after every creditor has been satisfied." 4 Thomp. Corp. (2d Ed.) § 4463.

The definition of "insolvency" in section 1a(15) of the federal Bankruptcy Act indicates that the capital stock of a corporation is not to be taken into account in determining whether a corporation is insolvent. Capital stock is a liability, but in no sense can it be said to be a corporate debt to be reckoned with in ascertaining whether the company is insolvent.

It is not necessary to decide whether a preference was created by the indorsements on the insurance policies January 1, 1914, or if on those days the company was insolvent. Neither is the court required to decide whether, under the terms of the mortgage and the policies, Coleman, trustee, is limited to the insurance paid on the buildings, as contended by the plaintiff.

[2] The plaintiff insists that the bond and mortgage are void because the capital stock taken by the mortgagor, in consideration therefor, being its own capital stock, was not property, and furthermore because the bond for which the mortgage was given as security is a

fictitious debt, within the meaning of the Constitution and Laws of Pennsylvania. Article 16, § 7, of the Constitution, provides:

"No corporation shall issue stocks or bonds, except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void."

The Act of April 17, 1876 (P. L. 32) § 4, which was enacted to carry the constitutional mandate into effect, also says:

"No such corporation shall issue either bonds or stock, except for money, labor done or money or property actually received, and all fictitious increase of stock or indebtedness in any form shall be void."

Now, if the capital stock of a corporation, sold by its stockholders to it and for which the company gives to the vendors its bond and mortgage, is not property within the meaning of the Constitution and laws of Pennsylvania, it follows as a corollary that there has been a fictitious increase of debt. Neither the appellate nor the lower courts of Pennsylvania have decided this question, and it remains for this court to place its own construction upon the constitutional mandate. The prohibition extends to all classes of corporations. *Cheetham v. McCormick*, 178 Pa. 190, 35 Atl. 631. It seems that an asset of some kind, valuable from the standpoint of availability to creditors, should have passed to the corporation for its bond and mortgage. Surely the corporation did not receive anything it did not already have, so far as ability to pay its debts was concerned. If such a transaction as the one in hand is upheld as to a portion of its stock, why would it not hold good as to the whole amount? Surely the law would not tolerate such a transfer. The bankrupt not only failed to obtain any property for the bond and mortgage, but the corporate debts were increased \$15,000, and, by virtue of the recorded mortgage, property to this amount was attempted to be placed beyond the reach of creditors. Neither corporation nor creditors benefited by virtue of this transaction, but the real beneficiaries, if permitted, would be the dissatisfied stockholders. The bond and mortgage is nothing but a contract by which the bankrupt agreed to repay to the several contributors of its capital stock their several contributions, whereby such contributions were converted into corporate debts. This doubtless is not valid even so far as it concerns the corporation, much less as against the trustee in bankruptcy who here stands for creditors of the corporation. *Guarantee T. & T. Co. v. Dilworth Coal Co.*, 235 Pa. 601, 84 Atl. 516. I do not believe that the vendors were actuated with any fraudulent intent, but it matters little what their intentions were; they gave nothing to the corporation which could be termed property that would enlarge its assets, and for this reason it follows that the debt created is fictitious and the security given void.

[3] There is yet another reason, not raised by the parties, which is a complete bar to the defendants' right to the fund being litigated. Under the law of Pennsylvania, and that is the law of this case, capital stock of a corporation is a trust fund for the payment of company debts. 1 *Eastman, Private Corp.* (2d Ed.) § 552, page 510, section 239, pp. 236, 237, and cases cited. However much this doctrine may

have been qualified by the courts of other states, or by the federal courts, the principle has never been questioned in Pennsylvania.

[4] Within less than one year after the giving of the bond and mortgage the corporation was adjudicated a bankrupt, then owing \$13,127.53 to unsecured creditors, most of whom, if not all, were such at the time of the execution and delivery thereof. The sum now being litigated under the particular circumstances of the case represents capital stock, and as such must be regarded as assets for the payment of these debts. This is true especially looking at it from the viewpoint of the claimant Coleman, trustee. The only consideration he has to offer for his bond and mortgage on which he relies to recover here is his money paid for the stock subscribed by him and the other cestui que trustents. If this amount had by any circumstances been received by the mortgagee, or the other defendants, under the authority of Stang's Appeal, 10 Wkly. Notes Cas. (Supreme Court of Pennsylvania) 409, they would have received it impressed with a trust for the creditors, which a court of equity would enforce. In the syllabus of the case it is said:

"The capital of a corporation is a trust fund for the payment of its creditors; stockholders who diminish that fund by distribution among themselves, without first providing for the payment of all indebtedness, receive it impressed with the trust, which a court of equity will enforce."

Since the capital stock of a corporation is a trust fund for the payment of its debts, the use of this fund in the purchase of its own shares, in itself, is destructive of a security intended primarily for the creditors, and a plain misappropriation of it. If the corporation was permitted to so use the trust fund, it might in this way distribute its capital among its stockholders, extinguish their personal liability, and leave its creditors without security or remedy. Columbia Bank's Estate, 147 Pa. 436, 23 Atl. 625, 626, 628. The bond and mortgage were given in exchange for the company's own stock in the hands of Coleman, trustee. Thus far, the transaction amounted to nothing more than an agreement by the company to redeem the stock, for, until the mortgage was paid, the capital stock surrendered was not paid for. The defendants' position therefore, at this time, amounts to an attempt to seize, through legal process, the capital stock fund represented by the trustee's holders, to the loss of the creditors of the company, who were such creditors at the consummation of the agreement pretending to stamp the transaction with authority, and this, at a time when the company is in the course of settlement in bankruptcy. If, under the authority cited, a court of equity would require these defendants to bring back this fund had they received it, a fortiori, the court must now award the fund to the trustee in bankruptcy.

THE WYOMISSING.

(District Court, E. D. New York. June 15, 1915.)

COLLISION Ⓒ61—TOW AND DREDGE—FAULT.

A dredge with a material scow alongside was engaged in working in the Kills between Staten Island and New Jersey, on the New Jersey side of the channel, under a government contract which provided that "in case the contractor's plant so obstructs the channel as to impede the passage of vessels it shall promptly be so moved as to afford a practicable passage on the approach of any vessel." A tug approaching with a tow of 25 barges to pass between the dredge and the New Jersey shore gave an alarm signal, but proceeded with the ebb tide, and 2 or 3 of the barges came into collision with the material scow and were injured. *Held*, that the alarm signal was not sufficient notice to place the fault upon the dredge for not immediately moving, but that the tug was in fault for not requesting the removal and stopping to give time for the same, if in the opinion of her master there was not sufficient room for a safe passage, and that in going ahead as she did she took the risk of collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 78; Dec. Dig. Ⓒ61.]

In Admiralty. Suit for collision by James Morrow and another against the steam tug Wyomissing and the Morris & Cumings Dredging Company. Decree against the tug, and dismissed as to the Dredging Company.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for libelants.

Armstrong & Brown, of New York City (Pierre M. Brown, of New York City), for claimant of the Wyomissing.

Everett, Clarke & Benedict, of New York City (A. Leo Everett, of New York City, of counsel), for dredging company.

CHATFIELD, District Judge. On the 14th day of March, 1914, a tow of 25 coal scows, arranged 4 in a tier on a 25-fathom towing hawser, proceeding toward Elizabethport with an ebb tide, came into collision with a material scow which was moored upon the New Jersey side of the Morris & Cumings dredge, then operating in the Kill just north of the Elizabethport bridge, between Staten Island and New Jersey. The accident occurred in the evening, and all of the boats were showing the proper lights. The tug Wyomissing was in charge of the tow. The port barge in the third tier came in contact with the side of the material scow, and was shoved over or carried out of line, so that the bow of the libelants' scow, which was the port boat in the fourth tier, struck the corner of the material scow, slid up over the corner, and received injuries in so doing. The port scow in the tier immediately behind this boat also struck the corner of the material scow.

There is no dispute as to the size or shape of the tow. It was made up with the boats ready for towing and as to which orders had been received, with 4 boats abreast in a tier, because that was the custom-

ary way of making up a tow, and because up to this time the necessity for narrowing the tiers of boats either had not become evident or had not been accepted by the tugboats. The dredging operations were being conducted with the authority of the law. The contract provides (section 26) as follows:

"The contractor will be required to conduct the work in such a manner as to obstruct navigation as little as possible, and at the completion of the work shall remove his plant, including ranges and buoys, piles, etc., placed by him under the contract in navigable waters. In case the contractor's plant so obstructs the channel as to impede the passage of vessels, it shall promptly be so moved as to afford a practicable passage on the approach of any vessel."

The tugboat with the 6 tiers of scows took its position in making the turn just above the Crescent Shipyard so as to clear whatever boats were lying along the Central Railroad of New Jersey bulkhead. The testimony of the captain of the Wyomissing and of the captain of the Penquoit makes it plain that the tow passed as close to the Jersey shore as was safe, and that the stern of the tow either touched the shore or was held off by the Penquoit. These conditions fixed the position of the Wyomissing as she rounded the turn. Whether the dredge and the scow were further down toward the west, or whether they were up opposite the Crescent Shipyard, as fixed by the captain of the Wyomissing, makes substantially no difference, because the captain of the Wyomissing took a course apparently as far towards New Jersey as possible so as to clear the boats upon making the turn, and at that time estimated, and immediately indicated by blowing a signal, that he would have difficulty in navigating his tow under the ebb tide past the dredge and scow on the Jersey side of the channel.

The injured boat, which was in the fourth tier and on the port side, rode over the corner of the scow, which was low, because laden down on that corner. The barge immediately ahead struck the scow, but did not ride over the corner, and the barge immediately behind the one injured also struck the corner and received some injury itself. This would indicate that the tow had not yet rounded the corner and reached a position where the tow would be moving parallel to the scow. If the situation were such as the witnesses for the dredging company understand it to be, the accident could not have happened unless the captain of the Wyomissing deliberately went as close as possible to the scow, with the idea of forcing the captain of the dredge to move the scow, or to hug the scow, instead of the shore. If the captain of the Wyomissing did that, it was his fault. On the other hand, if we take the facts the way the captain of the Wyomissing fixes as the locality of the accident, then he was taking care of his boats in making the turn, and the boats were still under the influence of that turn at the time of the accident.

That would bring up the exact question presented by the provision in the contract, viz., as to whether the dredge was bound to move upon receiving a signal from a tow that it needed more room to get through the channel. It may be assumed that if the tow came to anchor, or sent a polite request in advance, so that opportunity was given to remove the obstruction, it would not be a strained construction of the

contract to interpret the words "any vessel" as a tow, and if movement of the scow was necessary to give a "practicable passage" for any tow, then upon notice the dredge and scow would have to be moved; but the requirements of navigation on signal by whistle cannot be the same as upon a polite request transmitted half an hour in advance.

So the question we have to deal with is what can be done in the way of indicating navigation or the movement of an obstructing scow by the blowing of an "alarm" whistle, when the boat thus giving a warning goes on, instead of stopping or avoiding danger. The requirement of the contract is that if "the contractor's plant obstructs the channel so as to impede the passage of vessels, it shall promptly be so moved as to afford a practicable passage on the approach of any vessel." That means, if a channel is not afforded, or if the channel is obstructed so that a vessel cannot get through, the channel must be cleared upon receiving notice. That does *not* mean that a vessel can take the risk of indicating that the channel is impeded, or that the passage left is not practicable, by suddenly blowing a whistle, unless it ascertains that that whistle is answered and knows that it can make the passage.

If a vessel moving down the channel with the ebb tide can rely upon giving a danger signal to indicate navigation, and thereby to indicate that it wishes a practicable passage for an indefinite sized tow, without any establishment of rules by which the size of the "practicable passage" would be indicated, then the vessel attempting to go through the space must stop and indicate its needs, or take the risk of the navigation. So, on the facts shown by the Wyomissing, I think that on this particular voyage the captain of the Wyomissing was depending upon the danger signal to make safe for him what might otherwise be dangerous, but that he had not by law, nor by custom, nor by rule, nor by agreement, any right to rely upon the captain of the dredge replying immediately to that danger signal and getting out of the way in time to make the passage safe. All the Wyomissing could expect from the danger signal was to suggest that if the dredge heard the signal and if it could promptly be moved so as to afford a practicable passage, that the contract required it to do so. Such a right is not the same as a whistle signal in navigation. I fail to see why under such circumstances the responsibility is not on the tug.

I think that under the contract the dredge had the right to temporarily take up the entire channel, *if necessary*, and that the navigating vessel had nothing but a right to insist on some safe method of having the dredge moved, so that they could take their boats through. The dredge was not an unlawful impediment, unless it failed to move so as to afford a practicable passage upon sufficient notice, which ought to be arranged in advance, to be given either by whistle or some other form of notice.

The libelants may have a decree, with costs.

The petition against the dredging company is dismissed.

In re AMBROSE MATTHEWS & CO.

(District Court, D. New Jersey. January 21, 1916.)

1. BANKRUPTCY ⇨57—ACTS OF BANKRUPTCY—"CONVEYANCE TO DEFAUD CREDITORS."

A corporation executed an instrument appointing two persons as agents, attorneys, and trustees for the corporation, its stockholders and directors, for the purpose of winding up its affairs, and empowered them to collect outstanding accounts, pay debts, prosecute and defend suits, convey and dispose of property, and after payment of debts divide the assets among the stockholders, and to prepare the necessary papers for the dissolution of the corporation after the settlement of its accounts, and in general terms sought to confer upon them all the powers and liabilities of a board of directors in winding up the corporation's affairs. It contained no words of conveyance, assignment, or transfer, and no intent to confer title upon the trustees appeared. *Held* that, as there was no change in the title to the property, either absolute or conditional, the instrument was not a conveyance or transfer of the corporation's property with intent to hinder, delay, or defraud creditors within the contemplation of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 66, 69-79; Dec. Dig. ⇨57.]

For other definitions, see Words and Phrases, First and Second Series, Conveyance; Hinder, Delay, and Defraud.]

2. BANKRUPTCY ⇨60—ACTS OF BANKRUPTCY—"ASSIGNMENT FOR BENEFIT OF CREDITORS."

There being no assignment of anything by the instrument, it was not a general assignment for the benefit of creditors, within the Bankruptcy Act, since while the general assignment there contemplated is to be taken in its generic sense, and embraces any conveyance at common law or by statute by which one intends to make an absolute and unconditional appropriation of all his property to pay his creditors, share and share alike, there must be an absolute appropriation of the property to raise a fund for the payment of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. ⇨60.]

For other definitions, see Words and Phrases, First and Second Series, Assignment for Benefit of Creditors.]

3. BANKRUPTCY ⇨60—ACTS OF BANKRUPTCY—ASSIGNMENT FOR BENEFIT OF CREDITORS.

An assignment, to constitute an assignment for the benefit of creditors, within the Bankruptcy Act, need not be formal, and need not even be valid for all purposes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. ⇨60.]

4. BANKRUPTCY ⇨60—ACTS OF BANKRUPTCY—"ASSIGNMENT FOR BENEFIT OF CREDITORS."

To constitute an assignment for the benefit of creditors, within the Bankruptcy Act, there must be an absolute transfer by the debtor of both the legal and equitable titles to his property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. ⇨60.]

In Bankruptcy. In the matter of Ambrose Matthews & Co., alleged bankrupt. On exceptions to and motion to confirm the report of a special master recommending that the alleged bankrupt, a corporation of

New Jersey, be adjudged a bankrupt. Exceptions sustained, and petition dismissed.

Howard A. Sperry, of New York City, for petitioning creditors.

Charles R. Snyder, of Atlantic Highlands, N. J. (S. C. Sugarman, of New York City, of counsel), for alleged bankrupt.

HAIGHT, District Judge. [1] The acts of bankruptcy relied upon are that the alleged bankrupt made a general assignment for the benefit of its creditors, and that it conveyed or transferred its property with intent to hinder, delay, or defraud them. The special master has found that each of these acts has been established. This finding is based upon the execution, by the alleged bankrupt, of an instrument whereby it appointed two persons (hereinafter referred to as "trustees") to wind up its affairs. It is necessary primarily, therefore, to construe this instrument and to ascertain its legal effect as respects the property of the alleged bankrupt. It does not contain any words of conveyance, assignment, or transfer. It merely appoints two persons as "agents, attorneys, and trustees" for the stockholders, directors, and corporation "for the purpose of winding up the affairs" of the corporation. It empowers them to collect the corporation's outstanding accounts, to pay its debts, to prosecute and defend suits for and against it, to convey and dispose of its property, and after payment of its debts to divide its assets among the stockholders; also, to prepare the necessary papers for the dissolution of the corporation immediately after its accounts have been settled; and, generally, it sought in terms to confer upon them all of the powers and to impose all of the liabilities of a board of directors in winding up the affairs of a corporation upon dissolution. It seems entirely clear that it conferred no title whatever to any of the corporation's property upon the trustees. Its effect was merely to clothe the trustees with certain powers regarding the disposition of the corporation's assets and the distribution of the same among its creditors and stockholders. Nor can I find that there was any intent on the part of the alleged bankrupt to confer title upon the trustees. Each of the latter were attorneys at law, and the purpose of the instrument was that they, who were presumably better qualified, rather than the directors, should wind up the affairs of the corporation. As the instrument brought about no change in the title to the property, either absolute or conditional, nothing was conveyed or transferred by it, and it could not hinder, delay, or defraud creditors, because any creditor could proceed to satisfy his claim from the corporation's property to the same extent as though the instrument did not exist.

[2-4] The next question is whether it is a general assignment for the benefit of creditors, within the meaning of the Bankruptcy Act. It has been held quite uniformly that the general assignment there contemplated is to be taken in its generic sense, and embraces any conveyance, at common law or by statute, by which one intends to make an absolute and unconditional appropriation of all his property to pay his creditors, share and share alike. In *re Thomlinson Co.*, 154 Fed. 834, 83 C. C. A. 550 (C. C. A. 8th Cir.), and cases there cited; *Courtenay Mercantile Co. v. Finch et al.*, 194 Fed. 368, 114 C. C. A. 328 (C. C. A.

8th Cir.); *In re Salmon & Salmon*, 143 Fed. 395 (D. C. W. D. Mo.); *Missouri, etc., Elect. Co. v. Hamilton Brown Shoe Co.*, 165 Fed. 283, 288, 91 C. C. A. 251 (C. C. A. 8th Cir.). The assignment need not be formal, and it is not even necessary that it should be valid for all purposes. *Griffin v. Dutton*, 165 Fed. 626, 91 C. C. A. 614 (C. C. A. 1st Cir.); *Canner v. Webster Tapper Co.*, 168 Fed. 519, 93 C. C. A. 541 (C. C. A. 1st Cir.); *Courtenay Mercantile Co. v. Finch et al.*, *supra*. But an absolute transfer by the debtor of both the legal and equitable titles is indispensable. *Missouri, etc., Elect. Co. v. Hamilton Brown Shoe Co.*, *supra*; *In re Federal Lumber Co.*, 185 Fed. 926 (D. C. Mass.); *In re Hartwell Oil Mills (D. C.)* 165 Fed. 555; and *In re Empire Metallic Bedstead Co.*, 98 Fed. 981, 39 C. C. A. 372 (C. C. A. 2d Cir.).

In no case to which my attention has been directed has it ever been held that an instrument such as this, which neither contains words of conveyance, nor in legal effect transfers the title of property, would constitute the general assignment contemplated in the Bankruptcy Act; in other words, that a mere power of attorney is a general assignment. If nothing is assigned by an instrument, it is difficult to perceive how it can be said to be an assignment. Nor would an instrument such as this, which did not divest the corporation of all title to the property, constitute, under the laws of New Jersey, a general assignment. *Muchmore v. Budd*, 53 N. J. Law, 369, 386, 22 Atl. 518. In fact, the authorities in all jurisdictions recognize that to constitute a general assignment, which is *sui generis*, there must be an absolute appropriation by the debtor of his property to raise a fund for the payment of his creditors. I am therefore constrained to hold that the instrument in question did not constitute a general assignment. Hence the execution and delivery of it was not an act of bankruptcy. I have reached this conclusion with reluctance, because I think that the interest of all parties would be better served if the estate were administered in bankruptcy.

The petitioner further contends that the answer in this proceeding was filed without authority from the proper corporate officers. When the answer was filed, a motion was made to strike it out, upon the same ground. This was denied, because it was then shown that at a regularly convened meeting of the board of directors the filing of the answer and the employment of an attorney to defend against the petition was authorized. The evidence taken before the special master has disclosed nothing to change the view then entertained. Counsel for petitioner has, in urging the point at this time, probably overlooked the last adjourned meeting of the board of directors, a copy of the minutes of which were attached to the affidavit which was presented in opposition to the motion, above mentioned, to dismiss the answer.

It follows, therefore, that the exceptions to the special master's report must be sustained, and the petition dismissed.

THE FRANCIS J. O'HARA, JR.

(District Court, D. Massachusetts. August 12, 1915.)

No. 660.

1. MARITIME LIENS ⇨25—SUPPLIES—MASTER—AUTHORITY TO BIND VESSEL.

Where a fishing schooner was being sailed on the one-quarter "lay," under which the master and crew, and not the vessel, were required to pay for supplies, the master had no authority in fact to bind the vessel for supplies.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 31-36; Dec. Dig. ⇨25.]

2. MARITIME LIENS ⇨25—STATUTORY LIENS—LAY—LACK OF AUTHORITY—NOTICE.

Act June 23, 1910, c. 373, § 3, 36 Stat. 605 (U. S. Comp. St. 1913, § 7785), provides that any person furnishing supplies to a vessel shall be entitled to a lien thereon, and that the master shall be presumed to have authority from the owners to secure supplies for the vessel, but that nothing therein shall be construed to create a lien, when the furnisher by the exercise of reasonable diligence could have ascertained that the person ordering the supplies was without authority to bind the vessel therefor. Fishing vessels are customarily sailed on "lays," and several different lays are recognized; the relative obligations of the vessel and of the master and crew under each being well understood in that business. A party furnishing salt on the order of the master of a vessel which was sailing on the one-quarter lay, under which the master and crew, and not the vessel, were required to pay for supplies, was familiar with these different lays, and knew that the vessel in question was being sailed on a lay, but made no inquiry of the master or the managing owners as to the lay under which she was being operated. Though it had previously furnished salt to the vessel when she was on the one-half lay and was liable therefor, and it had been paid for by the owners, this had last occurred more than two years before, and there had been nothing equivalent to a continuous course of dealing, from which authority to buy supplies might be inferred. There was no actual or constructive representation that the vessel was on the half lay or liable for supplies. *Held*, that such party, knowing that the vessel was on a lay, was bound to inquire whether it was one under which the vessel or the master and crew were to pay for the salt, and by the exercise of reasonable diligence could have ascertained that the master had no authority to bind the vessel, and hence was entitled to no lien.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 31-36; Dec. Dig. ⇨25.]

In Admiralty. Proceeding by the Union Spar Company against the schooner Francis J. O'Hara, Jr. On intervening petition of the Gorton-Pew Fisheries Company. Intervening petition dismissed.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for petitioner.

James M. Marshall, of Gloucester, Mass, for claimant.

MORTON, District Judge. This is an intervening petition, asserting a lien in rem against the fishing schooner Francis J. O'Hara, Jr., to recover payment for salt furnished to that vessel. The claimant,

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

O'Hara, is her managing owner. The case is submitted on an agreed statement of facts.

At the time when the salt in question was furnished, the schooner was being sailed on the one-quarter lay, under which the master and crew, and not the vessel, should pay for it. It is customary for fishing vessels to be sailed on "lays." Several different lays are recognized in the fishing business; the relative obligations of the vessel and of the master and crew under each are well understood in that business, and were familiar to the petitioner. After the trip for which the salt in question was furnished had been completed, the catch was sold, and a settlement was made between the owners of the vessel, on the one side, and the master and crew, on the other. The owners took only a proper share for the vessel; they did not reserve anything to pay for the salt here in question; there was no known reason why they should do so.

[1, 2] It is not contended that under the general admiralty law a lien would attach for this salt. The lien claimed arises, if at all, under the act of June 23, 1910 (U. S. Comp. St. 1913, § 7785), which provides in substance that any person furnishing supplies to a vessel shall be entitled to a lien, and that the master shall be presumed to have authority from the owners to secure supplies for the vessel. It further provides (section 3) that nothing in the act shall be construed to create a lien when the furnisher, by the exercise of reasonable diligence, could have ascertained that the person ordering the supplies was without authority to bind the vessel therefor. The salt was ordered by the master of the vessel. He was in fact without authority to bind the vessel therefor. *Rich v. Jordan*, 164 Mass. 127, 41 N. E. 56.

The real question is whether, upon the agreed facts, the intervening petitioner could, "by the exercise of reasonable diligence," have ascertained the master's lack of authority. The petitioner knew that the vessel was being sailed on a lay; it knew that on some lays the vessel would be liable for the salt, and that on others she would not. It made no inquiry whatever, either from the master or the managing owners, though it might easily have done so, as to what lay she was being operated under, and it had no information on the subject from other sources. It is not stated in the agreed facts that the master, if inquired of, would not have told the truth. On several previous occasions salt had been furnished by the petitioner to the vessel when she was on the one-half lay, and was therefore liable for it, and it had been paid for by the owners. The last time before that here in question was more than two years previous, in May, 1909; and there had not been thereafter anything equivalent to a continuous course of dealing between the vessel and the petitioner, from which authority to buy supplies on her account might be inferred. There was no actual or constructive representation that the vessel was on the half lay or was liable for supplies when this salt was purchased.

The case is not like *The City of Milford* (D. C.) 199 Fed. 956, where the libelants acted on information which they supposed reliable, and were held to have been justified in so doing, though the information turned out to be false. It is said in the opinion in that case:

"I am persuaded that those witnesses who have testified that he [the president of the company which was the agreed purchaser of the vessel] and the other agents of the company led them [the lienors] to believe that it was the owner of the ship have testified truthfully and accurately." Rose, District Judge, The City of Milford (D. C.) *ubi supra*, 199 Fed. at 958.

Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to those important facts.

It seems to me that the petitioner, knowing that the vessel was on a lay, was bound to inquire whether that lay was one under which she, or the master and crew, were to pay for the salt. The Eureka (D. C. Cal.) 209 Fed. 373. The slightest inquiry would have disclosed that the master had no authority to buy it on the vessel's account.

I accordingly find that the intervening petitioner could, by the exercise of reasonable diligence, have ascertained that the master was without authority to bind the vessel for the salt in question.

Except as they appear in this opinion, I have not considered those facts contained in the agreed statement, the admissibility of which is in dispute. So far as I have referred to them, I rule that they are admissible.

The intervening petition of the Gorton-Pew Fisheries Company is therefore dismissed.

DARROW v. POSTAL TELEGRAPH-CABLE CO. OF NEW YORK.

(District Court, M. D. Pennsylvania. January 6, 1915.)

No. 696.

PROCESS \Leftrightarrow 148—QUASHING SERVICE—SUFFICIENCY OF EVIDENCE.

On application by a telegraph company, a New York corporation, to set aside the service of summons on the ground that the manager of a local telegraph office upon whom the summons was served was the agent of a Pennsylvania corporation of the same name, and not of the New York corporation, evidence as to the relations between the two corporations held insufficient to rebut the prima facie presumption that the return was true and the service sufficient.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 201; Dec. Dig. \Leftrightarrow 148.]

At Law. Action by Jessie G. Darrow against the Postal Telegraph-Cable Company of New York. On rule to set aside service of the summons. Rule dismissed.

R. W. Archbald, of Scranton, Pa., and Paul J. Sherwood, of Wilkes-Barre, Pa., for plaintiff.

Warren, Knapp, O'Malley & Hill, of Scranton, Pa., for defendant.

WITMER, District Judge. Upon petition of the defendant, the Postal Telegraph-Cable Company, a corporation of New York, a rule was granted on the plaintiff to show cause why the service of the sum-

mons should not be set aside upon the ground, as alleged, that the marshal's return erroneously recited that S. G. Fitch, upon whom service was made, was at the time manager for the defendant and in charge of its office in the city of Scranton. Answer was made to the rule, and the issue raised has to do with the business relations of Mr. Fitch, in charge of the Postal Telegraph office in Scranton, and the defendant, New York corporation.

It is conceded that there are existing two severally chartered corporations, one a Pennsylvania and the other a New York corporation, both known as the Postal Telegraph-Cable Company, the officers of each being the same persons. A written lease was executed by several of these officers, in the name of the former corporation, for the rental of the offices wherein the Postal Telegraph Company does business in Scranton, through Mr. Fitch, as manager. It was also testified on behalf of defendant that Mr. Fitch was employed and paid by the Pennsylvania company, and that the New York company was not interested in the Scranton office and was not carrying on any business whatever in Pennsylvania. The conclusions expressed by the defendant's witnesses could be easily affirmed, were it not for a book here in evidence, entitled "List of Offices, Revised Tariff Instructions and Rules." On the ninth page of the book the following appears:

Postal Telegraph-Cable Co. Executive Office.

New York, January 1, 1914.

Instructions.

I. This book contains a complete list of telegraph offices of the Postal Telegraph-Cable Company and its connections. * * *

II. This Line Stations. Stations of the Postal Telegraph-Cable Company are known as "this line stations," and are indicated by the letter P placed before the name.

The following paragraph, III, has to do with "Connecting Line Stations," giving the names of companies classified as such, thus distinguishing from stations on "this line." On page 427 of the book is found the name of the Scranton office, indicated as a station on this line, and not therefore a connecting line station. The book furthermore shows a division of the territory of the United States into four divisions, Eastern, Western, Southern, and Pacific. Each division has a number of district superintendents. The Eastern division, embracing the state of Pennsylvania, has the following:

Division Superintendents.

1. Christopher F. Leonard, New York.
2. Edson Kimmey, New York.
3. Charles E. Bagley, Philadelphia, Pa.
4. Charles A. Richardson, Boston, Mass.
5. Harvey D. Reynolds, New York.
6. Henry Scrivens, Pittsburg, Pa.
7. Edward B. Pillsbury, New York.

District Superintendent Bagley testified that the manager of the Scranton office is required to make report of the business of his office once every month to the auditor, Felix J. Kernan, who has offices at 253 Broadway, New York, the headquarters of "our system, known

as the Postal Telegraph-Cable Co., operating throughout the United States." The name of Mr. Kernan also appears among the list of officers of the defendant company as auditor. He further says that the immediate superior of Mr. Fitch, manager of the Scranton office, is First District Superintendent Christopher F. Leonard, New York, from whom Fitch takes orders, and to whom he makes report of his official business. He furthermore admits that the supplies for the Scranton office are obtained on requisition from the New York office. How the receipts of the office are ultimately applied, and what are the arrangements of the holdings and sales of stock of the several corporations, has not been shown. Reference has been made to an agreement in writing called a traffic arrangement, which is supposed to control the affairs of the independent companies, comprising the comprehensive system of the defendant company; but this agreement has not been offered, and the court is not able to ascertain from it what are the relations of the two corporations in question.

The plaintiff insists that the Pennsylvania company is only a unit of the system of the defendant company, and holds a subordinate position, being but a means or instrument in furthering the business of the major corporation, or that, in other words, the local corporation is merely the agency of the foreign corporation in conducting its business in this state, and that the latter is therefore engaged in business here, of which Mr. Fitch is its manager, at the Scranton office. The argument comes with some degree of persuasion under the evidence in hand; and, while I am not ready to be convinced, as the matter now stands, I am far from being persuaded to the contrary.

The defendant having failed to rebut the prima facie presumption that the marshal's return is true and that the service is not defective, the rule to show cause why the summons should not be set aside is dismissed.

In re E. C. FISHER CORP.

(District Court, D. Massachusetts. May 18, 1915.)

No. 16788.

1. BANKRUPTCY ⇨346—PREFERRED CLAIMS—TAXES—POWER OF BANKRUPTCY COURT.

Under Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 (Comp. St. 1913, § 9648), making taxes preferred claims, but providing that, in case any question arises as to the amount or legality of any such tax, it shall be heard and determined by the court, the court is not bound by the action of the taxing authorities, but may decide the amount or legality of the tax for itself, and is not limited to such questions as the bankrupt might have raised against the tax at the date of the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. ⇨346.]

2. BANKRUPTCY ⇨346—PREFERRED CLAIMS—TAXES—VALIDITY.

A state tax commissioner assessed against a corporation a tax based on the market value of its stock, acting upon a padded and false return

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

made by the corporation, which largely overstated its assets and understated its liabilities. The stock was in fact worthless, and if the real facts had been disclosed no assessment could properly have been made. *Held*, that the state was not entitled to the allowance of the tax in bankruptcy, to the prejudice of the general creditors of the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. Ⓢ346.]

In Bankruptcy. In the matter of the E. C. Fisher Corporation, bankrupt. On review of an order of the referee. Affirmed.

William R. Buckminster, of Boston, Mass., for trustee.

Roger Sherman Hoar, Asst. Atty. Gen., for the Commonwealth of Massachusetts.

MORTON, District Judge. [1] Section 64a of the Bankruptcy Act, which makes taxes preferred claims, provides that a trustee shall be credited with the amounts paid therefor upon filing receipts of the proper public officers; and it further provides that "in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court." The tax asserted by the public officer and evidenced by his bill would ordinarily represent the final determination of the taxing authority. The power explicitly given to the bankruptcy court to hear and determine "any question" as to the "amount or legality" of the tax would seem to imply that it is not bound by the action of the taxing authority, but may decide the question for itself; and the right is not limited by the statute to such questions as the bankrupt might still have raised against the tax at the date of the bankruptcy proceedings.

There are strong reasons why such power and right should have been given to the bankruptcy court. Persons in failing circumstances are apt to be careless about their taxes, and not to take the necessary steps to protect themselves against improper taxation. In the case of corporations, compelled by statute to make a public return of their financial condition, there is great temptation to give that return an appearance favorable to the corporation, as was done in this case, in the hope of not impairing its credit. It was eminently just that, when taxes were given priority over other claims, general creditors should be protected against the depletion of the debtor's estate by payment of excessive or unjust taxes.

[2] In *New Jersey v. Anderson*, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, 17 Am. Bankr. Rep. 63, 70, it was the duty of the state board to ascertain and fix the amount of the franchise tax in the cases of corporations which failed to make returns, and the amount fixed by the board became due and payable. The bankrupt corporation there in question made no return. The state board fixed its tax upon the whole authorized capital. In the bankruptcy proceedings the state presented a bill for the taxes so fixed. In fact, only one quarter of the capital stock had been issued—\$10,000,000, instead of \$40,000,000—and it was held by the Supreme Court of the United States that the bankruptcy court had power to revise the amount of the tax and to allow only so much of the bill as was properly due.

In the present case the tax commissioner of Massachusetts, instead of acting on no return by the bankrupt corporation, acted upon a padded and false return made by it, which largely overstated its assets and understated its liabilities. He fixed the value of its stock at \$50 per share, when in fact the stock was worthless. If the real facts had been disclosed, no assessment could properly have been made. The principle on which *New Jersey v. Anderson* was decided seems to cover the case at bar.

I do not think that the general creditors ought to be prejudiced by the action of the officers of the bankrupt corporation in making this false return, nor that the state of Massachusetts is entitled to receive at their expense this tax, to which, upon the real facts, it was not entitled.

It is contended for the state that, although in fact the stock may have been worthless, it does not follow that the tax valuation is illegal or excessive, because, under Massachusetts law, it was assessed, not with reference to intrinsic worth, but with reference to "market value" only; and it is said that the stock of an insolvent corporation may have market value if the insolvency is not known, and that the agreed facts state that the tax commissioner acted, not only on the return and the testimony of Wyman, but upon "other things." It is urged that, although the return was grossly false and Wyman's testimony (or information) very inaccurate, there may nevertheless have been other facts warranting a determination that the market value was \$50 a share, and that this court should therefore put that value upon the stock. But this court is not undertaking to revise the tax commissioner's action on the evidence before him; it is endeavoring to ascertain for what amount the tax claimed ought to be allowed as a preferred claim. For this purpose, the amount and legality of the tax are to be determined by the bankruptcy court. *In re Heffron Co.* (D. C.) 216 Fed. 642, 650; *In re Selwyn Importing Co.*, 18 Am. Bankr. Rep. 190. While the tax commissioner might have based his valuation on other facts than those contained in the corporation's return, there is no evidence that he did so, nor that the stock in question had a market value different from its real value.

I agree with Mr. Referee Perry that the tax is not due, and that the claim should be expunged.

Decree affirmed.

FLAS v. ILLINOIS CENT. R. CO.

(District Court, D. Nebraska, Omaha Division. February 5, 1916.)

No. 425.

1. REMOVAL OF CAUSES ⇨3—JOINDER OF CAUSES—ACTIONS UNDER EMPLOYERS' LIABILITY ACT.

Where a plaintiff, suing for personal injuries, alleged in one count a cause of action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. 1913, §§ 8657-8665]), and in another count a cause of action arising under the common law and state statutes, but the subject of each count was the same injury, the action was removable to a federal court, notwithstanding section 6 (section 8662) of such act, providing that no case arising thereunder and brought in any state court of competent jurisdiction shall be removed to any court of the United States, as only a portion of the action arose under the Employers' Liability Act.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. ⇨3.]

2. REMOVAL OF CAUSES ⇨3—JOINDER OF CAUSES—ACTIONS UNDER EMPLOYERS' LIABILITY ACT.

Within Employers' Liability Act, § 6 (section 8662), providing that no case arising thereunder shall be removed to any court of the United States, the "case" referred to is what plaintiff makes it in good faith by his petition.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. ⇨3.]

At Law. Action by Charles Flas against the Illinois Central Railroad Company. On motion to remand. Motion denied.

John W. Battin, of Omaha, Neb., for plaintiff.

William Baird & Sons, of Omaha, Neb., and Helsell & Helsell, of Ft. Dodge, Iowa, for defendant.

MUNGER, District Judge. [1] Plaintiff brought an action in the state court for personal injuries sustained by him, and his petition contained two counts. The first count sets forth a cause of action under the Employers' Liability Act of Congress (35 Stat. 66; 36 Stat. 291), and the second count sets forth a cause of action arising under the common law and state statutes, but the subject of each count is the same injury. The statutes of this state permit two such causes of action to be joined in the petition. Section 7657, Rev. Stats. Neb. 1913.

A petition for removal was filed, and the cause is now presented on a motion to remand the case. Each count of the petition sets forth a cause of action of which this court would have jurisdiction, if a suit had been begun in this court by a petition setting forth the facts relied upon in that count. The suit is therefore removable to this court, unless forbidden by section 6 of the Employers' Liability Act, which provides that:

"No case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

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

[2] The "case" referred to is what plaintiff makes it, in good faith, by his petition. *Mountain View Min. & Mill. Co. v. McFadden*, 180 U. S. 533, 21 Sup. Ct. 488, 45 L. Ed. 656; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870; *Cella v. Brown*, 144 Fed. 742, 75 C. C. A. 608. Because his good faith is presumed, it has been held that a single count, which states facts sufficient to make a case either under the act of Congress or under the state statutes and common law, states a case arising under the act of Congress. *Ullrich v. New York, N. H. & H. R. Co.* (D. C.) 193 Fed. 768; *Rice v. Boston & M. R. R.* (D. C.) 203 Fed. 580.

In the pending case, the plaintiff's petition announces his intention to proceed either under the act of Congress or independently of it, as he elects. The action, therefore, cannot be said to arise under the Employers' Liability Act, for but a portion of it so arises. This would be entirely clear, had plaintiff joined in his petition, as he is permitted to do by the Nebraska statute, causes of action against the same defendant for personal injury arising under the Employers' Liability Act of Congress, for trespass upon plaintiff's property, and for other injuries to plaintiff at another time and place, and not arising under the act of Congress; but it is not less clear that this plaintiff has presented two distinct and separate causes of action, upon either of which he may elect to proceed, and but one of which arises under the act of Congress.

The prohibition of removal mentioned in section 6 of the Employers' Liability Act is limited to cases which purport, by the plaintiff's petition, to arise under that act; and when, to a cause of action arising under that act, there is joined one which does not purport to arise under that act, the prohibition does not apply. *Strother v. Union Pacific R. Co.* (D. C.) 220 Fed. 731; *Patterson v. Bucknall S. S. Lines* (D. C.) 203 Fed. 1021.

BOSTON EXCELSIOR CO. v. SWEATT.

(Circuit Court of Appeals, First Circuit. January 27, 1916.)

No. 1114.

1. MASTER AND SERVANT ⇨278—ACTIONS FOR INJURIES—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

An employé, operating an excelsior baling press, consisting in part of a plunger, moving horizontally forward and back across a pit, and a treader, coming down into the pit from above, was killed by the treader knocking him into the pit in front of the plunger. It was part of his duty to bend over the pit, and put a header into the pit, as the plunger drew back, when the pit was filled with excelsior, and when he went to work he was instructed, before doing this, to shut off the flow of excelsior and move a lever, throwing the treader out of operation. There were no eye-witnesses to the accident, and the excelsior was found shut off, but the treader was in operating position. There was evidence that the treader would sometimes operate when the lever was in the stop position, and throw the lever into the operating position; that this was known to the agent whom the employer directed to instruct the employé as to the manner of doing the work; that it was abnormal and dangerous for the treader to so operate, and that it would not do so if the machine was in proper repair; and that the employé had always been seen by the employer and his associates doing his work as instructed. *Held*, that the jury were warranted in finding that the machine was out of repair; that the employer knew this, or from the length of time that it had existed, ought to have known of it, and put it into proper condition; and that it was negligent in failing to do so.

[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 ⇨276—ACTIONS FOR INJURIES—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

A finding was warranted that the employé followed the instructions and stopped the operation of the treader, and that the machine was afterwards put into operation through its being out of repair, especially in view of the fact that he must have known that it would be extremely hazardous, if not impossible, for him to put in the header when the treader was operating.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. ⇨276.]

3. MASTER AND SERVANT ⇨265—ACTIONS FOR INJURIES—BURDEN OF PROOF.

It was not incumbent upon the employé's administratrix, in an action for death, to show what particular defect in the machine caused it to operate in the abnormal and dangerous way mentioned; the fact that it did so operate itself disclosing that the machine was in some particular defective.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. ⇨265.]

4. MASTER AND SERVANT ⇨285—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for the death of an employé, operating an excelsior baling press and killed when a treader, the lever operating which had been placed in a stop position, was in some way thrown into operating position, evidence *held* to make questions for the jury as to whether the accident was caused by the worn condition of certain parts of the machine, which allowed them to come in contact with an upright controlling the operation of the treader.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. ⇨285.]

5. MASTER AND SERVANT ⇨270—ACTIONS FOR INJURIES—ADMISSIBILITY OF EVIDENCE.

In an action for the death of an employé, operating an excelsior baling press and knocked into a pit in front of a plunger by a treader, there was evidence that when he went to work he was instructed to move the lever controlling the operation of the treader to a stop position before leaning over the pit, and that his employer and associates had always seen him do the work in this way. The treader was found in operating position after the accident, but there was evidence that defects in the machine might have caused this. *Held*, that the testimony as to how he operated the machine was competent, whether or not testimony of habit is admissible, to show the method of work pursued at the time of an accident, as such evidence simply tended to show that in doing his work he understood what his instructions were and followed them, and it was a perfectly reasonable inference for the jury to make that he probably followed such instructions on the occasion in question.

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

6. MASTER AND SERVANT ⇨270—ACTIONS FOR INJURIES—ADMISSIBILITY OF EVIDENCE.

In an action for the death of an employé, claimed to have been caused by the machine he was operating being thrown into operating position because of defects in the machine, the court admitted evidence as to occasions shortly before he commenced work on the machine and shortly after the accident, when the operation of the machine was started in this way, as well as evidence regarding the wear on a part of the machine claimed to have thrown the machine into operation. *Held*, that an objection to this evidence on the ground of remoteness raised a question for the trial court, and presented no error of law.

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

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

Action by Abbie E. Sweatt, administratrix, against the Boston Excelsior Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward K. Woodworth, of Concord, N. H. (Streeter, Demond, Woodworth & Sulloway and Jonathan Piper, all of Concord, N. H., on the brief), for plaintiff in error.

De Witt C. Howe, of Concord, N. H. (Thomas F. Clifford, of Franklin, N. H., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. This action is brought by Abbie E. Sweatt, administratrix of the estate of Roy H. Sweatt, against the Boston Excelsior Company, under the Employers' Liability Statute of New Hampshire (Laws 1911, c. 163), to recover damages for the death of Roy H. Sweatt, which occurred on December 24, 1913, while he was in the defendant's employ. There was a trial by jury, and a verdict for the plaintiff.

The case is here on the defendant's bill of exceptions, and the errors assigned are the refusal of the court to direct a verdict for the

defendant at the close of all the evidence, to give certain requested instructions, and in the admission of certain evidence.

The statute under which the action is brought does away with the defenses of assumed risk and negligence of fellow servants, and places the burden of proving contributory negligence upon the defendant.

The plaintiff's intestate, at the time he met his death, was at work upon a machine for baling excelsior, and had been engaged in this work for about 2 months. He was 26 years of age, a man of good habits, intelligent, and thoroughly acquainted with the work he was required to do.

The press was operated by steam power. Connected with and forming a part of the press was a plunger, which moved periodically forward and back across a pit into which the excelsior was fed and pressed the excelsior into bales. The plunger was always in motion and not subject to the operative's control. There was a treader which was so constructed and arranged as to come down into the pit and tread the excelsior. The operation of the treader was supposed to be controlled by a lever, in such a way that if the operative set the lever in the stop position the treader would not come down.

Sweatt's work, in operating the machine, consisted in pulling a rope which let the excelsior down from above into the pit, then in moving the lever to the left or operating position, whereby the upright that operated the treader would be brought in contact with the head of the plunger rod, on its upward movement on the gear that operated the plunger, and thus throw the treader into operation. After the pit was filled with excelsior, it was his duty to pull the rope to shut off the excelsior from above, move the lever to the right to put the treader out of operation, then take a header in his right hand, and, standing on a step with his body bent over the pit, reach with the header into the pit, and, as the plunger drew back to the proper position, insert the header.

Sweatt was killed while putting the header into the press in the regular course of his work, by reason of the treader coming down and knocking him into the pit and subjecting him to the operation of the plunger. There was no eyewitness to the accident. Just before the accident he was seen by his brother, and the lever was then in the operating position, with the treader working the excelsior into the pit. Immediately after the accident occurred, Sweatt was found in the pit, the treader had been working, and the lever was in the operating position.

As the lever, when seen before and immediately after the accident, was in the operating position, the defendant insists in its motion for a directed verdict that there was no evidence from which the jury could find (1) that the defendant was negligent, or (2) that its negligence was the cause of Sweatt's death.

[1, 2] There was evidence that when Sweatt went to work for the defendant he was instructed that, before putting in the header, he should shut off the excelsior and move the lever to the stop position, then reach down into the pit and put in the header; that he was not only instructed to do this, but his employer and associates had always

seen him do the work in this way. At the time of the accident the excelsior had been shut off, so that it could not come down. There was evidence that the treader would at times operate when the lever was in the stop position and throw the lever into the operating position. It had done this at times prior to Sweatt's death, and on one occasion it occurred some three or four weeks before Sweatt went to work for the defendant, and this fact was known to the agent, whom the defendant directed to instruct Sweatt as to the manner of doing his work. It was an abnormal and dangerous thing for the treader to operate in this way, and the testimony was that it would not do so if the machine was in a proper state of repair.

From this evidence we think the jury might properly have found that the machine was out of repair; that the defendant knew that this was so, or, from the length of time that it had existed, ought to have known of it, and put it into proper condition; and that it was negligent in failing to do so. The testimony showing that Sweatt was instructed to do his work in a particular way, and had always been known to follow the instructions, was sufficient to warrant the conclusion that at the time of the accident he followed the instructions and moved the lever to the stop position before attempting to put in the header, and that the machine was afterwards put into operation through its being out of repair. Especially is this true when it is taken into account that he had shut off the excelsior before putting in the header, and that he must have known that it would be an extremely hazardous, if not an impossible, thing for him to put in the header when the treader was operating.

[3] The defendant's request for instructions embodied in its third assignment of error was properly refused. It was not incumbent upon the plaintiff to show what the particular defect in the machine was that caused it to operate in this abnormal and dangerous way. The fact that it did so operate disclosed of itself that the machine was in some particular defective, and the testimony of the plaintiff's expert confirmed the proposition.

[4] The defendant's sixth and seventh assignments of error are based on the refusal of the court to instruct the jury that there was no evidence from which it could find that the defendant was negligent in respect to the condition that existed around the hub of the twin gears, or that the alleged wear around the hub could have caused the accident. The evidence was that the upright which operated the treader came down in the space between the twin gears, and that the distance from each gear to the upright was three-fourths of an inch, that the gears were 40 inches in diameter and revolved on a shaft, and that the hole in the gears through which the shaft passed had become so worn and enlarged as to allow a radial sway of the gears of about 3 inches; that the upright, when thrown out by the arm of the lever, would be in the vicinity of the teeth of the gears, so that, if the gears wobbled an inch or more, the teeth could catch the bottom of the upright and throw the treader into operation. The construction of the machine was such that the upper portion of the upright passed through a confined space in the frame of the machine, which tended,

as the upright was pushed up, to throw it into its normal or operating position and against the arm of the lever, which would have the tendency to throw the lever from the stop to the operating position. In this state of the proof, it was clearly open to the jury to say whether the accident did or did not come about because of this defect in the gears. The court was justified in refusing the requested instructions.

The fourth and fifth assignments of error raise the same questions as to the condition around the pin connecting the head of the plunger rod to the twin gears as was raised by the sixth and seventh assignments of error concerning the wear about the hub of the twin gears. As to these requests, the defendant's contention is that there was no evidence from which it could be found that, when the upright was out of position, the head of the plunger arm could hit it, so as to put the treader in operation. The evidence was that the distance from the upright, when out of position, to the head of the plunger arm on its upward movement on the gear, when in a proper state of repair, was an inch and a half; that at the time of the accident the hole in the head of the plunger arm, through which the pin on the gears worked, was worn; that the machine had been long in use, and at times operated abnormally; and that, a few months after the accident, the hole in the head of the plunger arm was found to have extended in the direction of the plunger 2 inches or more beyond the circumference of the original hole. The defendant contends, however, that, even if the hole in the plunger arm could be found to have been in this worn condition, the head of the plunger arm could not come in contact with the upright, when out of position, so as to set the treader in operation, as the plunger head, on approaching and passing the bottom of the upright, was being drawn, and, if drawn, the worn portion of the hole towards the plunger could not be availed of to permit the plunger head to hit the upright. On the other hand, it is suggested that the wear in the hole of the plunger head might permit it to be thrust forward, so as to come in contact with the upright, and that this might occur if the plunger stuck on the initial pull; and, while it may not be as probable that the upright was put in operation from this source as from the worn condition of the gears about the hub, we do not think that the court erred in refusing to give these requests or that the defendant was prejudiced thereby.

The eighth assignment of error is covered in our discussion of the sixth and seventh assignments, and needs no further consideration.

[5] The ninth, tenth, and eleventh assignments of error relate to the admission of testimony as to how Sweatt operated the machine. This testimony was objected to on the ground that the method pursued by Sweatt, at the time of the accident, could not be found from evidence showing what his habit was in doing the work. But, whether habit testimony to show such a fact is competent or incompetent, we do not think that the testimony in this case comes under that head. The case discloses that the defendant instructed Sweatt as to the manner of doing his work, and the evidence here objected to simply tends to show that in doing his work he understood what his instructions were and followed them, and it was a perfectly reasonable inference

for the jury to make that if he had been instructed as to how he should do his work, and understood his instructions, he probably followed them on the occasion in question.

[6] The twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twenty-second assignments of error relate to the admission of testimony showing that the treader would work when the lever was thrown into the stop position, and that the lever at times would be thrown back into operating position. The evidence was that such occurrences took place a short time before Sweatt began his work on the machine and shortly after the accident. The principal objection to the testimony was that it was too remote. The question of remoteness, however, was one for the trial court and presents no error. Another objection raised was that the court erred in admitting the testimony "because there was no evidence that a defect in the press causing the feeder board to operate while the lever was in a position to stop it could have caused the accident." We have already shown that the treader might be put in operation by the upright coming in contact with the gears when the lever was in the stop position, and that the lever would remain in the stop position, or be thrown into the operating position, depending upon whether the upright, on being thrown up, was made to push sufficiently hard against the arm of the lever.

The twentieth and twenty-first assignments of error relate to the reception of certain evidence pertaining to the wear about the hole in the head of the plunger arm. The chief objection seems to be that it was too remote. But this objection presents no error of law. The evidence tended to show what the condition of the machine was at the time of the accident, and it was clearly admissible for this purpose.

The judgment of the District Court is affirmed, with interest, and the defendant in error recovers her costs of appeal.

CITIZENS' TRUST & GUARANTY CO. OF WEST VIRGINIA v. GLOBE & RUTGERS FIRE INS. CO.

(Circuit Court of Appeals, Fourth Circuit. December 10, 1915.)

No. 1336.

1. INSURANCE ⚡560—NOTICE OF LOSS—WAIVER.

A policy of fidelity insurance issued to an insurance company on account of an agency required the assured to give immediate notice of any loss, or of facts indicating that loss had probably been sustained. The assured notified the insurer of a claim against the agency several months overdue, explaining that the delay in giving notice was due to its continued attempts to obtain settlement and statement of the account. The insurer, without objecting to the notice, also assisted in trying to obtain an agreement between the parties. *Held*, that it thereby waived the condition requiring immediate notice.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1393-1404; Dec. Dig. ⚡560.]

2. INSURANCE ⚡556—WAIVER OF CONDITIONS—AUTHORITY.

A provision of an insurance policy that none of its conditions shall be deemed waived, unless in writing, signed by the president or vice president of the company, with its seal attached, cannot prevent a waiver by the company itself, acting through its officers who have charge of its business.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1374-1377; Dec. Dig. ⚡556.]

3. INSURANCE ⚡665—FIDELITY INSURANCE—CONSTRUCTION OF POLICY.

Evidence *held* to sustain a recovery on a policy insuring against loss by reason of "fraud or dishonesty" of an agent, where, while there was a dispute between the principal and agent as to the amount of compensation which the agent was entitled to retain from collections made, he used the money so collected, and was unable to pay it over on final settlement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. ⚡665.]

4. INSURANCE ⚡285—AVOIDANCE FOR CONCEALMENT—SURETY BOND.

A renewal surety bond, insuring a principal against loss by reason of the fraud or dishonesty of an agent, which was procured by the agent, is not invalidated by the fact that, when the renewal was made, the agent owed the principal a considerable balance, of which the insurer was not advised, where the principal had no communication with the insurer, was not asked the state of its account, and had no knowledge of fraud or dishonesty on the part of the agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 657; Dec. Dig. ⚡285.]

5. INSURANCE ⚡168—SURETY BOND—CONSTRUCTION.

A mere recital in a surety bond given by an agent that he has been appointed agent at a certain place does not limit the scope of the bond, or the liability of the surety to business done by the agent at such place.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 325; Dec. Dig. ⚡168.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Action at law by the Globe & Rutgers Fire Insurance Company against the Citizens' Trust & Guaranty Company of West Virginia. Judgment for plaintiff, and defendant brings error. Reversed.

B. M. Ambler, of Parkersburg, W. Va. (Van Winkle & Ambler, of Parkersburg, W. Va., on the brief), for plaintiff in error.

H. W. Hayward, of New York City (Reese Blizzard, of Parkersburg, W. Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. This action was on two surety bonds given to the Globe & Rutgers Fire Insurance Company by the Citizens' Guaranty Company, in behalf of a corporate agency of the insurance company, first called General Southern Agency, and retaining its identity through several changes of name. The first bond for \$10,000, covering the period from June 7, 1906, to June 7, 1907, was extended to June 7, 1908; the second, for \$5,000, covered the period from July 15, 1908, to July 15, 1909. The District Judge instructed a verdict for \$5,000 and interest, aggregating \$6,400, for defaults secured by

both bonds under the terms of the second bond. In giving this instruction the court held, first, that under the report of the commissioner appointed to state the account between the fire insurance company and its agent and the evidence taken in open court there was no real dispute that the default under both bonds, recoverable under the terms of the second bond, after allowing all credits, was more than the \$5,000; and, second, "that because defendant company, after notification and knowledge of the relations existing between plaintiff and its agent, demanded statements of the accounts and proofs of loss, and based its refusal to pay solely on the ground that Fowler & Co. were claiming credits and sets-off, it is estopped from denying its obligations upon its bonds for other reasons than account of such sets-off." The insurance company accepts the verdict, and does not assign error in the denial of a larger recovery.

[1] The evidence supports the conclusion of the District Judge that there was a waiver of the condition that, "upon the discovery by the employer that a loss has been sustained, or of facts indicating that a loss has probably been sustained, the employer shall immediately so notify the company in writing, at its principal office in the city of Parkersburg." The letter of the insurance company of October 16, 1908, notifying the surety company of the balances claimed against the agency, gave the information that balances had been several months overdue, and that there had been delay in giving notice under the policy on account of long and persistent efforts to obtain a settlement with the agent. The surety company in reply made no allusion to the delay in giving notice, and in a somewhat protracted correspondence sought to bring the insurance company and its agency to an agreement as to the amount due. This correspondence indicates clearly that the surety company intended to proceed in the matter of ascertaining its liability on the theory that the letter of October 16, 1908, was due notice of the alleged default, and it shows an effort by the assured to comply with the requests made of it. On this point the case, therefore, falls within the rule that any course of action which leads the assured to believe that by conforming thereto the condition of immediate notice will not be insisted on, followed by labor or expense in the effort to conform, will operate as waiver or estoppel. *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Hartford Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496; *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. It is true that later, on November 13th, the defendant wrote to the insurance company:

"We beg to say again that we cannot consider this claim until a settlement is reached with Fowler & Co., or (if settlement cannot be had) until your claim is established by process of law. Then, if we are liable, we will pay; otherwise we cannot do so. * * * Fowler & Co. dispute your claim. * * * We understand that Fowler & Co. are ready to pay any balance which they may owe you, whenever the same may be ascertained by a proper settlement or by a court of competent jurisdiction. * * * It appears that they have asked you for a settlement of the contingent commission account, which has not been furnished. It seems to us that Fowler & Co. are entitled to a detailed statement of the account; and if it were furnished it would certainly put an end to excuses for delay on that ground. We suggest that you

render a detailed statement setting forth fully your contention (just as if you would have to do if you were proving your claim in court), and we fully believe that you would have no trouble in reaching a settlement with them. We are sending a copy of this letter to Fowler & Co."

But this letter could not avail to recall the waiver on which the insurance company had acted in trying to comply with the surety company's demand that it come to an agreement with the agent as to the amount due.

[2] It is argued, however, that the correspondence could not operate as a waiver, because the bond provides:

"Fourteenth. None of the conditions or provisions contained in this bond shall be deemed to have been waived by or on behalf of the company, unless the waiver be clearly expressed in writing over the signature of its president or vice president, and its seal be thereto affixed, duly attested."

There can be no doubt that the same authority that issues a bond may waive any of its conditions. The provision quoted is valid in denying to any agent of the company the power to waive any of the conditions or provisions of the policy, unless the waiver should be under the signature of the president or vice president, and under the seal of the company. But it cannot mean that the company itself cannot waive or otherwise contract with reference to the insurance in any way it should see fit. The letters which expressed the intention to waive the requirement as to notice were sent from the general office of the company, and they were signed by the secretary, presumably under the authority of the company. Hence the waiver was by the company itself. *Insurance v. Norton*, supra.

[3] The bonds expressly limit liability to such pecuniary loss as may be sustained "by reason of the fraud or dishonesty of the employé," and expressly exclude "any loss occasioned by accident, mistake, negligence, error of judgment on the part of, or breach of contract by, the employé." There is nothing in the evidence showing that the surety company intended to extend its obligation to cover a liability not expressed in the bonds, or to admit that the employé had been guilty of fraud or dishonesty. On the contrary, the correspondence indicates the confidence of the surety company that the agency had acted in good faith. Taken together, the letters might well be regarded as importing refusal of the surety company to consider whether any default fell under its obligation until the amount of the default had been ascertained by proof or agreement.

Still we think the evidence did not make a serious issue of fact as to whether the agent had been guilty of fraud or dishonesty. The general rule is that an agent is guilty of fraud or dishonesty when he collects money belonging to his principal and uses it for his own purposes, or refuses to turn it over. But if there be mutual demands, and the failure to settle be due to an honest conviction of the agent that he has good offsets against the balance appearing against him, he cannot be said to be acting fraudulently or dishonestly in the mere withholding of the balance to the extent of the amount claimed by him until the true amount due by him be ascertained. Nevertheless, under such circumstances, the agent is bound in honesty not to use the money

collected for his principal, but to hold the whole amount ready for settlement when the offsets claimed are passed upon, and the true balance ascertained; and if he uses the money, so that he is unable to pay it over upon the final settlement, he is guilty of dishonesty. This is the rule applicable here. Assuming that the claims of offsets by the agent were made in good faith, and that one of them was valid, and should have been allowed to the extent of the amount claimed, yet these offsets were claimed, not for payments or disbursements on account of the principal, but for additional compensation. This additional compensation was in dispute, and the plain duty of the agent, which honesty required, was to hold all funds collected for his principal until the dispute was settled. This he failed to do, and when insolvency came he was unable to turn over the money he held in trust. This view of his conduct as dishonesty is made clearer by the fact that the agent admitted a large balance to be due and promised a remittance of \$2,500 thereon. The meaning of fraud and dishonesty extends beyond acts which would be criminal. They are to be given a broad signification, and taken most strongly against the surety company. *City Trust Company v. Lee*, 204 Ill. 69, 68 N. E. 488; *United States Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co.*, 148 Fed. 353, 78 C. C. A. 345.

[4] It is admitted by the plaintiff that when the \$5,000 bond was given on July 15, 1908, the agent owed a considerable balance on his account. The defendant insists, as a matter of law, that the failure of the insurance company to inform the surety company of this default was a fraud, which annulled the bond. The undisputed fact is that the insurance company had no communication with the surety company as to the giving of the bonds, and that it merely received the bonds which the agent had procured. The surety company made no inquiry of the insurance company as to the state of the agent's accounts. Having chosen to act on its own responsibility, in the absence of concealment or knowledge of the insurance company of intentional wrongdoing of the agent, the surety company must abide the consequences. Under the same conditions the surety was held liable in *Magee v. Manhattan Life Insurance Co.*, 92 U. S. 93, 23 L. Ed. 699, the court saying:

"The plea does not set forth any of the circumstances attending the execution and delivery of the bond. It does not aver that there was any misrepresentation, anything fraudulently kept back, or any opportunity to make disclosures on the part of the company, or any inquiry by the sureties, before the bond was delivered. Nor is it averred that the company was aware that the sureties were ignorant of the facts complained of. It is, perhaps, to be inferred from the plea that the fact was—as the record, aside from the plea, shows it to have been—that the bond was executed at Mobile, and sent by Voorhees by mail to the company in New York. If this were so, the company, upon receiving it, was under no obligation to make any communication to the sureties. The validity of the bond could not depend upon their doing so. The company had a right to presume that the sureties knew all they desired to know, and were content to give the instrument without further information from any source. Under these circumstances, it was too late, after the breach occurred, to set up this defense."

[5] It is insisted that no liability could attach under the bond for business done by an office maintained in the city of Baltimore, for the

reason that the first bond contains the recital "that the General Southern Agency had been appointed agents of the insurance company at Bluefield, W. Va." It seems evident that the bare recital of the location of the agency did not limit the territory in which the agency was to do business.

The objection to the introduction of a number of letters seems to have no foundation. They were letters between the parties or their counsel, and between the insurance company and the agent. All of them bear on the question whether there was a fraudulent or dishonest default by the agent.

The questions propounded to Fowler, representative of the agency, called for his interpretation of written contracts, and were properly excluded.

The point of chief difficulty is the method of ascertainment of the amount of the liability. The first bond was effective from June 7, 1906, to June 7, 1908; the second was effective for one year from its date July 15, 1908. Thus it appears that there was an unbonded period from June 7, 1908, to July 15, 1908. The second bond contained these provisions:

"First. The company shall not be liable hereunder for any sum or amount whatever, which the employé may, at the commencement of the term hereinbefore provided for, owe the employer."

"Third. The company, upon the execution of this bond, shall not thereafter be liable to the employer under any previous bond executed in behalf of the employé, and upon the execution of the company of any new bond to the employer in behalf of the employé, all the obligations of this bond shall immediately cease and determine; it being mutually understood that it is the intention of this provision that but one (the last) bond shall be in force at one time: Provided however, that the employer shall have the right, within six months after the termination of any previous bond, to make claim for, and proof of, any loss occurring thereunder; but if any claim be so made under any previous bond during the said period of six months, and if loss also occur under this bond, the aggregate liability of the company for all losses under all bonds shall not exceed the sum of _____ dollars."

Although the limitation is left blank, there seems to be no dispute that the intention was to limit the total liability under the two bonds to the amount of the second bond, \$5,000. The result is that the surety company is not liable for any default occurring between June 7, 1908, and July 15, 1908; but it is liable for the aggregate defaults, not only of the period covered by the second bond, but also of the period covered by the first subject to the limitation that the entire liability shall not exceed \$5,000.

The monthly balances against the agency were not due until the expiration of 60 days after the monthly reports. Hence there was no default until the expiration of 60 days after each report. But the agency was liable to the insurance company as soon as money was collected by it for the credit of the insurance company; and the undertaking of the surety company immediately attached to credits to the insurance company in the hands of the agency. The surety company was bound to see that these collections were honestly accounted for. It follows that under the first bond the surety company was liable for all amounts reported by the agency to be in its hands up to June 7,

1908, less all payments made thereon and all credits which the agency was entitled to at that date, including the \$2,500 or less amount allowed to the agency under its contract.

While the surety company is not liable for any amounts collected for the unbonded period from June 7, 1908, to July 15, 1908, this exemption does not extend to amounts which had been previously collected, and reported during this unbonded period. On July 15, 1908, when the second bond was given, the surety company was chargeable with the balance unpaid under the old bond ascertained as above indicated. The liability under the terms of the new bond commences with this balance. To it is to be added all collections made from July 15, 1908, to the close of the agency's transactions, including the balances which fell due under the 60-day rule after the termination of the agency, less payments made by the agency and amounts collected from subagents. The amounts collected from subagents cannot be credited on moneys collected and accounted for during the unbonded period, because the presumption, in the absence of proof to the contrary, is that the subagents remitted the balances in their hands as they fell due, and that the collections from them after the termination of the agency were for the later months covered by the last bond.

Under this method of the application of the credits the account will stand thus:

Total balance of the entire period, including unbonded period....	\$10,251 24
Less collections in unbonded period.....	3,742 89
	<hr/>
Total balance accruing during bonded period.....	\$ 6,508 35
Less credit under contract.....	\$2,500 00
Less collections from subagents.....	1,497 79
	<hr/>
Net balance.....	\$ 2,510 56
Interest from May 6, 1909, date of proofs of loss, to January 13, 1914, first day of the term of District Court at 6 per cent. per annum, on \$2,510.56.....	705 69
	<hr/>
Total amount due on bonds.....	\$ 3,216 25

The result is that the judgment of the District Court must be reversed, and a new trial ordered, unless the plaintiff shall within 60 days after this judgment remit from his recovery \$3,183.75 the difference between his judgment, \$6,400, and the amount above stated. The main points of doubt are whether the above credit of \$2,500 should be reduced to \$1,900, as found by the commissioner, and whether \$3,742.89 is the true amount collected and unpaid by the agency for the unbonded period. It is possible, too, that the plaintiff may be able to show affirmatively that the amounts collected from subagents, \$1,497.79, were on account of unpaid balance of the unbonded period. If so, that sum should be taken from the total balance of the unbonded period, claimed to be \$3,742.89, before such balance of the unbonded period is subtracted from the total balance of \$10,251.24. Upon these points we are not to be understood as expressing any opinion. The credits are given for the full amounts claimed by the defendant merely by way of illustration, and to end the litigation, in case the plaintiff

should prefer to accept the amounts contended for by the defendant in these particulars, rather than incur the expense of a new trial.
Reversed.

QUINETTE v. PULLMAN CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. January 5, 1916.)

No. 4235.

1. COURTS \Leftrightarrow 366—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.

Rev. St. § 721 (Comp. St. 1913, § 1538), provides that the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be rules of decision in trials at common law in the courts of the United States. The Constitution of Oklahoma (article 9, § 43) provides that no corporation shall be permitted to do business without filing a list of its stockholders, etc., and that every foreign corporation, before being licensed to do business, shall designate an agent for the service of process. Comp. Laws Okl. 1909, §§ 5605, 5606, require railroad companies doing business therein to designate a person on whom process may be served and to file a certificate of the designation with the clerk of the district court. *Held*, that the decision of the Supreme Court of Oklahoma that a railroad company, because of its noncompliance with the constitutional and statutory requirements, was not entitled to plead limitations, was conclusive on the federal courts in an action for injuries sustained in Oklahoma.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. \Leftrightarrow 366.]

2. APPEAL AND ERROR \Leftrightarrow 1050—HARMLESS ERROR—EVIDENCE—PECUNIARY CONDITION OF INJURED PERSON.

On the trial of a passenger's action against a carrier for injuries, evidence as to plaintiff's investments, tending to show that he was a man of means, was immaterial and prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. \Leftrightarrow 1050.]

3. APPEAL AND ERROR \Leftrightarrow 1060—HARMLESS ERROR—MISCONDUCT OF COUNSEL.

In a passenger's action against a carrier for injuries, the statements of defendant's counsel in examining plaintiff, and in a colloquy concerning the admissibility of evidence, that plaintiff had recovered some thousands of dollars from a casualty company, and had been paid two or three times already for the damages incurred, was misconduct requiring a reversal, where the court did not adequately warn the jury against such misconduct, but merely told them that the result in any other suit was wholly immaterial, and that the question was whether defendant was liable, and the jury would give no consideration whatever to any claimed recovery in any other case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. \Leftrightarrow 1060.]

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

Action by Jermain P. Quinette against the Pullman Company and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

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

*Rehearings denied March 27, 1916, and May 2, 1916.

Charles Mitschrich, of Lawton, Okl., for plaintiff in error.

R. A. Kleinschmidt, of Oklahoma City, Okl. (W. F. Evans, of St. Louis, Mo., and E. H. Foster, of Oklahoma City, Okl., on the brief), for defendant in error St. Louis & S. F. R. Co.

Charles H. Woods, of Oklahoma City, Okl. (J. R. Cottingham, S. T. Bledsoe, and George M. Green, all of Oklahoma City, Okl., and H. T. Wilcoxon, of Chicago, Ill., on the brief), for defendant in error Pullman Co.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SMITH, Circuit Judge. The plaintiff, Jermain P. Quinette, brought this suit on August 18, 1911, in the district court of Comanche county, Okl., against the Pullman Company, to recover for personal injuries sustained October 21, 1910. The case was removed to the United States District Court for the Western District of Oklahoma. There plaintiff filed an amended petition, and to this the Pullman Company filed answer. On January 31, 1913, the plaintiff filed an application to make the St. Louis & San Francisco Railroad Company, hereafter called the Frisco, a party defendant, and, leave having been granted, filed a second amended petition against the Pullman Company, an Illinois corporation, and the Frisco Company, a Missouri corporation, for \$50,000 for personal injuries. The Frisco operated through vestibuled trains from St. Louis, Mo., to Lawton, Okl., through Ft. Sill, Okl. The plaintiff lived at the Ft. Sill military reservation. He left St. Louis, Mo., on October 20, 1910, for his home. He traveled on the line of the Frisco, but rode in a car of the Pullman Company. He claims that before they reached the Ft. Sill station he asked the conductor of the railroad train if it would stop at the water tank near the Ft. Sill station, and if he could there get off, as that was nearer his home than the station, and that he was told the train would stop there, and that he could get off there if he desired to do so. He communicated this to the Pullman porter before they reached the water tank, which was about 10 o'clock at night, on the 21st of October, 1910. As they approached the water tank stop the porter took his hand baggage and went to the forward end of the Pullman, and the plaintiff followed him out into the vestibule. As the train stopped the porter said, "Here you are, boss," and he stepped out and fell some 20-odd feet from a bridge to the bed of a stream and sustained serious injuries. The Pullman Company denies, and supports its denial by evidence, many of the latter claimed facts. It is conceded that the general statute of limitations of Oklahoma in such cases is two years, and this suit was brought against the Frisco Company about two years and four months after the accident.

[1] Section 5553 of Snyder's Compiled Laws of Oklahoma of 1909 is as follows:

"Sec. 5553. *Absence—Limitations.*—If, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state, or ab-

second, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

It is provided in the Constitution of Oklahoma (article 9, § 43) that:

"No corporation, foreign or domestic, shall be permitted to do business in this state without first filing in the office of the Corporation Commission a list of its stockholders, officers, and directors, with the residence and post office address of, and the amount of stock held by each. And every foreign corporation shall, before being licensed to do business in this state, designate an agent residing in the state; and service of summons or legal notice may be had on such designated agent and such other agents as now are or may hereafter be provided for by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise."

Section 5605 of the Compiled Laws of Oklahoma of 1909 provides:

"Every railroad company or corporation, and every stage company doing business in Oklahoma, or having agents doing business therein for such corporation or company, is hereby required to designate some person residing in each county, into which its railroad line or stage route may or does run, or in which its business is transacted, on whom all process and notices issued by any court of record or justices of the peace of such county may be served."

Section 5606 of the same statutes provides:

"In every case such railroad company or corporation, and stage company, shall file a certificate of the appointment and designation of such person, in the office of the clerk of the district court of the county in which such person resides; and the service of any process upon the person so designated, in any civil action, shall be deemed and held to be as effectual and complete as if service of such process were made upon the president, or other chief officer of such corporation."

The Frisco Company filed an answer setting up the statute of limitations, but not alleging a compliance with these constitutional and statutory provisions, and the plaintiff demurred and replied to such answer; but the court overruled this demurrer, and on October 10, 1913, the court sustained a motion for judgment for the Frisco Company upon the pleadings. The case was tried to a jury on the issue between the plaintiff and the Pullman Company, and resulted in a verdict for the defendant, upon which judgment was rendered. The plaintiff sued out a writ of error as against both defendants.

The first question in the case normally is as to the statute of limitations. In *Hale v. Same Defendant* (the Frisco) 39 Okl. 192, 134 Pac. 949, 49 L. R. A. 1915C, 544, Ann. Cas. 1915D, 907, on January 21, 1913, and of course before any of the questions in this case had been submitted or ruled on, the Supreme Court of Oklahoma decided that the Frisco was not entitled to plead the statute of limitations in question. This decision seems to be doubted, because it was prepared by the Judges of the Supreme Court Commission, Division No. 2; but at the close of the opinion is the announcement: "Per Curiam. Adopted in whole." It is evidently as much the opinion of the Supreme Court of Oklahoma as any other. A petition for a rehearing was overruled in that case on September 2, 1913.

It is elementary that the federal courts ordinarily are bound by the decisions of the Supreme Court of a state as to the interpreta-

tion and construction of a state statute. The cases in general upon this question are too numerous to cite, but reference is made to all the authorities cited in the Encyclopedia of the U. S. Reports, vol. 4, page 1066 et seq., and volume 12, page 424, but reference will be had to some of the cases arising under the statute of limitations:

"Sec. 721. The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Revised Statutes of the United States.

In *Bauserman v. Blunt*, 147 U. S. 647, 652, 13 Sup. Ct. 466, 468 (37 L. Ed. 316), it is said:

"No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court. *Higginson v. Mein*, 4 Cranch, 415, 419, 420 [2 L. Ed. 664]; *Shelby v. Guy*, 11 Wheat. 361, 367 [6 L. Ed. 495]; *Bell v. Morrison*, 1 Pet. 351, 360 [7 L. Ed. 174]; *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79; *Green v. Neal*, 6 Pet. 291, 297-300 [8 L. Ed. 402]; *McElmoyle v. Cohen*, 13 Pet. 312, 327 [10 L. Ed. 177]; *Harpending v. Dutch Church*, 16 Pet. 455, 493 [10 L. Ed. 1029]; *Lef- fingwell v. Warren*, 2 Black, 599 [17 L. Ed. 261]; *Sohn v. Waterson*, 17 Wall. 596, 600 [21 L. Ed. 737]; *Tioga Railroad v. Blossburg & Corning Railroad*, 20 Wall. 137 [22 L. Ed. 331]; *Kibbe v. Ditto*, 93 U. S. 674 [23 L. Ed. 1005]; *Davie v. Briggs*, 97 U. S. 628, 637 [24 L. Ed. 1086]; *Amy v. Dubuque*, 98 U. S. 470 [25 L. Ed. 228]; *Mills v. Scott*, 99 U. S. 25, 28 [25 L. Ed. 294]; *Moores v. National Bank*, 104 U. S. 625 [26 L. Ed. 870]; *Michigan Insurance Bank v. Eldred*, 130 U. S. 693, 696 [9 Sup. Ct. 690, 32 L. Ed. 1080]; *Penfield v. Chesapeake, etc., Railroad*, 134 U. S. 351 [10 Sup. Ct. 566, 33 L. Ed. 940]; *Barney v. Oelrichs*, 138 U. S. 529 [11 Sup. Ct. 414, 34 L. Ed. 1037]."

In *Metcalf v. Watertown*, 153 U. S. 671, 673, 14 Sup. Ct. 947, 948 (38 L. Ed. 861), it is said:

"And from the beginning this court has recognized statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court, as rules of decision in the courts of the United States."

In *Patton v. Easton*, 1 Wheat. 476, 482, 4 L. Ed. 139, and again in *Powell v. Harman*, 2 Pet. 241, 7 L. Ed. 411, the Supreme Court construed a Tennessee statute of limitations of real actions in accordance with the decisions of the Supreme Court of that state; yet in *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402, a judgment of the Circuit Court of the United States which had followed those cases was reversed because of a more recent decision of the state Supreme Court establishing the opposite construction, and in *Lefingwell v. Warren*, 2 Black, 599, 603, 17 L. Ed. 261, the Supreme Court said:

"The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the thirty-fourth section of the Judiciary Act of 1789. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. * * * If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications."

In *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 189, 14 Sup. Ct. 1010, 1014 (38 L. Ed. 953), after approving these statements, the Supreme Court said:

"These views * * * do not in any way conflict with *Burgess v. Seligman*, 107 U. S. 20, 32 [2 Sup. Ct. 10, 27 L. Ed. 359], *Carroll v. Smith*, 111 U. S. 556, 562 [4 Sup. Ct. 539, 28 L. Ed. 517], or *Gibson v. Lyon*, 115 U. S. 439 [6 Sup. Ct. 129, 29 L. Ed. 440]. None of those cases involved the question of the conclusiveness on this court of the decisions of the courts of a state as to a statute of limitations and the bar created thereby."

And in that case the Supreme Court clearly intimated that if it were passing upon the question there involved it would decide it differently from the decision of the state courts.

In *Campbell v. Haverhill*, 155 U. S. 610, 614, 15 Sup. Ct. 217, 219 (39 L. Ed. 280), it is said:

"The argument in favor of the applicability of state statutes is based upon Revised Statutes, § 721, providing that 'the laws of the several states, except, etc. * * * shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' That this section embraces the statutes of limitations of the several states has been decided by this court in a large number of cases, which are collated in its opinion in *Bauserman v. Blunt*, 147 U. S. 647 [13 Sup. Ct. 466, 37 L. Ed. 316]. To the same effect are the still later cases of *Metcalfe v. Watertown*, 153 U. S. 671 [14 Sup. Ct. 947, 38 L. Ed. 861], and *Balkam v. Woodstock Iron Co.*, 154 U. S. 177 [14 Sup. Ct. 1010, 38 L. Ed. 953]. Indeed, to no class of state legislation has the above provision been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction."

In *Seneca Nation v. Christy*, 162 U. S. 283, 289, 16 Sup. Ct. 828, 830 (40 L. Ed. 970), it is said:

"The proper construction of this enabling act, and the time within which an action might be brought and maintained thereunder, it was the province of the state courts to determine."

And in *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 339, 16 Sup. Ct. 810, 814 (40 L. Ed. 986), it is said:

"The limitation of actions is governed by the *lex fori*, and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions."

In *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 73, 16 Sup. Ct. 939, 942 (41 L. Ed. 72), it is said that:

"No rule is more firmly established than that this court will follow the construction given by the Supreme Court of a state to a statute of limitations of a state."

And the rule laid down in *Bauserman v. Blunt* is cited approvingly in *Forsyth v. Hammond*, 166 U. S. 506, 519, 17 Sup. Ct. 665, 41 L. Ed. 1095, and in *Vance v. Vandercook Co.*, 170 U. S. 468, 473, 18 Sup. Ct. 645, 42 L. Ed. 1111, and in *Hartford Insurance Co. v. Chicago, etc., Railway Co.*, 175 U. S. 91, 108, 20 Sup. Ct. 33, 44 L. Ed. 84.

No case has been found where the Supreme Court has under any circumstances authorized a departure from this rule as applied to questions arising under the statute of limitations.

The case of *Burgess v. Seligman*, 107 U. S. 20, 35, 2 Sup. Ct. 10, 27 L. Ed. 359, is cited. It did not involve the statute of limitations. In that case the question was under submission in the federal court before it was decided by the state court and while that case is still adhered to by the Supreme Court it cannot, in view of the other cases that have been cited and the manifest difference between it and this one, be rightly held to be in point.

Clapp v. Otoe County, 104 Fed. 473, 476, 45 C. C. A. 579, is also cited, but does not seem to us to be in point. The same is true of *Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co.*, 137 Fed. 26, 71 C. C. A. 1. In that case the syllabus was by the court and is that:

"Decisions of the state courts which so construe their statutes as to destroy or impair rights previously acquired through contracts between citizens of different states under statutes and Constitutions which warranted and sustained them when they were vested are not obligatory upon the courts of the United States."

This court has itself gone further than any of the cases cited in *City of Ottumwa v. City Water Supply Co.*, 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604; but such cases do not seem to us to be in point.

It is suggested that if such a law had been passed before the liability of the road ceased, or a decision had been rendered construing the law before the liability of the road ceased, the time of the statute might have been extended; but the Supreme Court of Oklahoma held that there never was a time the Frisco Railroad could plead the statute of limitations in that state, and consequently that if any one supposed the statute of limitations was running he was mistaken, and if any one thought that the cause of action was dead after two years he was mistaken.

Until some case is cited in which it has been held that the federal courts can change the construction of the state courts of a statute of limitations, we must hold that the statute is governed by the decision in this case by the Supreme Court of Oklahoma. It must be borne in mind that there was no common-law statute of limitations, and the defendant is claiming the benefit of a statute of limitations enacted by Oklahoma, and construed by the Supreme Court of that state not to apply to it.

It is said that the United States District Court for the Western District of Oklahoma in another case, *Tiller v. Same Defendant*, 189 Fed. 994, held the statute of limitations did apply; but it was held in *Bauserman v. Blunt*, that, even though the federal court below had decided that case before the decision of the Supreme Court of the state modifying the holding as to the state statute of limitations, still the case would be reversed by the Supreme Court to conform to the decision of the Supreme Court of Kansas, from which the case came. This case thus serves to accentuate how far the courts have gone in following the construction of the state courts of statutes of limitations.

[2, 3] Turning now to the writ of error as to the Pullman Company: When the plaintiff was on the stand on cross-examination by the Pullman Company, the following took place:

"Q. That time was nearer than the present time to the time of the accident, and your memory was clearer and fresher at that time than it would be now. This suit here we have been questioning you about, wherein you are plaintiff and the Fidelity & Casualty Company of New York was defendant, and you recovered judgment— (Plaintiff objects; incompetent, immaterial. Defendant proposes to ask the question for the purpose of eliciting the following fact— Plaintiff objects to any statement of any facts not in evidence before the jury.)

"The Court: What is the purpose of the question, without stating what you seek to elicit?

"Mr. Parmenter: To show that growing out of this particular injury he recovered out of this defendant company in that case some thousands of dollars— (Plaintiff objects to a statement of that kind in the presence of the jury, and asks the court to caution the jury not to be influenced by the statement of counsel, because it is irrelevant, incompetent, and immaterial in this case.)

"The Court: I don't see on what theory that would have any bearing on this case in any way at all.

"Mr. Parmenter: He has been paid two or three times for it already. (Plaintiff moves the court to strike out the statement of counsel, and to instruct the jury that the remark of counsel is improper, for the reason it is prejudicial, incompetent, and immaterial in this case, and made for no other purpose than to get something before this jury that is improper evidence.)

"The Court: Gentlemen whatever might have been the result in any other suit, or in the one which has been adverted to here in the examination, is wholly immaterial in this case. The question in this case is whether this defendant company is liable in damages to the plaintiff, and you will give no consideration whatever to any claimed recovery in any other case. Objection sustained. (Defendant excepts to the instruction, and also to the sustaining of the objection.) * * *

"Q. What is your present income at this time? (Plaintiff objects; immaterial, unless shown it is derived from personal services. Sustained. Defendant excepts.)

"Q. What business are you engaged in at this time, if any? A. None. Q. Have you any investments at this time? (Plaintiff objects; immaterial. Overruled. Exception.) A. I own a little bank stock. Q. Is that the only investment you have? A. I am not interested in business of any kind. Q. Is that the only investment you have? A. A little stock in the Lawton Real Estate & Investment Company. (Plaintiff moves to strike out answer; immaterial. Overruled. Plaintiff excepts.)

"Q. What other investments besides those two? (Plaintiff objects; immaterial. Overruled. Exception.) A. Nothing but loans. Q. Money loaned out? A. Yes, sir. Q. Do you have anything to do with the management of the bank where you have stock? A. No, sir. Q. What bank is that? A. First National of Lawton. Q. Any other bank? A. No, sir. Q. This real estate company; where is its place of business? A. Lawton. Q. Have you any connection with its management? A. No, sir. Q. Simply own stock in it as an investment? A. Yes, sir. Q. What other investments besides those two have you? A. Nothing except loans. Q. Where are those loans? Where are they made? (Plaintiff objects; immaterial. Overruled. Exception.) A. Lawton. Q. Who looks after those loans? A. My brother, W. H. Quinette. Q. What part do you take in looking after them? A. None. Q. Now, what other investments have you besides the three you have detailed to the jury? A. None. Q. That's the extent of it? A. That's the extent of it. Q. Since 1910 what, if any, work, services, or labor have you performed? A. Nothing.

"By Mr. Mitschrich: Q. What's the reason you haven't performed any work, services, or labor since 1910? A. I haven't been in physical condition. (Plaintiff moves to strike out all questions and answers with reference to the investments inquired about, for the reason it has developed upon the examination of the witness that no personal services were required of him in connection with them, and under the state of the evidence the testimony is incompetent, immaterial, and we ask the court to strike it out; also to in-

struct the jury that it has no bearing in this case, and cannot be considered by them in arriving at their verdict. Motion overruled. Plaintiff excepts.)”

All of the evidence thus elicited tending to show that the plaintiff was a man of means was immaterial and prejudicial, and the statement of Mr. Parmenter that the plaintiff recovered of the Fidelity & Casualty Company of New York some thousands of dollars, and that he has been paid two or three times for the damages incurred already, were misconduct, and the failure of the court to more adequately warn the jury against the misconduct all require that this case be reversed as to the Pullman Company.

It is therefore ordered that both the judgments rendered against the plaintiff be reversed, and the cause be remanded, with directions to proceed in harmony with this opinion.

HERBERT et al. v. SHANLEY CO.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 83.

1. COPYRIGHTS Ⓒ66 — INFRINGEMENT — MUSICAL COMPOSITIONS — “PERFORM PUBLICLY FOR PROFIT.”

Under Copyright Act March 4, 1909, c. 320, 35 Stat. 1075, authorizing the copyright of musical compositions and dramatico-musical compositions, and giving one taking out a copyright on a dramatico-musical composition the sole right to print and sell copies, and the sole right to publicly perform it, but to the author of a musical composition only the right to print and sell copies and to perform the copyrighted work “publicly for profit,” the copyright of a song, if valid, was not infringed by rendering it in a public restaurant, where no admission fee was charged, though the performer was privately paid for rendering it by the proprietor of the restaurant.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. Ⓒ66.]

2. COPYRIGHTS Ⓒ40—LOSS OF RIGHTS—SEPARATE PUBLICATION OF PARTS OF WORK.

The copyright covering a comic opera or dramatico-musical composition was lost as to a vocal number contained in the opera, which was published and sold separately without any announcement on the copies sold that the opera from which it was taken was copyrighted, assuming that the insertion of such notice would have retained the advantages of the copyright as to the republished song.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 35; Dec. Dig. Ⓒ40.]

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

Suit by Victor Herbert and others against the Shanley Company. From a decree (222 Fed. 344) dismissing the bill of complaint, the cause comes up on appeal by complainants. Affirmed.

Nathan Burkan, of New York City, for appellants.

Gilbert, Lauterstein & Gilbert, of New York City (Francis Gilbert, of New York City, of counsel), for respondent.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This was a suit brought to protect a copyright. It is alleged that on April 2, 1913, G. Schirmer, Incorporated, having been duly authorized by the authors to do so, copyrighted a dramatico-musical composition entitled "Sweethearts," and that the right to copyright the composition was granted, subject to the condition that the performing right should belong to the other complainants, who were the authors of the composition. Thereafter a separate copyright was taken out by G. Schirmer, Incorporated, of the vocal number "Sweethearts." This second copyright is upon words and music, which are a component part of the previously copyrighted dramatico-musical composition similarly entitled. It is alleged to be the leading vocal number of the composition, and the success and popularity of that opera is said to be largely due to this particular vocal number.

Those of the complainants in whom is vested the performing right in this dramatico-musical composition entered into an agreement with certain theatrical managers and producers to perform it upon the public stage, and preparations were made for its extensive production; sceneries, costumes, accessories, and other paraphernalia being provided. Artists were secured to render it, and booking contracts were entered into for its public performance in a theater in New York City, and it has been so performed for a considerable period. It is claimed that the composition has been a great financial and artistic success and has attained great popularity with the public.

The defendant company maintains a restaurant and place of public entertainment in New York City, and is said in the complaint to have caused the separately copyrighted song to be sung by professional singers upon a stage in the dining hall on its premises, accompanied by an orchestra, and it is charged that it proposes to continue the unlawful and wrongful performance. And the complaint avers that the vocalists and orchestra are engaged by the defendant to perform and play upon the premises for compensation; that these performances are open to the public, and are not given for a charitable, religious, or educational purpose, but for the purpose of defendant's business and as part of the service rendered to the patrons of its establishment who purchase and partake of refreshments; that this use of the song is without the permission of the complainants and against their will, and amounts to an infringement of the copyright; that the rendering of the song is a part of a theatrical entertainment given by the defendant upon its premises for the entertainment and amusement of its patrons, and for the purpose of attracting them; that the performers are under the pay of the defendant, and that the entertainment thus offered to the public costs the defendant \$1,000 each week.

The answer admits that the defendant, through its servants and employes, caused to be sung in its restaurant the vocal selection known as "Sweethearts." It states that the song is published in sheet music form, and published and sold separately, and not as a part of any dramatico-musical composition. It admits that the persons singing the song receive compensation therefor from the defendant. It avers that no charge for admission is made to the patrons of its restaurant,

or for the privilege of listening to any performance of music therein; that no additional charge is made for meals furnished in the restaurant at the time when such music is performed over the charge made when no music is performed; that the musical composition mentioned in the complaint is not performed by the defendant, or caused to be performed by it, publicly for profit; that the musical composition entitled "Sweethearts" is published in sheet music form and copyrighted separately and apart from any dramatico-musical composition, and as so published was offered for sale and sold to defendant and the public generally; that by virtue of its purchase of the song so published and sold defendant was authorized to cause the same to be performed in its restaurant in the manner stated.

The answer was accompanied by an affidavit made by the secretary of the defendant company. It appears from that that in the restaurant is erected a platform on which an orchestra is seated at certain hours of the day during which a musical program is given for the benefit of the patrons; this platform is not a stage and has none of the appurtenances that are necessary parts of a stage; no foot lights, side lights, border light, scenery, wings, curtain, or flies; no theatrical performance is given on the premises; none of the singers who appear ever appear in any costume other than the ordinary conventional evening dress costume; none of the songs that are sung are ever sung in character. The musical entertainment is only given during limited hours; from about noon to 2 p. m., and from 6 o'clock until about 1:30 a. m. the orchestra plays, and at intervals during that time singers appear, who sing various selections of a diversified character.

The sheet music of the copyrighted song is in the record. It is entitled "Sweethearts—Waltz-Song from the Comic Opera 'Sweethearts.'" There is, however, nothing on its face which shows that the comic opera from which it was taken was itself copyrighted. We have to consider, therefore, what the law is which is applicable to this state of facts. The concrete question is whether the singing of the separately copyrighted song "Sweethearts" in a restaurant to which the public is admitted without charge infringes the complainant's copyright for the dramatico-musical composition "Sweethearts" owned by the complainants, there being nothing on the copyrighted song to show that the dramatico-musical composition from which the song was taken was itself copyrighted.

In 1831 (Act Feb. 3, 1831, c. 16, 4 Stat. 436), Congress repealed the acts of 1790 (Act May 31, 1790, c. 15, 1 Stat. 124) and 1802 (Act April 29, 1802, c. 36, 2 Stat. 171), and embodied in one statute the law relating to copyright. The act of 1831 for the first time expressly provided for the copyrighting of musical compositions. The Copyright Act of 1909, being the law now in force and under which the complainants took out their copyright, expressly authorizes the copyright of dramatic or dramatico-musical compositions, and of musical compositions. The act gives the author of any dramatic or dramatico-musical composition who takes out a copyright thereon two distinct and separable rights. It gives him:

(1) The sole right to print and sell copies of the words and music, and

(2) The sole right to publicly perform it.

And it gives the author of a musical composition in like manner two separable rights:

(1) The right to print and sell copies of the words and music:

(2) The right to perform the copyrighted work publicly for profit.

[1] The distinction therefore exists that in the case of the dramatico-musical composition the act secures to the author the sole right to publicly perform it without reference to whether it is performed for profit. But in the case of the musical composition, so far as performance is concerned, the act restricts the author's exclusive right to public performance for profit.

This court has held in *John Church Company v. Hilliard Hotel Company*, 221 Fed. 229, 136 C. C. A. 639 (1915), that the copyright to a certain musical composition is not infringed where the music is publicly rendered in the dining room of a hotel, which is open to the guests without charge for admission. We construed the language of the act giving to the copyright proprietor the exclusive right "to perform the copyrighted work publicly for profit, if it be a musical composition," to be limited to performances where an admission fee or some direct pecuniary charge is made. We there said:

"It does not make a performance any less gratuitous to an audience because some one pays the musician for rendering it, or because it was a means of attracting custom, or was a part of the operation of the hotel."

It follows therefore that the copyright of the song publicly rendered in defendant's restaurant under the circumstances heretofore stated did not infringe the copyright secured upon that composition, assuming that a valid copyright was obtained. The conclusion that there was no infringement makes it unnecessary to inquire whether a subsequent copyright can be obtained upon a portion of a previously copyrighted work. We express no opinion on that question.

[2] This brings us to inquire whether the complainants can claim protection for this song under their prior copyright of the dramatico-musical composition from which it has been taken. The copyright of a dramatico-musical composition secures to the proprietor, as already stated, the exclusive right of performance, and it makes no difference whether the performance is or is not for profit. Did the complainants, by publishing and copyrighting the song separately and apart from the previously copyrighted dramatico-musical composition of which it was a part, lose as to the part so published the benefit of its copyright as a dramatico-musical composition? There can be no doubt that they have lost that right as to the republished part, for the reason that in republishing they failed to state that the comic opera from which the song was taken was itself copyrighted. We have failed to find any such announcement printed on the music sheets of the song. In its absence the complainants cannot claim the benefit of the prior copyright. Whether, if they had inserted a notice of the previous copyright, they could have retained the advantages of it as to the republished song, we need not now consider.

The conclusions to which we have come are:

(1) That complainants cannot claim the benefit of the copyright of the dramatico-musical composition for that portion of the composition which they republished separately and without notice of the copyright previously obtained.

(2) That the copyright of the song "Sweethearts" as a separate musical composition, even if valid, is not infringed by its being rendered in a public restaurant where no admission fee is charged, although the performer is privately paid for rendering it by the proprietor of the resort.

Decee affirmed.

WILSON v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 5, 1916.)

No. 213.

1. POISONS ↪4—CRIMINAL OFFENSES—STATUTORY PROVISIONS—"ANY PERSON."

Harrison Law (Act Dec. 17, 1914, c. 1) § 1, 38 Stat. 735, provides that every person, who produces, deals in, etc., opium or coca leaves, shall register with the collector of internal revenue and pay a special tax, but that this shall not apply to certain classes of persons therein specified. It also provides that it shall be unlawful for any person required to register thereunder to produce, deal in, etc., any of such drugs without having registered and paid such special tax. Section 8 provides that it shall be unlawful for any person not registered thereunder, and who has not paid the special tax, to have any of such drugs in his possession or under his control, and that such possession or control shall be presumptive evidence of a violation of that section and of a violation of section 1, provided that such section shall not apply to any employé of a registered person, or to a nurse under the supervision of a registered physician, dentist, or veterinary surgeon, or to the possession of any such drugs prescribed in good faith by a registered physician, etc., or to any United States, state, county, etc., officer or official having possession thereof by reason of his official duties, or to a warehouseman holding possession for a person registered or to common carriers transporting such drugs. *Held*, that the words "any person," as used in section 8, are not limited to persons required by section 1 to register and pay such tax, but are sufficiently broad to cover, and do cover, all other persons not excepted by the proviso of section 8.

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

↪4.

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

2. GRAND JURY ↪38—PRESENCE OF STENOGRAPHER IN GRAND JURY ROOM.

The presence in the grand jury room of a stenographer, who merely recorded the testimony as it was given and did not attend at the deliberations of the grand jury, did not invalidate an indictment, especially where such stenographer was a regular clerk and assistant to the district attorney, appointed by the Attorney General to an office with prescribed duties and fixed tenure, and who had taken the oath required from all government officials.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 81; Dec. Dig. ↪38.]

3. GRAND JURY ⚡38—PRESENCE OF STENOGRAPHER IN GRAND JURY ROOM.

Act June 30, 1906, c. 3935, 34 Stat. 816 (Comp. St. 1913, § 534), providing that the Attorney General or any officer of the Department of Justice or any attorney or counselor specially appointed by the Attorney General under any provision of law may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceedings, including grand jury proceedings, which district attorneys are authorized to conduct, is not an exclusive enumeration of all persons who may be present at any time in a grand jury room when testimony is being taken, and does not prohibit the presence of a stenographer, as that act is not concerned with that subject at all, but deals only with the conduct of legal proceedings.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 81; Dec. Dig. ⚡38.]

In Error to the District Court of the United States for the Southern District of New York.

Tom Wilson was convicted of a violation of section 8 of the act of December 17, 1914, familiarly known as the "Harrison Law," and the cause comes here upon writ of error to review the judgment. Affirmed.

L. Jersawitz, of New York City, for plaintiff in error.

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, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. There is no dispute about the facts. There was found in defendant's possession a substantial quantity of opium. He admitted that he kept it solely for the purpose of smoking it; that whenever he desired to smoke he would take some of the opium found in his possession, "cook it," and smoke it. He did not produce opium, nor import, nor manufacture, nor compound, nor deal in it. Nor did he dispense it, nor sell, distribute, or give it away. He was employed as a jewelry salesman; no physician had ever prescribed opium for him; he was not a nurse, nor a federal, state, or municipal official such as the statute enumerates, nor was he the employé of a person registered under the statute, nor was he a warehouseman or common carrier.

[1] Section 1 of the act provides as follows:

"That on and after the first day of March, nineteen hundred and fifteen, 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: Provided, that the office, or if none, then the residence of any person shall be considered for the purposes of this act to be his place of business. At the time of such registry and on or before the first day of July, annually thereafter, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs shall pay to the said collector a special tax at the rate of \$1 per annum: Provided, that no employé of any person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the afore-

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

said drugs, acting within the scope of his employment, shall be required to register or to pay the special tax provided by this section: Provided further, that the person who employs him shall have registered and paid the special tax as required by this section: Provided further, that officers of the United States government who are lawfully engaged in making purchases of the above-named drugs for the various departments of the Army and Navy, the Public Health Service, and for government hospitals and prisons, and officers of any state government, or of any county or municipality therein, who are lawfully engaged in making purchases of the above-named drugs for state, county, or municipal hospitals or prisons, and officials of any territory or insular possession or the District of Columbia or of the United States who are lawfully engaged in making purchases of the above-named drugs for hospitals or prisons therein shall not be required to register and pay the special tax as herein required.

"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 thirty-two hundred and forty of the Revised Statutes of the United States are hereby extended to the special tax herein imposed."

Section 8 provides as follows:

"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."

The contention of defendant is that he is not covered by the provisions of section 8 because the words "any person" as used therein are to be construed as referring only to persons of the classes referred to in section 1 as being obliged to register and to pay a tax. We do not find this contention persuasive; the words "any person" are comprehensive; they are broad enough to cover not only the "producers, dealers, distributors, givers away," etc., who by section 1 are allowed to register, but also all other persons. That Congress used the words with this comprehensive meaning seems to us manifest from the exceptions which it includes in the proviso that immediately follows. A nurse may have some opium in her possession, and yet not be herself "a dealer, distributor," etc., nor entitled to take out a license. So too

a person subject to sharp spasms of pain may have some in his possession, and yet not be himself "a dealer, distributor," etc., nor entitled to take out a license. Both these persons would be covered by the first clause of section 8 and their possession would be unlawful. *Therefore* Congress saved them in the proviso, by relieving from the application of the first clause—the nurse, if her possession was by virtue of her employment, and the invalid, if the drug had been prescribed for him by a physician. Grammatically there is nothing in the section which would so restrict the comprehensive meaning of the words "any person," as to make them include only those who might take out license but have neglected to do so.

There is nothing to indicate that Congress intended its proscription to be less comprehensive than the language it used requires. It has legislated quite drastically about opium in Act Feb. 9, 1909, 35 Stat. at Large, 614, c. 100 (Comp. St. 1913, § 8800), prohibiting its importation for any but medicinal purposes and making any one who imports for other purposes or who uses the drug, knowing that it has been so fraudulently imported, subject to prosecution. The eighth section of the act of 1914 is legislation of the same sort; it prohibits any one, other than those who register and pay tax, and a few other persons, nurses, invalids, common carriers, etc., from having any opium in their possession and imposes a penalty for their doing so.

[2] Error is further assigned to a refusal of the trial judge to quash or abate the indictment "because of the presence in the grand jury of an unauthorized person during the taking of the testimony relating to the indictment."

This person was one of the official staff of the district attorney; he was present only while testimony was being taken and all that he did was to take down in shorthand the testimony of the witnesses. The question presented is: Does the sanction of secrecy which the common law has always given to proceedings before grand juries preclude the use of a fit and properly appointed stenographer from recording the testimony adduced before them? Apparently there have been different answers to this question in different districts; but in this circuit for upwards of 60 years it has been uniformly held that the presence of a proper shorthand reporter, who merely recorded the testimony as it was given and did not attend at the deliberations of the grand jury did not invalidate an indictment. See *United States v. Reed*, 27 Fed. Cas. 727, decided in 1852 by Judge Nelson, who said:

"That has been the practice, to my knowledge, without question, ever since I have had any connection with the administration of criminal justice."

See, also, *United States v. Simmons* (C. C.) 46 Fed. 65; *United States v. Rockefeller* (D. C.) 221 Fed. 462; *United States v. Heintze* (C. C.) 177 Fed. 772.

These decisions refer to the shorthand writer who discharges the important function of preserving an accurate record of the testimony taken; they do not at all indicate that other individuals, whose presence may be more or less convenient or useful, such as expert book-keepers or accountants, may attend, except as witnesses.

The Circuit Court of Appeals in the Fifth Circuit (*Latham v. United*

States, 226 Fed. 420, — C. C. A. —), has reached a different conclusion and in its full and careful opinion will be found a strong presentation of the reasons for maintaining a strict observance of a rule which originated before there were shorthand writers. Nevertheless, we are not persuaded to abandon the well-settled and long-continued practice in our own circuit. To do so would seem like a reverter to strict technicalities, overattention to which sometimes tends to defeat rather than to advance the ends of justice. There seems no reason why criminal law and procedure should not, like other law and procedure, progress with the progress of the age. Presumably no court to-day would set aside a righteous verdict for the reasons which appeared convincing to Mr. Justice Taney in *United States v. Dow*, 25 Fed. Cas. 901.

We are satisfied that the preservation of an accurate record of the testimony submitted to a grand jury tends to advance the ends of justice. The knowledge that there is being taken a record of such sort that, in any future prosecution for perjury, it will probably be taken by a trial jury as a correct one is a wholesome check on the witnesses who are testifying before a grand jury. There are very many causes which come before a grand jury which involve complicated questions and call for voluminous testimony from many witnesses. It cannot all be put in at once; not infrequently the statement of one witness will indicate where another witness may be found and days or weeks may elapse before he can be produced. The recollection of the 16 jurors may not always be harmonious as to what some prior witness testified to; it is important and advances the ends of justice always to have before the grand jurors themselves when they deliberate on their future action an accurate record of all the testimony which a stenographic report alone can give; it is as important for the person charged as it is for the government; it may save him from indictment through misrecollection.

Moreover, this stenographer was no chance man called in by a district attorney for this case and merely sworn to take and transcribe his notes of that investigation accurately. He was a regular clerk and assistant to the district attorney, appointed by the Attorney General of the United States to an office with prescribed duties and fixed tenure. And he took the oath required from all government officials to bear allegiance and "well and faithfully to discharge the duties" of his office during the term of his incumbency.

[3] Plaintiff in error cites the act of Congress of 1906 (34 Stat. at Large, p. 816), which provides that:

"The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought."

It is contended that this is an exclusive enumeration of all persons who may be present at any time in the grand jury room when testi-

mony is being taken. We do not so construe the act; it is not at all concerned with that subject, dealing only with the "conduct of legal proceeding" and increasing the power of the Attorney General at the expense of the exclusive powers of the district attorneys.

The judgment is affirmed.

In re HOLLINS et al.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 55.

1. BANKRUPTCY ⚡387—JURISDICTION OF COURTS OF BANKRUPTCY.

C. and S. pledged securities with H. & Co., who repledged them to a bank, also pledging certain securities of their own. A petition in bankruptcy was filed against H. & Co. and a receiver appointed. C. and S. thereafter petitioned the court for an order directing the receiver to consent to the purchase by them of the notes of the bankrupt firm held by the bank, and to the delivery by the bank to them of the collateral securing such notes, which petition was granted, whereupon C. and S. paid the bank the amount due it, and the securities pledged were turned over to them, and by them subsequently sold. After the granting of such petition the bankrupt's offer of composition was confirmed. Thereafter it filed a petition asking that C. and S. be directed to pay over to them or to the receivers the proceeds then remaining in their hands of the securities turned over by the bank to C. and S., which at the time were the property of the bankrupt, on the theory that C. and S. had no right to apply such securities in the first instance to the payment of the debt, without applying their own pledged securities pro rata. *Held*, that under Bankr. Act July 1, 1898, c. 541, § 70f, 30 Stat. 565 (Comp. St. 1913, § 9654), providing that, upon the confirmation of a composition, the title to the bankrupt's property reverts in him, and section 21g, providing that a certified copy of an order confirming a composition shall constitute evidence of the revesting of the title in the bankrupt, the bankruptcy court had no jurisdiction; the property sought to be recovered not being in the custody and control of the bankruptcy court when the composition was confirmed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 603-605, 607-616; Dec. Dig. ⚡387.]

2. COURTS ⚡255—UNITED STATES COURTS—JURISDICTION.

All the courts of the United States are courts of limited jurisdiction, and they possess only such powers as are expressly or by necessary implication conferred upon them by the Constitution and acts of Congress.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 792, 794, 805; Dec. Dig. ⚡255.]

3. COURTS ⚡23—JURISDICTION—CONSENT OF PARTIES.

Parties cannot by consent invest a court with jurisdiction or power not authorized by law or conferred upon it by the Constitution, though where jurisdiction has attached, and the cause of action or subject-matter is legally and properly within the power and cognizance of a court, it may proceed upon consent or stipulation with reference to the matters before it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 75, 75½, 81; Dec. Dig. ⚡23.]

4. COURTS ⚡405—CIRCUIT COURT OF APPEALS—LACK OF JURISDICTION BELOW.

Where the District Court had no jurisdiction of a petition by a bankrupt, whose offer of composition had been confirmed, to require the pay-

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

ment of money to it or to the receiver in bankruptcy, the Circuit Court of Appeals could not consider the case on the merits, though the question of jurisdiction was not raised by the parties, and though a determination on the merits was probably desired by all parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101-1103; Dec. Dig. ¶¶ 405; Appeal and Error, Cent. Dig. §§ 156, 3302, 3386.]

Petition to Revise and Appeal from Order of the District Court of the United States for the Southern District of New York.

In the matter of Harry B. Hollins and others, alleged bankrupts. A petition of H. B. Hollins & Co. to compel Crossman & Sielcken to pay over money to the petitioners, or to A. Leo Everett, receiver in bankruptcy, was denied, and the petitioners appealed and filed a petition to revise. Affirmed without prejudice.

Beekman, Menken & Griscom, of New York City (William C. Armstrong, of New York City, of counsel), for petitioners and appellants.

Leonard B. Smith, of New York City, for respondents.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This case presents an interesting question relating to the marshalling of securities. The respondents, Crossman & Sielcken, pledged certain securities with the firm of H. B. Hollins & Co. before the alleged bankruptcy of the latter, who repledged them to the Chase National Bank. At the same time the securities of the respondents were pledged, H. B. Hollins & Co. pledged with the bank certain securities of their own. Subsequently the respondents paid the bank what was due from H. B. Hollins & Co., and all the securities were turned over to them. The present action is brought to determine whether H. B. Hollins & Co. have a right to require that all the securities which the bank held should contribute pro rata to the payment of the debt due from them to the bank, or whether the respondents had the right to apply in the first instance the securities which belonged to H. B. Hollins & Co. We are not, however, at liberty to decide the question upon the merits, as we think the bankruptcy court was without jurisdiction to hear and determine the matter.

[1] It appears that on November 13, 1913, a petition in bankruptcy was filed against the firm of H. B. Hollins & Co., and that on that day a receiver was appointed. On November 21, 1913, the firm of Crossman & Sielcken, the respondents herein, presented a petition to the District Court wherein they sought to obtain an order directing the receiver to consent to the purchase by the firm from the Chase National Bank of certain notes having a face value of \$950,000, drawn to the order of the bank and executed by H. B. Hollins & Co., and to the delivery by the bank to the firm of Crossman & Sielcken upon the purchase of the aforesaid notes of all collateral which had been deposited by the firm of H. B. Hollins & Co. with the bank, consisting of \$1,073,000 New York City bonds, belonging to Crossman & Sielcken and by them pledged to H. B. Hollins & Co., together with certain securities which belonged to H. B. Hollins & Co., consisting of 50 shares of the stock of the Northern Pacific Railroad Company, and

certain bonds of the St. Louis & San Francisco Railroad of the New Orleans, Texas & Mexico Division. On November 22, 1913, the above petition was granted, and in pursuance thereof Crossman & Sielcken paid the bank the sum of \$962,439.69, and the securities which had been pledged to the bank by H. B. Hollins & Co. were then turned over to Crossman & Sielcken and by them were subsequently sold. On June 29, 1914, an order was made by the court confirming an offer of composition made by the firm of H. B. Hollins & Co. to its creditors. On April 21, 1915, H. B. Hollins & Co. filed a petition demanding that the firm of Crossman & Sielcken be directed to pay over forthwith to the petitioners or to the receiver the sum of \$4,860.83, the proceeds then remaining in their hands of the securities turned over by the bank and which at the time were the property of H. B. Hollins & Co. On May 12, 1915, that petition was denied. On May 24, 1915, a petition for appeal was presented to the District Court and allowed.

[2] The United States District Courts are by the Bankruptcy Act created into bankruptcy courts, and their jurisdiction as such is limited. All the courts of the United States are of limited jurisdiction. They possess only such powers as are either expressly or by necessary implication conferred upon them. *Kempe's Lessee v. Kennedy*, 5 Cranch, 173, 3 L. Ed. 70 (1809). Their jurisdiction and powers are derived from the Constitution and the acts of Congress passed in pursuance thereof. *Rice v. Minnesota, etc., R. Co.*, 1 Black, 358, 17 L. Ed. 147 (1861). It is possible under the Bankruptcy Act for a bankrupt to take his estate out of the bankruptcy court. See *Remington's Bankruptcy*, vol. 3, § 2345. This he may accomplish by means of a composition agreement confirmed by the court. Bankruptcy Act, § 70f declares that:

"Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him."

And section 21g of the act provides that:

"A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart."

In *Re Frischknecht*, 223 Fed. 417, 139 C. C. A. 11 (1915), we held that moneys or accounts in the hands of bankers which they obtained from a bankrupt prior to his bankruptcy reverted in the bankrupt at once when the court confirmed a composition made between him and his creditors, and that he took the same free of any claim or right of the trustee. We accordingly affirmed the action of the court below which had refused to order certain creditors, who had attached in the state court those moneys as the property of the bankrupt as soon as the composition was confirmed, to turn the same over to the trustee in bankruptcy.

[3] So in the case at bar the composition restored the estate to the bankrupt and reverted the title thereto in H. B. Hollins & Co. That being so, there was no authority in the District Court to exercise jurisdiction of the claim which these petitioners assumed to bring before it by the petition filed on April 21, 1915. The parties cannot by

consent invest a court with jurisdiction or power not authorized by law or conferred upon it by the Constitution. The fact that the respondents obtained the securities from the Chase National Bank at a time when the District Court as a court of bankruptcy had the estate of H. B. Hollins & Co. in its custody, and that the receiver in bankruptcy, acting under the court's order, made no objection to the delivery by the Chase National Bank of the securities to the respondents upon the payment by the latter of the debt due from H. B. Hollins & Co. to the bank can make no difference. At the time the court confirmed the composition the property now sought to be recovered was not in the custody and control of the court. It is true that where jurisdiction has attached and the cause of action or subject-matter is legally and properly within the power and cognizance of a court, it may proceed upon consent or stipulation with reference to the matters before it. 11 Cyc. 675. But at the time this proceeding was begun the cause of action or subject-matter was not legally and properly within the power and cognizance of the District Court.

[4] We have no discretion to consider the case on its merits. No doubt counsel on both sides are not only willing, but desirous, to have this court determine whether the brokers in this case had a right to do what they did with the pledged securities, and whether the respondents are entitled to retain all the proceeds realized from the sale of the securities, or must pay over a part of the same now in their hands to these petitioners. But, as we have said in an earlier part of this opinion, the consent of parties cannot give a court jurisdiction, and the petition should have been dismissed by the lower court on that ground. The court decided that it had jurisdiction, and so decided the case on the merits and denied the petition. As the petition should have been denied for want of jurisdiction, we concur in the result, but disclaim all consideration whatever of the merits, which the court below had no right to consider, and which we have no right to review. The fact that the parties have not raised the question of jurisdiction in this court does not matter.

The order denying the petition is affirmed without prejudice.

THE CHARLES HUBBARD.

THE W. G. POLLOCK.

(Circuit Court of Appeals, Sixth Circuit. January 14, 1916.)

No. 2679.

1. COLLISION ⚡73—MOVING AND ANCHORED VESSELS—PRESUMPTION OF FAULT.

A moving vessel, which comes into collision with one at anchor without fault of the latter, is presumptively in fault, and has the burden of proof to exonerate herself from liability by showing that it was not in her power to prevent the collision by adopting any practicable precautions.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 103; Dec. Dig. ⚡73.]

2. COLLISION ⚡71—MOVING AND ANCHORED VESSELS—FAULT.

In the absence of evidence that it was customary, a steamship anchored for the night cannot be held in fault for a collision with a moving vessel because she did not keep up steam, so as to be prepared to instantly move out of the way.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⚡71.]

3. COLLISION ⚡71—MOVING AND ANCHORED VESSELS—FAULT.

A moving steamship, which, in attempting to reach a position in which to come to anchor at one side of the fairway in the St. Mary's River above the locks, was allowed to swing and come into collision with another vessel anchored in a proper place to one side of the fairway, *held* solely in fault. The failure of the officer in charge of the anchored vessel to release the anchor, when at almost the last moment the danger of collision became apparent was at most an error of judgment in extremis, and not a fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⚡71.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in admiralty for collision by the Valley Steamship Company, owner of the steamer W. G. Pollock, against the steamer Charles Hubbard, the Great Lakes Steamship Company, claimant, with cross-libel against the Pollock. Decree for libellant, and claimant appeals. Affirmed.

Goulder, White & Garry, of Cleveland, Ohio, for appellant.

Holding, Maſten, Duncan & Leckie, of Cleveland, Ohio, for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and CLARKE, District Judge. .

CLARKE, District Judge. The appellee, as the owner of the steamship W. G. Pollock, filed its libel in the District Court, claiming that its ship was damaged by fault in the navigation of the steamship of the appellant, the Charles Hubbard, about 2 o'clock on the morning of May 2, 1913, at a point in St. Mary's River a few miles northerly from the canals at Sault Ste. Marie. The appellant filed a cross-libel, admitting that the collision occurred, but claiming that it was not occasioned by any fault of the Hubbard, and alleging various faults on the part of the Pollock. The trial court found that the collision was due to the sole fault of the Hubbard, and rendered judgment in favor of the appellee for the damage found to have been sustained by the Pollock.

The facts as developed by the testimony are that about 9 o'clock on the evening of May 1st the Pollock, upbound light, came to anchor about a half dozen miles above the Sault locks and about 250 feet on the American (or southern) side of the range line. Some time prior to the arrival of the Pollock, the steamship Siemens had anchored about 1,000 feet lower down the river than the Pollock and somewhat nearer to the range line. A short time prior to the collision complained of the steamship Stadicon, bound down and not far ahead of the Hubbard, came to anchor at a point about 1,000 feet above the

Pollock, somewhat on the Pollock's port bow and about 200 feet to the south of the range. It is fully established by the evidence that the night, though dark, was calm and clear; that the current running in the river at the time of the collision was not unusually strong, being about $2\frac{1}{2}$ to 3 miles an hour, and that there was some ice running, but not sufficient to interfere with the control of the Hubbard.

Under these conditions the master of the Hubbard, downbound from Lake Superior, was advised, as he passed information stations upon the American and Canadian shores, a considerable distance above the place where the collision occurred, that there were several boats ahead of his, which made it necessary for him to find an anchorage to await his turn before going through the locks. Under these conditions, and with a full view and understanding of the positions of the Pollock and of the Stadicona, the master of the Hubbard decided to cross the bow of the Pollock and come to anchor inside of and not far from—perhaps somewhat astern of—the Stadicona. There was an abundance of unoccupied water in the immediate vicinity, where the Hubbard could have been anchored without coming near to the Pollock; but her master had a legal right to select his own place to anchor, and no serious criticism is made of the position which he selected. It is the all but uncontradicted testimony that the Pollock, the Siemens, and the Stadicona were all in a usual and proper place of anchorage.

The master of the Hubbard testifies that, while there was something of a haze, he saw the lights perfectly of all the ships involved in the consideration of this case, and understood and fully appreciated the positions in which they were lying as he approached from the north. The Pollock had come to anchor about 9 o'clock the night before, and as the Hubbard approached her she had all required lights properly burning, her first mate was on watch in the pilot house, the wheelsman was on the main deck, and a watchman was forward in the bow. When the Hubbard came to a point on the range about opposite the Stadicona, and so about 1,000 feet from the Pollock, her master attempted, by dropping her port anchor, to come around across the bow of the Pollock, so that he might anchor somewhat astern of the Stadicona. It was in the progress of this maneuver that the Hubbard collided with the starboard bow of the Pollock.

[1] Upon this appeal, the appellant assigns four claims of error on the part of the trial court. The first error claimed is in holding that the fault of the Hubbard was the sole cause of the collision. The navigating officers of the Hubbard admit that they saw the Pollock and neighboring ships and fully understood their relative positions before the maneuver was commenced which resulted in the collision. There was, as we have said, nothing so unusual in the weather, and nothing so unusual in the current of the river and the presence of ice in it as to affect the navigating of the Hubbard, and her officers say that she was in all respects in good working condition. Since the testimony shows beyond substantial dispute that the Pollock was anchored in a proper place, and that the officers of the Hubbard saw her lights and realized what her position was, in the language of the Su-

preme Court, we are not called upon to inquire wherein the Hubbard was not managed with proper nautical skill.

"Such inquiries are superfluous where the collision was caused by a vessel having the power to move or stop at pleasure in a channel of sufficient breadth, without any superior force compelling her to the place of collision." "The fact that in these circumstances the steamboat did collide with the barge [anchored Pollock] is conclusive evidence that she was not properly managed, and that she should be condemned to pay the damages caused by the collision." *The Granite State*, 3 Wall. 310, 18 L. Ed. 179.

To the same effect is *The Virginia Ehrman and The Agnese*, 97 U. S. 309, 24 L. Ed. 890, where the Supreme Court says:

"Vessels in motion are required to keep out of the way of the vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame, by showing that it was not in her power to prevent the collision by adopting any practicable precautions."

To precisely the same effect is *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, where, after detailing circumstances strikingly similar to those prevailing at the time of the collision complained of in this case, the Supreme Court, speaking through Justice Brown, says:

"The circumstances above detailed raise a presumption of fault on the part of *The Oregon*, and the burden of proof is upon her to exonerate herself from liability."

And again (page 197 of 158 U. S., page 809 of 15 Sup. Ct., 39 L. Ed. 943):

"Where one vessel, clearly shown to have been guilty of a fault adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault. This principle is peculiarly applicable to the case of a vessel at anchor, since there is not only a presumption in her favor, by the fact of her being at anchor, but a presumption of fault on the part of the other vessel, which shifts the burden of proof upon the latter."

The collision under discussion was obviously enough the result of a mistake in the judgment of the master of the Hubbard in not commencing to turn his vessel sooner than he did when he decided to cross the bow of the Pollock, and there was no reason in the situation why he might not have commenced that maneuver at a sufficient distance from the Pollock to have avoided any possibility of collision with her, and therefore under the authorities cited, the claim that the trial court erred in holding that the Hubbard was at fault in causing the collision cannot be sustained.

Second. The appellant assigns error on the part of the trial judge in refusing to hold that the Pollock was at fault in anchoring improperly in the sailing course of steamers. This claim is wholly unsupported by the testimony and cannot be allowed.

[2] Third. Error on the part of the trial court is claimed in refusing to hold that the Pollock was at fault, in that, being improperly anchored, she failed to maintain a competent and sufficient lookout. Our finding that the Pollock was not improperly anchored is sufficient to dispose of this assignment of error, but there is no evidence what-

ever that the lookout which we have described as being maintained upon the Pollock at the time of the collision was not such as was customary in that locality under like conditions, or that it was not ample for the safety of the ship, except it be held that it was necessary for her to be at all times prepared to guard against and to avoid the negligence of the masters of other ships.

It is argued by counsel that if the Pollock had had her steam up and her engines in condition for immediate moving of the vessel, she could have backed away from the Hubbard when the collision was threatened, and so have avoided the accident. There is no evidence whatever in the record that it was customary for a ship lying at anchor, as the Pollock was, to maintain her engines and boilers in condition for such immediate movement, and since no decided cases have been produced as authority for this claim, it cannot be allowed. For these reasons, this third claimed error must be overruled.

[3] The fourth claimed error on the part of the trial court is that the Pollock was at fault in failing to release her anchor chain and thereby allow the ship to drift out of the path of the on-coming Hubbard and avoid the collision. The navigating officers of the Hubbard say that they saw and fully understood the position of the Pollock long before they came near to her; the evidence is that the three men constituting the watch on the Pollock, including the first mate, were all alert and saw the approach of the Hubbard, and understood, as her movement progressed, that her purpose was to anchor above the Pollock and near to the Stadicono, and yet it is clear that no one of the men engaged in navigating the Hubbard, or of those on watch upon the Pollock, thought that there was any danger whatever of collision between the ships until almost immediately before it occurred.

When the Hubbard swung around, and when her stern was about 50 or 60 feet away from his ship, the mate of the Pollock for the first time, anticipating that a collision was possible, called to the captain of the Hubbard that he had better "steady" up his ship or he would hit the Pollock, but this occurred almost at the moment when the ships came together. The officers navigating the Hubbard say that they did not think there was any danger of collision until almost the moment when it occurred, and they gave no signal whatever to the Pollock by whistle or hail, indicating that they thought a collision was impending, or that action by the men in charge of her might be of service in avoiding it.

In argument much emphasis is laid upon the claim that the mate of the Pollock on watch was guilty of negligence contributing to cause the accident because he says that when he realized a collision might occur, he started toward the compressor for the purpose of releasing it, and letting out the anchor chain, which it is claimed would have allowed the ship to drift with the current a sufficient distance to avoid the collision, but that he changed his mind and did not do so. It is to be noted, however, that this officer says he changed his mind and did not attempt to release the compressor for the reason, as he says, "I thought there was no use; it was too late, and I stood back waiting for the jar of the collision," which he realized was inevitable.

Thus the decision of the mate of the Pollock was made in an emergency created by the negligence of the master of the Hubbard, and under such circumstances "the judgment of a competent sailor in extremis cannot be impugned" (*The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943), or, as was said by the court in *The City of Paris*, 9 Wall. 634, 19 L. Ed. 751:

"The acts complained of were done in the excitement of the moment, and in extremis. Whether they were wise it is not material to inquire. If unwise, they were errors and not faults. In such cases the law in its wisdom gives absolution."

It is obvious that this well-settled rule makes impossible the serious consideration of this fourth and last claim of error made by the appellant, and it is overruled.

The decree of the District Court is affirmed.

MITCHELL v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 58.

1. CRIMINAL LAW ⚡370—EVIDENCE—OTHER OFFENSES—ADMISSIBILITY.

On a trial for conspiracy to violate Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. 1913, §§ 8717-8728), by shipping Caracas coffee misbranded as Bogota coffee, where defendant denied all knowledge of the misbranding and claimed that it was "put over him" by employes acting secretly with coffee brokers through whom an order for the coffee was received, warehouse orders passing through defendant's office and directing the mixing and misbranding of other lots of coffee were admissible as tending to show his knowledge; the court having carefully charged as to the purpose and effect of such evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 825-829; Dec. Dig. ⚡370.]

2. CRIMINAL LAW ⚡432—EVIDENCE—DOCUMENTS—PRELIMINARY PROOF.

On a trial for conspiracy to violate the Food and Drugs Act by shipping misbranded coffee, where warehouse orders for the mixing and misbranding of other lots of coffee were admitted as bearing on defendant's knowledge of the misbranding, evidence as to the meaning of initials with which such coffee was marked *held* to make such orders intelligible, so as to render them admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1021; Dec. Dig. ⚡432.]

3. CONSPIRACY ⚡43—INDICTMENT—ISSUES, PROOF, AND VARIANCE.

Under an indictment charging defendants with conspiring among themselves and with other persons unknown to ship misbranded coffee in violation of the Food and Drugs Act, the mere fact that third parties testified before the grand jury as to which they did in misbranding the coffee did not show that they were known to the grand jury to be conspirators when the indictment was found, and hence either defendant could be convicted for conspiring with such third persons, though the jury found that the defendants did not conspire with each other.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. ⚡43.]

4. CONSTITUTIONAL LAW ⇨70—LEGISLATIVE POWER—MERGER IN OFFENSES COMMITTED.

Congress having made a conspiracy to commit an offense a distinct offense, with a penalty differing from and frequently more severe than that imposed for the commission of the act which defendants conspired to commit, the claim that it is unfair for the government to prosecute defendants for conspiracy to commit an offense, when it has proof tending to show the commission of the substantive offense, is one to be addressed to Congress, and not to the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. ⇨70.]

In Error to the District Court of the United States for the Southern District of New York.

William L. Mitchell was convicted of an offense, and he brings error. Affirmed.

This cause comes here upon writ of error to review a judgment of conviction, entered in the District Court, Southern District of New York. William L. Mitchell (the sole plaintiff in error) and Peter J. Shannon were convicted, under section 37, United States Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [U. S. Comp. St. 1913, § 10201]), of a conspiracy to commit an offense against the Food and Drugs Act, in that they conspired on May 20, 1914, to ship from Brooklyn, N. Y., to Milwaukee, Wis., 84 bags of coffee which should be then and there adulterated and misbranded, in that the said coffee should be marked and sold as Bogota coffee, when in fact it was to be washed Caracas coffee. The indictment charged the two named defendants with conspiring among themselves and with divers other persons unknown. Both were convicted; Shannon has not appealed.

George Gordon Battle, of New York City (I. H. Levy, of New York City, of counsel), for plaintiff in error.

H. Snowden Marshall, U. S. Atty., and Roger B. Wood and B. A. Matthews, Asst. U. S. Attys., all of New York City.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Shannon was a coffee broker doing business as Peter J. Shannon & Co.; William Mitchell was a partner with his brother George, under the firm name of Mitchell Bros., as importers and jobbers of tea and coffee. George attended to the tea side of the business; William to the coffee side.

[1] There are five assignments of error. The first three present in one form or another the proposition that there was not evidence sufficient to send the cause to the jury. The fifth refers to the exclusion of certain testimony; as it was not argued orally or on the brief, it need not be considered. The fourth reads as follows:

“Fourth. The court erred in admitting in evidence, over the objection of the defendant, evidence of other alleged offenses of misbranding on the part of the defendant, William L. Mitchell, or on the part of Mitchell Bros.”

This assignment covers the introduction of what are known as Exhibits 18 to 25, inclusive. This fourth assignment may be first con-

sidered. In order to appreciate the precise point thus raised, it will be necessary to set forth much of the testimony in a condensed form.

Heidmann & Co., of Milwaukee, wrote to Shannon, asking him to send them three or four samples of Bogota coffee. He sent them four samples, separately numbered, all described as Bogota at 17 $\frac{1}{4}$ cents for each sample. Heidmann & Co. selected sample No. 11, 84 bags, and ordered Shannon to get it. Shannon sent them a sales memo. of 84 bags Bogota at 17 cents as sold to them by Mitchell Bros.—also a bill of Mitchell Bros. May 25, 1914, for the same 84 bags Bogota. Eighty-four bags were shipped to them, but were seized on the way as misbranded; the bags were all branded "P. A. L. Bogota," which means Pedro A. Lopez, of Bogota. The samples which Shannon sent were obtained from various chops of Caracas coffee exposed in Mitchell's office; No. 11 was a mixture of two of these chops. The Caracas coffee represented by these samples was the property of Mitchell Bros. and in warehouse. Two chops, amounting in all to 96 bags, were mixed and shipped by Mitchell Bros. in the 84 bags marked "P. A. L. Bogota." An order was sent by Mitchell Bros. to the warehouse to mix these two lots of 38 and 59 bags, respectively, and to put the contents into 84 bags, marked "P. A. L. Bogota."

Upon the books of Mitchell Bros. and in the record of the warehouse the two lots (38 bags and 59 bags) were marked as having come from Caracas. The 84 bags into which the mixed lot was to be put were furnished to the warehouse company by an employé of Mitchell Bros., already marked "P. A. L. Bogota." It is not disputed that Shannon and one or more of Mitchell Bros.' employés, with an intention "to put something over on Heidmann & Co.," did mix these two lots of Caracas coffee, did brand them as "P. A. L. Bogota," indicating that they were from Pedro A. Lopez, of Bogota, and did send them into interstate commerce, thereby violating the Food and Drug Act.

The questions in the case were whether defendant Mitchell knew of this performance, and whether he conspired with the others to have the coffee thus misbranded. There were various bits of proof, from which, according to the government's contention, the jury might infer that the particular single offense against the Food Act was a matter within Mitchell's knowledge and brought about with his procurement. A government inspector also testified that at an interview he had with defendant Mitchell on June 9th (after the coffee was seized) Mitchell told him that, after he had agreed to sell these two lots of Caracas coffee to Shannon's customer (he did not give Shannon's name, but called him merely the broker), the latter told him they would have to be dumped and mixed, and that Shannon would share with Mitchell one-half the cost of this; also that Shannon told him (Mitchell) the bags would have to be marked "P. A. L. Bogota."

Down to the time when the government rested its case there had been no evidence introduced to show other instances of misbranding initiated or carried out in defendant's office. Moreover, with the testimony of the government inspector as to Mitchell's admissions, there was a

prima facie case on which the government was entitled to go to the jury.

Defendant then took the stand. He denied so much of the story of the inspector as stated that he (Mitchell) had told the latter that Shannon said anything to him about putting the particular lots in P. A. L. Bogota bags. He admitted that the two lots of Caracas coffee (charged as the overt act) had been mixed and packed in bags marked "P. A. L. Bogota," but asserted that this was wholly without his knowledge; that it had been "put over him" by persons in his office, acting secretly with the brokers; and that he was very indignant when he found it out. On cross-examination the government got him to identify a pile of orders to the New York Dock Company (the warehouse company) as having passed through his office signed by Von Thaden, the shipping clerk. They were in the same form as the order (Exhibit 10) directing that the 97 bags of Caracas coffee be dumped, mixed, and bagged as 84 bags Bogota P. A. L., the overt act charged in the indictment. These eight documents were then offered in evidence—they were objected to as incompetent, irrelevant, and not sufficiently proved. The court admitted them, and such admission is the subject of the fourth assignment of error. The trial judge carefully stated his reason for admitting them as follows:

"The purpose is this: As to the transaction in suit the defense of the witness is that he knew nothing about this; that it went through his office without any knowledge upon his part at all as to these nefarious features in the sale of the coffee; that he sold it as Caracas, but he knew nothing about the other transaction. Of course, if they can show that it was not an unusual thing for transactions of that kind to go through his office, it is a circumstance for the jury to determine whether they would be likely to go through his office without this defendant having knowledge of it. It is simply a circumstance for the jury to consider."

Later on, in admitting one of these orders, the court said:

"It is merely evidence of circumstances for the jury bearing on the question whether the transaction involved could likely have gone through the witness' office without his knowledge; evidence bearing on the question of the witness' knowledge."

Still later, when the government undertook to offer other orders similar to the eight (Exhibits 18 to 25), the court said:

"I do not think it is necessary to put in too many instances of this kind. They are only admitted as bearing on the question of the knowledge and intent of this defendant of the transaction in question. He is not on trial for anything involved, except in this present indictment; but in an instance where a question of the intent or knowledge of the defendant as to the particular transaction arises, then you may show similar transactions that would tend to throw light on the question the jury is to determine."

Finally, in charging the jury as to this evidence, Judge Van Fleet said:

"This charge, gentlemen of the jury, has solely relation to the bags disclosed in the evidence and mentioned in the indictment. The other instances that may have been disclosed where similar acts were done were only admitted before you as tending to lay before your mind what the fact was as to the claimed want of knowledge of the defendant Mitchell as to these transactions passing through his office. In other words, unless a case has been

made out which would warrant you, under the principles that I have stated to you, in convicting the defendants upon the charges contained in the indictment in this case, the fact that you may believe that an offense had been committed, with reference to other shipments of coffee than those mentioned in the indictment in this case, would not warrant you in finding a verdict of conviction. Those acts are, as I said, merely to aid you in determining whether one of the defendants, Mr. Mitchell, had knowledge of this particular transaction."

Certainly the jury were most carefully and repeatedly instructed as to the object and bearing of this testimony. Had the case closed when the government's proofs were in, none of this testimony would have been offered, because with the proof of defendant's admission of his knowledge and participation in the misbranding shown as the overt act conviction would naturally follow. It was his own testimony that brought this testimony in. When he denied the admission, and also asserted that this transaction was a secret one, "put over him" behind his back by Shannon, who wished to do an ill turn to Heidmann & Co., and by defendant's faithless clerks, he told a plausible story. The jury might well believe that as to this single instance of misbranding he knew nothing. It was then quite legitimate to show that, so far from this misbranding being a single incident, it was one of many being carried out by his clerks, who had no pecuniary interest at all in such misdoings, for the evidence showed that all of them were paid salaries, with no commission. These circumstances were such as a jury might fairly consider when deciding, as they must, whether or not they would believe his statements that he knew nothing at all about repeated misbranding by his firm, being himself in charge of the coffee side of its business. Since the court most carefully guarded the interests of defendant against any possible misconception by the jury touching the effect of such evidence, we find no error in its admission under the authorities. *Williamson v. U. S.*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278 (citing *Holmes v. Goldsmith*, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118); *Wood v. U. S.*, 16 Pet. 342, 10 L. Ed. 987; *Farmer v. U. S.*, 223 Fed. 903, 139 C. C. A. 341; *Stern v. U. S.*, 223 Fed. 762, 139 C. C. A. 292.

[2] It was argued here that these eight warehouse orders, although it was shown that they came from defendant's office, properly signed, really showed nothing. Counsel for the government suggests that no such objection was made below, as the record seems to indicate. But, however that may be, we see no force in the objection. The coffee in the indictment instance was in two lots marked "H. L. B. C." and "D. B. C." A witness testified that the "C.," of "H. L. B. C.," meant "Caracas" and that "D. B. C." was a trade-mark of Bliss, Dallett & Co. It also was proved that Caracas coffee always comes by Venezuelan Line steamers, of which the *Progresso* is one, while Bogota coffee comes by the Columbian Line, of which the steamship *Allemania* is one. Defendant further testified that "M. A. R. A." is a Mexican mark; that "Antenas Choice" is a designation of where the coffee is grown, and that "Escobal Extra Selected" is a shipping mark put on Columbia coffee. Bogota coffee is Columbia coffee. In the light of this testimony the eight shipping orders become quite intelligible.

Exhibit 18, dated April 1, 1914, refers to two lots of coffee; one of 15, the other of 13 bags. The same marks, "H. L. B. C." and "D. B. C.," are given; also the mark "M. A. R. A." Certainly some of this coffee, the "H. L. B. C.," came from Caracas, while the Bliss Dallett coffee ("D. B. C.") apparently was Mexican. The directions given by Mitchell Bros. to the warehouse as to these coffees was to "mix, put into 25 Bogota bags and mark 'P. A. L. Bogota.'" Exhibit 19, dated March 25, 1915, refers to 38 bags of coffee (in lots of 20, 4, 3, 5 and 6 bags). The same marks as on Exhibit 18 appear (with others); certainly some of this was Caracas, some Mexican. The directions given were to put in "Bogota bags and mark 'J. S. Especial.'" Exhibit 20, dated March 25, 1914, refers to two lots, of 5 and 6 bags, respectively. The same marks appear as on No. 18, indicating that one lot was Caracas and the other, apparently, Mexican. The directions given were: "Mix and put into 10 Bogota bags and mark 'Antenas (Antoise) Choice Extra.'" The same remarks apply to Exhibits 21, 24, and 25. In Exhibit 22 the only mark given is "D. B. & C.," but as the coffee is described as "Ex Progreso" it is evidently Caracas. Defendant testified that the coffee referred to in Exhibit 23 was all Caracas coffee which was ordered mixed and put into Bogota bags.

We find no error in the admission of this testimony.

There was sufficient evidence to send the case to the jury, and they were fully and correctly instructed as to presumption of innocence and reasonable doubt.

[3] The court charged the jury that if they should find:

"That defendant Shannon entered into a conspiracy with Hole and others, although not with Mitchell, to commit the offense charged in this indictment, you could convict Shannon although Mitchell should go scot-free. On the other hand, should you find that Mitchell entered into a conspiracy with others than Shannon to carry out and perpetrate this offense against the United States, then you could convict Mitchell, although acquitting Shannon."

Counsel for Shannon excepted on the ground that, if the jury should find that Shannon conspired with Hole or the other witnesses who testified before the grand jury, Shannon could not be convicted. The theory being that the fact that these witnesses testified before the grand jury shows that they were not unknown to the grand jury. Counsel for Mitchell joined in this exception.

It might be sufficient to say that this part of the charge is not assigned as error; but it is also without merit. The mere circumstance that Hole and Von Thaden testified before the grand jury as to what they had done in misbranding the 84 bags of coffee did not establish the proposition that they were known to the grand jury to be conspirators when the indictment was found.

[4] No other error is assigned, but defendant's counsel argues that the method of trial permitted was prejudicial to the rights of defendant. The proposition is that when the government has proof tending to show that defendants have committed a substantive offense, violating some provision of statute, it is not fair to indict and try them for conspiracy to commit that offense. This argument is one to be

addressed to Congress, not to the courts. Congress has made the conspiracy itself a distinct offense, with a penalty differing from, and frequently more severe, than that imposed for the commission of the act which defendants conspired to commit. It would not be difficult to conceive some very good reasons for such an enactment, but any such inquiry would be impertinent; the matter is one wholly within the discretion of Congress.

The judgment is affirmed.

In re GARROSI et al.

(Circuit Court of Appeals, First Circuit. January 27, 1916.)

No. 1160.

1. CERTIORARI ⇐5—**MANDAMUS** ⇐4—**PROHIBITION** ⇐3—**LACK OF OTHER REMEDY.**

Where a proceeding in the District Court was advancing in due course and would ultimately ripen into a judgment from which an appeal would lie to the Circuit Court of Appeals, that court would not, ordinarily, for the purpose of saving the cost and delay of litigation, grant a writ of mandamus, prohibition, or certiorari to restrain the District Court from proceeding further.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. ⇐5; Mandamus, Cent. Dig. §§ 9-21, 24-34; Dec. Dig. ⇐4; Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. ⇐3.]

2. MANDAMUS ⇐169—**DISMISSAL ON MOTION.**

The questions of law arising on a petition for a writ of mandamus may, in ordinary cases, be disposed of on their face in the summary manner of a motion to dismiss.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 375; Dec. Dig. ⇐169.]

Original petition by Tomas Garrosi and another for a writ of mandamus, prohibition, or certiorari. On motion to dismiss. Motion allowed, and petition dismissed.

Francis H. Dexter, of San Juan, Porto Rico, and Joseph B. Jacobs, of Boston, Mass., for the motion.

Hollis R. Bailey, of Boston, Mass. (José A. Poventud, of Ponce, Porto Rico, on the brief), opposed.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. [1] This is a petition for mandamus and sundry alternative writs of prohibition and certiorari to Hon. Peter J. Hamilton, Judge of the District Court for the District of Porto Rico. The real parties in interest have been summoned in and thus made parties to the record. The proceeding to which the petition relates is advancing in due course, and would in due course, ultimately, so far as the record now stands, come to a decree on which an appeal lies to this court. The purpose of the present proceeding is to obtain an order of this court for a judgment to restrain the District Court

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

from further advancing the bill, the motive of this short cut being to save the cost and delay of litigation.

The rule is laid down specifically in Phillips' United States Supreme Court Practice (5th Ed.) 408. This work is of the highest authority, and the rule as there laid down has never been questioned by any court. It is there said that to render mandamus a proper remedy "the person applying for it must be without any other specific and legal remedy"; and decisions of the Supreme Court are cited in support of that proposition. This has been said by other authorities at different times, and has never been contravened or qualified so far as we are aware.

This principle applies as a matter of course to all the special writs to which the petition before us refers; and the same fundamental rule applies to all of them, and clearly disposes of the present petition, because it is plain that, in the regular course, the bill to which it relates will ripen into judgment against one of the parties concerned, which other courts will have ample jurisdiction to reverse or affirm.

[2] The present, immediate proposition arises on a motion to dismiss the petition in question. Formerly, as shown by the old editions of *Moses on Mandamus*, and elsewhere, the methods of dealing with petitions for mandamus were rigid; but for a long time there has been no doubt that the questions of law arising may be disposed of on their face in the summary manner of a motion to dismiss, which was the manner adopted by the learned judge of the District Court and the parties arrayed with him. Consequently, as we have the jurisdiction to grant the motion to dismiss, it is our duty to do so; but we have not undertaken in this case to deal with the question of costs.

We may add in all substantial particulars the case is strictly analogous to the principle involved in *Atlantic City Railroad*, 164 U. S. 633, 17 Sup. Ct. 208, 41 L. Ed. 579, and we reach the same result as reached there.

The motion to dismiss the petition of Tomas Garrosi and Juana Maria Gonzales, filed on the 19th day of October, 1915, is allowed; and said petition is hereby dismissed, without costs to either party.

BINGHAM, Circuit Judge (concurring). This is a petition for a writ of mandamus to restrain the District Judge for the District of Porto Rico from entertaining jurisdiction and proceeding to trial in an equity cause now pending in that court, in which Tomas Garrosi and his sister, Juana Gonzales, are defendants, and his wife, Manuela Garrosi, is plaintiff. The petition sets forth that the petitioner, Tomas Garrosi, is a citizen of France residing in Porto Rico, that Manuela Garrosi is likewise a citizen of France residing in Porto Rico, and that Juana Gonzales is a citizen and resident of Porto Rico. It alleges that the District Court of Porto Rico is without jurisdiction of the subject-matter involved in the equity suit (1) because no judgment has been entered for alimony in favor of Manuela in the divorce proceeding which she has brought against her husband in the district court of Ponce; and (2) because she has no interest in the community property until a divorce is awarded her.

No question is raised as to the jurisdiction of the District Court over the parties, and none could be. In the Act of March 2, 1901, § 3, 31 Stat. at Large, c. 812, p. 953 (Comp. St. 1913, § 3786), it is provided:

"That the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April 12, 1900, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

The ground of the petitioner's complaint is that the District Court was without jurisdiction over the subject-matter; that the bill did not state a cause of action, either at law or in equity.

This court is without authority to issue writs of mandamus to District Courts, except in aid of its appellate jurisdiction. *McClellan v. Carland*, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762; *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945, 952, 953, 66 C. C. A. 55, 67 L. R. A. 761; *In re Dennett*, 215 Fed. 678, 131 C. C. A. 607; Judicial Code of 1911 (Act March 3, 1911, c. 231) § 262, 36 Stat. 1162 (Comp. St. 1913, § 1239); Rev. Stat. § 716. Original jurisdiction in such matters is conferred upon the Supreme Court "where a state or an ambassador or other public minister, or a consul or vice consul is a party," but upon that court only. Judicial Code of 1911, § 234; *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667.

As early as 1803 it was held that the act of Congress (Act Sept. 24, 1789, 1 Stat. at Large, 80, c. 20, § 13) conferring original jurisdiction on the Supreme Court in mandamus proceedings was unconstitutional; that Congress, in the enactment of the law, had exceeded its power, for the statute, as it then stood, did not contain the qualifying clause above set forth. Const. U. S. art. 3, § 2, par. 2; *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60; *M'Cluney v. Silliman*, 2 Wheat. 370, 4 L. Ed. 263.

In the early decisions considering the question now before us, it was held that federal courts, in the exercise of their appellate jurisdiction, were not authorized to issue writs of mandamus to inferior courts until they had actually obtained jurisdiction of a cause—that such writs issued only in aid of a jurisdiction actually acquired; but the view now entertained is that, "where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction" while the case is pending in the court below. *McClellan v. Carland*, 217 U. S. 268, 279, 280, 30 Sup. Ct. 501, 54 L. Ed. 762.

The first question, therefore, is whether an appeal will ultimately lie to this court to determine whether the District Court has jurisdiction of the subject-matter of the cause.

In section 128 of the Judicial Code of 1911, as amended by the Act of January 28, 1915 (38 Stat. at Large, c. 22, § 2, p. 803), it is provided:

"The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii and the United States

District Court for Porto Rico, *in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law.*"

The cases in which appeals and writs of error may be taken direct to the Supreme Court, as enumerated in section 238 of the Judicial Code of 1911, as amended by the Act of January 28, 1915 (38 Stat. at Large, c. 22, § 2, p. 804), are as follows:

"Appeals and writs of error may be taken from the district courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the [question of] jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States." Judiciary Act of 1891, § 5.

The meaning of the word "jurisdiction" as used in this statute has been before the court for consideration many times, and in *United States v. Swan*, 65 Fed. 647, 13 C. C. A. 77, Judge Taft, in speaking for the Circuit Court of Appeals for the Sixth Circuit, said that the word as used in section 5 of the Judiciary Act of 1891, which is the basis of the present statute, is applicable to—

"initial questions of the jurisdiction of a United States District * * * Court, whether in law or equity over the subject-matter and parties, and not to questions whether a court of equity or law is the proper forum for the working out of rights properly within the particular federal jurisdiction for adjudication."

This statement is quoted with approval in *United States v. Larkin*, 208 U. S. 333, 338, 28 Sup. Ct. 417, 52 L. Ed. 517, in an opinion delivered by Mr. Chief Justice Fuller. See, also, *Smith v. McKay*, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731; *Blythe v. Hinckley*, 173 U. S. 501, 17 Sup. Ct. 991, 42 L. Ed. 1210; *Kendall v. American Automatic Loom Co.*, 198 U. S. 477, 25 Sup. Ct. 768, 49 L. Ed. 1133; *Chicago Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111; *Louisville Tr. Co. v. Knott*, 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159; *Remington v. Central Pacific R. R.*, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959.

It has also been held that where the question of the jurisdiction of a District Court of the United States, as a court of the United States, is in issue, and is certified to the Supreme Court under section 5 of the act of 1891, the jurisdiction of the Supreme Court is exclusive. *United States v. Larkin*, 208 U. S. 339, 340, 28 Sup. Ct. 417, 52 L. Ed. 517; *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859; *United States v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; *Excelsior Co. v. Pacific Bridge Co.*, 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910.

In view of these decisions, and entertaining the opinion that the question raised as to the jurisdiction of the District Court is one which relates to its jurisdiction over the subject-matter of the suit, we think

that the question is reviewable by writ of error or appeal to the Supreme Court under section 5 of the act of 1891 (Judicial Code of 1911, § 238), and not to this court; and, such being the case, that this court is without jurisdiction to issue the writ of mandamus.

Then, again, if this court, in the exercise of its appellate jurisdiction, was authorized to issue the writ, no occasion exists for so doing, inasmuch as it does not clearly appear on the face of the record that the District Court is without jurisdiction of the subject-matter of the suit. In *re James Pollitz*, 206 U. S. 323, 331, 332, 27 Sup. Ct. 729, 51 L. Ed. 1081, and cases there cited. It would seem rather, that, under the Civil Code, the wife, even before dissolution of the marriage, has a present subsisting interest in the community property, movable and immovable, of such a nature that the husband cannot defeat it through fraudulent transfers, and that the District Court is acting within its right in taking jurisdiction of the suit. *Garrozi v. Dastas*, 204 U. S. 64, 27 Sup. Ct. 224, 51 L. Ed. 369. But if there is nothing in the nature of the case itself against the power of this court to issue the writ, it is extremely doubtful whether, under the recent holdings of the Supreme Court, the case comes within the principles allowing the issuance of such a writ. It would seem that it did not. *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, and cases there reviewed. *Ex parte Roe*, 234 U. S. 70, 34 Sup. Ct. 722, 58 L. Ed. 1217.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. November 18, 1915.)

No. 152.

STREET RAILROADS ⇨78—LEASE—LIABILITY OF LESSOR FOR TORTS OF LESSEE.

The lease of its system by the Metropolitan Street Railway Company to the New York City Railway Company, executed February 4, 1902, under authority conferred by the New York statute (now section 148 of the Railroad Law [Consol. Laws, c. 49]), *held* valid, following prior decisions of the court; also, adopting the construction of the statute given it by the Court of Appeals of the state, the Metropolitan Company *held* not liable jointly with its lessee for torts committed by the latter in its operation of the system.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 166-171; Dec. Dig. ⇨78.]

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

Suit in equity by the Pennsylvania Steel Company and another against the New York City Railway Company and others. From an order confirming report of special master in what is known as the "Joint and Several Liability Proceedings," Charles Benner and others, as a tort creditors' committee, and Mollie Latta, as administratrix, appeal. Affirmed.

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

Charles Benner, of New York City (J. Rosenzweig, of New York City, of counsel), for appellants Benner et al., tort creditors' committee.

J. R. Abney, of New York City, for appellant Latta.

R. R. Rogers, of New York City, for New York Rys. Co.

Masten & Nichols, of New York City (A. H. Masten and William M. Chadbourne, both of New York City, of counsel), for Robinson, as receiver.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. Persons who have recovered judgments for personal injuries against the New York City Railway Company, represented throughout these proceedings by a committee called the "tort creditors' committee," and one Mollie L. Latta, separately represented, insist that the Metropolitan Street Railway Company and the New York City Railway Company are jointly and severally liable for payment of their claims.

February 14, 1902, the Metropolitan Company leased its property and franchises for the term of 999 years to the New York City Company. It was authorized to do this by the Railroad Law of the state of New York then in force. Chapter 433, Laws 1893, now section 148 of the Railroad Law. The tort creditors contend that, notwithstanding the lease, the lessor remains liable for any negligence in operation by the lessee, because there is no express exemption of the lessor in the statute. The Court of Appeals of the state of New York has construed this law as relieving the lessor corporation of any such liability. *Miller v. New York, Lackawanna & Western Ry. Co.*, 125 N. Y. 118, 26 N. E. 35. Similar laws in some other jurisdictions have been differently construed; the courts holding that to relieve the lessor there must be an express exemption in the statute. There is no authority in the Supreme Court controlling us.

Two cases are relied upon by the appellants. In *Railroad Co. v. Brown*, 17 Wall. 445, 21 L. Ed. 675, the plaintiff was a passenger traveling on a ticket of the lessor railroad company. The act complained of was an assault in the District of Columbia, where the road was being operated by equitable receivers of the company; the balance of the road in Virginia being operated by the individual lessees. Mr. Justice Davis held: First. That a railroad company could not escape from its charter duties by a voluntary surrender of its road to lessees. He was considering whether there was any difference between an operation under a lease from the company and under receivers appointed by the court. A lease without the consent of the state would be invalid. *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Abbott v. Railroad Co.*, 80 N. Y. 27, 36 Am. Rep. 572. At all events there was no reference to any statute authorizing the lease in question, and of course no reference to any judicial decision construing such statute. Second. As the lessor company allowed tickets to be issued in its name over the whole line, on one of which the plaintiff was traveling at the time of the acts complained of, it was liable in contract to her. There is no such feature in the case under consideration. The other case, *Chicago, Burlington & Quincy R. R.*

Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521, arose out of an accident in the state of Illinois, whose statute had been construed by the Supreme Court of that state as not exempting the lessor. There being no case controlling us, we are content, even if it is not binding upon us, to adopt the construction of the New York statute given it by the Court of Appeals of that state. See also *Cain v. Railroad Co.*, 27 App. Div. 376, 50 N. Y. Supp. 1.

The tort claimants further contend that, notwithstanding the lease to the City Company, the Metropolitan Company still remained, or at least soon thereafter became, the real and actual operator of the property; the City Company being a mere dummy. Proofs on this subject were presented in the proceeding called the "Validity of Lease Proceeding." The question was elaborately argued before the special master, who held the lease valid and binding upon the City Company and its creditors. His first conclusion of law was as follows:

"From April 1, 1902, to September 24, 1907, and at all times during said period, the lease dated February 14, 1902, between Metropolitan Street Railway Company and Interurban Street Railway Company was a valid, subsisting contract, and binding in its terms upon Interurban Street Railway Company (now New York City Railway Company), and enforceable at law and in equity. Said lease cannot be avoided or set aside by New York City Railway Company or its creditors, but said creditors in any proceeding duly instituted for that purpose nevertheless have the right to present all contentions involving the marshaling of all claims against the New York City Railway Company, including all liabilities arising under the lease."

Upon exceptions to this report it was confirmed by the court below, whose decree upon similar exceptions was affirmed by this court. We expressly held that nothing had been proved by virtue of which the lease could be held invalid, but that the contention of the tort creditors for priority of payment over the Metropolitan Company out of the New York City Company estate was not involved, and therefore not decided. *Penna. Steel Co. v. New York City Railway Co.*, 198 Fed. 765, 117 C. C. A. 503.

Subsequently the claim in this shape, viz., of priority over claims of the Metropolitan Company, was presented in what is called the "Preference Proceeding." In it there was a great mass of testimony as to the intercorporate relations of the two companies; as to the continuation by the City Company of the Metropolitan Company's operating force; of common directors in both companies; of payments of rent by the City Company in the form of dividends to the stockholders of the Metropolitan Company, while the City Company was incurring larger and larger annual deficits; in short, of all the grounds now relied on for claiming that both companies are jointly and severally liable to the tort creditors. The special master and District Court both denied the preference claimed. Upon appeal to this court the order was affirmed. *Penna. Steel Co. v. New York City Railway Co.*, 216 Fed. 473, 132 C. C. A. 518. We held that the creditors of the New York City Company had no priority, that the lease was valid, and that the payment of dividends to the stockholders of the Metropolitan Company was lawful, even if preferential, and that any other conclusion would be manifestly inequitable.

In the proceeding now under consideration the special master held that the tort creditors could not prove at all against the estate of the Metropolitan Company:

"First. From April 1, 1902, to September 24, 1907, and at all times during said period the lease dated February 14, 1902, between the Metropolitan Street Railway Company and the Interurban Street Railway Company was a valid existing contract and binding in its terms upon the Interurban Street Railway Company (now New York City Railway Company), and enforceable at law and in equity. Said lease cannot be avoided or set aside by the New York City Railway Company or its creditors.

* * * * *

"Fourth. All claims of tort claimants allowed against New York City Railway Company should be dismissed as against the Metropolitan Street Railway Company and its estate."

This was confirmed by the court below, Judge Lacombe saying:

"Every proposition advanced in support of the exceptions has been decided adversely to proponent in other proceedings in these causes. The brief seems to concede that this is so, so far as the District Court is concerned. Apparently this present proceeding is brought in the hope that upon appeal, reargument may induce some modification of prior deliverances of the Circuit Court of Appeals. That being so, the record need not be encumbered with an additional opinion. Exceptions are overruled, and report of special master confirmed."

If the Metropolitan-City lease is valid, and if the tort creditors have no priority over the Metropolitan Company as against the City Company's estate, all of which has been decided, we discover no possible ground for holding that they have any claim against the Metropolitan Company estate, or that both companies are jointly and severally liable to them. Our former decisions, which we have no disposition to disturb, are decisive of the question.

The decree is affirmed.


ROGERS, Circuit Judge. I concur in the result on the sole ground that the question involved has been settled by the previous decision of this court. I do not, therefore, find it necessary to inquire whether a railroad company can escape from its charter duties by its voluntary surrender of its road to another corporation, where the stockholders and officers of the two corporations are practically identical.

In re GRANING et al.


In re POWERS.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 88.

1. BANKRUPTCY  136—CONCEALMENT OF ASSETS—PRESUMPTIONS AND BURDEN OF PROOF.

On a Saturday about two weeks before bankruptcy, the members of a partnership received a check for \$2,000, and instead of depositing it they drew it out in bills from the bank upon which the check was drawn. On returning to their place of business about 12:30 they dismissed their bookkeeper for the day, and, as they claimed, put the money in their

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

safe. Though they were at the store nearly all the afternoon, and though the store was locked when they left, and though there was nothing to show that the store or the safe was broken open, or that anything unusual happened, they claimed the money was not there the following Monday. They told the bookkeeper on Monday to charge the \$2,000 to expenses, but later directed her to change the entry and charge it to materials, and one of them testified that he did this because he thought it would look better to creditors. *Held* that, while the trustee, seeking to compel the turning over of this money to him, had the burden of proving that the money was in the bankrupt's possession by evidence which was clear and convincing, he did this, and the burden was shifted to the bankrupts to show what became of the money.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. Ⓢ136.]

2. BANKRUPTCY Ⓢ136—CONCEALMENT OF ASSETS—EVIDENCE.

The bankrupts utterly failed to give any satisfactory or reasonable explanation as to what became of the money, and the court erred in refusing to adjudge them in contempt for failing to restore it to the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. Ⓢ136.]

3. BANKRUPTCY Ⓢ136—CONCEALMENT OF ASSETS—PRESUMPTIONS AND BURDEN OF PROOF.

While the burden of proving the concealment of assets by a bankrupt is upon the trustee, he is not required to produce positive proof of an agreement to conceal, followed by proof that the property was actually abstracted, and such proof is usually established by presumptions drawn from the facts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. Ⓢ136.]

Petition to Revise Order of the District Court of the United States for the Western District of New York.

In the matter of Charles T. Graning and another, individually and as copartners doing business under the firm name of Graning & Wellman, bankrupts. A motion of John R. Powers, trustee, for an order adjudging the bankrupts in contempt was denied, and the trustee files a petition to revise. Reversed, and order of the referee affirmed.

Isaac Adler, of Rochester, N. Y., for trustee.

Hampton H. Halsey, of Rochester, N. Y., for bankrupts.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. This is an appeal from an order denying the trustee's motion for an order adjudging the bankrupts in contempt for not restoring to the estate \$1,975 alleged to have been fraudulently taken and concealed by the bankrupts. The referee had previously decided that the money should be returned upon the ground that the proof was insufficient to show that the bankrupts were not in possession of the money when the petition was filed.

[1, 2] Briefly, these are the facts. About two weeks before the petition was filed in bankruptcy the bankrupts received a check for \$2,000. This was on Saturday, January 9, 1915, about noon. Instead of depositing the money in their own bank they drew it out in bills from the Alliance Bank, upon which the check was drawn. At 12:30 they

reached their own place of business. The bookkeeper, Miss Coleman, was there when they arrived and she was told that she need not return again that afternoon. This was an unusual occurrence, such a dismissal not having taken place since the preceding summer. Wellman testified that he put all the money in the cash drawer of the safe, the amount being \$1,975. The bankrupts were at the store nearly all the afternoon. This was the last seen of the money. The bankrupts conceded they had this money on Saturday afternoon when it was last seen.

It is true that the trustee must prove that it was in the bankrupts' possession by evidence which is clear and convincing. This he has done. The burden is then shifted to the bankrupts to show what has become of it. This the bankrupts have utterly failed to do. What possible reason was there for getting the money in bills Saturday afternoon when they could have deposited the check in their bank? If they deposited it in their own safe, which was a most unusual thing to do on Saturday afternoon, it must have been there when they returned the Monday following. It was not there. There is not a particle of proof that the store or safe was broken open or that anything unusual had happened at the store. So far as accounting for the money they might as well have testified that they put the bills in a box in the front window of the store expecting to find it when they returned on Monday. Their story is too improbable for human credence. It does not even have the merit of ingenuity which is sometimes shown in the attempt to conceal assets. There is not a particle of credible evidence that the store or safe was robbed. When the bankrupts left on Saturday afternoon, the doors were locked and they were the last persons to leave on that day. When they came to the store on Saturday afternoon no mention of the money was given to the bookkeeper, Miss Coleman, and of course no entry was made in the books. On her return on Monday morning she inquired of the bankrupt Wellman what entry she should make of the transaction and was told to charge the \$2,000 to expense but later he directed her to change the entry from "expense" to "materials," which was done. When asked why this change was made Wellman testified that he thought it would look better to creditors. There was no evidence that the store was entered between Saturday afternoon and Monday morning or that the safe had been opened. There was testimony that the safe might be unlocked by turning the knob, but, if this were so, it seems incredible that any sane man would place \$1,975 in such a safe and leave it there from Saturday afternoon until Monday.

In a similar case arising in the Southern District of New York, Judge Addison Brown said:

"No account is given of what disposition was made of the \$2,000, which it is said was received in bills, except that they were paid out, or deposited. There is no corresponding deposit in the bank book. In several details of his testimony the bankrupt's evidence was inconsistent and contradictory, and was in some particulars proved to be false. The referee considered it incredible that the bankrupt was as ignorant of his business and his payments as he professed to be, and he did not consider him worthy of belief. No special losses, and no special causes of loss in business, were intimated by the bankrupt in his testimony." *In re Schlesinger* (D. C.) 97 Fed. 930.

This court in the Matter of Weber Company, 200 Fed. 404, 118 C. C. A. 556, said:

"Upon the application to punish for contempt he made no explanation as to how or why it was that this particular sum had disappeared, merely denying that he ever had it. His statement that he had no money when the proceeding for contempt was instituted, without some such explanation, was insufficient, and the judge quite properly held him in contempt for not paying it over. To excuse disobedience of the order by such general denial would make it easy to evade the requirements of the Bankruptcy Act [Act July 1, 1898, c. 541, 30 Stat. 544]."

[3] If such excuses as are here interposed are permitted, it will put a premium upon fraud and make deception easy. These bankrupts on Saturday afternoon had in their possession \$2,000. The drawing of this money in bills from a bank other than their own was an unusual proceeding. In the ordinary course the \$2,000 check would have been deposited in their own bank. No satisfactory explanation is given of the necessity of having so large an amount of specie at such a time. No plausible reason is given for carrying such a large sum of money over Sunday in a safe which could easily be opened. Is it credible that men possessed of ordinary intelligence would do an act so inexcusably careless? It is true that the burden of proving the concealment of assets is upon the trustee; he is not required to produce positive proof of an agreement to conceal followed by proof that the property was actually abstracted by the bankrupt. Such proof is usually established by presumptions drawn from facts. In the case at bar we have on Saturday afternoon \$2,000 in the possession of the bankrupts. On Monday morning the money has disappeared. No one else is shown to have had access to the money, no robbery is shown, no fire has taken place and nothing but the most improbable suggestions are offered as an explanation for the disappearance of the money. To sustain such excuses puts a premium on fraud. The bankrupts here are shown to have been in possession of the \$2,000 and they have not shown any plausible excuse for not producing it.

The order of the District Court is reversed and the order of the referee is affirmed.

FOWLER et al. v. PENNSYLVANIA R. CO. et al.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 44.

1. COURTS ⇨372—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.

In an action in a federal court, the validity of a contract between a sleeping car company and one of its conductors, whereby he acquitted and discharged the company and a railroad over which he ran from all claims for liability on account of personal injury or death, was not to be determined by the laws of the state where the accident occurred, but by the decisions of the United States courts and by the general law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. ⇨372.]

2. RELEASE Ⓒ20—LIABILITY FOR INJURIES—VALIDITY.

Such release was not invalid, and precluded a recovery for the death of the conductor by reason of a defect in a bridge owned by the railroad company.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 34-36; Dec. Dig. Ⓒ20.]

In Error to the District Court of the United States for the Southern District of New York.

Action by Ethel Ruth Fowler and another, infants, by Henry M. Fowler, their guardian ad litem, against the Pennsylvania Railroad Company and another. Judgment was entered in favor of the Pennsylvania Railroad Company, and dismissing the complaint as to the Pullman Company, the plaintiffs having elected to proceed against the railroad company under the Pennsylvania statute giving a right of action for damages for causing death. From such judgment, plaintiffs bring error. Affirmed.

Martin T. Manton and Anthony J. Ernest, both of New York City, for plaintiffs in error.

Allan McCulloh, Clifton P. Williamson, and Edward W. Walker, all of New York City, for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. This case comes here on writ of error to review a judgment directed by the District Court in favor of the defendant Railroad Company in an action brought by plaintiffs for damages occasioned by the death of their father, Howard L. Baldwin, who was a conductor employed by the Pullman Company. He died through injuries received by the derailment of a Pullman sleeping car at Glen Lock, Pa., by reason of a defect in a bridge owned by the Railroad Company. At the close of the entire testimony the court directed a verdict for the defendant on the ground that Baldwin had made contracts with the Pullman Company whereby that company agreed to indemnify the Railroad Company from any and all damages sustained by the Pullman Company's employes, or their representatives in case of death. It appeared also that the Pullman Company had a contract with the defendant Railroad Company by which the Pullman Company agreed to indemnify the Railroad Company against any and all claims made by the said employes on account of death, personal injury or otherwise and also agreed that it would indemnify the railroad against any such suit and defense.

[1, 2] In the contract with Baldwin he agreed to save the Pullman Company harmless with respect to any and all sums of money it may be compelled to pay in consequence of injury or death happening to him. He acquitted and discharged both the Pennsylvania and the Pullman Company from all claims for liability of any nature or character whatsoever on account of personal injury or death to him while in said employment. Do these agreements constitute a complete bar or defense to the action? We think the contention that the contract must be construed by the laws of Pennsylvania because the accident occurred

there cannot be maintained. The question of the validity of the release is one not to be determined by local law, but, in suits in the United States courts, by the decisions of those courts and by the general law and, in the absence of a statute holding such releases invalid, the United States courts will uphold them unless prohibited from doing so by some controlling authority.

The law of the United States courts seems to be settled, regarding such questions as we are now dealing with, that the courts of the United States are not controlled by state decisions but are at liberty to adopt their own view of the law. It is, we think, the law of the United States courts, when considering the question as one to be determined by general law, that such releases as we have here to consider are not invalid. In *Lake Shore Railway Co. v. Prentice*, 147 U. S. 101, at page 106, 13 Sup. Ct. 261, at page 262, 37 L. Ed. 97, the question related to the oppressive conduct of a conductor towards a passenger on one of its trains. The court says:

"This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers—such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment—is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states. *Railroad Co. v. Lockwood*, 17 Wall. 357, 368 [21 L. Ed. 627]; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443 [9 Sup. Ct. 469, 32 L. Ed. 788]; *Myrick v. Michigan Central Railroad*, 107 U. S. 102, 109 [1 Sup. Ct. 425, 27 L. Ed. 325]; *Hough v. Railway Co.*, 100 U. S. 213, 226 [25 L. Ed. 612]."

In *Beutler v. Grand Trunk Co.*, 224 U. S. 85, at page 88, 32 Sup. Ct. at page 402, 56 L. Ed. 679, the court says:

"So it has been decided that in cases tried in the United States courts we must follow our own understanding of the common law when no settled rule of property intervenes. *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349 [30 Sup. Ct. 140, 54 L. Ed. 228]; *Northern Pacific R. R. Co. v. Hambly*, 154 U. S. 349, 360 [14 Sup. Ct. 983, 38 L. Ed. 1009]."

In *Robinson v. Baltimore & Ohio R. R.*, 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849, *Robinson*, the plaintiff in error, sued the Railroad Company to recover damages for injuries sustained by him while acting as a porter on a Pullman car which was being hauled by the railroad. The defendant introduced the plaintiff's contract with the Pullman Company which is similar to the one here in issue. He released the Pullman Company "from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment or service." The contract also contained a provision releasing corporations, over whose lines the Pullman cars are hauled, from "liability of any nature or character whatsoever on account of any personal injury or death to me while in said employment or service." The court held that the plaintiff in error was not an employé of the Railroad Company within the meaning of the Employers' Liability Act and could not maintain the action.

In *Baltimore & Ohio Railway v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, the action was brought by an express messenger

against the railway company for injuries received in consequence of a collision between two trains owned by the railway upon one of which Voigt was riding at the time. He was engaged in a car which was set apart for the use of the United States Express Company under a contract between that company and the railway company. The court held that Voigt was not a passenger, that he was not constrained to enter into the contract which relieved the railway company from liability to him.

The judgment is affirmed.

UNITED STATES v. E. W. BLISS CO.

(Circuit Court of Appeals, Second Circuit. October 7, 1915. On Reargument, December 14, 1915.)

No. 132.

On Reargument of Issue Relating to Double Regulation of Air.

UNITED STATES ⇐70—CONSTRUCTION OF CONTRACTS—CONTRACT FOR MANUFACTURE OF TORPEDOES—RESTRICTIVE PROVISIONS.

A provision in a contract for the manufacture by defendant of torpedoes for the United States Navy that defendant should not "make use of any device, the design for which is furnished to it by [the United States] in any torpedo constructed or to be constructed for any person or persons, firms or corporations, or others, or for other governments," is not to be so narrowly construed as to exclude from its operation a material device adopted at the request of the government merely because no blueprint or working drawings were furnished, where it was so simple of construction that its indication on the drawings already furnished was sufficient to enable defendant to understand it.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 53; Dec. Dig. ⇐70.]

Ward, Circuit Judge, dissenting.

On petition by defendant for rehearing. Granted.
For former opinion, see 224 Fed. 325, 139 C. C. A. 633.
Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. When the question as to the device for the compound regulation of air arose, the members of the court were so widely separated that oral consultation was out of the question. In the circumstances it was thought that the proper course to pursue was for the presiding judge to communicate by mail with the other members of the court, especially so as we understood both parties approved this course. However, as the defendant did not have an opportunity to be heard by this court upon the question of the inclusion in the decree of the device for the compound regulation of air, it seems to us proper that such opportunity should now be given. The question is in exceedingly narrow limits, and it seems to us that it can be treated more satisfactorily by submitting short written briefs; the defendant to have ten days to submit its views, and the plaintiff an equal time to reply. If, how-

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

ever, an oral argument is desired, we will arrange for a date some time in the near future.

As to the other grounds for a reargument set forth in the petition, the motion is denied.

On petition by defendant for rehearing and reargument of the issue relating to the double regulation of air.

Arthur C. Fraser, of New York City (Arthur C. Fraser, Frank H. Platt, and Robert H. Ewell, all of New York City, of counsel), for appellant.

Melville J. France, of Brooklyn, U. S. Atty., and Archibald R. Watson, of New York City, Sp. Asst. Atty. Gen. (John M. Harrington, of New York City, of counsel), for the United States.

COXE, Circuit Judge. The defendant's contention upon the issues now before the court, if successful, may result in rendering the entire decree abortive. It does not seem to be seriously disputed that if the defendant be permitted to make the device for the double regulation of air it cannot logically be enjoined from making the balanced turbine. The issue is more important, therefore, than a mere statement of it would indicate. The question, broadly stated, is whether the contract is to be so literally construed that no improvement, however simple in construction, suggested by the Bureau, can be regarded as belonging to the complainant unless a blueprint or working drawing has been furnished at or prior to giving the notice. It is clear that the contract should not be so strictly construed as to require the officers of the Bureau of Ordnance to do a vain and unnecessary thing. A common sense construction is all that is required. If the defendant is put in possession of all the facts so that misconception is impossible it should be sufficient. Of course where the proposed change involves a complicated structure or device a blueprint drawing or a model is necessary, but where the mechanical change is so simple that an ordinary artisan will know what to do the moment the change is directed, it is not perceived how any additional advice is necessary. If the ordnance officer directs the mechanic to make a valve an inch wider or add an additional valve, indicating the place where it is to be inserted, we do not think a blueprint is necessary to make plainer what is perfectly plain without it.

That the defendant's officers had due notice of the complainant's position as to the double regulation of air, and that they thoroughly understood it, is not disputed. No blueprint was furnished but the Bureau offered to furnish the defendant with cards and data obtained by experiments at the Torpedo Station for the information of the defendant if it desired and requested it. It did not request it. There can be no doubt that the defendant fully understood the government's contention regarding the necessity for a double regulation of air. There was no complaint that the Bureau's request for another valve was not fully understood. The defendant's sole objection seems to have been not that there was any difficulty in making the change but

that it would not accomplish the desired result. The defendant's vice president was asked and answered the following question:

"Q. In reference to the double air regulation, the Bliss Company finally adopted the double air regulator after it had been urged to do so by the Bureau and the Inspector of Ordnance at your works for some time, did they not?
A. Yes, they did."

It seems obvious that the defendant clearly understood what was wanted by the Ordnance Bureau. It made no complaint of lack of details, asked for no additional information and opposed the scheme on the ground that in the opinion of defendant's experts the plan would not work.

Briefly the situation was practically this: The Bureau officers said to the Bliss Company's officer, "You need another valve, put it here"—indicating the place on the drawing or model where the second valve was to be inserted. This was done and with the result that the defect was remedied. Can it be that the complainant is to lose the benefit of this improvement because its agents did not go through the wholly inconsequential ceremony of furnishing a blueprint? The defendant had itself indicated when a similar situation arose with reference to the starting mechanism, that the mere suggestion by the Bureau of the use of a breaking tube which solved the difficulty, would have made that device the sole property of the complainant. We have only to substitute the words "an additional valve" for the words "breaking tube" and we have the opinion of the defendant itself that the device for the double regulation of air is the property of the United States. The defendant did not need a model or a blueprint to inform it where to place the second valve and does not now pretend that such information was asked for or was necessary any more than the blueprint of a breaking tube was necessary in the hypothetical case suggested by the defendant.

We think the decree as entered is correct and should not be disturbed.

WARD, Circuit Judge, dissents.

In re HOPKINS.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 106.

1. BANKRUPTCY ⇌ 288—RECOVERY OF PROPERTY—QUESTIONS OF FACT.

In a proceeding by a trustee in bankruptcy to compel the bankrupt's wife to turn over money to him, evidence held to make a question of fact as to whether money which the wife at one time had on deposit in a bank belonged to her or to the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⇌ 288.]

2. BANKRUPTCY ⇌ 442—RECOVERY OF PROPERTY—WAIVER OF OBJECTIONS TO SUMMARY PROCEEDINGS.

Where, in a summary proceeding by a trustee in bankruptcy to compel the bankrupt's wife to turn over money claimed to belong to the estate,

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

neither the bankrupt, the wife, nor any one else objecting to the form of the proceeding, it was too late on a petition to revise to contend that a plenary suit, and not a summary proceeding, should have been brought.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 918; Dec. Dig. ⚡442.]

3. BANKRUPTCY ⚡446—REVIEW OF PROCEEDINGS—QUESTIONS OF FACT.

Where, in a proceeding to compel a bankrupt's wife to turn over money to the trustee, the evidence made a question of fact as to the ownership of money at one time on deposit in the wife's name, the Circuit Court of Appeals would not be justified in overruling the finding of the District Judge after seeing and hearing the witnesses.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⚡446.]

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of Clarence E. Hopkins, bankrupt. On petition by Anna S. Hopkins, the wife of the bankrupt, to revise an order directing her to pay over to the trustees or to the clerk of the court the sum of \$1,680.80. Affirmed.

Charles J. Ryan, of Brooklyn, N. Y., for petitioner.

Winifred Sullivan, of New York City, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. Clarence E. Hopkins was adjudicated a bankrupt July 25, 1914, and on August 17th, Lawrence Hull was appointed trustee. The bankrupt was engaged in the furniture, storage and moving business in Brooklyn and in December, 1913, he incorporated the business under the name of the Fifty-Second Street Storage House, which corporation was owned and controlled by him. The trustee commenced an action in the state court to recover the property and obtained an injunction restraining the corporation from disposing of it. Upon the trial of this action final judgment was rendered January 18, 1915, declaring the transfer to the corporation fraudulent and void, and the property was taken over by the trustee.

[1] An examination before the referee disclosed the following facts:

On October 17, 1914, Anna S. Hopkins, the wife of the bankrupt, opened an account with the People's Trust Company and deposited \$1,205.80. She also deposited thereafter as follows: On November 6, \$175, on November 16, \$100, and on November 20, \$200. On December 4, 1914, the total amount then on deposit, \$1,680.80, was withdrawn. On the following day Mrs. Hopkins opened an account with the Montauk Bank by making a deposit of \$1,600 which was checked out from time to time and on February 23, 1915, the account was finally closed by the withdrawal of the balance, \$711.08. The trustee contends that the entire amount deposited in the Montauk Bank belonged to the bankrupt and should go to his creditors. The petitioner contends that the money belonged to her. She testified that the largest part thereof, \$1,500, was borrowed from Mary T. Ward who received her note therefor, payable in February, 1914, with interest, at the rate of 6 per cent. She says she spent the money for house-

hold expenses and in February, 1914, purchased two vans and horses which were to be used in her husband's business. Regarding the purchase of the vans she is corroborated by William R. Wood who testified that he sold four horses and two vans to her for \$975 and was paid by a check for \$425 and the balance in cash.

Alexander C. Nicholson testified that he is the brother of Mary T. Ward who lives at Rupert, Idaho, but was in Brooklyn in February, 1914, when she loaned Mrs. Hopkins the \$1,500 in question. He swore that he drew the note, that it was left with him and was still in his possession. The note was produced and marked in evidence.

It is apparent from the foregoing epitome of the evidence that the question whether or not the money which the bankrupt was directed to turn over to the trustee, by virtue of the order dated August 2, 1915, belongs to the estate or to the wife of the bankrupt, is a question of fact.

[2] The principal argument in the petitioner's brief is in support of the proposition that the question here should be decided in a plenary suit and not upon a summary order. To sustain this proposition *Louisville Trust Co. v. Cominger*, 184 U. S. 25, 22 Sup. Ct. 293, 46 L. Ed. 413, and five other authorities are cited. From these the learned counsel for the petitioner draws the following conclusion:

"It is within the undeniable power of the bankruptcy court to assert and exercise a summary power over the property of the bankrupt and even against third persons holding such alleged property and claiming title, provided such claim is merely colorable and fraudulent but inasmuch as such proceeding deprives a person of the usual due process of the law, the summary order directing its surrender should be based upon facts which no fair mind can dispute."

This statement is correct, so far as it goes, but the authorities cited have no application to a case where the party who questions the summary proceeding has been given an opportunity to object and fails so to do.

The question was presented to the trustee whether he would proceed summarily or by a plenary suit and he elected the former without objection by the bankrupt, his wife or any one else. Having proceeded without objection we think it is too late now to present a question which is addressed solely to the form of the proceeding. If the objection had been made at the time the trustee was required to elect, it is quite possible that the petitioner's contention would have been sustained, but she, apparently, acquiesced in the summary proceeding as the most satisfactory way of disposing of the question and we are of the opinion that it is too late to present the question on this review by an appellate court.

[3] The question as to who was the owner of the \$1,680.80 was one of fact and was decided by the District Judge after seeing and hearing the witnesses. We think that in such circumstances this court would not be justified in overruling his findings.

The order is affirmed with costs.

ALPHA PORTLAND CEMENT CO. v. CORSI et ux.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 68.

1. MASTER AND SERVANT ⇨285—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for the death of an employé, caused by contact with a revolving shaft containing an unguarded collar and set screw while he was oiling certain bearings, in which defendant claimed that the machine could have been readily stopped by pressing a button, and that all employés, including deceased, were forbidden to oil the machinery without shutting it down by cutting off the electric current, evidence as to whether any such instructions were given, and whether it was the custom or practice to stop the machinery for the purpose of oiling it, *held* to make a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. ⇨285.]

2. MASTER AND SERVANT ⇨209—LIABILITY FOR INJURIES—FAILURE TO GUARD MACHINERY.

Notwithstanding Factory Act Pa. May 2, 1905, § 11 (P. L. 355), requiring all gearing, belting, shafting, set screws, etc., to be properly guarded, an employer might have made a revolving shaft containing a collar and set screw safe without guarding it, by placing it where no workman could approach it, except to oil it, and then requiring it to be stopped before oiling was attempted; but, if it chose this method as an alternative for the statutory one, it should have been scrupulously careful to make its substituted method efficient.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 552, 553; Dec. Dig. ⇨209.]

In Error to the District Court of the United States for the Southern District of New York.

Action by Ilario Corsi and wife against the Alpha Portland Cement Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

This cause comes here upon writ of error to review a judgment in favor of defendants in error, who were plaintiffs below. The action is brought by the parents of Silvio Corsi, who was killed in defendant's mill at Martin's Creek, Pa.

L. H. Porter, of New York City, for plaintiff in error.

H. S. Bird, of New York City, for defendants in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The action is brought under a Pennsylvania statute allowing such action to be brought by the parents of a person killed by negligence. Deceased on the day in question was engaged in oiling machinery in the mill. He met his death by coming in contact with a revolving shaft containing a collar and a set screw, which were wholly unguarded. The Pennsylvania Factory Act (P. L. c. 226, § 11, May 2, 1905) provides that:

"All vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws, grindstones, emery wheels, flywheels, and machinery of every description shall be properly guarded."

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

[1] There was no eyewitness of the accident, but the time, circumstances, position of the body, and condition of the clothes leave no doubt as to how the accident happened. The unguarded shaft was on a platform reached by a ladder; there was no occasion for deceased to go on that platform, unless he intended to do something in connection with the machinery there. He did have occasion to go there at stated times in order to oil certain bearings. The defense was contributory negligence in that deceased went upon the platform in disregard of express instructions, and that he chose a dangerous method of doing his work, although a safe one was open to him.

The particular machine was one of a series run by electricity; it could be readily stopped merely by pressing a button conveniently located on the floor below the platform. Such temporary disconnection would not interfere with the rest of the plant. The testimony for defendant tended to show that to all, including deceased, instructions had been given, forbidding any one from undertaking to oil the machinery until after he had shut it down by cutting off the electric current, which ran it; also that deceased had on one occasion repeated these instructions to another man, who was about to take his place temporarily. Plaintiff in error relies on our decisions in *Canadian Pacific R. R. v. Elliot*, a cause which came twice before this court. 137 Fed. 904, 70 C. C. A. 242; 161 Fed. 250, 88 C. C. A. 286. It may be noted that in the *Elliot Case* the controversy was whether the rule had been so frequently and notoriously disregarded as to have become a dead letter. Of the promulgation of the rule there was not a particle of doubt. In its original or amended form (the amendment making it more efficient to insure safety) it had been in force for years. It was printed and included in the book of rules with which the deceased had been supplied and a copy of which was found on his body.

It is not necessary to state the facts in the case at bar more fully. While we think that plaintiff's case was a weak one, and are inclined to put little reliance on the testimony of their main witness, Read, nevertheless, with his evidence in the case, there was conflict as to vital issues, which could not be taken from the jury. He testified that he never knew the machinery to be stopped for the purpose of oiling during the entire eight years it was there; that he never knew of any orders being given to stop it for the purpose of oiling, nor of any custom or practice to stop it for that purpose; that he had seen it oiled while in operation repeatedly. There was also testimony that, in order to find out if oiling was necessary, one would have to go to it and feel if the bearings were hot. The witness who testified that deceased told him always to shut down before oiling was a Hungarian, who testified through an interpreter; deceased was an Italian, and the record is somewhat vague as to how the one communicated instructions to the other.

[2] Weak though plaintiff's case was, its weight was for the jury to determine. If the result be hard on defendant its own laxity is the cause of such result. Concededly it did not guard this shaft as the statute required. Although it did not so guard it, it might make it safe by placing the machine where no workman could approach it,

except to oil it, and then requiring it to be stopped before oiling was attempted. But if it chose that method as an alternative for the statutory one, it should have been scrupulously careful to make its substituted method efficient. This it might easily have done. Had it posted a notice conspicuously near the unguarded shaft, forbidding any one to undertake to oil it, or to come close to it, unless he first stopped the machine, on pain of dismissal for disobedience, and had it further been careful to make such notice intelligible to the polyglot workmen whom it employed, its situation at the trial would have been different. As it is the finding of the jury on controverted questions cannot be disturbed.

Judgment affirmed.

PHILADELPHIA & READING COAL & IRON CO. v. ORAVAGE.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 79.

1. MASTER AND SERVANT ⇐180—LIABILITY FOR INJURIES—NEGLIGENCE OF FELLOW SERVANTS.

The Pennsylvania Liability Act (Act June 10, 1907 [P. L. 523] § 1) provides that the negligence of a fellow servant of an employé shall not be a defense, where an injury was caused or contributed to by the neglect of any person engaged as superintendent, manager, foreman, or any person in charge or control of the works, plant, or machinery, or the negligence of any person in charge of or directing the particular work in which the employé was engaged at the time of the injury or death. A sweeper in a coal breaker, employed to clean out screenings between the tracks, was killed as a result of the negligence of a person in charge of the work of running loaded cars down such tracks by gravity in failing to give the sweeper adequate warning. *Held*, that he was in charge as the alter ego of the defendant in the particular work, and for his negligence the defendant was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. ⇐180.]

2. MASTER AND SERVANT ⇐286—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for the death of a sweeper in a coal breaker, engaged in cleaning out screenings accumulating between the tracks and struck by a car running down the track by gravity, with no one on board to manage it, the person in charge of the work of sending cars down the tracks testified that he shouted a warning to decedent. A witness working about 20 feet from decedent testified that he heard no warning shouts. *Held*, that this testimony, in connection with the presumption that an able-bodied, prudent man, with an experience of six years in the business in question, would not remain in a position where he was sure to be crushed to death if such warning shouts had been given, made a question for the jury as to the giving of such warning.

[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.]

Lacombe, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action by Anna Oravage against the Philadelphia & Reading Coal & Iron Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Armstrong, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for plaintiff in error.

Rufus M. Overlander, of New York City (Herbert C. Smyth, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1] The plaintiff sues to recover damages for the death of her husband while engaged in working for the defendant in the capacity of "sweeper"—his duties being to clean out the screenings which accumulate between the tracks in the defendant's coal breaker. John Walsh was the person in charge of the cars and directed how many cars should be brought down for loading each day. As there was a grade there the cars were run down by gravity. At the time of the accident Walsh released the brakes on two empty cars and they started down grade with the patent brake set so that they would couple with a single car standing on the track. The coupling device did not work. The force of the impact jolted the brakes off the single car and started it down the track with no one on board to manage it; the result being that it struck and killed Oravage. He was standing with his back towards the runaway car. There was a brisk wind blowing and the breaker made considerable noise. It must be conceded that the accident was due to the neglect of Walsh to give adequate warning but the defendant insists that he was only a fellow servant of Oravage and was not a foreman or person in charge referred to in the Pennsylvania Liability Act. This, we think, is the pivotal question in the case. The act provides, *inter alia*, that:

"The negligence of a fellow servant of the employé shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: Any defect in the works, plant or machinery, of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or any * * * person in charge or control of the works, plant or machinery; and negligence of any person in charge of or directing the particular work in which the employé was engaged at the time of the injury or death." Act June 10, 1907 (P. L. 523) § 1.

There is nothing to show that Oravage was not a careful and prudent man. The fact that he had been working for the defendant for a period of six years as sweeper is persuasive evidence of his efficiency in that capacity. The business was from its very nature an exceedingly dangerous one on account of the grade, the noise, the dust and the smoke. In order to control the situation it was necessary that some one should be in charge of the work as required by the law. If Walsh were not such person it must be admitted that the defendant was conducting a highly dangerous business with no one in charge. We have no doubt that Walsh was in charge as the alter ego of the defendant in this particular work. The cars were run by his orders, he directed the time of running and the number of the cars. The defendant relies upon the case of *Remmert v. Penna. Railroad*,

18 Pa. Dist. R. 372, which holds that an engineer of one locomotive is the follow servant of another engineer and with this ruling we quite agree. We do not, however, recognize its application to the case of a "sweeper," whose duty it is to clean the spaces between the tracks and who is killed through the neglect of one who has general charge of the work of loading and bringing down by gravity the loaded cars of the defendant. The other cases cited by the defendant are easily distinguishable upon the facts.

[2] It is said there is no positive proof that Walsh failed to give warning. There is the stipulated testimony of Seiwinski who was working about 20 feet from where Oravage was struck who did not hear any of the warning shouts testified to by Walsh. In addition there is the presumption that an able-bodied, prudent man with an experience of 6 years in the particular business in question would not remain in a position where he was sure to be crushed to death if the warning shouts testified to by Walsh were given.

The questions of negligence were questions of fact and the jury answered both in favor of the plaintiff. We see no reason to disturb their verdict of \$2,250 which was a conservative one considering all the circumstances.

The judgment is affirmed.

LACOMBE, Circuit Judge. I dissent for the reason that I am not satisfied that Walsh was in charge, or control, or was directing within the meaning of the statute.

COHEN et al. v. BACHARACH.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 91.

1. BANKRUPTCY Ⓒ116—COLLECTION OF ASSETS OF ESTATE—DUMMY CORPORATIONS.

Where, though a trustee in bankruptcy claimed that a corporation was a dummy corporation and that all of its property belonged to the bankrupts, there was evidence that its property was subject to a mortgage, and that the bankrupts had transferred their stock to their wives for value, the trustee should have proceeded against the corporation for the surrender of all its property to him, in order that stockholders and creditors, if there were any other than the bankrupts, might have an opportunity to resist the application, or, if it was granted, to prove their claims against the estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. Ⓒ116.]

2. BANKRUPTCY Ⓒ148—PREFERENCES—PAYMENTS CONSTITUTING.

After an adjudication in bankruptcy, bankrupts could properly pay on a mortgage on property formerly owned by them, which they desired to have paid, money earned by them after the petition was filed, or obtained by them from relatives or friends.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 625; Dec. Dig. Ⓒ148.]

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

Bill in equity by Lawrence B. Cohen, as trustee in bankruptcy of Simon Uhlfelder and another, individually and as members of the firm of Uhlfelder & Weinberg, bankrupts, against Julius Bacharach. From a decree dismissing the bill, complainant appeals. Affirmed.

Engel Bros., of New York City (J. B. Engel, of New York City, of counsel), for appellant.

M. S. & I. S. Isaacs, of New York City (L. M. Isaacs, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a bill in equity filed by the trustee in bankruptcy of Uhlfelder & Weinberg against Julius Bacharach to recover \$6,600 paid to him by the bankrupts after their adjudication on account of a mortgage of \$7,500, not made by them, but covering premises on Eightieth street, formerly owned by them. Judge Learned Hand dismissed the bill, without costs.

In June, 1911, Bacharach began an action to foreclose his mortgage. The petition in involuntary bankruptcy was filed against Uhlfelder & Weinberg October 11, 1911. The bankrupts begged Bacharach to delay the prosecution of his action, so as to give them time to raise money to pay off the mortgage, and they did make him payments from time to time between October 11 and November 7, 1912, aggregating \$6,600. The trustee's theory is that these payments were out of the proceeds of sale of leasehold premises on Franklin street belonging to the Channel Realty Company, which he charges to have been a dummy corporation organized by the bankrupts who owned the whole of its capital stock.

The reason why the bankrupts were so anxious to have this mortgage paid off was that they had furnished an agreement in Bacharach's name, his signature being forged, subordinating his mortgage to two mortgages subsequently executed by them on the same premises to secure the payment of \$16,500 each. The only conceivable inducement to Bacharach for delaying foreclosure of his perfectly safe mortgage lien was to give the bankrupts, one of whom was his cousin, a chance to raise the money to pay it off and so prevent publicity. There was evidence that the Franklin street leasehold was subject to a mortgage of the Channel Realty Company of \$18,000 and that the bankrupts had transferred their stock in the company to their wives for value; also some evidence that Bacharach and his attorney had enough notice to put them on inquiry whether the moneys paid him did not belong to the bankrupts' estate.

The bankrupts were willing witnesses for the trustee, but the District Judge, because of what they had done and of the manifold contradictions in their evidence, gave them little credence. We concur in his conclusion that the trustee has failed to make out as clearly as he should that the Channel Realty Company was a dummy corporation; that is, that all its property belonged to the bankrupts, and that there were no stockholders other than themselves, nor any creditors interested in it.

[1] The proper course would have been for the trustee to proceed against the Channel Company for the surrender of all its property to him. In this way stockholders and creditors of that company, if there were any, other than the bankrupts, would have been given an opportunity to resist the application or if it was finally granted, then to prove their claims against the estate in bankruptcy. This is what was done in *Re Rieger* (D. C.) 157 Fed. 609, 19 Am. Bankr. R. 622, and *Re Munsey Pulp Co.*, 139 Fed. 546, 71 C. C. A. 530, much relied upon by the trustee.

[2] The proofs leave a further doubt, viz. whether all the payments to Bacharach did come out of the proceeds of sale of the Franklin street leasehold. The bankrupts could properly pay him money which they earned after petition filed, or got from relatives or friends.

While it must be conceded, as the District Judge did concede, that the whole transaction is complicated, perplexing, uncertain, and unsatisfactory, we think he rightly dismissed the bill, without costs, and therefore the decree is affirmed, with costs of this court.

O'BRIEN v. AMERICAN AGRICULTURAL CHEMICAL CO.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 73.

ACCORD AND SATISFACTION ⚡9—COMPROMISE AND SETTLEMENT ⚡6—PART
PAYMENT—UNLIQUIDATED DEMANDS.

An employé, notified on February 13th that his discharge had been ordered, worked that day and the next day, and on February 15th, being ill, phoned to the employer to send him, as was customary, his salary for the first half of February. The employer sent him a receipt for \$151.67 as salary and expenses from February 1st to 15th, and for \$183.33 as "one month's additional salary," with a request that he sign it, and also sent him a check for the aggregate of those amounts, less an amount previously advanced for expenses. The employé had the check certified, understanding that the employer was offering to pay him one month's salary in settlement of all controversy over his discharge; but he claimed that the amount due was liquidated, and that the acceptance of a less sum was not an accord and satisfaction. *Held* that, while the salary from February 1st to 15th was liquidated, the sum which the employer should pay the employé as damages for the discharge was not liquidated, but consisted of the agreed salary and per diems for the term of the employment, less such sum as the employé would receive or might have received from other employment, and as the employé's act in having the check certified was equivalent to an acceptance, there was an accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 88-91; Dec. Dig. ⚡9; Compromise and Settlement, Cent. Dig. §§ 35-50; Dec. Dig. ⚡6.]

In Error to the District Court of the United States for the Southern District of New York.

Action by William H. O'Brien against the American Agricultural Chemical Company. Judgment for defendant, and plaintiff 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, which was defendant below. The action was brought to recover upon a contract for services of plaintiff as a traveling auditor. The original contract was for a year beginning February 1, 1906, for a fixed salary payable semimonthly and an additional per diem for expenses. The contract was renewed, year by year, and on February 15, 1913, plaintiff was discharged. Plaintiff contended that his discharge was wrongful; defendant, that it was for cause. Defendant further contended that on plaintiff's discharge defendant delivered to him, and he accepted from it, \$335 in full satisfaction and discharge of its liability to him. At the close of plaintiff's case the court dismissed the complaint.

Robert D. Ireland, of New York City (A. J. Ernest, of New York City, of counsel), for plaintiff in error.

Gifford, Hobbs & Beard, of New York City (J. D. Fearhake, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Judge Mack disposed of the cause by dismissal, because he was satisfied from the proof, as it stood when plaintiff rested, that an accord and satisfaction was established. That is the only question which need be considered. On February 13, 1913, plaintiff was notified that his discharge had been ordered. He continued his work the balance of that day and also the next day. On February 15th, being ill and confined to the house, he phoned to the defendant to send him, as was customary, his salary for the first half of February. In response there was sent to him a receipt, with the request that he sign it, which stated the amount due for his salary and expenses from February 1st to 15th at \$151.67, and also as "one month's additional salary \$183.33." Both these items were accurately stated. There was inclosed with the receipt an acquittance for \$50, which allowed him to keep a sum of \$50, which he had theretofore received as cash advanced on account of expenses. There was also inclosed a check for \$285, being the balance of \$335 remaining after crediting the \$50. This check he had certified, which was equivalent to accepting it. Undoubtedly he understood that defendant was offering to pay him one month's full pay, in addition to what was then due him, in settlement of all controversy over his discharge. He testified that he understood that the defendant had in mind that this was to be a final payment, or as he elsewhere expressed it that they "were willing to give [him] one hundred and eighty odd dollars as a sop to be satisfied with and get out."

The contention here made is that the amount due him for an unwarranted discharge—and for the purposes of this appeal it may be assumed that the discharge was unwarranted—was a liquidated amount, to wit, a year's salary, with \$4 per diem for expenses. It is argued that, in cases where there is no dispute as to the amount due, the acceptance of a less sum will not in itself establish an accord and satisfaction. The authorities cited are not applicable. The salary from

February 1st to 15th was, of course, a liquidated amount; but the sum which defendant should pay plaintiff as damages for an improper discharge was by no means liquidated. The damages would be one year's salary and per diems, less such sum as plaintiff might have received from other employment obtained during the year, or, assuming the cause came to trial promptly after dismissal, less such compensation as from the evidence, the jury might be satisfied that plaintiff would receive by proper effort in seeking other employment.

The judgment is affirmed.

KAPLAN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 69.

1. POST OFFICE ⚡35—FRAUDULENT USE OF MAILS—ISSUES.

On a trial for using the mails in aid of a scheme to defraud, involving the sending to parties from whom defendant desired credit of false statements of his financial condition, the controlling consideration was the truth or falsity of such statements, and if they were knowingly false the sending thereof could not be reconciled with honesty.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⚡35.]

2. POST OFFICE ⚡49—FRAUDULENT USE OF MAILS—SUFFICIENCY OF EVIDENCE.

On a trial for using the mails in aid of a scheme to defraud, involving the sending of false financial statements to parties from whom defendant desired credit, where, though defendant attempted to fasten the blame for the false statements upon his bookkeeper, he stated in his request for credit that the figures therein were correct to his knowledge and had been investigated, the jury were justified in declining to hold the bookkeeper solely responsible.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. ⚡49.]

In Error to the District Court of the United States for the Southern District of New York.

David Kaplan was convicted of an offense, and he brings error. Affirmed.

Writ of error to review a judgment entered upon the verdict of a jury finding the defendant guilty, upon the third count of the indictment, of having devised a scheme to defraud by sending through the mails a false statement of his assets and liabilities, for the purpose of obtaining credit. Section 215, Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1913, § 10385]).

The particular offense charged in the third count is the mailing to Bachman, Emmerich & Co., 222 Fourth Avenue, New York City, of a statement of his assets and liabilities in which he places his assets at \$20,965.91, his liabilities at \$3,846.80 and the "net surplus in business" at \$17,119.11.

O'Gorman, Battle & Vandiver, of New York City (George Gordon Battle and John M. Quinn, both of New York City, of counsel), for plaintiff in error.

H. Snowden Marshall, U. S. Atty., of New York City (Harold A. Content and Ben A. Matthews, Asst. U. S. Attys., both of New York City, of counsel), for the United States.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The two questions involved in this review are questions of fact—First, were the statements of the defendant's financial condition false? Second, were they sent through the mails to persons and firms from whom the defendant was seeking to obtain credit? The evidence as to the use of the mails was so clear and convincing that the court might well have assumed that the mailing was unquestioned, but instead of doing so, he took the safer course and submitted to the jury the question whether the defendant instructed the bookkeeper to mail the letters or whether he knew that the mail was being used in the distribution of the statements to defendant's creditors. The jury found that the mails were used with defendant's knowledge.

[1, 2] The crucial question, however, is whether or not the defendant devised a scheme to defraud by using false statements of his financial condition to induce the sale to him on credit of a large quantity of goods which, had the truth been known, would not have been sold. Here, the controlling consideration is the truth or falsity of the statements. If false and known by the defendant to be false, it is impossible to reconcile his conduct with honesty. The questions were submitted to the jury by Judge Pope in a charge which stated the issue with absolute clearness and impartiality, no exception being taken by either side to the charge. The jury has found the issues of fact against the defendant and we see no reason for disturbing their verdict. The attempt of the defendant to escape liability for the false and misleading statements and to fasten the blame upon the bookkeeper, who had no motive for falsifying the records, did not impress the jury favorably. In view of the statement of the defendant in his request for credit that "the above figures are correct to my knowledge; all the figures have been compared and investigated before the submission of this statement to you," it is not surprising that the jury declined to hold the bookkeeper solely responsible for the false statements. It was defendant's duty when he certified to the truth of these statements to make the necessary investigation to enable him to do so honestly. The jury evidently were not influenced by any bias against the defendant as is evidenced by their verdict of not guilty on the first, second and fourth counts.

We are unable to find any reversible error in the record and think the judgment of conviction should be affirmed.

LUTEN v. BEARCE et al.

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

No. 1134.

PATENTS ⚡218—PREMATURE COMMENCEMENT.

The time for payment of a royalty for use of a patented construction in the building of a bridge held to have been extended until completion of the bridge rendering an action for nonpayment brought before that time premature.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 330-338; Dec. Dig. ⚡218.]

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Suit in equity by Daniel B. Luten against George B. Bearce and another. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 219 Fed. 237.

Frank H. Drury, of Chicago, Ill., for appellant.

Frank A. Morey, of Lewiston, Me. (McGillicuddy & Morey, of Lewiston, Me., on the brief), for appellees.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This case was appealed from the District Court for the District of Maine. The proceeding was a bill in equity alleging the infringement of certain patents owned by the complainant and being used in the construction of a highway bridge between the towns of Foxcroft and Dover, in the state of Maine. The respondents below, namely, Bearce and Clifford, were the contractors for the construction of the bridge, and their dealings were with the complainant, Luten, who is also president of the National Bridge Company, which owns the patents in question. The defense in substance was that the respondents, Bearce and Clifford, were the contractors who were constructing the bridge, and that they made a contract with the towns for the entire bridge, including the right to make use of the patents referred to in such construction, so that, if anything was due on account of the use of the patents, it was in the way of a license fee or royalty therefor. This cannot be sued for by a bill in equity alleging infringement. The substance of the conclusion of the learned judge of the District Court is found at pages 203 and 204 of the record as follows:

"In the case at bar there is no denial of the validity of complainant's patents, nor of his right to the monopoly which they give him. The conduct of the parties, as shown by the evidence, discloses the intention of all concerned in the transaction that the patents should be used by the defendants until the bridge was fully constructed. The time of final payment of the amount due by the defendants had clearly been extended until the bridge had been fully constructed, and the terms of the contract had been carried out. The complainant had clearly acquiesced in the acts of the Bridge Company in extending the time of final payment. There is no more reason for allowing him to ignore the terms of the contract, and the rights acquired under it, than

there is for allowing the Bridge Company itself to ignore those conditions. The evidence in the case shows that the complainant has waived his rights to invoke the provision of the contract negating the acquirement of a license by any act of the company or its agents until the full amount had been paid to the Bridge Company. It is evident that all the parties understood that the defendants should have the use of the patents until the bridge should be built. After a careful consideration of all the testimony, I find that, at the time this bill was brought, the complainant had no right to treat the defendants as infringers of the patents in suit."

This concluding sentence covers this entire case. The bill is an ordinary bill alleging infringement without authority, while the case shows that whatever was done in the construction of the bridge was by authority, with the reservation that payment should be made by a percentage of the cost of the work when the work was completed. The work has been going on and is practically completed, but the bridge has not yet been accepted, so that the compensation for the use of the patent rights is not yet payable, apparently. At any rate, as the bill is framed, without joining the two towns, which are entitled to the direct benefit of the bridge when completed, if the bill is sustained, the towns remain practically subject to injunction without being united so that their rights can be heard and determined. Especially for this reason, as well as for general reasons which are so apparent that they need not be stated at length, this litigation has developed entirely aside from the pleadings, and the learned judge was therefore right in the final expressions which we have cited from his opinion, and we need not go any further with the case, but leave it to the field of a suit at common law between the owners of the patents and the constructors, which is where it seems to belong.

The judgment of the District Court is affirmed, and the appellees recover their costs of appeal.

MURDOCK v. POLLOCK, District Judge.

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

No. 167.

HABEAS CORPUS ⚡82—HEARING ON PETITION—PRODUCTION OF PRISONER.

A practice of the District Court for a district in which a federal penitentiary is located, and in which applications for writs of habeas corpus are very numerous, to make a preliminary determination as to the propriety of issuing the writ without the personal appearance of the prisoner upon such preliminary determination, does not violate the statute governing writs of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 74; Dec. Dig. ⚡82.]

Original petition by Theodore Murdock for a writ of mandamus, directed to John C. Pollock, Judge of the District Court of the United States for the District of Kansas. On hearing upon rule to show cause why a writ of mandamus should not issue as prayed. Rule discharged, and petition dismissed.

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

Fred Robertson, U. S. Atty., and L. S. Harvey, Asst. U. S. Atty., both of Kansas City, Kan., for the United States.

Before ADAMS, Circuit Judge, and DYER and VAN VALKENBURGH, District Judges.

PER CURIAM. Petitioner, a prisoner in the United States penitentiary at Leavenworth, Kan., under a sentence pronounced in the District Court of the United States for the Northern District of Illinois, filed in the District Court of the United States for the District of Kansas an application for a writ of habeas corpus. He complains that the respondent, as judge of that court, has refused and neglected to take cognizance of this application, and accordingly prays that a writ of mandamus issue out of this court for his relief.

It appears from the petition filed herein, as well as from the return of the respondent, that the main insistence of the petitioner is that he is entitled to appear in the District Court in person for the purpose of prosecuting his application for the writ. It is urged, upon behalf of respondent, that where an application is filed praying that a writ of habeas corpus be granted, the court or judge to whom such application is made may do either one of three things: (1) If it appears from the petition that there is not sufficient cause for the issuance of the writ, and that the prisoner, if produced, would be remanded, the petition may be dismissed. (2) An order may issue upon the warden or other respondent to show cause why the writ prayed should not be granted. (3) The writ may be awarded forthwith, which course would command the respondent to produce the petitioner in court.

It is the practice in the district of Kansas to make a preliminary determination as to the propriety of issuing the writ as above indicated, and at such preliminary determination the prisoner does not appear in person. This practice is conceived to be of greater convenience in the administration of justice than if the prisoners were present, under the writ, in the custody of the warden, particularly in that district in which a federal penitentiary is located, and where applications for writs of habeas corpus are very numerous. It is supported and approved by abundant authority. *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; *Ex parte Royall*, 117 U. S. 241-254, 6 Sup. Ct. 734, 29 L. Ed. 868; *In re Lewis* (C. C.) 114 Fed. 963; *Erickson v. Hodges*, 179 Fed. 177, 102 C. C. A. 443; *In re Jordan* (D. C.) 49 Fed. 238-244; *Ex parte Farley* (C. C.) 40 Fed. 67. This procedure is adjudged to satisfy the mandate of the law relating to these writs, and if the petitioner feels aggrieved at the action of the court in denying his application, appeal will lie. His rights are thus fully safeguarded.

Neither in the pleadings nor elsewhere in the case before us do we discover anything which indicates any indisposition on the part of respondent to proceed in accordance with law to a determination of petitioner's rights. On the contrary, if there has been delay, it has been due, almost entirely, to petitioner's insistence upon his alleged

right to be produced in court at the preliminary stage of the inquiry. His contention cannot be sustained.

"The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it shall exert the powers conferred upon it." *Ex parte Royall*, 117 U. S. 241-251, 6 Sup. Ct. 734, 740 (29 L. Ed. 868).

Finding no merit in the petition, it is ordered that its prayer be denied, that the rule to show cause be discharged, and the petition dismissed.

VELLORE S. S. CO., Limited, v. STEENGRAFE.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 63.

WAR ⚡10—EFFECT ON LIABILITIES—ACTION BY BROKER FOR COMMISSION—DEFENSES.

Under a time charter of a British steamship, containing a clause providing for a commission to be paid by the owner on signing of the charter to the broker procuring the same, upon the gross amount of the charter, the right of the broker to the commission is not affected by the fact that the charter was subsequently annulled by reason of the European war.

[Ed. Note.—For other cases, see *War*, Cent. Dig. §§ 26-36; *Dec. Dig.* ⚡10.]

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Adelheid Steengrafe, as executrix of Claus Steengrafe, deceased, against the Vellore Steamship Company, Limited. Judgment for plaintiff, and defendant brings error. Affirmed.

This cause comes here on a writ of error to review a judgment entered on the 5th day of May, 1915, sustaining the demurrer of the plaintiff to the defendant's answer and directing that she recover of the defendant, Vellore Steamship Company, Limited, the sum of \$6,036.66, being the amount demanded with interest and costs.

Convers & Kirlin, of New York City (John M. Woolsey and Cletus Keating, both of New York City, of counsel), for plaintiff in error.

Burlingham, Montgomery & Beecher, of New York City (Norman B. Beecher and E. Curtis Rouse, both of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. This is an action to recover a balance of commissions in the sum of \$5,432 for services rendered by the plaintiff's deceased husband in procuring a charter of the British steamship Vellore to Barber & Co. of New York. The complaint alleges: That the plaintiff's testator, Claus Steengrafe, procured for the Vellore Steamship Company, a time charter of the defendant's ship Vellore for a period of four years and three months. That the defendant

agreed to pay for said service the sum of \$7,022.70, of which sum a part only has been paid, leaving a balance of \$5,432.39.

The answer sets up as a defense that on August 4, 1914, war was declared between Great Britain and Germany which nullified the charter and therefore released the defendant from paying the balance of commissions as aforesaid. This answer was demurred to by the plaintiff and the demurrer was sustained by the District Court.

We think this decision was correct. Clause numbered 25 of the charter is as follows:

"A commission of one-third of five per cent. upon the gross amount of this charter, payable by the steamship and owners, due to Theodor Ruger & Co. upon the signing hereof, steamship lost or not lost, and also upon any continuation or extension of this charter, by whom or their agents' vessel, to be reported at port of delivery."

It must be remembered that Claus Steengrafe, the plaintiff's testator, was doing business under the name of Theodor Ruger & Co. The charter party provides that the broker's commission is to be computed upon the gross amount of the charter due upon signing. What occurred after the signing did not affect the broker's right to be paid for what he expressly agreed to do, viz., procure a charter. This he did and, having done what he agreed to do, it cannot be held that he is without redress because, through no fault of his, the charter was not carried out. A broker, whether he deals in ships or real estate, when he procures the lease or charter for his employer, is entitled to be paid even if the house burns during the lease or the ship sinks or is put out of business by war during the time of the charter party. He has performed his part of the contract and is entitled to his pay. An alleged custom which directly nullifies the terms of the agreement cannot be pleaded as a defense. The commission of one-third of 5 per cent. is to be computed upon the "gross amount" of the charter which means the entire amount and not a part thereof. The agent had done all that he agreed to do and in fact, all that he could do, and we think he should not lose the stipulated compensation for his completed work because of an untoward future event for which he was not responsible and over which he exercised no control.

The judgment is affirmed with costs.

MAGEE v. FOX.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 99.

BANKRUPTCY ¶164—"PREFERENCE"—TRANSFERS CONSTITUTED.

Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1913, § 9644), provides that a transfer of any property by an insolvent within four months before the filing of a petition in bankruptcy if the transfer operates as a preference, and the person receiving it shall have reasonable cause to believe that its enforcement would effect a preference, it shall be voidable. Section 64b (Comp. St. 1913, § 9648) specifies the debts to have priority, and in subdivision 3 specifies the cost of administration,

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

including a reasonable attorney's fee for professional services rendered the bankrupt while performing the duties therein prescribed. Shortly before bankruptcy a bankrupt paid a pre-existing debt for legal services fully rendered; it being then insolvent, and the party receiving the payment having notice of the insolvency. *Held* that this payment was preferential.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. ¶164.

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

In Error to the District Court of the United States for the Southern District of New York.

Action by Lyttleton Fox, as trustee in bankruptcy of the John F. Stevens Construction Company, against Joseph T. Magee. From a judgment in favor of plaintiff for \$356.74 entered upon the decision of the court, a jury trial having been waived, defendant brings error. Affirmed.

William R. Page, of New York City, for plaintiff in error.

Isham Henderson, of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. This action was brought by Fox, as trustee in bankruptcy of the Stevens Construction Company, to recover an alleged preferential payment of \$300 made August 9, 1913, two days prior to the filing of a voluntary petition in bankruptcy and the adjudication thereon which took place on August 11, 1913.

Norwood & Marden, attorneys, had been retained to prepare the papers and conduct the bankruptcy proceedings and for these services, present and future, they were paid the sum of \$1,000, under section 64b3 of the act. Subsequently the referee reduced this amount to \$700. On the same day that the \$1,000 was advanced to the attorneys in bankruptcy the defendant was paid the said sum of \$300 "for legal services rendered." In other words, the Stevens Company owed Magee \$300 on August 9th. On that day, when the company was clearly insolvent, it paid him in full, he having notice of the insolvency. Turning to section 60 of the act subdivision "b," we find that it directly applies to the present situation. The payment in question was of a pre-existing debt for services fully rendered. The fact that it was for legal services in no way changes the situation. The only legal services which may be paid or secured are those directly connected with the bankruptcy proceeding. It was not intended that an honest insolvent should lose the benefit of the act because he had no cash in hand with which to pay a lawyer to prepare the petition and schedules. But we think it is equally clear that for past services the claim of a lawyer stands in no better position than that of a physician or merchant. We are clearly of the opinion that the services rendered by Magee were not those provided for in section 64b3 of the act as "one reasonable attorney's fee for professional services actually rendered * * * to the bankrupt." The District Judge finds that:

"It very plainly appears that the payment made to the defendant was for claimed services rendered prior to the proceedings in bankruptcy."

These conclusions are we think sustained by the following authorities: In re Wood & Henderson, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046; In re Stolp (D. C.) 199 Fed. 488; In re Kross (D. C.) 96 Fed. 816; In re Curtiss, 100 Fed. 784, 41 C. C. A. 59; Tripp v. Mitschrich, 211 Fed. 424, 128 C. C. A. 96.

The judgment is affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. January 18, 1916.)

No. 4391.

POST OFFICE ⇨10—EMBEZZLEMENT OF MAIL MATTER—LIABILITY OF SURETIES.

Though, under the regulations of the Post Office Department, the government is only responsible, in case of the loss of a registered package, for an amount not exceeding \$50, it can recover from the sureties on the bond of a postal employé, who embezzles a registered package containing a sum of money in excess of \$50, the full amount lost, if not in excess of the penalty of the bond.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 17; Dec. Dig. ⇨10.]

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

Action by the United States against the United States Fidelity & Guaranty Company. Judgment for the United States, and defendant brings error. Affirmed.

John M. Wood, of St. Louis, Mo., for plaintiff in error.

Arthur L. Oliver, of St. Louis, Mo., for the United States.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

PER CURIAM. The only issue involved in this case is whether, in view of the fact that under the regulations of the Post Office Department the government is only responsible in case of a loss of a registered package for an amount not exceeding \$50, it can recover from the sureties on the bond of its employé, who embezzled a registered package containing a sum of money in excess of \$50, the full amount lost, provided it is not in excess of the penalty of the bond.

This identical question was before us in National Surety Company v. United States, 129 Fed. 70, 63 C. C. A. 512. It was there held that there could be such a recovery. This case is ruled by that decision, and it is unnecessary to add anything to it.

The judgment of the court below is affirmed.

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

*Rehearing denied February 28, 1916.

VENTILATED CUSHION & SPRING CO. v. D'ARCY.
(Circuit Court of Appeals, Sixth Circuit, December 7, 1915.)

No. 2627.

PATENTS Ⓒ—328—**VALIDITY AND INFRINGEMENT—SPRING CUSHION.**

The Stotts patent, No. 840,522, for a spring cushion for automobiles, cars, etc., is strictly limited by the prior art, which shows, in patents for beds and cushions, all of its elements, although not in precisely the same combination, and by the proceedings in the Patent Office, to the specific structure described, or its full equivalent. As so limited, *held* not infringed.

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by the Ventilated Cushion & Spring Company against Frank P. D'Arcy. Decree for defendant, and complainant appeals. Affirmed.

L. V. Moulton, of Grand Rapids, Mich., W. R. Rummler, of Chicago, Ill., and Cyrus W. Rice, of Grand Rapids, Mich., for appellants.

F. L. Chappell, of Kalamazoo, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This is an appeal from the decree in an infringement suit in which the bill was dismissed. The patent in suit, No. 840,522, was issued to E. O. Stotts January 8, 1907, and through mesne assignments the appellant ultimately (August 8, 1907) succeeded to the title. The suit was commenced June 25, 1908, and the patent and all rights under it were acquired by the Jackson Spring Cushion Company April 16, 1913, when an order was entered authorizing the Jackson Company to prosecute the suit for its use in the name of the plaintiff. The pleadings are in form substantially the same as they usually are in patent cases, where issues of infringement and lack of invention through anticipation are joined.

The patent relates to spring structures. The main object of the patentee was to produce a structure which would be adapted particularly for cushions in seats of automobiles and other cars or carriages where the springs might be subjected to sudden and violent jarring. The exterior form of the structure comprises three sides of a quadrangle, a curved rear side, and the dimensions of an ordinary automobile cushion. The interior structure consists of two sets of spiral springs, one set being nearly twice the height of the other, and all are disposed in rows. According to the drawings and the exhibits in evidence, the long springs are each in the form of an hour-glass, and are disposed in four rows, running from front to rear, and parallel with the two straight sides of the structure; the upper and lower coils of the outside rows are each fastened to the adjacent parts of two border-frame wires which surround the structure, one being maintained in the plane of the top surface and the other in that of the bottom surface of the structure; the inner portions of such outside rows of coils are each fastened at the bottom to straight wires, called braces, disposed lengthwise along such rows, and extending from the front to a

point near the curved rear side of the border-frame wire, which is maintained, as stated, at the bottom of the structure; and the outer portions of each of the lower coils of the two interior rows are fastened to straight wires (braces), which are disposed between such rows similarly to the other braces just mentioned. The short springs, which are each frusto-conical in shape, are disposed in three rows, occupying the spaces between the lower coils, and also portions of the spaces embraced within such coils, of the adjacent long springs. The short springs are all fastened at their lower and upper coils, the former to the lower coils of the adjacent long springs, and the latter to connecting wires disposed upon the upper coils.

We have thus attempted to describe a model (an exhibit) of plaintiff's spring structure, called "Rough Rider," which, it will be seen, differs somewhat from the structure illustrated by the drawings accompanying the specification; still these drawings will serve to illustrate both of such structures. The drawings follow:

Fig. 1.

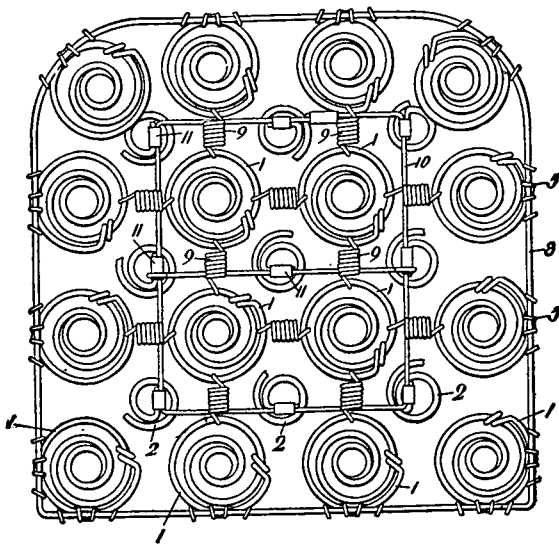


Fig. 2.

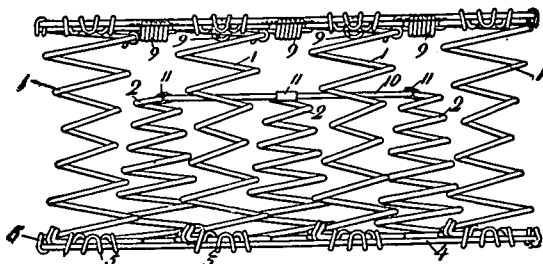
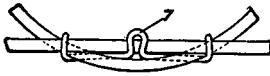
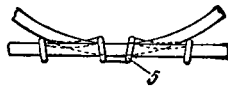
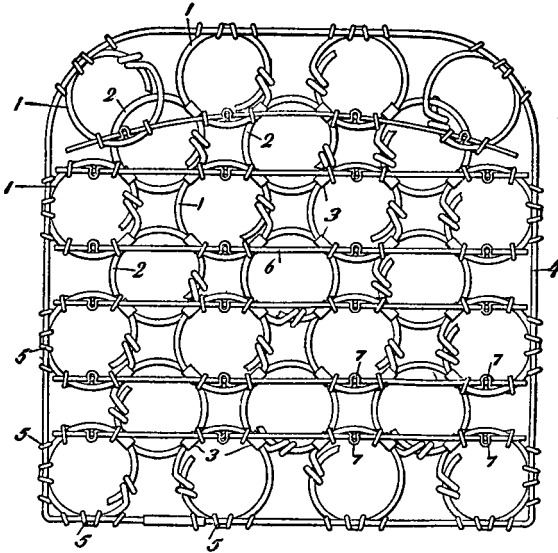


Fig. 4.*Fig. 5.**Fig. 3.*

It is stated in the specification that Fig. 1 "is a top plan of a cushion spring constructed according to this invention." Fig. 2 is an end elevation, Fig. 3 a plan showing the structure of the bottom, and Figs. 4 and 5 forms of attaching-clip designed to connect the adjacent wires. The numerals indicate: 1, the long springs; 2, the short springs; 3, a metal wrapping to fasten the bases of adjacent springs; 4, the lower border-frame wire; 5, wire-clip to fasten the base of each of the outer springs to the border-frame wire; 6, cross-wires, called a plurality of braces, which, with the wire-clip (7) to fasten such braces to the springs as shown in Fig. 3, are said to form a rigid base for the cushion; 8, the upper border-frame wire; 9, short helical springs connecting the top coils of the inner long springs as shown in Fig. 1; 10, a wire frame disposed along and fastened by clips (11) to the top coils of the short springs as shown in Figs. 1 and 2.

The specification in substance states that the long springs ordinarily support the weight upon the cushion, but in case of a jar these springs at times yield sufficiently to bring the weight of the passenger upon the short springs; some of the witnesses saying that the short springs

are to prevent what is called "grounding," and the consequent discomforts, when traveling over a rough road. It is to be observed that the rough rider, above described, appears to be the plaintiff's preferred spring device; and that structure differs from the one shown in the drawings in these particulars: The braces are disposed perpendicularly to the front face instead of the sides; the helical springs (9) and the rear long spring of each of the outside rows are omitted; the omission of the helical springs is claimed to be justified, in view of the claims in suit; but metal sheet bands are added to and used to stiffen the bottom of the rough rider structure.

Judge Sessions, who decided the case below, was of the opinion that in view of the prior art, and the history of the patent itself as it is shown by the file wrapper, the claims were entitled only to a narrow construction, and consequently that the patent was not infringed. Concededly the component parts of the patented structure are old, but it is insisted that the structure as a whole is new. We assume, without deciding, that the patent is valid, and so shall confine the inquiry to the scope of the invention. The combinations of the claims in suit all concern a spring-cushion, and the elements may be conveniently considered according as they are there grouped and varied. The claims in issue are 1, 2, 6, 9, and 10. A fair understanding of all may be gathered from the first, with an accompanying statement showing in what respects the others differ from it. Claim 1 reads:

"In a spring-cushion, the combination of a plurality of spiral springs arranged in a plurality of rows, a second set of spiral springs of less height than those of the first set, and located in the spaces between the springs of the first set, the bottom convolutions of the springs of the first set being in contact with and secured to the bottom convolutions of adjacent springs of the second set, and co-operating to form a wire-network base."

The second claim is the same, except that it adds:

"A plurality of braces extending along said rows and fastened to said bottom convolutions to form a supporting-base for said springs."

The sixth claim substitutes two sets of "spiral furniture springs" for the springs mentioned in the first claim, and adds to the first claim:

"A system of wire bracing extending across said bottom convolutions secured thereto and co-operating therewith to form a stiff supporting-base of wire network."

The ninth claim differs from the first only in the statement that the form of the second set of springs is "frusto-conical." The tenth claim substitutes a "top frame yieldingly supported thereby" for the "plurality of rows" specified in the first claim; also, as respects the second set of springs, it states that each shall have "its bottom convolution extending into the space bounded by the periphery of the bottom convolution of one of the springs of the first set," and, after providing for the "wire-network base" as in the first, adds:

"Said springs and top being so disposed as to permit the top to be depressed a considerable distance without resistance by the second set and to cause such resistance when said top is further depressed."

Quite a number of observations are to be made upon these claims with respect to the prior art. In the first place, the idea of employing

two sets of spiral springs of different heights for the purpose of adding to the normal resistance of the first set, also that of the second set when necessary, and of so adjusting such means of resistance according to the different weights that might be imposed, was disclosed in patent No. 83,489, to Hacker, in 1868. True, Hacker's invention concerned a "new and improved spring bed-bottom." However, apart from the obvious analogy between spring-cushions and spring bed-bottoms having similar springs, it is strenuously urged here that the excellence of plaintiff's rough rider spring-cushion is shown through its adoption by the Pullman Company for alternate use as seats or beds in its sleeping cars; and, besides, the sixth claim distinctly calls for "spiral furniture springs." Nothing more than Hacker's specification is needed to give point to the present relevancy of his invention:

"The spiral springs, *A*, being shorter, are only brought into action when the longer springs are compressed to a level with the shorter, and, by the further compression, the incumbent weight would rest on the cushions of the middle rail. The object of this invention is to adapt the bed-bottom to persons of varying weight, and to prevent sagging in the center, which is almost uniformly the case with spring-bottoms in use."

Hacker, it is also true, mounted his springs upon wooden slats; but this could not affect either the originality or the merit of his idea of associating long and short springs for purposes identical with those expressed in the patent in suit respecting the co-operating advantages of such springs; nor is it invention simply to substitute a metal base for a wooden one. *Sheffield Car Co. v. D'Arcy*, 194 Fed. 686, 692, 116 C. C. A. 322 (C. C. A. 6th Cir.). Still other inventions disclose association and use of spiral springs of different heights and in varying methods. For example, patent No. 179,257, to Birk, in 1876, for an improvement in bed-bottoms. Fig. 1, as the patentee states in his specification, shows "the springs at rest," when the top of the short spring is not in contact with the bed-bottom; but he says that Fig. 2 shows "all the springs in play to resist a greater weight." Patent No. 324,335, to Murray, in 1885, relating to "spring-seats," employs inverted conical springs, with a short spring disposed within each of the long springs, and, though this was the patentee's preferred method, he distinctly stated that the springs might be separately disposed. Patents No. 371,825, to Crocker & Diehl, in 1887, also No. 379,763, to them, in 1888, No. 396,272, to Diehl, in 1889, and No. 550,980, to Kohnle & Keeler, in 1895, all relate to associated long and short vehicle springs which were designed to adjust the spring resistance according to the loads imposed; and patent No. 561,139, to J. G. Smith, in 1896, discloses a double-decker spring bed-bottom, with short springs disposed directly under the long springs.

We may next turn attention to the supporting feature of the patented structure. In claims 1, 9, and 10, this is called a "wire-network base," while in claim 2 it is called a "supporting-base for said springs," and in the sixth claim "a stiff supporting-base of wire network." It is to be remembered that this support, regardless of the names applied to it in the claims, consists of the bottom spring convolutions, the lower border-frame, the braces, and the contrivances used to connect and

hold these parts in place. This operates as an efficient metal base; but metal bases, even wire bases, comprising bottom convolutions of spiral springs of uniform length disposed and held in rows, and, as a whole, fastened and sustained through metal, including wire, connections, and braces, were old at the time the present patent was issued. It can hardly be that the teachings of this feature of the old art in respect of springs of uniform length would not embrace also a union of springs of different lengths, for, as we have seen, the association of springs of different lengths as well as those of uniform length was old, and, above all, only the bottom convolutions are involved in the metal base now under consideration. The fact, then, that metal bases of the old art embrace bottom convolutions of spiral springs of any sort, tends strongly to show, if it does not conclusively show, that the base now in issue belongs to the old art, and at last is but a substitution of a metal base for a wooden base. That metal bases comprising bottom convolutions of spiral springs were old, as stated, may in part be seen, for instance, in patent No. 269,242, to J. G. Smith, in 1882, an improvement in bed-bottoms. It is quite plain, however, that the border-frames, which were to be maintained at the edges of and in the planes of the bottom and top surfaces, were iron rods, not wire. This is to be said, too, of patent No. 331,523, to Mellon, in 1885, for an improvement in spring beds; the springs are of the double-conical type, and are so constructed as to form the bottom and top convolutions into rings, but novelty in the springs is disavowed; and the plan of connecting spring to spring at their bottom convolutions, called end rings, and the springs to the bottom border-frame, appears not only in the drawings, but also in claims 2, 3, and 4.

Patent No. 458,067, to Purefoy, in 1891, relating to spring bed-bottoms, though declared to be adapted to "spring-seats and lounges," discloses a union of double-cone springs, disposed in rows, connected both longitudinally and transversely by braces fastened to the bottom and top convolutions of the springs; and certain of the springs are still further connected by double wire border-frames, to which such of the top and bottom convolutions as adjoin these borders are fastened. To the same effect are patents Nos. 486,184 and 593,781, to Purefoy, in 1892 and 1897. Patent No. 530,248, to Stoll, in 1884, discloses a plan of connecting the upper and lower convolutions of springs, which are disposed in rows and held in place by longitudinal and lateral wires that may be aptly called braces; and each of the upper and lower spring convolutions embraced in the rows overlaps its adjoining convolution, and so extends "into the space bounded by the periphery" of such convolution (see quoted portion of tenth claim in issue, *supra*). If we except this overlapping feature, the same thing may be said of the patent No. 654,756, to Hunt, in 1900, as we have said of the Stoll patent. It is probable, though not clear, that several of the devices last cited were designed to be used as upper surfaces, not as bases, of bed-bottoms; but, whether this was so or not, the parts shown were evidently calculated, as well as intended, to sustain substantial weights.

It is not necessary to continue a review of the prior art. It is not meant to say, however, that the organization of any of the structures

to which reference has been made was the same as that of the patented device; but it is meant to say that the manifest similarity in component parts described, in mode of operation, and in results sought, both in the patents of the prior art and in the patent in suit, is strongly suggestive of the exercise of skill, rather than the faculty of invention, in the latter patent; certainly there was but slight room left for invention.

It results that the prior art alone imposes substantial limitations upon each of the claims in issue, and to these limitations must be added the effect of certain acts of the patentee in securing the allowance of claims. The original application contained 9 claims, and they were all rejected except the eighth claim. This resulted in amendments of old claims and the presentation of new ones, and finally in the allowance of the 12 claims appearing in the letters patent. As to the claims in issue which were rejected, 1 and 9 were amended by adding the words "and co-operating to form a wire-network base"; substantially the same words were inserted in claim 6 by amendment; 2 escaped amendment upon its being pointed out by applicant that it already had "the additional limitation of the braces fastened to the bottom convolutions"; 10 was afterwards presented and allowed, but with the same words that were added to rejected claims 1 and 9. The true effect of these facts will be more fully appreciated by considering them in connection with certain other portions of the same claims. These claims each contain a provision which in substance requires "the bottom convolutions of the springs of the first set" to be "in contact with and secured to the bottom convolutions of the adjacent springs of the second set"; claims 2 and 6 also require that the braces they specify shall extend along the rows of bottom convolutions and be fastened to them; further, the specification states that the border-frame 4 "is fastened to the base of each of the outer springs by means of a wire-clip 5," and Fig. 3 of the drawings displays the resulting unitary character of the supporting base. The reasons for the introduction of such a supporting base as this will become apparent upon reading the grounds stated by the examiner, when rejecting all but one of the original claims:

"Claims * * * are rejected as not distinguishing by any patentable novelty from the following patents: * * * Hacker shows applicant's arrangement of long and short springs. Birk shows the short springs with the large end down. Mellon exhibits springs attached to adjacent springs. Purefoy, Alvord, and Neider show springs united at their base convolutions."

We have already pointed out the features of the first four of the patents so referred to; the Alvord patent is not in evidence; but what the examiner said of the Neider patent is correct. It must therefore be concluded that the provisions so introduced concerning the supporting-base were at the time regarded as limitations and restrictions which were necessary alike to distinguish the claims from the prior art and to obtain the patent, and that each claim in issue was ultimately allowed and accepted upon this understanding.

Now, if there is anything new in the combinations relied on, as counsel insist, it must be found in the supporting-base. It is to be ob-

served that the language of the amendment, "co-operating to form a wire-network base," relates to the co-operating effect of the bottom convolutions of the springs, which enter into the formation of the base, not to the co-operating effect, found in the old art, of uniting long and short springs for the purpose of adjusting their combined resistance to varying weights imposed upon them. The patentee simply brought the bottom convolutions closer together, and so grouped more springs within a given space than had been done before, since all the other features of the base, not to speak again of the forms of the springs themselves, were substantially the same as those disclosed in the old art; even the quality ascribed in the specification to the supporting-base—that it is "capable of yielding to a certain extent"—is not mentioned in any of the claims in suit or of the patent, and, indeed, such a claim would apparently have been inconsistent with the degree of rigidity wrought through the amendments made to the rejected claims. If upon any theory of patentable novelty this base can be effectively distinguished from the earlier metal bases, still it is most difficult to perceive, and it is not shown, how either the spring structure as an entirety or its component parts have been substantially changed in function, in principle of operation, or in the result produced, except in matter of degree. *Adrian Wire Fence Co. v. United Fence Co.*, 223 Fed. 342, 345, 138 C. C. A. 604, and citations (C. C. A. 6th Cir.); *U. S. Hame Co. Cases*, 227 Fed. 876, — C. C. A. —, decided by this court November 12, 1915. This is not saying that the combinations relied on are in fact wholly lacking in patentable novelty; indeed, invention has been assumed, and, we may say, upon the theory that it is not necessary to pass upon that question, for, upon all the considerations stated, we are constrained to hold that, in order rightfully to accord validity to any of the claims in issue, they must be closely limited to the full equivalents of the specific structure which they, in connection with the specification and drawings, describe (*Kokomo Fence Machine Co. v. Kitselman*, 189 U. S. 8, 19, 23 Sup. Ct. 521, 47 L. Ed. 689; *Ross-Moyer Mfg. Co. v. Randall*, 104 Fed. 355, 359, 43 C. C. A. 578 [C. C. A. 6th Cir.]; *Rich v. Baldwin, Tuthill & Bolton*, 133 Fed. 920, 923, 66 C. C. A. 464 [C. C. A. 6th Cir.]; *Sander v. Rose*, 121 Fed. 835, 839, 840, 58 C. C. A. 171 [C. C. A. 8th Cir.]; *Cumming v. Baker & Hamilton*, 144 Fed. 395, 397, 398, 75 C. C. A. 373 [C. C. A. 9th Cir.]; *McCarty v. Lehigh Valley Railroad Co.*, 160 U. S. 110, 119, 16 Sup. Ct. 240, 40 L. Ed. 358); and under this interpretation the charge of infringement is not sustained.

Defendant manufactures three structures which correspond more or less one with another, and in general appearance with the plaintiff's structures; yet there are substantial differences between the two sets of structures. Neither plaintiff's supporting-base with its essential parts, nor the wire-frame (10) disposed upon the top convolutions of the short springs, nor the short helical springs (9) used for connecting the upper convolutions of the long springs, appear in any of the defendant's devices. Defendant uses a mesh of small wires (crossing one another at right angles and engaging the border-frame) as a bottom surface, and another as a top surface, for each of its structures.

Similar wire-mesh constructions appear in patent for spring-seats, No. 324,335, to Murray, in 1885, and in patent for bed-springs, No. 819,671, to Pennepacker, in 1906; and it is not too much to say that meshwork of this character has been of common knowledge for many years. True, such mesh is "wire network," but not within the true intendment of that term as it was employed in the amendments to the claims of the patent in suit; for the use of the term had reference there to a specific base which was supposed to be an advance over the prior art. The upper and lower convolutions of the outside rows of defendant's long springs (which are of the hour-glass form) are woven into the meshwork, though such convolutions are not connected one with another; and the bottom convolutions of its short springs (which are of the hour-glass form and so unlike plaintiff's) are woven into the bottom mesh, but none of these convolutions is connected with the bottom convolution of any of the long springs, and thus defendant's short springs could, while plaintiff's could not, be removed without interfering with the rest of the construction. In one of defendant's devices, however, the bottom convolutions of some of the short springs slightly overlap like convolutions of some of the adjacent long springs, but this does not, nor do any of the other bottom convolutions, enter into or operate as part of the supporting-base; for in defendant's structures the mesh sustains the springs, while in plaintiff's the springs are made in essential part to sustain themselves. It might well be, it is true, that if plaintiff's patent could be treated as having made considerable advance over the prior art in matter of invention, it would be entitled to a range of equivalents which would include defendant's structures; but we need not repeat that the patent cannot be so treated. We think the case falls fairly within the rule laid down by this court in *Rich v. Baldwin, Tuthill & Bolton*, supra, 133 Fed. 924, 66 C. C. A. 464, and also by the Circuit Court of Appeals, Eighth Circuit, in *Sander v. Rose*, supra, 121 Fed. 840, 58 C. C. A. 171, since to find infringement here would be to ignore the limitations of the prior art, and particularly the effect of the patentee's acquiescence in the restrictions imposed upon his patent through rejection of his original, and subsequent allowance of his amended, claims. *Royer v. Coupe*, 146 U. S. 524, 532, 13 Sup. Ct. 166, 36 L. Ed. 1073; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 617, 27 Sup. Ct. 307, 51 L. Ed. 645; *Campbell v. American Shipbuilding Co.*, 179 Fed. 498, 502, 103 C. C. A. 122 (C. C. A. 6th Cir.); *XXth Century Heating Co. v. Taplin, Rice-Clerkin Co.*, 181 Fed. 96, 100, 101, 104 C. C. A. 156 (C. C. A. 6th Cir.).

The decree is affirmed, with costs.

MERGENTHALER LINOTYPE CO. v. INTERNATIONAL TYPESETTING
MACH. CO. et al.

('Circuit Court of Appeals, Second Circuit. November 9, 1916.)

No. 14.

1. PATENTS ⇌328—INFRINGEMENT—LINOTYPE MECHANISM.
The Bedell patent, No. 848,338, for means by which the operator, without leaving his seat, can disconnect the ejector slide in linotype machines, claim 4, which specifies as an element means for disconnecting the slide from the connecting bar, *held* not infringed by a machine in which such parts are not disconnected, but the slide is made in two sections, which can be separated from each other.
2. PATENTS ⇌328—VALIDITY—LINOTYPE MECHANISM.
The Cooney and Totten patent, No. 759,501, claim 11, for a magazine gate for linotype machines, *held* void, as too broad.
3. PATENTS ⇌328—INFRINGEMENT—LINOTYPE MECHANISM.
The Homans patent, No. 888,402, claim 14, for a magazine gate or matrix lock device for linotype machines, *held* not infringed.
4. PATENTS ⇌328—VALIDITY AND INFRINGEMENT—LINOTYPE MECHANISM.
The Rogers patent, No. 619,441, for a vise jaw mechanism for linotype machines, claims 1 and 2, if valid, are narrow, and are not infringed by the device of the Homans patent, No. 1,107,758, claim 4, *held* invalid as too broad.
5. PATENTS ⇌328—INFRINGEMENT—LINOTYPE MECHANISM.
The Morehouse patent, No. 826,593, for a vise jaw mechanism for linotype machines, *held* not infringed.
6. PATENTS ⇌328—INFRINGEMENT—LINOTYPE MECHANISM.
The Rogers patent, No. 925,843, claims 1, 2, 3, and 4, for a mold disc support for linotype machines, *held* not infringed.
7. PATENTS ⇌328—VALIDITY AND INFRINGEMENT.
The Kennedy patent, No. 797,436, claim 1, for a keyboard lock for linotype machines, conceding its validity, if narrowly construed, *held* not infringed.
8. PATENTS ⇌328—VALIDITY AND INFRINGEMENT—LINOTYPE MECHANISM.
The Muelheisen patent, No. 718,781, claims 2 and 3, relating to magazine channels for linotype machines, if valid, must be narrowly construed, and, as so construed, *held* not infringed.
9. PATENTS ⇌328—INVENTION—LINOTYPE MECHANISM.
The Bedell patent, No. 787,821, claims 1, 2, and 3, for a gear wheel for actuating the second keyboard roll in linotype machines from the first, *held* void for lack of invention.
10. PATENTS ⇌328—INFRINGEMENT—LINOTYPE MECHANISM.
The Dodge patent, No. 797,412, claim 9, for a magazine supporting frame in linotype machines, *held* not infringed.
11. PATENTS ⇌328—INFRINGEMENT—LINOTYPE MECHANISM.
The Homans patent, No. 830,436, claim 7, for a magazine supporting frame for linotype machines, as limited by the prior art, *held* not infringed.
12. PATENTS ⇌328—INFRINGEMENT—LINOTYPE MECHANISM.
The Dodge patent, No. 739, 996, claims 1, 2, and 3, for a mold support for linotype machines, *held* infringed.
13. WORDS AND PHRASES—"COVER."
The word "cover" implies opening and closing, and to be a true cover the part must be movable.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cover.]

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

Suit in equity by the Mergenthaler Linotype Company against the International Typesetting Machine Company and another. From the decree, both parties appeal. Affirmed in part, and reversed in part.

This cause comes here upon cross-appeals from a decree in a suit for infringement of patents. The bill declared upon 25 patents, but in the progress of the trial many of these have been abandoned, and in the present appeal only 12 patents are involved.

The decision of the District Court was adverse to the plaintiff on the following patents:

Bedell, No. 848,338, March 26, 1907, for disconnection of ejector slide.

Cooney and Totten, No. 759,501, May 10, 1904, for magazine gate.

Homans, No. 888,402, May 19, 1903, for magazine gate.

Rogers, No. 619,441, February 14, 1899, for vise jaw.

Morehouse, No. 826,593, July 24, 1906, for vise jaw.

Rogers, No. 925,843, June 22, 1909, for mold disc support.

Kennedy, No. 797,436, August 15, 1905, for keyboard lock.

Muehleisen, No. 718,781, January 20, 1903, for magazine channel.

Bedell, No. 787,821, April 13, 1905, for keyboard roll gears.

Dodge, No. 797,412, August 15, 1905, for magazine support.

The decision of the District Court was adverse to defendants on the following patents:

Homans, No. 830,436, September 4, 1906, for magazine support.

Dodge, No. 739,996, September 29, 1903, for mold support.

Plaintiff appeals from the decision as to the first group; defendant appeals from the decision as to the second group.

The opinion of Judge Hough will be found in 229 Fed. 168. It discusses the patents and the art at considerable length, and, so far as practicable, this decision will avoid the repetition of any statements of the District Judge as to what the record discloses. As in most patent causes, the controversies involve questions of fact, and it is assumed that any one who may wish to know what is here decided will consult both opinions.

Every patent here involved deals with some detail of the complicated machine known as the "Linotype." That remarkable and successful machine, which revolutionized the printing art, was conceived by Mergenthaler and in its great fundamentals protected by patents, which were correctly held to be pioneers in the art. *National Typographic Co. v. New York Typographic Co.* (C. C.) 46 Fed. 114. These fundamental patents have now expired. During their lifetime improvements in one or other of the details of their structure were devised, some trivial, some of more importance. Although it was not to be expected that the patents taken out to cover them would receive the broad construction which had been accorded to the earlier group, the patentees who took them endeavored, so far as possible, to incorporate in them statements as to "essence of the invention" and claims so phrased that contention might be made that their language was broad enough to cover combinations in some instances, quite different from those particularly shown in the specifications and drawings.

Robert Fletcher Rogers, of New York City (Frederick P. Fish and Odin Roberts, both of Boston, Mass., of counsel), for complainant.

Wetmore & Jenner, of New York City (Edmund Wetmore and Robert D. Eggleston, both of New York City, of counsel), for defendants.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Judge Hough has discussed at some length the rules to be applied when a court is construing and undertaking to determine the true scope of sub-

siary or secondary patents of the sort referred to above. Plaintiff vigorously attacks this part of the opinion. Although there may be a phrase here or there in it which we may not concur in, we are generally in accord with Judge Hough's views as to the interpretation of such patents, but think it wiser in this case to deal with particulars, rather than generals, disposing of each separate patent by itself. They may be taken up in the order in which they were discussed on the oral argument.

The Ejector Slide Disconnection.

Bedell, 848,338.

[1] The ejector blade is a flat rectangular sheet of metal, which, being thrust forward into the mold slot, forces out the slug. It is fastened to the forward end of a movable slide; the rear end of the slide is fastened to a bar, which engages with a cam on a wheel at the rear of the machine.

Originally the blade was fastened to the forward end of the slide by screws. When it was desired to change it for one of a different size, the operator went to the rear of the machine and operated the cam wheel, which thrust the slide forward. He then returned to the front, got a screw driver, drew the screws, substituted the new blade for the old, and screwed it on. Randall (560,537) substituted, for the screws, pins on which the blade was placed and held in position, or set free, through the operation of a handle which could be reached from the operator's position at the keyboard in front of the machine. This dispensed with the screw driver; it was, however, still necessary for the operator to go to the rear of the machine and operate the wheel, in order to put parts in position to admit of removal.

Bedell altered the connection between the rear end of the slide and the connecting rod, which ran thence to the cam wheel, so that it could be broken by the operator reaching in from his seat in front and pulling a handle. Such connection being broken, the slide with blade attached can be slid forward and the blade changed. This dispensed with the loss of time involved in the operator's leaving his seat to go to the rear of the machine whenever he wished to change a blade.

Defendant does not break the connection of the slide with the connecting bar which operates it, but divides the slide into two sections, which he can separate from his seat at the keyboard by pulling on a chain. When separated, the disengaged front section of the slide is moved forward, and the change of blade effected.

The only question is: Does this device infringe claim 4? The specification states that "heretofore the forward end of the link [connecting bar] has been permanently connected with the slide"; also that "the essence of the invention" lies in providing for the instantaneous disconnection of the slide from its operating devices (the connecting rod). Claim 4 reads:

"4. In a linotype machine, the ejector slide movable forward and backward, the actuating cam, connections from the cam to the slide, and means operative from the front of the machine for effecting instantaneous disconnection and

release of the slide at will, whereby the operator at the front of the machine is enabled to move the slide forward at will without changing the position of the cam."

The question presented is not what Bedell might have claimed, if he had chosen to do so, but what limitation he has put upon his claim by the language he has used. It is of no importance to discuss whether he could have claimed as an element means whereby the operator, without leaving his place, can make a break in the sequence between cam and ejector blade head at some place, which will permit him to move the blade forward so as to change. What Bedell did was to specify as an element of his claim the disconnection and release of the slide from the connecting bar, and we do not see how defendant can be held as an infringer when he leaves the connection between slide and connecting bar wholly undisturbed.

The Magazine Gate Patents.

Cooney & Totten, 759,501; Homans, 888,402.

In all linotype machines there is what is known as a magazine. Substantially it is a flat box, partitioned within into a succession of runways through which run the matrices as they are fed forward to service position. The magazine lies in an inclined position; the matrices being fed in at the top, which, of course, is open for their reception. From time to time it is necessary to remove the magazine; in that process it is frequently tilted, so that the contained matrices tend to slide in a direction reverse to normal. In simpler language, when this magazine with an open top end is shifted, its contents, or part thereof, are likely to fall out. In the early art a slab of wood or bar of some kind was kept at hand so that the operator could place it across the throat of the magazine and fasten it there. It would act as a gate to prevent the matrices from falling out, when the magazine was tilted back out of normal position.

[2] Cooney and Totten devised a movable gate mounted at the throat end of the magazine to prevent the accidental escape of matrices, with means for holding the gate in operative position and means for throwing it out of action. Evidently defendant's device does not copy the details of Cooney and Totten, for no charge of infringement is made under any of the many specific claims which cover their device. The only claim relied on is:

"11. In a linotype machine, in combination with a removable magazine, a gate or guard movably connected to its upper end to prevent the accidental escape of the matrices when the magazine is separated from the machine."

Undoubtedly this claim textually covers defendant's device, but the difficulty with it is that it covers every combination in which a gate for closing the mouth of the magazine is movably connected to the side of the mouth which it closes. If the old detached slab of wood or metal were hinged to the top of the magazine, so that when desired it could be folded over the top of the magazine chutes and fastened in that position by a hook or a bolt or a bit of string, the device would be covered by this claim. Neither Cooney and Totten nor any one else could properly be granted a claim so broad as this; it is manifestly invalid.

[3] The Homans patent deals with a multitude of different improvements. The particular claim relied on is:

"14. In combination with a supporting frame and a removable magazine, a movable matrix-locking device at the upper end of said magazine, and a spring whereby said bar is moved to confine the matrices as the magazine is moved from its operative position."

[13] It is difficult to make out from the specification and drawing just how the central sliding bar 7" operates; apparently as it is slid forward by a spring, teeth protruding from its side engage each tooth with the top matrix in a chute. Defendant has a true cover for the throats of all the chutes, which is moved in or out of place by spring action, or by being forced out against spring action. We do not see how infringement can be made out, unless this claim 14 be held to cover any movable magazine cover affixed to the magazine (unless a cover be "movable," it is not true cover; the word implying opening and closing) and operated by a spring. The art will not warrant any such broad construction, and defendant's device does not infringe.

The Vise Jaw Patents.

Rogers, 619,441; Morehouse, 826,593.

[4] The Rogers patent is quite fully discussed in Judge Hough's opinion, and we fully concur in his disposition of its claims.

[5] The Morehouse patent shows a device whereby the movable jaw can be locked and unlocked, and so moved to definite positions. We cannot agree with the plaintiff in his contention that the claims should be construed so as to cover, not only the device shown, but also any and all means within reach of the operator (in his seat at the keyboard) whereby the movable jaw of the linotype machine may be locked, unlocked, and moved to be set in a predetermined position, all by one hand at a single operation. Unless it can be so construed there is no infringement shown, for concededly the means employed by defendant for effecting the result are specifically different from those set forth by Morehouse. The decree as to these patents is affirmed.

Mold Disc Support Patent.

Rogers, 925,843.

[6] As to this patent we are entirely satisfied to affirm on Judge Hough's opinion.

Keyboard Lock Patent.

Kennedy, 797,436.

[7] As to this patent, also, we affirm on Judge Hough's opinion. The typewriter art is undoubtedly analogous, and the claim of this patent must be confined to the precise structure shown, if it is to stand at all.

Magazine Channel Patent.

Muelheisen, 718,781.

[8] Quotations from the patent and from the argument will be found quite fully set forth in the opinion of Judge Hough, with whose

conclusions we agree. The following additional suggestions may be added: It seems to us that the argument is needlessly complicated by harping on the distinction between "magazine channels," and "magazine channel entrances" as separate things. The place into which the matrix drops is practically the "entrance" or "throat" of the channel, whether the organized machine has or has not an entrance channel in advance of a magazine channel. If it were novel to make these throats of unequal widths, or unequal distances between their centers, and a useful purpose was thereby subserved, we cannot see why it was not an improvement which the inventor might properly claim. It seems evident that one advantage would be a gain in available space; more entrance throats could be placed in the same row. But the fundamental difficulty with plaintiff's case seems to us to be the circumstance that he was not the first to point out that it might be desirable to have the magazine channels of unequal width. Concededly from the very beginning of the art the matrices have been of varying thickness. Cf. cap. W and l. c. i. Mergenthaler in No. 347,629 says:

"B represents the magazine—composed of a series of independent vertical tubes, each of which is made internally of suitable size to receive the particular type which it is designed to contain." Page 2, line 48.

If the tubes or channels thus varied, one might presume that their throats or entrances would also vary. See, too, the following statement in No. 345,526 (page 3, line 84):

"Magazine.—The magazine B consists, as shown in Figs. 2, 3, 5, 15, and 24, of two parallel vertical plates, *g*, and intermediate sheet-metal partitions, *h*, the edges of which are seated in grooves formed in the plates, thus dividing the space between the plates into a series of matrix tubes or channels corresponding in width to the thickness of the matrices which they are to receive. The partitions are to be made of exceedingly thin metal, in order that the tubes may be brought together at the base in the smallest space possible. Toward their upper ends the channels diverge, in order to produce mouths of increased width, so as to admit of the matrices dropping therein with certainty, and prevent a matrix designed for one tube from being carried accidentally into the mouth of the next. Each tube is separated from the next by two partition plates joined at the top and bottom, but separated between said points, as shown."

Certainly, in view of these quotations from the prior art, this patentee cannot hold the broad invention of claim 2, viz.:

"In combination with matrices of different thickness, a magazine having entrances of different widths corresponding to their respective matrices."

As to claim 3, which adds the distributor to the combination of claim 2, he certainly cannot cover any and every distributor which would feed channels of unequal widths, but only the particular mechanism which he devised so to feed them, and that, so far as we can make out, defendant does not use.

The decree as to this patent is affirmed.

Gear Patent for Keyboard Rolls.

Bedell, 787,821.

[9] To secure the proper escapement of the matrices from the magazine by the manipulation of the keys, it is necessary to interpose

certain pawls, cam yokes, etc. To their proper action it is necessary to have two rolls, which in the prior art were revolved by two short belts from a single driving shaft. It is important that these rolls should revolve in unison; with separate driving belts this did not always happen. Bedell's device has a single belt to one roll, connecting one roll with the other by a gear. This device, a common one in many arts, insured absolute unison of revolution. The District Court held the patent invalid.

If one were informed that matrices did not deliver properly because one of the two keyboard rolls sometimes lagged behind the other, and were further informed that this lagging was produced because one or other of the rolls, whenever extra work was thrown on its driving belt, slipped or stretched, it would certainly not involve invention to correct the difficulty and make the rotation of both rolls uniform by the use of this well-known gear-wheel device.

Appellant contends, however, that there was patentable novelty in discovering what the difficulty was. This is in line with many decisions, such as our recent one in *Miehle v. Whitcock*, 223 Fed. 647, — C. C. A. —, and other cases therein cited. His brief says:

"There had been a very serious problem, and many efforts to correct the transposition of matrices."

Evidence sufficiently persuasive to establish these propositions might result in a conclusion that the patent should be held valid; but a search through the testimony has not revealed any evidence at all to that effect. None is referred to in the brief. The decision of the District Court is affirmed.

Magazine Support Patents.

Dodge, 797,412; Homans, 830,436.

[10] Prior to Dodge the machine was so constituted that, when it was necessary to change the magazine, it could be removed only by passing it and the heavy base frame secured to its under side upward and backward over an elevated bar in the main frame. As the magazine, when full, weighed more than 100 pounds this was a laborious task, sometimes requiring two men to accomplish it. Dodge placed his magazine detachably in a frame, and then hinged that frame to the machine in such a way that it could be released, and turned downward, carrying the magazine, which latter could then be readily removed from the frame. When the magazine was replaced on the frame, the latter could be turned upward into place and there fastened. Manifestly this was an improvement, and patentable; but the difficulty with finding infringement results from the language of the claim. Possibly the prior art, of which there is little shown, would have warranted Dodge in taking a claim which would cover any method of attaching the magazine carrying frame to the machine, so that it might be moved to a position which would make it easy to remove the magazine; but he took out no such claim. The one relied on reads:

"9. In a linotype machine, the combination of a main frame, a distributing mechanism thereon, a removable magazine arranged in receiving relation to

the distributor, and a magazine sustaining frame hinged at the end remote from the distributor, to swing upward and downward."

In defendant's structure the magazine sustaining frame does not swing upward and downward, like a trapdoor; it has quite a different cycle of motion; it is hinged nearer to its center than it is to the end remote from the distributor. Had the claim called for a sustaining frame "hinged at a point *remote from the distributor*," there might be some ground for giving it a liberal construction; but, when it specifies a frame "hinged at *the end* remote from the distributor," its meaning is too plainly expressed to justify a construction which will cover defendant's structure.

[11] Homans' patent deals with two magazines, separately removable, and an escapement mechanism for the matrices. It covers a combination of parts for removing the lower magazine as a separate invention by claim 7:

"7. In a linotype machine, the combination of a main frame, an inclined removable magazine, and a secondary frame to sustain the magazine in its operative position, said secondary frame movable bodily in an endwise direction rearward and downward, with the magazine thereon, whereby the removal and application of the magazine is facilitated."

The lower magazine is removably seated on a skeleton frame having longitudinal side plates containing slots and supported by studs on the main frame extending into the slots. When the magazine is to be removed, the magazine sustaining frame is drawn backward being supported and guided by the studs and by some rollers on the main frame. This movement has the "double effect of carrying the magazine rearward and outward from the frame and also of tipping it rearward and downward," so that it is conveniently positioned for removal of the magazine from the skeleton frame. Homans' first movement is downward from the escapement; then a rearward horizontal motion at right angles to the downward movement; then a swing downwards.

In defendant's device the magazine frame has on its underside near its center an arm or bracket about a foot long, the lower end of which is pivoted on a shaft mounted in the main frame, so that the arm acts like the spoke of a wheel. As it is pulled out of normal, the frame moves in the arc of a circle upward, rearward, and downward.

It will be seen that both these devices differ materially from the Dodge device, where the frame, with no rearward movement at all, dropped down in situ like a trapdoor. Judge Hough found infringement mainly because there was, as he held, "full mechanical equivalence in the two motions." We do not concur in this conclusion. Presumably the securing of a backward movement in addition to the downward movement constituted an improvement over Dodge, but Homans was not the first to secure such movement. In the patent to Rogers, 803,928, November 7, 1905, the magazine is "adapted to be tipped upward at the front and then drawn rearward in a horizontal direction from the main frame." The cycle of movement of defendant's device resembles Rogers' as closely as it does Homans'. The latter is not entitled to cover every magazine frame "movable bodily in an endwise direction rearward and downward"; the combination of parts by

which such motion is secured in defendant's device differs from the combination of Homans'. As to this claim, therefore, the decision of the District Court is reversed. It may be noted that the Rogers patent was not discovered until after decision below, and was inserted in the record by stipulation of counsel and consent of Judge Hough.

Mold Support Patent.

Dodge, 739,996.

[12] As to this patent we do not think it necessary to add anything to the opinion of the District Judge.

Except as to Homans, No. 830,436, as indicated above, as to which decree is reversed, the decree of the District Court is affirmed, with costs.

CHESHIRE v. COX MULTI-MAILER CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1915. Rehearing Denied January 3, 1916.)

No. 2202

1. PATENTS ⇨328—VALIDITY AND INFRINGEMENT—FEEDER FOR PRINTING PRESSES.

The Brewer and Cheshire patent, No. 971,245, for a feeder for printing presses was the joint invention of the patentees, was not anticipated, and discloses patentable invention; also *held* infringed.

2. PATENTS ⇨91—JOINT INVENTION—PRESUMPTION FROM GRANT.

It requires clear proof to overcome the presumption of joint invention created by the grant of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 121-123; Dec. Dig. ⇨91.]

3. PATENTS ⇨92—PERSONS ENTITLED TO PATENT—JOINT INVENTORS.

An invention may be joint, although both patentees did not hit upon the same inventive thought at the same time, but each contributed separate, but essential, elements of the combination.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 124; Dec. Dig. ⇨92.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Julian W. Mack, Judge.

Suit in equity by Carey A. Cheshire against the Cox Multi-Mailer Company. Decree for defendant, and complainant appeals. Reversed.

Appellant brought this suit to restrain infringement of patent No. 971,245, granted September 27, 1910, for a feeder for printing presses, to Brewer and Cheshire. The device is one for expediting the feeding of books and pamphlets, through feed rolls, to printing or type cylinders. Appellee contends at the outset that, while the patent was granted to the two, it was in fact the invention of only one, Cheshire. Both of them were engaged in seeking a

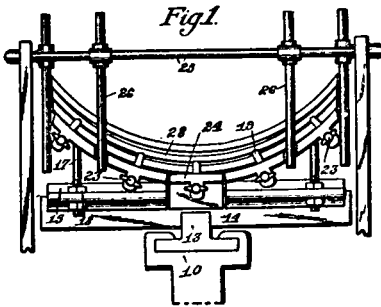
⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

feeder which would serve as a substitute for manual feeding. Cheshire was an inventor; Brewer was an engineer. The former finally hit upon the idea, so he testifies, that books and pamphlets might be segregated from each other by causing them to be held in the hopper, in a curved position, so that either the top or bottom book or pamphlet would stand out from the body of the books or other articles to be passed on to the printing cylinder to such a degree as to engage the vertically adjustable feeder points. These latter were provided by Brewer. He also suggested the base plate with upwardly curved edges, which was at first made flat, and then, at Cheshire's suggestion, curved downwardly at the edges. Both of them worked at the combination, and finally agreed on a device which had a concave reciprocating base plate curved transversely of its path of travel and having feed fingers to expel the lowermost book or pamphlet on the base plate.

Appellee further contends that by the patentees' action in the Patent Office they abandoned the broad invention which appellant now insists on, and accepted that found, as it asserts, in the limited character of the claims. Original claim 1 called for a hopper having a curved base, which should support the articles therein in curved positions, for the purpose stated. Claim 1 as granted calls for a reciprocating base plate having its side edges higher than its center, "so that articles to be printed resting thereon will lie in curved positions," causing their longitudinal central portions to be spaced apart, a stationary hopper, and a finger on the base plate to enter between the two lower articles at their spaced longitudinal centers. Original claim 2 calls for the reciprocating base plate, having its top surface curved, stationary hopper members to hold books, etc., to permit the lower one to project beyond the hopper members. Claim 2 of the patent covers a concave reciprocating base plate curved transversely of its path of travel to support articles so that they will stand spaced apart, stationary hopper members designed to hold books, etc., on the base plates, and to permit the lower one to extend beyond the base plate, and a finger on the base plate to enter between the two lower books, etc. Original claim 3 is for two curved hopper members, means for adjusting them toward and from each other, and a hopper member between said curved hopper members. Allowed claim 3 is for two reciprocating base members curved transversely of their line of travel, means for moving them from and towards each other, a central reciprocating member detachably supported between them, stationary hopper members to hold books, etc., on the reciprocating base members, and means carried by said base members for engaging the lower book, etc. Original claim 4 is for two curved hopper members, means for adjusting them to and from each other, and a central hopper member designed to be supported between said curved hopper members, the latter having a flat top. Present claim 4 calls for a reciprocating support member, a cross-head thereon, two segmental base plates adjustably affixed to the cross-head, and feeder fingers at one end of the base plates. Original claim 5 covers a reciprocating support member, a cross-head thereon, two segmental base plates, an adjustably fixed head, feeder fingers at one end of said base plates to said cross-head, and also at one end of said base plate members. Claim 5 of the patent calls for a base member, a feeder finger thereon capable of up and down movement and having an inclined lower end, a contractable spring to hold the yielding finger downwardly, and a set screw to engage the inclined end, for the purposes stated.

Originally there was presented a sixth claim. The patent has no sixth claim. It called for a base member with feeder finger mounted upon it capable of up and down movement, having an inclined lower end, a contractable spring to hold the yielding feeder finger downwardly, and a set screw designed to engage the inclined end, for the purposes stated. This claim is embodied in claim 5 of the patent. Each of the original and allowed claims calls for a combination. The specification discloses the object of the invention to be "to provide a feeder for printing presses of simple, durable and inexpensive construction, especially adapted for use in feeding books or pamphlets, and so arranged that it may be readily and easily adjusted to fit books or pamphlets of different sizes, and also so arranged that the feeder fingers may be made to firmly engage the lower one only of the pamphlets or books, and

said lower one may then be readily and easily moved from under the pile of books contained in the feeding hopper." Figure 1 of the drawings is here reproduced:



The preferable form of base plate, as shown in said Figure 1 and in the specification, has a flat center with segmental or curved base plate on either side thereof, and this base plate forms the base of the hopper upon which the articles to be fed are placed in a curved position. About the base plate there is a hopper of ordinary construction for holding pamphlets or articles on the base plates against longitudinal movement. These are horizontally arranged rods (25) with vertical rods (26) adjustably connected therewith. The vertical rods are designed to engage the side and end edges of the books, pamphlets, or other articles lying on the base plate. These hopper rods are numbered 25 and 26 in the drawings. There is mounted upon the frame of the printing press a reciprocating supporting bar numbered 13, capable of movement toward and from the feed rollers, and extending transversely from this bar is a cross-head number 14. Adjustably mounted on the cross-head 14 of the printing press are two block numbered 15 secured to the cross-head by the set screws 16. In the preferable form of base plates shown in the drawings the base plate may be raised or lowered by means of the screw threaded rod numbered 17 in the drawings, which rod runs through the block 15 of the printing press, as shown in the drawing, and these base plates may be adjusted toward and from each other by sliding the blocks on the printing press numbered 15 on the cross-head of the printing press numbered 14. At the end of the curved base plates is a series of feeding fingers capable of vertical movement and having feeder points at their upper ends. These are shown in the drawing and numbered 20. The finger points are adjusted relative to the base plate by set screws 23 as shown in the drawings. In practical use the books or pamphlets to be printed or fed are placed upon the curved base plate, and they will obviously assume a curved position and their upper edges will engage each other, and many articles so placed on the curved base plates will stand spaced apart from each other at their longitudinal centers, and all articles when placed thereon will engage each other more firmly at their upper edges than at their longitudinal centers. When the base plate is moved forward towards the feed rollers, the feeder fingers will engage the lower book, pamphlet, or article lying thereon, and this article will be carried on the base plate toward the feed rollers, and as the book, pamphlet, or article to be fed enters between the feed rollers it will be flattened out, so it will enter between the printing rollers in flat position. It is stated in the specification for letters patent that a number of advantages are gained by having the hopper made in curved shape instead of flat, one of these advantages being that the feeder fingers will more readily enter between the books or pamphlets on account of the fact that their central portions stand spaced apart, and another advantage is that the books or pamphlets will slide relative to each other more readily because the edges only thereof are in engagement with each other.

It will thus be seen that the invention consists of a curved reciprocating base, curved transversely of its path of travel, with feeder fingers at one end thereof to expel the lowermost article thereon. After the patent in suit was issued, appellant advised appellee's general manager, Tomlinson, that the device was in operation in Chamberlain Printing Company's plant at Des Moines, Iowa. This party went to see it, and at once expressed a wish for a license. These negotiations were later continued by mail and again orally. The same

party, after he had seen the patented device, ordered a drawing thereof made called "assembly drawing Woman's World machine," with the purpose of having a device like appellant's put upon the "Woman's World" machines, and did so. Appellee claims to have been unable to make appellant's device work well upon the "Woman's World," because the leaves would catch on the gate. In the meantime, having failed to come to terms with appellant as to a license contract, appellee consulted counsel, and was advised that appellant's patent was not valid as to its broad features, because of the proceeding in the Patent Office and the prior art. Appellee thereupon proceeded to appropriate the main features of the patent. It claims to have found that appellant's theory of resting the edges of the articles in the hopper, so as to provide space between the two lower articles and permit the insertion of the feeding points therein, was wrong in theory as to the work on the "Woman's World." It therefore, among other changes, lessened the curve of the base plate, so it contends, which it made in one section, in order, it asserts, that the articles in the hopper might avoid spacing, and provided a beveled block in front of the feed gate, and other means to force the bottom article against the mass above so that it would not catch on the gate, using the curved base only as a means for imparting stiffness to the sheet so that it would yield to the push of the feeding point, and making the finger contact with the edge of the article to be protruded rather than enter the space above it. The beveled block is about one-eighth to one-sixteenth of an inch high. The feeder point elevations, too, are very slight. Other minor changes were made in adjusting the device to the "Woman's World" needs. There is nothing in the specification, drawings, or claims of the patent which prescribes the degree of curvature of the base plates, except the description of the results to be attained, such as spacing. In rejecting original claims 1, 2, 3, and 4, the examiner cited a number of patents in the prior art. None of these are in the record, nor does it appear in just what respects the examiner found anticipation, except, as stated by him, that the reciprocating plate of Sullivan and the reciprocating separator of Wright, are curved. The trial court found there was no infringement but did not pass upon the validity of the patent in suit. The bill was dismissed for want of equity.

Thomas A. Cheshire, of Des Moines, Iowa, for appellant.

Frank T. Brown, of Chicago, Ill., for appellee.

Before BAKER and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] Unless there is novelty in the combination of a reciprocating, concavely curved base plate, curved transversely of its path of travel, with means for engaging the lowermost article in the hopper and for adjusting the parts of the base plate toward and from each other, appellant's device is devoid of novelty. The curved reciprocating base plates, curved transversely of their line of movement, constitute the genius of the invention. If there was no joint invention, then also the patent is void.

It will be observed that the original claims 2 and 3 were indefinite in form for the want, among other things, of a clause requiring the base plate to be curved transversely of its path of travel. In the absence of the prior art, we may well assume that this alone may have differentiated them from the references in the patent office. Comparison of them shows that they failed in other respects to properly describe the invention for the purposes set out in the specification. New claim 1 is simply an amplification of original claim one, which

makes reference to the specification instead of making a full recital, and in other particulars. We do not consider the statement of claims 1 and 2 as to spacing apart as functional. It is a matter of common knowledge that the placing of leaves or pamphlets in a concave position has a tendency to engage the edges of the articles with the curved sides of the base plate, and to a degree release the lower article along its longitudinal center from the bulk. This is true of any appreciable curve, the spacing diminishing with the decrease of the curve. The statement of claim 1, "so that articles to be printed resting thereon will be in curved positions with their side edges elevated and so that the lower one of said articles will have its longitudinal central portion spaced apart from the article above it," is therefore a mere declaration of what the effect of a curve is, and in no sense proclaims a function. Were the claim to call for a certain degree of curvature to produce a certain definite effect, it might be objectionable. We conclude that the difference between claim 1 as allowed and original claim 1 is simply one of form, and does not effect an abandonment of any of the essential features of the original claims, by the claims as allowed, and do not consider the objection well taken. We are, however, of the opinion that the changes in the form of the original claims as disclosed in the new may well, in the absence of the prior art, be deemed to have removed whatever of anticipation the examiner found in the prior art. What were the character and form of the reciprocating curved plate of Sullivan and the reciprocating separator of Wright, we are not advised. Presumably they were not deemed of importance in the present suit.

While, of course, curved receptacles for holding pamphlets and the like, in connection with printing devices, are not new, yet there would appear to have been something new in the combination of the patent. Appellee's manager seized upon the idea with avidity. It operated successfully at high speed, doing the work of a number of human hands. With some classes of work it seems to have needed further adjustment, such as the work on the "Woman's World," but as a concept it took the field. It does not appear that it had ever been practically applied to the printing art. We are satisfied from the record that the idea worked a great improvement in labor saving, and has been of real value. The basic idea was the combination of the curved reciprocating base plates curved transversely of their path and having finger points to expel the lowermost article. These we consider somewhat broadly patentable in combination, sufficiently so to dominate ordinary means for effectuating them, with a liberal range of equivalents.

[2, 3] We are not impressed with appellee's contention that the invention was not a joint one. That both patentees worked upon the combination and contributed ideas which were incorporated therein is plainly disclosed in the record. The combination is a unit. Each element pervades the whole of the basic features of the patent. Brewer contributed the adjustable feeder fingers and the curving of the base plates with its edges upward. Cheshire supplied the other items of

the combination. It requires clear proof to overcome the presumption of joint invention created by the grant. *Priestly v. Montague* (C. C.) 47 Fed. 650; *Page Woven Wire Fence Co. v. Land* (C. C.) 49 Fed. 936; 1 *Hopkins on Patents*, p. 27. It is not necessary that both patentees should have hit upon the same inventive thought at the same time. *Worden v. Fisher* (C. C.) 11 Fed. 505. The invention may be joint, though some of the elements are contributed by but one of the patentees. *Quincy Mining Co. v. Krause*, 151 Fed. 1014, 1017, 81 C. C. A. 290; *Vrooman v. Penhollow*, 179 Fed. 296, 102 C. C. A. 484. The objection is a formal one, and, in the present case, deemed not well taken.

Therefore we conclude that the patent in suit is valid, and proceed to the question of infringement. Appellee's contention that it avoided the patent by reducing the curve of its base plate is indefinite. There is no prescribed curve to the base plates of the patent. Appellee insists that its curve is merely for the purpose of giving a stiffening effect to the lower pamphlet or article to be advanced by the feeder fingers. This advantage, if it be one, would be more marked where the curve is considerable. If appellee's curve be less than appellant's the difference would be one of degree. There would still be a spacing effect. If appellee's device produces no such effect, then why is it found necessary to supply a beveled gate block, so as to press the lower article against the superincumbent mass? It is inevitable that the longitudinal center of the pamphlet or other article should be spaced by the concave base plate at least up to the gate block, which has an almost inappreciable elevation, and the object of which seems to be to flatten the articles so that they will pass under the so-called feed gate to the rollers. This block is not a part of the curved base feeding device, but is attached to a cross bar situated below the feeding device. Appellant provides for the feed to the printing rolls in a like flat condition by means of feed rolls, and the evidence shows that under ordinary conditions the provision is adequate. We find therefore that appellee's device used in the construction of the "Woman's World" has the spaced longitudinal center. The so-called gate block, if an improvement, is nothing more than that. The principle of operation is the same in both feeders.

Appellee claims that its feeder finger does not enter the space between the two lower articles in the hopper, but engages the body of the lower article. This finger is adjustable to meet the variation in thickness of the article to be advanced. If desirable, appellee's operator could adjust it within the space or at any operable point below the top of the article. It is nothing more than an equivalent of appellant's arrangement. The fact that appellant's curved base plates are made in three sections, while appellee's are constituted of one piece, does not constitute a patentable difference between the two or modify the combination of the patent. They operate in substantially the same way. Their functions are the same, and the concept of the two is practically identical. It is urged that the "Woman's World" device was so modified as to come within the patent, if it did so come, by parties

other than appellee, after it was installed. This contention we find to be not sustained. We are clearly of the opinion that appellee has appropriated the substance of appellant's invention. Whether or not it has made improvements thereon need not be now passed upon. That can be taken into consideration on the accounting.

The decree of the District Court is reversed, with direction to grant the injunction as prayed and order an accounting.

SANITARY STREET FLUSHING MACH. CO. v CITY OF AMSTERDAM.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 161.

PATENTS Ⓒ328—INFRINGEMENT—STREET-FLUSHING MACHINE.

The Ottofy patent, No. 795,059, for a street flushing machine, held infringed by a machine which, as used by defendant, discharged the stream of water onto the pavement at an angle of less than 20 degrees.

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

Suit in equity by the Sanitary Street Flushing Machine Company against the City of Amsterdam. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 225 Fed. 389. See, also, 216 Fed. 190.

This cause comes here upon appeal from a decree holding a patent valid and infringed. The patent is No. 795,059, granted July 18, 1905, to Leopold F. Ottofy, for a "street flushing machine." The specification states that "in flushing or washing devices it is necessary to localize the distribution of water and to have it strike with considerable velocity at an angle depending upon the nature of the surface, so as to have first a scouring and then a flushing effect to carry off before it the loosened material." It is necessary to quote merely the first claim, which sufficiently indicates the combination of the patent:

1. "In a traveling street washing machine the combination with a tank adapted to contain water under pressure of a nozzle or nozzles located near the plane of the points upon which the machine is supported, and having narrow elongated delivery apertures which open towards the front of the machine and are substantially parallel to said plane, said nozzles being constructed to deliver water under pressure nearly parallel to said plane."

The opinion of Judge Ray from which this appeal is taken will be found in 225 Fed. 389.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, H. S. Duell, and R. W. France, all of New York City, of counsel), for appellant.

Edwards, Sager & Wooster, of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Few patents have produced such a voluminous collection of judicial literature as this one has. It was last before us with an alleged infringing device in January, 1914, in the cause entitled *St. Louis Trust Company v. Studebaker Company*, opinion reported 211 Fed. 980, 128 C. C. A. 478. We then enumerated the prior decisions, as follows: *St. Louis Street Flushing Machine Company v. American Street Flushing Machine Company*, 156 Fed. 574, 84 C. C. A. 340. The same suit produced opinions reported in 180 Fed. 759, and 192 Fed. 121, 112 C. C. A. 582. *American Street Flushing Company v. D. Connolly Boiler Company*, a long opinion by Judge Hazel (not reported), which was affirmed by us in 198 Fed. 99, 117 C. C. A. 285. When the patent was last here we stated that in the opinions enumerated above there would be found a sufficient statement of the facts relating to invention, prior art, and construction of the claims, and then discussed some references to the prior art which had not been theretofore considered. We reaffirmed the validity of the patent, frequently sustained in the earlier decisions, and discussed the scope of the claims at some length, concluding with this statement:

"As to the machine now alleged to infringe, the testimony is conflicting, but we are inclined to think the defendant's witnesses have based their statements more on careful measurements and less on estimates. Upon the whole, we think it has been shown that defendant's machines as made and operated do not deliver the stream at a less angle than 25 degrees, which seems to be a satisfactory arrangement for modern streets and is not an infringement of the patentee's device. We are also satisfied that defendant's machine has all the elements of the patent claims, except the angle less than 20 degrees, and that it is a very simple and easy job to modify it, so that it will be a complete infringement. The mere lengthening of the pipes a very few inches, and a trifling regulation of the position of the nozzle, will make any one of the defendant's machines an infringing device. As at present organized, these machines would probably not commend themselves to a municipality which had streets paved with cobble or blocks with earth interstices; but the changes which would adapt it for use there are so slight that there must be a constant temptation to make them. However, until that temptation has been yielded to, we cannot find that the patent has been infringed, and therefore affirm the decree dismissing the bill, with costs of this appeal to defendants."

When this deliverance was filed we assumed that, in the absence of some additional bit of prior art not theretofore presented (and none is here presented), there would be an end of judicial discussion as to the validity of the patent, or the construction of its claims. Our assumption has proved to be fallacious. Since then these questions have come before the courts in *Sanitary Street Flushing Machine Company v. Studebaker Company* (October 9, 1914, District of New Jersey) 229 Fed. 591; *Same v. City of St. Louis* (July 8, 1914, Eastern District of Missouri, not reported); *Same v. City of Kansas City* (October, 1914, Western District of Missouri, not reported); *Kansas City v. Sanitary Street Flushing Mach. Co.* (C. C. A. 8th Circuit) 224 Fed. 964, 140 C. C. A. 456.

The suit which was before us in 211 Fed. 980, 128 C. C. A. 478, was brought against the Studebaker Company, a manufacturer of street flushing machines. The suit now at bar is brought against the

city of Amsterdam, which uses a street flushing machine, and the defense is conducted by the Studebaker Company, which made that machine and sold it to the city of Amsterdam.

The quotation above from our last opinion did not seem to us to be especially obscure; indeed, when we defined a precise angle of delivery (20 degrees), we supposed the last element of uncertainty in the construction of the claims was eliminated. Judge Ray evidently found no difficulty in understanding what we held. He says:

"I assume from the language of the Circuit Court of Appeals above quoted that when one of these Studebaker machines has its nozzle so attached and set that it will and does, when in use, discharge the water or a considerable part of it onto the pavement, even a part of the time, within the prohibited degree of actual contact—that is, within the angle of 20 degrees—it becomes an infringing machine."

This assumption of Judge Ray is entirely correct, and since this suit is against a user only it makes not a particle of difference who made the machine, nor in what condition it was when it left the maker's factory and came into the possession of the user. The only question to be considered is: As used, does it infringe?

The cause was tried in open court. Judge Ray had the benefit of hearing and seeing the witnesses, and found that the defendant the city of Amsterdam had used a Studebaker machine with the nozzle so attached and set as to discharge within the prohibited degree. There is much testimony in the record about a so-called "Rensellaer" machine; but, since the user of that machine is not a defendant here, the testimony is unimportant. Perusal of the testimony of the witnesses who testified to this Amsterdam machine suggest not the slightest ground for reversing the District Court on that simple finding of fact.

Since that is the only question left in the case, the decree is affirmed, with costs.

ALLEN AUTO SPECIALTY CO. v. BAKER.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 124.

PATENTS 328—INVENTION—COVERING FOR AUTOMOBILE TIRES.

The Nathan patent, No. 799,662, for a covering for automobile tires, designed to protect spare tires when carried on a machine from rain and dust, *held* void for lack of patentable invention.

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

Suit in equity by the Allen Auto Specialty Company against E. G. Baker. Decree for complainant, and defendant appeals. Reversed.

The decree of the District Court held valid and infringed claim 1 of letters patent No. 799,662 granted to Benjamin Nathan on September 19, 1905, for a covering for automobile tires.

Cyrus N. Anderson, of Philadelphia, Pa., for appellant.

Howson & Howson, of New York City (Hubert Howson, of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The patent in controversy relates to covers for inclosing tires for automobiles or other vehicles and is designed to protect the extra tires carried on the vehicle from the deteriorating effects of rain and dust. The claim which sufficiently describes the patented device is as follows:

"A cover adapted, when closed about a tire, to form an annular tube, the opening to receive the tire being from the front and all exposed edges of the cover in its closed or tubular form being overlapped in the same general direction, to shed rain when the cover and its inclosed tire are hung up."

The wisdom of inclosing the extra tires carried on motor cars was apparent from the beginning of their use and cases of waterproof material were early adopted for the purpose. It required no inventive skill to discover that if rain were to be excluded the upper flap of the cover must overlap the lower flap, otherwise the water would find its way between them and would soon reach the inclosed tire.

At the date of the application, December 20, 1904, the principle of overlapping for the purpose of shedding water was as old as shingled roofs. To keep an object dry it is necessary to cover it so that the joints of the inclosing material are water tight and do not permit the water to find its way between them to the interior of the covering. As is said by the District Judge:

"In this way, when the tire is kept upright, there is no crack in the tire cover which will not shed the rain. At both top and bottom the cover presents the familiar overlap which is used in so many devices for shedding rain."

Evidently the learned judge was in doubt on the question of invention for he says:

"Of course, I need not say that it was the commonest expedient to put a flap over the part where you wanted to shed the rain. We are all familiar with that, in a hundred different situations."

We cannot agree with him that it required more than the skill of the mechanic to apply a well known method of keeping out rain to a new article. The material and the method of using it were at hand and all that was necessary was to adapt and apply them to the new object—a suit case, a shoe, a carriage top or a tire cover. The method of keeping out rain by waterproof or water shedding joints was conceded old, and Nathan's problem was to apply the well known principle to a rubber tire case. The prior art told him, what was indeed a perfectly obvious fact, that if the upper flap of the case is so fastened that its edge covers the lower section, the rain as it descends will be carried down past the inner edge and therefore no water can reach the tire inside the case. No one with such a problem to solve would think of having the lower edge overlap the upper edge for immediately a groove would be formed which would stop the flow of the water and permit a large part to find its way into the inside of the case. It would seem that no one possessing even a limited amount of mechanical skill would think of leaving this opening to the inner side of the covering entirely unprotected; as well might one begin to shingle a roof from the top. Such coverings or guards as Nathan describes were constantly made in garments and analogous structures to keep out rain and were well known at the date of his application.

The moment the advisability of keeping the rubber tires free from rain was apparent, it would, we think, have occurred to the ordinary mechanic to cover the sections so that the water would pass beyond the inner folds and not be delivered to the inside of the case. It is difficult to imagine a mechanic of ordinary intelligence who would leave the passage open when the obvious and natural thing to do is to cover it.

The decree is reversed with costs.

WITZEL et al. v. BUTLER BROS.

(Circuit Court of Appeals, Second Circuit. November 9, 1915.)

No. 128.

PATENTS 328—VALIDITY AND INFRINGEMENT—WIRE MATTRESS.

The Witzel reissue patent, No. 13125 (original No. 921,494), for a wire mattress having its sides extended and turned up at right angles to form a side guard to prevent the hair mattress from spreading, claim 23, construed in the light of the prior art and the proceedings in the Patent Office, must be limited to a construction having auxiliary lugs or springs to maintain the lengthwise tension of the side guards, and, as so construed, *held* not infringed. Claims 19, 20, 22, and 24 also *held* not infringed.

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

Suit in equity by Charles J. Witzel and the Englandor Spring Bed Company against Butler Bros. From the decree (229 Fed. 197), both parties appeal. Affirmed in part, and reversed in part.

This cause comes here upon cross-appeals from a decree in a suit for infringement of United States reissue patent No. 13,125, granted June 28, 1910, to Charles J. Witzel, for a wire mattress. Judge Learned Hand dismissed the bill as to claims 19, 20, 22, and 24; he held claim 23 to be valid and infringed. Each side appealed from so much of the decree as was adverse to its contentions.

The patent came first before a court in *Witzel v. Berman* (D. C.) 212 Fed. 447, when Judge Mayer held it valid and infringed. This court affirmed that decision in 212 Fed. 734, 129 C. C. A. 344. Subsequently, in the present suit against Butler Bros., Judge Learned Hand granted a preliminary injunction. Upon appeal we held that, in view of a debatable question as to claim 23, we were not inclined to reverse the order granting a preliminary injunction, as "more light on the subject may be obtained at final hearing." 221 Fed. 947, 137 C. C. A. 517. The opinion now on appeal will be found in 229 Fed. 197.

So much has been quoted from the patent, and so much stated as to the facts, in these prior opinions, that it would involve unnecessary repetition to set it all out again. The earlier opinions may be consulted for a fuller statement of the questions involved.

C. A. Weed, of New York City (Livingston Gifford and John R. Nolan, both of New York City, of counsel), for complainants.

Samuel E. Darby, of New York City (Charles Neave, of New York City, of counsel), for defendant.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The patentee states that the object of his device is not only to hold the hair mattress in place on the wire mattress, but also to prevent its unsightly spreading. This is accomplished by extending the sides of the wire mattress and then bending them up at right angles, so that they will act as side guards to maintain the hair mattress in its original boxlike form and shape. These side guards are themselves stiffened and held in place by reinforcing strands, which, as stated in the specifications and shown in the figures, are kept rigidly in taut position by auxiliary

springs between the lugs, to which the reinforcing strands are attached, and other auxiliary lugs bent up from the cross straps at the head and foot of the wire mattress. Manifestly these auxiliaries played an important part in the combination, because they kept the bent-up side guards in taut position, taking up any slack which the inherent elasticity of the side guards was not sufficient to prevent.

When this patent first came before us upon appeal in the Berman Case, we held that, although Witzel's device was not as great an invention as he contended it was, nevertheless he was the first who held the hair mattress securely and firmly in place on the wire mattress, preserving its boxlike symmetry, and that in view of the clumsy and bungling devices of the prior art, as disclosed in the record, the patented structure required an exercise of inventive genius. We expressly declined to look into 11 patents not cited in the answer, or offered in evidence, or referred to in the District Court.

Having thus found patentable invention in the patent, it was not difficult to discover infringement in Berman's mattress. His side guards of woven wire were not turned up from the bottom, but were separate pieces, which, however, were fastened to the bottom fabric by a strand of wire—a manifest equivalent. Moreover he used—certainly we were satisfied from the exhibit (see our second opinion) that he used—one auxiliary spring at the foot of each side guard, while patentee's preferred structure showed three at each end. Moreover, his single auxiliary spring was badly located, at the bottom instead of the top of the side guard. In consequence Berman's device seemed to us unsatisfactory, as not calculated to stand up in service; but it did include both Witzel's elements—a woven fabric turned up from the bottom and an auxiliary spring to preserve tension and take up slack. The appeal was from a decree finding infringement; since infringement was evident, there was no necessity for going into any analysis of the claims; injunction and accounting had been properly decreed against him, so we merely affirmed.

The patent next came up on appeal from preliminary injunction in this cause; on that appeal it became necessary to examine the claims. We found that a device which, although meritorious, was extremely simple, susceptible of being covered by 2 or 3 claims, had been through the ingenuity of applicant and examiner expanded to 24 claims. See our comment thereon in 221 Fed. 947, 137 C. C. A. 517.

Analyzing the claims relied on, we found that all save one (No. 23) included as an element either auxiliary coil springs or some equivalent thereof, which took up slack and maintained tension, otherwise than by the inherent elasticity of the side guard itself. Since apparently the only preservative of tension in defendant's device was the inherent elasticity of the side guard (the woven fabric plus the strengthening strand), it seemed to follow that all the claims other than No. 23 were not infringed, because, in one or another form of words, each of them included as an element to insure permanent operative action of the side guards some auxiliary tensional force reinforcing the inherent elasticity of the side guards. This conclusion was indicated in our opinion, and the trial judge in view of that indication has held that

none of these other claims are infringed by defendant's structure. The record now before us leads to the same conclusion, and his decision as to those claims is affirmed.

There remains claim 23, which does not include any auxiliary tensional device, and therefore, as we said in our last deliverance, textually covers defendant's device. As the record stood on the first appeal, it will be remembered that it indicated there was much prior art, which we felt we were not at liberty to consider, because it had never been presented to the District Court. On the second appeal, from preliminary injunction, we said that "in view of the former holdings as to this patent we are not now inclined to reverse the action of the District Judge in granting preliminary injunction." Of claim 23, which textually covered defendant's device, we said:

"If the art will warrant the finding of validity in this claim, when construed so as to cover an upper wire originally stretched between the lugs (with no auxiliary lugs or springs) and maintaining lengthwise tension solely by its inherent elasticity, then it would seem to cover defendant's device. If, however, the prior art makes it necessary to read into this claim some equivalent of the particular auxiliary devices to maintain the lengthwise tension, which are found in the other claims, then defendant's device may not be covered by its terms."

In thus reserving decision on what was before us, until both sides might have opportunity to present something more, we unintentionally obscured the question, for Judge Hand, not unnaturally, took this as an intimation that the prior art as disclosed on the record in the preliminary injunction appeal did warrant a finding that the claim was valid. Since the final hearing before him added nothing of substance to the prior art, he held this claim valid, and of course—being valid—infringed.

We think that upon the record, as it was before us on the last preceding appeal and as it is now, with the light turned on the situation by the proceedings in the Patent Office on original application and on reissue, indicates very clearly that a device which depends for permanent control in boxlike shape of the mattress merely on the inherent elasticity of the side guards, whether of woven wire or of a succession of perpendicular strands strengthened with a top guard strand of coiled wire, without any auxiliary support from coiled springs or their equivalent, does not infringe; also that defendant's device, which has no auxiliary springs, as Berman's had, does not infringe.

So much of the decree as finds claim 23 valid and infringed is reversed.

SAFETY CAR HEATING & LIGHTING CO. v. GOULD COUPLER CO.

(District Court, W. D. New York. June 22, 1915. On Rehearing, February 8, 1916.)

No. A-86.

1. PATENTS ⇨157—RULES OF CONSTRUCTION.

A patent, when attacked for invalidity, should be viewed in a liberal spirit, and should not only be sustained whenever possible, but the construction placed upon it by the patentee should be adopted, whenever this can be done without excluding anything from it or adding anything to it which is not fairly contained therein.

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

2. PATENTS ⇨168—RULES OF CONSTRUCTION.

The claims of a patent are entitled to the construction their language naturally imports, and their rejection or replacement by others, or the substitution of a new specification, do not necessarily require the limitation or narrowing of their scope.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. ⇨168.]

3. PATENTS ⇨328—VALIDITY AND INFRINGEMENT—CAR LIGHTING SYSTEM.

The Thompson patent, No. 1,070,080, for an electric car-lighting system, consisting of a generator driven from the car axle which charges current to a storage battery and lamps, the special features of which are means to prevent the overcharging of the storage battery and to maintain a constant current, notwithstanding variations in the speed of the car or increased voltage of the battery, was not anticipated, discloses patentable invention, and, while not for a pioneer invention, covers an improvement of such utility as to entitle it to a fair range of equivalents; also *held* infringed.

4. PATENTS ⇨259—"CONTRIBUTORY INFRINGER"—SUPPLYING PARTS OF INFRINGING STRUCTURE.

Where a person manufactures an essential part of an infringing structure, which is not adaptable to other uses, and disposes of the same to others, with the intention that the structure shall be completed or the remaining parts supplied by the user, he becomes liable as a "contributory infringer."

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 400-402; Dec. Dig. ⇨259.

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

In Equity. Suit by the Safety Car Heating & Lighting Company against the Gould Coupler Company. On final hearing. Decree for complainant.

Duell, Warfield & Duell, of New York City, for complainant.

Kenyon & Kenyon, of New York City (Wm. Houston Kenyon, Richard Eyre, and Gorham Crosby, all of New York City, of counsel), for defendant.

HAZEL, District Judge. This action was brought to enjoin infringement of letters patent No. 1,070,080, issued to the Safety Car Heating & Lighting Company, as assignee of Harrison G. Thompson,

inventor, on August 12, 1913, on an application dated August 22, 1908, for improvements in electric car-lighting systems, in which a shunt wound generator is driven from the car axle and charges current to the storage battery and lamps; the battery operating as a reservoir for emergency purposes and supplying the lamps with current when the car is standing still, or running so slowly that the generator output is insufficient to supply the demand. Before the Thompson invention in controversy there were a number of patents for train or car lighting systems wherein the current was generated by the car axle, and indeed such prior lighting systems included a storage battery, a generator regulator for keeping constant the generator current, and a carbon pile resistance in combination for maintaining constant the flow of current to the battery and lamps. But such prior patents were not free from objection on account of the danger of overcharging the battery, which interfered with efficient lighting. Specific improvements are claimed to have been made by the patentee to overcome such objections and to produce a constantly useful current in spite of the varying speed of the car and generator, especially with relation to the use of such current in charging the battery and to simultaneous protection of the battery from injurious or wasteful overcharging.

The claims in controversy are the fourth, ninth, tenth, eleventh, twelfth, and thirteenth. The fourth claim reads as follows:

"4. In car-lighting apparatus, in combination, an electric generator, a storage battery connected to be charged thereby, a variable resistance medium comprising a plurality of contacting members adapted to vary their aggregate resistance with pressure thereon, said resistance medium being connected in the field circuit of said generator, a current coil serially connected between said generator and said battery, a voltage coil connected across the charging circuit, separate movable cores respectively coacting with said coils, and means mechanically connected with said cores and tending normally to compress said medium and adapted upon either of said cores being attracted to tend to weaken the pressure upon said medium."

It is a combination claim for car axle lighting, and has the following elements: (1) A generator; (2) a storage battery connected for charging; (3) a variable resistance medium, consisting of a carbon pile rheostat having a plurality of contacting members adapted to vary their aggregate resistance with the pressure thereon; (4) a field circuit; (5) a current coil connected between the generator and battery; (6) a voltage coil connected across the charging circuit; and (7) separate movable cores tending normally to compress the carbon pile, and adapted to weaken the pressure thereon as either of the movable cores is attracted. The asserted new elements of the claim include the voltage coil, the manner of its connection, and the mechanism by which a plurality of disks in the carbon pile are compressed or pressure on the medium weakened.

Claim 9 includes broadly the shunting mechanism, consisting of a magnetic member arranged to co-operate with the current coil to increase the resistance, and "means adapted automatically to complete a shunt about said coil upon the voltage of said generator falling below that of said battery." Claims 10 and 11 specify the various ele-

ments in detail, and concededly are limited to contacts positioned upon the main switch as shown in Fig. 2 of the patent drawings; while claim 12 includes all the essential elements and the arrangement of the parts by which a co-operative result is obtained, and reads as follows:

"12. In car-lighting apparatus, in combination, an electric generator, a storage battery adapted to be charged thereby, lamps connected across said battery, a variable resistance medium comprising a plurality of contacting members adapted to vary their aggregate resistance with pressure thereon, said resistance medium being connected in the field circuit of said generator, a current coil, a magnetic member positioned in the field of said coil, means coacting with said magnetic member and variable resistance adapted to vary the pressure upon said resistance with a variation in current flowing in said coil and tending normally to compress said medium, a switch comprising a voltage coil connected across said generator, and a movable core having a contact member at one end thereof, said switch being adapted to disconnect said generator upon its voltage falling below that of said battery by movement of said contact member, a shunt about said first coil, means coacting with the remaining end of said core adapted to complete said shunt upon said switch being opened, a second voltage coil and means adapted upon said battery reaching a certain state of charge to render said second voltage coil effective in reducing the pressure upon said variable resistance medium."

Claim 13 omits the feature of shunting the current coil by the main switch, but specifies:

"A normally ineffective voltage coil adapted upon becoming effective to control said generator current by acting on the resistance of the generator field circuit, and means adapted upon the voltage of said battery attaining a certain value to render said voltage coil effective in controlling said generator current."

The defense is that the claims, if broadly construed, are invalid in view of the prior art, and, if limited to the device shown and described, are not infringed; that in any event the defendant's generator regulator is a patented departure from complainant's; and that the defendant was the first to substitute voltage regulation for current regulation to avoid overcharging the battery.

There were irreconcilable differences of opinion among the witnesses as to the fundamental conception of the patent, and the different disclosures of the specification and claims, as well as concerning the result attained. Complainant claims that the specification and claims are clear and definite with regard to substituting voltage regulation for current regulation when the battery is nearly charged, while the defendant asserts that the described means are for charging the battery at one time and discharging it at another, or for positively disconnecting the generator from the battery and permitting the generator to resume action regardless of the speed of the train. The argument is that the patentee contemplated another construction operating on an essentially different principle from the apparatus of the defendant company; that the original claims were improperly amended and broadened to include the defendant's regulator, after its mode of operation had become known to the patentee.

The case was tried in open court by able counsel, aided by competent expert witnesses, and the technicalities made as clear as possible; but nevertheless the abstruseness of the subject-matter and the per-

plexities arising from contradictory testimony render it difficult for me to clearly determine the many questions involved. My conclusions as to the proper construction of the patent have been formed after careful consideration of the evidence and the arguments thereon; but before stating them it will no doubt be helpful to an understanding of the patent from my point of view if I first direct attention to what I believe to be the objects of the invention as indicated by the specification. It is therein shown that the patentee designed by his invention to provide practical and efficient means for charging storage batteries, to provide reliable and sensitive means for rendering the generator inoperative upon its function being performed, and to provide automatic means for enabling the generator to resume its charging action independently of the speed of the train. A general reference to the specification shows that in the shunt field of the generator there is positioned a carbon pile rheostat of a type concededly known in the art at the date of the invention, which operated to change the aggregate resistance of the disks upon the yoke pressing against them, which yoke was caused to move oppositely by a core when coil 12 became energized. Thus the compression of the carbon pile resulted in a decreased aggregate resistance corresponding to the varying spring pressure imposed upon it, and permitted more current to flow through the shunt field circuit, which resulted in the regulation of the current and the generator output.

Figure 2 of the drawings, which is an embodiment of the invention, is herewith reproduced:

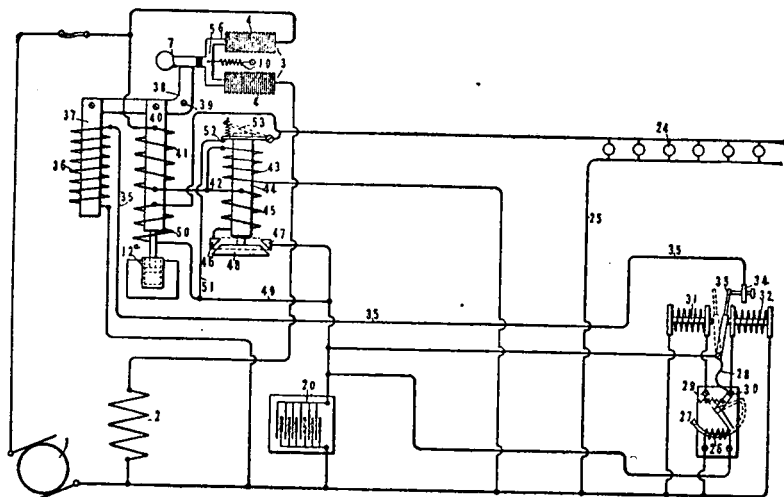


Fig 2.

This sketch shows the field coil in shunt across the generator circuit, the main switch being open and the carbon pile compressed through the mechanism while the spring 10 is pressed against the

yoke, with the result that the resistance in the shunt field circuit is decreased. A plunger or core, about which coil 41 is wound, has also a coil 50 which opposes or substantially neutralizes the effect of an increase of the current through coil 41 due to the decrease in the resistance of the external circuit of the generator. The specification states that:

"In this manner, the additional current is prevented from having a regulating and reducing effect upon the resistance device 3, and therefore the generator is permitted to furnish sufficient current for the lamps without cutting down the charging current of the storage battery. A relay, comprising a potential or voltmeter coil 26, contact member 27, magnets 31 and 32, and contact members 33 and 34, is connected to the terminals of the battery 20 in the same manner as already described with respect to Fig. 1, said relay controlling the circuit through the coil 36, which surrounds the core 37, which in this instance is connected with the bell crank lever 38. The operation of this relay and its associated coil is the same as already described with respect to the similar parts shown in Fig. 1. In order that no current from the battery can pass through the coil 50 when the core 44 is in its lowered position, in which position the generator is cut out, a conductor 51 connected to conductor 49 leads to a contact point 52, adapted when the core is in its lowered position to be engaged by a pivoted contact member 53 connected to the conductor which leads to the lamps 24, as shown in full lines in this figure. When the current in the coil 43 reaches a predetermined strength, the core will be drawn upward, as indicated in dotted lines, breaking the short circuit by lifting the contact member 53 from the contact point 52 and allowing the current from the battery to flow through the coil 50. The object of this short circuit device is to permit the generator voltage to pick up when the generator is to be thrown into circuit, which it would not satisfactorily do if the battery current were permitted to pass through the coil 50, as this current would tend to rotate the bell crank lever about its pivot in such a manner as to separate the carbon disks and therefore increase the resistance of the generator field circuit."

The regulation of the generator is brought about by the action of the series or current coil upon the carbon pile, which evidently operates as an equalizing medium for the current flowing to the battery, responding to its requirements as well as to the lamp load. The main circuit extends to the storage battery for the purpose of charging it, and then passes through the main switch 48 along to the coil of the series winding 45 and to the winding of the regulator, which maintains a constant current notwithstanding variations in the speed of the car or increased voltage of the battery during the charging operation. When the lamps are lighted, the generator current, which ordinarily passes through the storage battery, is caused to diverge, a portion flowing to the lamps and the balance passing to the battery. Then the lamp current passes on to series coil 50 on the generator regulator, and thence to the main switch 47, where it joins the battery current, and after passing through coil 41 the combined current returns to the generator. Without the enumeration of additional details, I think it will be understood that by such an arrangement of the circuits the lamp circuit comes in magnetic opposition to the battery circuit with the result that the regulation and maintenance of a constant and definite supply of current to the battery, which is the generator current flowing to the battery, is secured irrespective of the lamp lead.

Another important feature of the patent is that, when there is danger of overcharging the battery, coil 36, which is located in shunt with the battery current and connected by a lever to the regulator, becomes a factor in increasing the resistance in the field coil and in reducing or discontinuing the generator output. In this connection there is provided a polarized relay arrangement, which upon a full charge to the battery automatically establishes a circuit through the normally ineffective solenoid 36, which, as said in the specification, "will exert a powerful effect upon the lever and swing the same so as to draw the yoke 5 away from the resistance media 4, and materially increase the resistance in the field of the generator." By this adaptation the output of the generator is diminished, the voltage coil caused to supersede the series coil, thereby imparting constant voltage regulation in place of constant current regulation, and overcharge of the battery prevented. Means are also provided for protecting the system during the period when the battery alone is supplying current to the lamps. At such time a circuit is established leading from the battery to the lamps without affecting any part of the regulating instrumentality. This is accomplished by a shunt controlled by contacts on the main switch.

The invention, as shown by the evidence, consists principally of (1) a carbon pile resistance in series with the generator field; (2) a current coil adapted to influence the carbon pile in such a way as to control the resistance, thus controlling the generator and maintaining constant the output to the battery; (3) a voltage coil acting upon the carbon pile when there is danger of overcharging the battery; and (4) means for eliminating the current coil or cutting it out of circuit with the battery, so as to enable the latter to supply current to the lamps substantially alone.

Mr. Waterman, expert witness for the defendant, has severely criticized the language of the specification and claims, and, while such criticism was perhaps not altogether unwarranted, I nevertheless think that a proper construction of the patent requires an ascertainment, if possible, of its true meaning or intentment, in order to save it from invalidity, even though there may be imperfections or indefiniteness in the phraseology. The inconsistencies of description, about which much was said at the hearing, were due possibly to the failure of the solicitor to perfectly understand the invention; but my view is that the claims as they were finally allowed by the Patent Office correspond fairly to the description. Both Prof. Clifford, of Harvard University, and Mr. Hammer unqualifiedly testified, not only that the patent was intelligible to them, but that in their judgment the skilled in the art would experience no difficulty in understanding it and reducing it to practice. "Every invention," it is said in *Robinson on Patents*, § 488, "is a single step forward in the progress of the industrial arts, and cannot be intelligible, except to those who are familiar with the steps already taken and with the object this new advance is intended to subserve."

[1] The rule of law is that a patent, when attacked for invalidity, should be viewed in a liberal spirit, and should not only be sustained

whenever possible, but the construction placed upon it by the patentee should be adopted whenever this can be done without excluding anything from it, or adding anything to it which is not fairly contained therein. *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116. In *Diamond Rubber Co. v. Consolidated Tire Co.*, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527, the Supreme Court of the United States, adhering to this rule, substantially stated that if the description is sufficient, so that the skilled in the art can understand it, the law is satisfied; and that "it is no concern of the world whether the principle upon which the new construction acts be obvious or obscure, so that it inheres in the new construction."

The defendant, however, insists that the description covers simply the disconnection of the generator when the car is traveling at high speed, or the inoperativeness of the generator when the battery is near the full charge, and the resumption of the generator charge; but such limitations on the functions of solenoid 36 would not, I think, be a just construction of the patent. Reference is made in the description, it is true, to means for rendering the generator inactive upon its function being accomplished, and means to permit the generator to resume action, irrespective of the speed at which the train is running, and to the "absolute prohibition of any current being forced through charged cells"; but these excerpts should be read with the context, and considered in the light of the invention and its object as disclosed by the evidence.

But, aside from this, Prof. Clifford, in opposition to the literal interpretation of Mr. Waterman, referred to different descriptive phrases, from which it may be inferred that the patentee, in mentioning an "absolute prohibition of any current forced through the charged cells," merely provided for a possible condition. In various parts of the specification it is said that the current is maintained substantially constant, and that when the batteries are fully charged it is desirable "to substantially eliminate the charging current," and such wording, in connection with the quoted excerpts, to which defendant's expert attached importance, indicates that the inventor had in mind a different method of operation relating to the generator current at the time when the battery is supplying the lamps, namely, the depleting of the coil by short-circuiting to weaken the generator field, so that it would have a substantial effect with all variations of speed.

[2] The file wrapper and contents do not, as contended, support a limited construction of the claims in suit; for, although an inspection thereof shows that at different times amendments were made, and earlier claims rejected, the drawings are nevertheless identical with those filed with the application, and, according to a preponderance of the testimony, show the adjustment of the voltage regulator to cause a reduction of the generator output without the necessity of disconnecting the dynamo from the field to protect the battery from overcharging. The claims of a patent are entitled to the construction their language naturally imports, and their rejection or replacement

by others, or the substitution of a new specification, do not necessarily require the limitation or narrowing of their scope. *Hess-Bright Mfg. Co. v. Fichtel*, 219 Fed. 723, — C. C. A. —; *Hubbell v. United States*, 179 U. S. 77, 21 Sup. Ct. 24, 45 L. Ed. 95; *Western Elec. Co. v. Sperry Elec. Co.*, 58 Fed. 186, 7 C. C. A. 164. Applying this rule to the case at bar, I do not think that errors in the specification as originally filed, or inaccurate statements as to the mode of operation of the lighting system, as correctly portrayed in the drawings and as specified in the claims as allowed, require a limitation of the claims to means for open-circuiting the field of the generator.

[3] As to the prior art: It was old, as heretofore stated, to regulate the generator for a constant current charge of the batteries until the charge reached a predetermined point, and then to reduce the charge by shunt while the current flowed to the lamps. Lighting systems of this type are described in the Bliss patents in evidence; but, after examining them, I have concluded that they do not necessitate narrowing or limiting the scope of the claims in controversy. In claims 9, 10, and 11 of the patent in suit the generator battery lamps and variable resistance medium are combined with means for completing a shunt about the current coil when the voltage of the generator falls below that of the battery, and therefore it differs from the prior patents.

In Bliss patents, Nos. 799,516, and 863,692, there are means for train lighting which involve the use of a so-called "bucker" generator to neutralize the action of the main generator in order to effect regulation. As such constructions involved the use of commutators, extra brushes, and fields, I do not regard them as bearing materially upon the question of anticipation. In Bliss patents, Nos. 799,517 and 799,520, the carbon pile controls the field of the main generator; but, as there is no shunt contact in association with the main switch, they are not anticipatory. In Bliss patents, Nos. 572,627, 799,516, and 863,692, the coil which is shunted out of action by contacts on the main switch is one which would tend to build up the generator field, while in the patent in suit the shunting feature eliminates the coil to permit influencing the carbon pile to allow the generator voltage to pick up when the generator comes into the circuit. In the Bliss lighting system the cars are not separately lighted, and, notwithstanding the employment of somewhat similar means for regulating the battery and generator current, I think there was invention in adapting such means to a system for separately lighting cars by the production of a current of constant value for charging the battery and the simultaneous prevention of overcharge.

In the Jepson patent, No. 991,198, issued after complainant's application was filed, the shunt is caused to act by the operation of three switches, thus making a shunt about the current coil, the voltage coil, and a booster; but such patent does not, in my opinion, limit claims 9, 10, and 11 in suit.

The Turbayne patent, No. 760,714, which was owned by the defendant, describes a step by step rheostat resistance, and, though said resist-

ance medium was regarded at the date of the invention in suit as the equivalent of the carbon pile resistance, Turbayne differently wound the current windings, and the practicability of his adaptation is not free from doubt. Although this patent was granted before complainant's, it cannot be considered to anticipate it.

The witness Jepson testified that Turbayne's commercial system was essentially different from defendant's in operation and construction, as it used a small dynamo resistance, instead of a carbon pile; and there was credible evidence to show that it did not light efficiently. For these reasons it is not considered of sufficient importance to invalidate the patent in suit or to limit its claims.

Weight is given to the Dick patent, No. 682,978, which was for train lighting by the use of a single generator affixed to the car axle; but in such system it is testified there were no means to enable lighting the cars while the battery was being charged, nor for protecting the battery from overcharge during the charging process. There is a resistance device pointed out, which it is contended afforded such battery protection; but I am in doubt as to the manner of its operation. Furthermore, the Dick lighting apparatus employed two batteries when the generator was simultaneously supplying current to the lamps and batteries, and therefore it does not disclose the invention in suit.

There was also evidence to show prior use, in that a substitution of voltage regulation for current regulation was first used on the Lake Shore Railroad daily from February, 1908, to October, inclusive. This system, known as the system of Bliss, blueprint 3,041, closely approached the Thompson patent; but nevertheless credible testimony shows that it operated unsatisfactorily. The evidence is that the only shunt in such construction was positioned about the carbon pile, and not about a coil controlling the carbon pile, and that the inefficiency of the lighting system was due to the faulty location of the shunt. It was also shown that this apparatus was supplanted by a different lighting system, and accordingly the presumption is not unwarranted that its use, as claimed by complainant, was merely experimental. Therefore there is disinclination on my part to treat it as anticipatory or suggestive of any of the claims under consideration.

The Creveling patent, No. 920,827, includes a carbon pile resistance in series with the field circuit controlled by a circuit coil acting through a core and lever adjustment, and in this respect is quite similar to complainant's arrangement of the carbon pile. But Prof. Clifford swore that such invention had no normally ineffective voltage coil like that of Thompson, that there was no protection of the battery from overcharging, and that there was no shunt about the current regulating coil. Defendant, however, contends that every element of claims 4 and 13 is embodied in the Creveling construction, except that no relays are used. Prof. Clifford was cross-examined at length on these points, and the definiteness of his answers is questioned; but, on comparison of his testimony with the Creveling specification and drawings, I am of the belief that coil 38 of the Creveling patent in its co-operation with coil 18 does not operate to supersede the current regulation

with voltage regulation, and, though coil 33 is normally ineffective, it does not become effective at a predetermined point, as in the Thompson patent. Hence, in my estimation, there is such an important variance between the Creveling and Thompson patents as to prevent the consideration of the former on the question of the anticipation or limitation of the claims in suit. There was testimony tending to show that Thompson conceived his invention and completed it prior to the date of the Creveling application of May 28, 1908, the Bliss patent, No. 863,692, issued August 20, 1907, and the Turbayne patent, No. 991,106, on application dated May 2, 1908; but such testimony in favor of antedating the patent need not be reviewed, considering the essential differences existing between such patents and the patent in suit.

In a litigation before this court between complainant herein and the United States Light & Heating Co., Creveling patent, No. 747,686, was held valid and of sufficiently broad scope to include a carbon pile resistance in place of a wire rheostat resistance; and in another litigation between the same parties the W. I. Thomson patent, which included a carbon pile in series in the generator field, was held invalid; and it is argued by defendant herein that the effect of complainant's testimony, differentiating the patent in suit from the Creveling patent, is to show that the only novelty was the use of the carbon pile resistance in lieu of the step by step rheostat. Complainant rejoins that the said Creveling patent was for the broad invention; that the introduction of a current coil acting upon the carbon pile resistance to maintain a constant charging current, and of a voltage coil differing from Creveling's which, though normally ineffective, becomes effective at a predetermined time, was an important improvement. There is some doubt in my mind as to whether the arrangement by Thompson of the voltage coil to act upon the carbon pile resistance in series with the generator field, in view of what was disclosed in the Creveling and Thomson patents, involved invention; but, considering the utility of the apparatus, such doubt, I think, should be resolved in favor of the existence of invention. *Kremenz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558.

The prior art, in my opinion, does not disclose the combination of any of the claims in controversy. That the invention in suit was a useful contribution to the art may be inferred from the results which it produced. The record shows that at the time it was conceived a problem existed because of the danger of injury to the battery from overcharging, which skilled electricians were endeavoring to solve, each somewhat advancing the art, but in the main failing to accomplish what was finally accomplished by complainant's patent. And while such patent was not for a pioneer invention in the sense that a new art was discovered, it nevertheless was an improvement in an old art of such significance as to entitle it to protection and the application of a fair range of equivalents in a suit for infringement.

The question of infringement concerns, not only the fourth claim, covering the broad invention, but also the specific claims for practicing it. As the patentee was the first to devise means for successfully safe-

guarding the battery from excessive charge of current from the generator, thus making car lighting more efficient, the claims should be broadly enough construed to include apparatus which adapts substantially similar means and instrumentalities to attain the same result. True enough, in defendant's apparatuses there are differences of construction; but in my opinion they relate to the details of operation only.

At the hearing I entertained the impression that defendant had distinguished its construction from complainant's by connecting the voltage coil to the opposite ends of the carbon pile in such a way as to absolve it from infringement, and that such operation was upon a different principle; but I am persuaded by a fair preponderance of the evidence that that feature comes within the scope of the patent and was not essentially different from complainant's adaptation, or from the panel, Exhibit 15, which was exhibited by the patentee in Chicago in the year 1908, and which was provided with separate movable cores connected with the carbon pile, as specified in claim 4 of the patent. Defendant's operation from opposite ends of the carbon pile does not avoid infringement as the necessary pull was transmissible from the movable cores by one lever as well as two. Nor does it make any difference that in defendant's structure the cores were controlled by weights, instead of springs, for the former undoubtedly were the equivalent of the latter as it was adapted in complainant's patent.

[4] It is unnecessary to dwell further upon the question of infringement, as the apparatus of the defendant as sketched diagrammatically in Complainant's Exhibits 8 and 9, was an appropriation of the regulator described in the specification in suit. Exhibit 9 shows a constant current generator system, as distinguished from a constant battery current system, in which a shunt path for short circuiting the current coil was unnecessary; but this difference is not of material importance. In other respects the system is similar to the constant battery current system. It has the main switch with upper contacts and the circuits are arranged to shunt the current coil. Hence said apparatus is convertible without difficulty into a constant battery system by merely changing the lamp leads. To thus construct the device was to infringe claims 4 and 13, and also claims 9, 10, 11, and 12, under the doctrine of *Wallace v. Holmes*, 9 Blatchf. 65, Fed. Cas. No. 17,100, *Thomson-Houston Electric Co. v. Black River T. Co.*, 135 Fed. 759, 68 C. C. A. 461, and *Canda v. Michigan Malleable Iron Co.*, 124 Fed. 486, 61 C. C. A. 194, which cases substantially hold that where a person manufactures an essential part of an infringing structure which is not adaptable to other uses, and disposes of the same to others with the intention that the structure shall be completed or the remaining parts supplied by the user, he becomes liable as a contributory infringer.

Other reasons are urged by defendant why its lighting systems are not infringements of the patent in suit; but it would serve no useful purpose to separately discuss them. My conclusion is that the claims in Thompson patent, No. 1,070,080, are valid and infringed by the

lighting systems shown in the sketches to which reference has been made, and in bulletins 11-A and 11-B of Complainant's Exhibits 2 and 3.

Complainant is entitled to the relief prayed, with costs.

On Rehearing.

Duell, Warfield & Duell, of New York City, for plaintiff.

Kenyon & Kenyon, of New York City (Walter C. Noyes, Wm. Houston Kenyon, and Richard Eyre, all of New York City, of counsel), for defendant.

HAZEL, District Judge. Considering this case in connection with various matters argued on the rehearing, I think that I failed in my original opinion to sufficiently differentiate the Thompson patent in suit from the prior Turbayne patent, No. 760,714, the Bliss patents, Nos. 799,516 and 799,520, and Bliss Bulletin No. 20, and therefore, for the sake of clarity, I am filing this supplementary opinion, without, however, changing the conclusion heretofore reached that the claims in controversy are valid and infringed by the defendant.

We are not here concerned with a patent performing a function never before performed, but with an improvement in a car-lighting system relating specifically to a method of charging storage batteries in connection with generators driven by car axles with a view of making this operation more simple and efficient. To accomplish this the patentee provided sensitive means for making the generator inoperative upon the instant the battery is fully charged, and for permitting the generator to resume its work regardless of the speed of the train; such means consisting of the combination and arrangement of elements set forth in the specification and claims. In prior car-lighting systems, as shown in the Creveling patent (Safety Car Heating & Lighting Co. v. United States Light & Heating Co., 222 Fed. 310, affirmed 223 Fed. 1023, 138 C. C. A. 651), it was demonstrated that, to secure better and more economic results and to effectively avoid injury from overcharging the battery, means were necessary (automatically operated) for materially decreasing the generator output without affecting the battery, which should continue to supply current to the lamps. As the lamps, when lighted, do not require as much current as is required to keep the battery charged, a rapid or gradual reduction of the current output is necessary to prevent overcharging. The patentee in his improvement arranged the generator in shunt and provided: (1) A carbon pile resistance, to maintain a normal output, and made the same responsive to changing conditions of operation; (2) a current coil, to control the carbon pile in series to obtain a constancy of charge to the battery; (3) a voltage coil, to decrease the charging current; and (4) a cut-out, to regulate the battery when it alone supplies current to the lamps. There are many intricate details of operation and co-operation, as indicated by the quotation from the specification contained in the original opinion; but the merit of the invention resides in the adaptation of means by which a variable balance of current flow was maintained.

I have been much concerned about the proper interpretation of claim 4, which defendant insists is anticipated by the Turbayne patent heretofore mentioned, and which in the original opinion was held not anticipatory, as it disclosed a differential current winding and its practicability was considered doubtful. I should have stated that the main distinction is that claim 4 calls for separate movable cores respectively coacting with the current and voltage coils and functioning to compress the carbon pile resistance, and includes a voltage coil connected across the charging circuit and a voltage coil that is normally ineffective, while the Turbayne patent is without such elements or their equivalents. Although in a sense the separable movable cores of Thompson with voltage and current windings correspond to a single core with different windings, the latter nevertheless is unable to function in the same way as the former, or to efficiently protect the battery. It is important that the voltage coil should be normally ineffective until the predetermined time when it supersedes the current coil to control the generator. Professor Clifford clearly testified that there was a real point to the effect of separate cores, even though they put the winding 36 of the Thompson patent upon a single plunger with windings 41 and 50, saying:

"All the time when the battery is being charged by a constant current, current regulation being secured by these current coils on that plunger, all that from 36 is exactly as if it did not exist because it is not in circuit. It does not do it until the contact 27 (relay) comes on the contact 30. In other words, that contact not being operated by 26 until the battery is at danger point; that is, just exactly as if they were out of the system entirely. In other words, there is no voltage regulation until the battery is at full charge. It is merely current regulation."

"We find that [in Thompson] there are not only separate cores, but in effect separately movable cores, because in the first part of its cycle 36 is nonexistent, and in the second part of its cycles 41 and 50 are nonexistent so far as their regulating effect is concerned."

Turbayne's arrangement of the current coils and voltage coil F^2 around a single core functioned to affect the core and the step by step resistance as soon as the voltage was on the battery because of the combined action of the two current coils, one in series with the lamps and the other acting in opposition thereto. Such arrangement I think was incapable of producing the stop charge effect aimed at by the patentee or of producing a normally ineffective voltage coil. It is true claim 4 does not specify a normally ineffective voltage coil or a relay to make it effective, but the claim must be construed to cover the actual invention; that is, as if such features had been specified therein, since they are substantially described in the specification. *Fowler & Wolfe Mfg. Co. v. McCrum-Howell Co.*, 215 Fed. 905, 132 C. C. A. 143.

It is further urged that claim 13, which does not include a carbon pile, is anticipated by the Creveling patent. Although Creveling broadly indicates means for protecting the battery from overcharge, I am quite convinced that his means for controlling the rheostat resistance in series with the voltage field of the regulator were different from complainant's, in that he specified no current coil acting upon a resist-

ance medium to maintain a constant current and no voltage coil coming into action at a predetermined time. Coil 31 of his patent does not correspond to the normally ineffective voltage coil of the Thompson patent, and therefore the Creveling patent neither anticipates nor limits claim 13 in suit.

The Bliss patents, Nos. 799,516 and 799,520, are claimed to anticipate claims 9, 10, and 11 in controversy. Such claims, though not specifying as an element a voltage coil acting upon a carbon pile to protect the battery from overcharge, nevertheless include the feature of completing a shunt about the current coil when the voltage of the generator falls below that of the battery. The Bliss patents, as heretofore pointed out, are descriptive of a bucker system of train lighting; but defendant claims they are not limited to that, and, indeed, in patent No. 799,520 it is stated that a carbon pile may be substituted for the bucker, or that other suitable means may be used for regulating the flow. I nevertheless think that such patents are not anticipatory, as even with the carbon pile arrangement they were incapable of achieving the result of the invention in suit, owing to the fact that the resistances were positioned in parallel, and were not usable for efficient field regulation of the generator in a car-lighting system. It makes no difference that it was possible for them to use a carbon pile in lieu of the bucker by completing a shunt about the current coil when the voltage was decreased below the battery and thus to operate somewhat similarly to the patent in suit, for it is believed that the simplicity of co-operation attained by Thompson would not have followed. In such a situation the defendant cannot avoid infringement by merely proving that part of the entire invention is contained in one prior patent and part in another. *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54; *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68. And also I am still of the opinion that it was not an obvious thing for a skilled engineer to change a system for train lighting in which the generator was located in the baggage car or locomotive into a practicable system for separate car lighting in which the generator is driven by the car axle.

Bliss Bulletin No. 20 was not discussed in the original opinion, but it was not overlooked. It was believed that, as claims 9, 10, and 11 included as an essential element a variable resistance medium with the current coil in shunt for regulating its action—a feature not found in the Bulletin—it was not an important reference. Besides, the Bulletin specified a rheostat regulator coacting with vibrating contacts which operate by cutting in and out of the circuit. Such a contrivance could not evenly regulate the current and was based upon an essentially different element from the patent in suit.

Nor are claims 4 and 13 invalid because of anything contained in Jepson patent, No. 981,198, which describes regulation of the current to the battery by a booster device to assist the generator voltage in performing its function. In that patent coils 33 and 50 together controlled the resistance of the carbon pile and maintained the voltage of the generator constant. Certainly the carbon pile was not controlled, as in the Thompson patent, by a current coil until the voltage of the battery neared full charge, when the voltage operates to supersede

the current coil to decrease the output of the generator. Hence Jepson failed to accomplish the object of claims 4 and 13.

Claim 12 of the Thompson patent does not specify the relay or voltmeter (26 and 34) connected to the voltage coil 36, but specifies "means adapted upon said battery reaching a certain state of charge to render said second voltage coil effective in reducing the pressure upon said variable resistance medium"; while claim 13 specifies "means adapted upon the voltage of said battery attaining a certain value to render said voltage coil effective in controlling said generator current." The specification clearly shows what the means were to which the said claims refer, but they are not limited to such relay device or instrumentalities for accomplishing the desired results. While the patent was for an improvement, it nevertheless brought into the art a new and novel combination or arrangement of elements, separately old, but which achieved a new and useful result in car-lighting systems, and therefore the claims are entitled to a fair range of equivalents. A construction of such scope should be accorded them as to include a car-lighting system embodying a combination of the elements in suit which achieves substantially the same results.

Claim 4 is in my opinion infringed by the defendant company, for in its car-lighting system it uses in combination a generator, a storage battery, a carbon pile or variable resistance medium arranged in the field circuit of the generator, which operates to vary the aggregate resistance upon compressing the disks, a current coil serially connected, a voltage coil connected across the charging circuit, which under normal conditions is inert or uninfluenced, but which becomes effective when the accumulator is nearly fully charged; the voltage or energy passing through the voltage coil at such time being of sufficient potentiality to raise the separate movable cores, which are connected so as either to compress or to attract the carbon pile resistance. Defendant also embodies in its apparatus the elements of claim 9 (typical of claims 10 and 11), which includes the current coil and the specified means coacting with it to increase the resistance when the carbon pile is attracted, and "means adapted automatically to complete a shunt about said coil upon the voltage of said generator falling below that of said battery." By a lever mechanism operating upon the carbon pile there was secured a regulation of the movements of the core, and by opening the circuit and closing the shunt the battery was permitted to supply current to the lamps as in complainant's apparatus.

There was much discussion as to whether claims 12 and 13 were infringed, as concededly the defendant does not use a polarizing relay mechanism in its apparatus, nor an energizing coil functioning like coil 36 of the Thompson invention. It is, however, proven that to accomplish the same result defendant utilizes the magnetic pull or conductivity of the voltage coil to balance weights on the lever, thus securing the inertia of the core until the storage battery is substantially charged, when the strength of the voltage coil raises one core and releases the other, which then rests upon its stop. The series coil then becomes ineffective, leaving the control of the generator voltage to the voltage coil, as in complainant's patent. The question of whether

the defendant's embodiment comprises the means of the said claims in suit is not free from difficulty. But as a normally ineffective voltage coil for voltage regulation is used, and is arranged to become effective to supersede the series coil in supplying constant voltage regulation in lieu of constant current regulation, thus protecting the battery from overcharge, the claims are believed to be infringed by the defendant. They are not, as contended, for a mere result, and the defendant by its employment and arrangement of instrumentalities utilizes the principle upon which the Thompson invention is based. Surely defendant had an object for apportioning and attaching weights to the dash pot, and for adjusting the lever mechanism and winding the coil in a certain way, which object no doubt was to secure inertia of the voltage coil up to a certain degree of battery charge and then to render it effective.

Claim 13 is not anticipated by Dick patent, No. 682,978; my reason for such conclusion being stated in the original opinion. Other matters argued at the rehearing are also deemed by me to have been sufficiently covered in the original opinion.

As the defendant's system embodies the elements of the Thompson system in suit, operates in substantially the same way, and produces the same result, a decree for complainant may enter; but, on the assumption that defendant will wish to appeal, counsel are advised that a supersedeas will be allowed.

BROWN v. PENNSYLVANIA CANAL CO. et al.

(District Court, E. D. Pennsylvania. February 8, 1916.)

No. 677.

L. CORPORATIONS ⇨486—CORPORATE MORTGAGES—SINKING FUNDS—RIGHTS OF BONDHOLDERS—"NET EARNINGS."

A railroad company organized a canal company to take over a canal owned by it, and provided for an interlocking directorate. The canal company executed a mortgage and gave the trustee, a railroad official, power to select the officers and managers of the canal company, and the canal was conducted as a department of the railroad. The mortgage provided that the canal company would each year, out of its net annual earnings, if sufficient, provide a sinking fund of \$20,000, but, if not sufficient therefor, then a sum equal to such net annual earnings for the payment of the principal of the bonds, such sinking fund to be invested by the canal company in the bonds thereby secured or in other good securities. All the charges and earnings of the canal company were to be applied to interest as well as principal. The railroad company was a party to the mortgage, and indorsed on the bonds an agreement to purchase any of the interest coupons not paid by the canal company, and in a suit to foreclose the mortgage it was interpreted as requiring the redemption of interest coupons so taken up by the railroad company before payment of the principal. *Held*, that the bondholders had a right to have the net earnings of the canal company to the extent of \$20,000 a year applied to the sinking fund provided for payment of the principal, instead of paying interest on the bonds, and thereby relieving the railroad company of its obligation to purchase the coupons, since, while "net earnings," in bookkeeping language, means a balance, or what remains

after something has been deducted, the deductions to be made can only be determined from the occasion for the use of the words, or from the context.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⚡486.]

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

2. CORPORATIONS ⚡486—CORPORATE MORTGAGES—SINKING FUNDS—RIGHTS OF BONDHOLDERS.

If the railroad company was bound to purchase unpaid coupons attached to bonds in which the sinking fund was invested, it was a wrong to the bondholders to cancel such bonds, thereby depriving the sinking fund of the interest to accrue, while, if it was not so liable, it was a wrong to the bondholders to invest the sinking fund in securities which bore no interest.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⚡486.]

3. CORPORATIONS ⚡482—FORECLOSURE OF MORTGAGE—JUDGMENT—CONCLUSIVENESS.

The decree in the foreclosure suit, in which it was determined that the interest coupons taken up by the railroad company were to be first paid from the proceeds of the mortgaged property before payment of the principal, though conclusive as between all persons bound thereby on all questions involved in it, did not bar a suit to require the railroad company to account to the bondholders for the loss sustained by its diversion of moneys from the sinking fund, or depletion of the fund for its benefit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877-1888; Dec. Dig. ⚡482.]

4. CORPORATIONS ⚡318—LIABILITY FOR ACTS OF OFFICERS AND AGENTS.

Though there was no direct evidence that the railroad company had, by any corporate action, anything to do with the sinking fund, it was a fair inference that the common officers and agents of the two corporations, in diverting the sinking fund so as to benefit the railroad company, were acting for and by command of the railroad company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1363, 1364; Dec. Dig. ⚡318.]

In Equity. Suit by Alice Francis Brown against the Pennsylvania Canal Company and others. On trial hearing on bill, answer, and proofs. Decree for plaintiff.

John Cadwalader, Jr., and Thos. Raeburn White, both of Philadelphia, Pa., for plaintiff.

John Hampton Barnes, of Philadelphia, Pa., for defendant Pennsylvania Canal Co.

Francis I. Gowen, of Philadelphia, Pa., for defendant Pennsylvania R. Co.

John G. Johnson, of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. The questions raised and argued out in this case, so far as they call for discussion at the present time, are involved in the relations of the parties growing out of the transactions in which they were engaged, the proper construction of the contracts, in which they all had part, and the legal consequences of other litigation, to which they or some of them were parties.

A history of the transactions out of which this controversy has grown might well begin with the fact that the state of Pennsylvania

made over to the railroad company bearing its name certain property of the state. A part of this was a railroad. Another part was a canal known to this record as the Pennsylvania Canal. The railroad and the canal throughout the length of the latter ran side by side. Later on in time the railroad managers decided to have a canal company organized. It was doubtless deemed of importance to provide against the possibility of the control of the canal passing into hostile hands. Assurance against this was secured through the ownership of its stock. This, in turn, made possible an interlocking directorate. This again, in turn, made certain the selection of friendly officers and a friendly management. This selection of the personnel of officers and managers was extended to the trustee under the mortgage hereinafter mentioned, who and those who succeeded him was always some one who stood high in the responsible executive management of the railroad; the last trustee being the present president of that road. The affairs of the canal company were managed in accordance with this plan.

The fact has already been found by another court, and the situation and relation of the parties and what was done compels the finding, that the affairs of the canal were conducted after its incorporation precisely as they would have been, had the canal management continued to be a department of the railroad, an account of the earnings and disbursements of which was separately kept. This began at the beginning and continued to the end. A canal company was accordingly chartered. The plan of the managers of the railroad, as outlined in the annual report, embraced a supply of capital to the canal company through the expedient of an issue of bonds, the payment of which was secured by a mortgage of its property. An aggregate of \$3,000,000 of these bonds was issued. The intimate relations between the canal and railroad companies induced, if indeed they did not compel, the railroad company to become a party to this mortgage. This was effected through an agreement indorsed on the bonds that the railroad company would purchase any of the interest coupons which were not paid by the canal company. This gave to prospective bondholders a satisfying assurance that they would receive the interest as it fell due. Certain provisions (to be hereafter particularly discussed) were likewise made through a sinking fund for taking care of the principal of the bonds at maturity. This gave a like assurance of the payment of the principal. The payment of interest and principal being thus both provided for, the bonds were put upon the market and sold, the plaintiff's predecessor in title becoming the purchaser of some of them. It has been judicially determined in proceedings in equity (hereafter referred to at some length) that the undertaking of the railroad company was not a contract to guarantee the payment of the interest, but a contract to purchase the coupons.

It may be noted in passing that a more simple and direct means of providing a market for the bonds (which was evidently the purpose of the railroad company) would have been to have guaranteed the payment of both interest and principal. We have the opinion of the general solicitor of the railroad company (which affords the explanation

of why the simpler plan was not adopted) that the railroad company was without the corporate power to make a contract of guaranty, but did have full power to enter into a contract of purchase. What has come to pass is that the canal company was unable to pay either interest or principal. The railroad company admitted and, of course, met its obligation to take up by purchase the interest coupons. The bondholders have, in consequence, been paid their interest in full. The provisions made through the covenants of the mortgage for the payment of the principal of the bonds were not met and thus far the loss has fallen upon the bondholders. All the property and assets of the canal company are gone, and have passed almost wholly into the ownership of the railroad company. This has, it is alleged, been brought about, and the affairs of the canal company have been managed and its assets manipulated, by the railroad company in such manner as to result to its gain and the loss of the bondholders.

The plaintiff has brought this proceeding for the benefit of herself and of any other bondholders who may intervene. The general purpose of the bill is to fasten upon the railroad company responsibility for the loss sustained by the bondholders. The plaintiff avers such responsibility to arise out of certain acts of the railroad company. These resulted in acts of omission and commission on the part of the canal company and of the mortgage trustee. These acts may thus be summarized:

The mortgage (as construed by the plaintiff) provided that a sum (which we will call \$20,000) should be paid annually into a sinking fund pledged first to the payment of the principal of the bonds at maturity. The railroad company (as already stated) had agreed to cash the interest coupons which the canal company did not pay. The practical situation was in consequence this: If the \$20,000 was paid into the sinking fund the payment of the principal of the bonds was made sure, but the railroad company would have that much more to advance in the purchase of interest coupons. If the \$20,000 was diverted to the taking up of the coupons, the principal of the bonds would remain unpaid, and the railroad company would save \$20,000 annually. The money was applied to the coupons, and the principal of the bonds went unpaid. The railroad company thus gained what the bondholders lost. Another provision of the mortgage was that the sinking fund moneys might be invested in the purchase of the bonds or in other securities. If these funds were invested in the bonds, and the bonds were canceled, the bondholders would lose the accumulations of 40 years or less of interest. If the bonds were held as an investment, the question would arise of whether the contract of the railroad applied to interest coupons held by the sinking fund. No trustee for bondholders could avoid seeing that the bonds should not be canceled, and that none should be purchased unless the payment of interest was assured. Bonds were not only purchased for the sinking fund, but they were also canceled. Here, again, loss resulted to the bondholders and gain to the railroad company. The plaintiff asserts that if the bonds had been held as an investment the railroad company would have been obliged to take up the coupons. However this may be, it is clear that

the sinking fund should not have been invested in the bonds unless interest could be collected.

Still another feature of the situation was this: Some of the real estate of the canal company could be sold without the consent of the trustee under the mortgage. Some of it could be sold with his consent. Some could not be alienated from canal purposes. The property was sold. Much of it, as before stated, passed through such sales into the ownership of the railroad. The charter of the canal company was so changed by a special act of assembly as to give legislative consent to the abandonment and sale of all parts of the canal. The plaintiff avers that in these sale transactions the railroad company sold to itself and bought from itself, and that the prices paid were wholly inadequate. The undoubted fact is that when the bonds matured the canal company was found to be without assets sufficient in value to reach the payment of the principal of its bonds. All that it had went to the railroad company to repay the interest coupons which it had taken up, and which, under the terms of the mortgage as interpreted in the proceeding referred to, were to be first paid before the principal of the bonds.

There are other features of the transaction of which the plaintiff makes complaint. These, for the reason hereinafter stated, we pass without comment. Those referred to will suffice to present the grounds upon which the prayers for relief are based. It is unthinkable that the things which were done would have been done if the resultant loss to bondholders had been forecast. The course of events can only be accounted for upon the supposition that everybody in interest was consenting and that the things done were for their common benefit; it not being then foreseen that the bondholders would have an interest. The consequences are to be regretted, even if redress can be awarded, because of the possibility (as to which the proofs are silent) that the right to redress may have passed from many who really suffered the loss entailed. The general principle of the theory upon which the plaintiff rests her present claim was unchallenged at the argument. There is, because of this, no occasion to discuss it. The language of her counsel may be paraphrased in order to formulate a statement of it. It is that under the facts of this case the railroad company stood in such a relation to the bondholders as that it is bound to make good to them any loss which they have sustained from any wrongful acts of omission or commission done by the railroad company for its benefit, or done by the trustee or the canal company by the procurement of the railroad company.

[1, 2] The claim of the plaintiff is met by a denial that any wrongful act was done. So far as space permits we will take up the mentioned acts in their order. The first is the \$20,000 payment into the sinking fund. The provision in the mortgage is as follows:

"First. That the party of the first part [the canal company] shall and will first provide in each year out of the net annual earnings, if sufficient for that purpose a sinking fund of twenty thousand dollars (\$20,000.00) per annum, but, if not sufficient therefor, then such sum as shall be equal to the said net annual earnings for the payment of the principal of the bonds hereby secured, commencing on the first day of July, A. D., one thousand

eight hundred and seventy-two (1872), on or before which day the first of said annual appropriations of twenty thousand dollars (\$20,000) or other sum as aforesaid shall be made, and the same shall be from time to time invested by said party of the first part in the bonds hereby secured, or in other good securities."

The meaning of which we are in search is to be extracted from the words "net annual earnings." There is small aid to be had from the lexical meaning of "net earnings," and even less from the adjudged cases. The words, in bookkeeping language, mean a balance, or what remains after something has been deducted. What the deduction is, or what is to be included in it, can only be determined from the occasion for the use of the words, or from the context. The occasion here was a pourparler with the prospective bondholders. The words are the words of the railroad company. The purpose of their use was to make a market for the bonds by assuring a business certainty that the bondholders' money would be returned to them, interest and principal, when payable. If this had been the ordinary case of a corporation borrowing money, and the mortgage had been the usual mortgage, there would be a flat absurdity, as counsel for defendant point out, in providing for the payment of the principal at the expense of the interest going unpaid. It was not, however, such a case. The bonds could not have been floated on the credit of the canal company without the railroad. Nor was the mortgage the usual mortgage. It had attached to it this obligation of the railroad company to take up the interest coupons. The contract took this instead of the usual form of a guaranty of principal and interest, because (as already explained) the railroad company could agree to purchase, but could not guarantee. There was a practical difficulty in the way of an agreement to purchase the bonds, because no price could be fixed, and besides this would have defeated the main purpose of the loan. It was unnecessary to agree to purchase the bonds at maturity, if the payment of the principal was assured. At all events what the railroad company said to the investors in the bonds was this: You will receive your interest promptly, because we are a market for the coupons. You are certain to get your principal, because a sinking fund of \$20,000 per year is provided for out of earnings before interest is deducted. If it does not have this meaning, the sale of coupons would be at the cost of the principal, and the agreement to buy the coupons was a trap for the unwary.

The further argument of defendant comes to the same thing. It is that the construction contended for by plaintiff is inconsistent with the covenant of the mortgage that all the assets and earnings of the canal company should be applied to interest as well as principal and the finding that the interest was to be first paid. Again we say, if the mortgage were the ordinary mortgage, the argument would doubtless be sound. It is not, however, the ordinary mortgage, but such a mortgage with the covenant of the railroad company added, and with this added such a construction of this clause is entirely consistent with all the covenants of the mortgage. Out of the bond springs the obligation of the canal company to pay both interest and principal. The added contract requires the railroad company to advance the interest,

and the mortgage applies \$20,000 of the "net earnings" (before any deduction for interest) to the payment of the principal. We find, in consequence, [the division of] the net annual earnings up to the limit of \$20,000 for the benefit and in ease of the railroad company to have been a wrong to the bondholders, who suffered thereby. We think, also, there should be a like finding with respect to the purchase and cancellation of the sinking fund bonds. This finding is not affected by the argument of defendant that the railroad company was not bound to purchase the coupons held by the sinking fund. If the railroad company was so liable, it was a wrong to the bondholders to cancel such obligation for the benefit of the railroad. If the railroad company was not so liable, it was a wrong to the bondholders to invest their moneys for the benefit of the railroad in securities which bore no interest.

We feel relieved of the necessity, at this time, of inquiry into any further wrongs which the bondholders may have sustained. As the practical mathematics of the case have been presented to us, a decree enforcing the above findings will give to plaintiff all the relief to which she is entitled. If this turns out not to be the case, full relief can be accorded at the time of the entry of a formal decree. This brings us to the branch of the defense upon which chief reliance is placed. This rests upon the legal consequences of the litigation to which reference is made. This resulted in a decree of the court of common pleas No. 5 in and for the city and county of Philadelphia, sitting in equity.

[3] The bill was filed at the instance of the railroad company as a holder of bonds. The plaintiff was the trustee under the mortgage. The defendant was the canal company. The railroad company and a large number of other bondholders intervened as parties in interest. The cause reached on appeal the Supreme Court of the state and is reported in *Rea v. Penna. Canal Co.*, 249 Pa. 239, 94 Atl. 833. The principle invoked here is the *res adjudicata* principle. The general purpose of the bill was to foreclose the mortgage. To one trained under the Pennsylvania system of laws the legal effect may be best expressed by analogy to a judgment in a *scire facias sur mortgage* proceeding and a decree distributing the fund raised by a sale made under such proceeding. It must be that the decree referred to settled all questions which in legal intendment were involved in the issues there raised. It therefore is the law of the case, and is conclusive of the subject-matter of which and upon the parties of whom the court had jurisdiction and their privies.

Such a proceeding is essentially one in *rem*. The *res* at first is the property then subject to the lien of the mortgage and which might be taken and sold in satisfaction of the mortgage debt. It afterwards embraces the fund which is raised by the sale of the mortgaged premises under the foreclosure proceedings. The issues raised are determined by the pleadings. The judgment in the *sci. fa.* proceeding ordinarily determines the amount for which the plaintiff may have execution against the mortgaged premises, which premises he may sell under the execution and that he may sell whatever estate or interest any one who is a party to the proceedings and subject to the ju-

risdiction of the court has in the premises bound by the lien of the mortgage and affected by the judgment. The decree of distribution determines what the fund is to be distributed, and to whom, and in what order, and in what proportions it is to be paid. If a subsequent action be brought in the same or another court affecting the same subject-matter, or the same parties, as, for illustration, an action in ejectment, or upon the bond accompanying the mortgage, the *sci. fa.* judgment concludes only the parties to it or their privies in person or estate, and settles only the questions involved in the issues raised or disposed of. If two or more courts have concurrent jurisdiction of the same subject-matter or parties, no one of them will assume to retry what one of the others has thus disposed of, or, if the cause is still pending, to interfere with the exercise of the jurisdiction first asserted. After, however, the first court has rendered its final judgment, and another suit is brought in another court for a different cause of action, although relating to the same subject-matter and affecting the same parties, the second court will proceed to render judgment holding the parties to be concluded only as to those matters which were involved in the judgment first rendered.

This is the recognized application and limitations of the *res adjudicata* principle. It was applied by anticipation on the demurrer filed in the present case. The averments of the bill of complaint disposed of by the decree of the state court can be gathered from the prayers of the bill. These were, in addition to the final usual general relief prayer, 11 in number. They cover a finding of the mortgage to be a lien and upon what property it was a lien, a finding of what was due upon the mortgage, interest and principal, a finding that the interest was to be first paid, and a decree that the defendant canal company pay the amount so found to be due. In case of the failure of the defendant to pay, the bill prayed for additional decrees. These included a foreclosure of all equity of redemption in the owners of the mortgaged premises, a decree for the sale of the premises directed to be sold, a decree that the moneys in the hands of the trustee representing the parts of the mortgaged premises which had previously been sold be distributed in a certain way, a like decree with respect to the proceeds of the sale directed to be made, a decree that the defendant pay any deficiency in the moneys required to meet the mortgage debt, a decree providing for payment of the purchase moneys by the purchaser, and a decree for the execution and delivery to the purchaser of a deed for the purchased premises.

It is too clear to require statement that the decree of a court of competent jurisdiction, as already stated, must settle as between all persons bound by the decree all questions involved in it. The prayers of the bill in the present case, asking for a decree inconsistent with the decree already made in the foreclosure proceeding above mentioned, must therefore be denied. This denial is on the double ground that the decree so made is now the law of this case, and also because inconsistent decrees would evoke a condition of conflict which would be intolerable. This applies as well to the *res* as to the parties, and is so obvious as to forbid comment. Two courts having concurrent,

but neither having appellate, jurisdiction over the other, cannot enter conflicting decrees, binding the same parties or affecting the same res, without producing a confusion which cannot be cleared otherwise than upon the theory that one of the decrees is void or gives way to the other. The only way to avoid this is to follow the doctrine of comity before, and to apply the res adjudicata principle after, the decree has been made. The res adjudicata principle must not be confounded with that other principle, from which it is entirely distinct, upon which courts of the United States will, in some cases, follow the rulings of the state courts. In the class of cases in which the latter principle is applied, it is of broader application than the res adjudicata doctrine, and extends to all cases in which a like question of law arises. The doctrine which is invoked by the defense has its limitations and will not afford protection from claims not involved nor adjudicated in the former proceeding. Applying the doctrine to the case now before us, the decree in this prior proceeding in no way involved the equitable principle upon which the present plaintiff's claim is based, nor the liability of the present defendants to account to the plaintiff or to any other bondholders for the loss which was sustained by the diversion of moneys from the sinking fund or depleting this fund for the benefit of the railroad company. This is the only finding the relief to which plaintiff is entitled calls upon us now to make.

[4] The final stand of the defense (in the order in which we have considered the defenses raised) is upon the question of fact. It is doubtless true that the mere fact that one has benefited by the act of another, resulting in loss to a third person, does not render the party benefited responsible for the loss, nor are majority stockholders answerable for the default or even the misconduct of their corporation merely because they are majority stockholders. It is also doubtless true that there is no direct evidence that the Pennsylvania Railroad Company had by any corporate action anything to do with the sinking fund of the canal company. Every corporate act, except such as those which are performed through parliamentary forms of procedure, is done through and by some person or persons. When such persons are acting for the corporation, the only direct evidence which can be had of that fact is their own declaration, or a recorded resolution of its board of directors. If the persons have like relations to two or more corporations, this truth is emphasized. Their corporation, or, if they were connected with two or more, either or any of them, might be found from all the evidence to have done what was done. If the individuals who brought it about that moneys which should have gone to the sinking fund were diverted to the payment of interest, and who invested the sinking fund moneys in bonds and then canceled the bonds, had themselves profited by what they did, as the railroad company has profited, they would certainly be held to the finding that they as individuals controlled their actions as officials. How, then, without throwing away substance for shadow, can we refuse to make a like finding against a corporation under like facts and circumstances? If an individual, who is in an equivocal position, in the sense that he may act for himself or for a corporation of which he is an officer,

acts so that moneys which should have gone to the corporation go to him, he is liable to account for the unlawful gains. Why should not the same inferences, upon which this liability is based, be found against one of two corporations similarly placed? The basis of the finding is not bad faith, but it is an inference required to be drawn by a policy of the law, which, in turn, is based upon hard common sense. No man can serve two masters, and when he is in the service of two nominal masters whose interests conflict he is presumed to have acted for that one who is found to have been the real master.

The findings, so far as deemed necessary to be now made, are embraced in the following conclusions:

1. It was the right of the bondholders under the Pennsylvania Company mortgage to have the net earnings of the company above operating costs and other charges and before payment of the interest due on the bonds applied (up to the limit of \$20,000 per year) to the sinking fund provided for the payment first of the principal of the bonds at maturity.

2. It was also the right of said bondholders to have the moneys paid into said sinking fund kept invested in interest-bearing securities until the principal of the bonds became payable.

3. The said earnings of the canal company were diverted to the payment of interest coupons, to the benefit and advantage of the Pennsylvania Railroad Company, and to the equivalent loss of the plaintiff and other bondholders, amounting, with interest, to a sum to be stated in the decree to be entered.

4. Moneys of the sinking fund, amounting to the principal sum of \$159,000, were invested in bonds of the canal company, and the bonds were canceled, to the benefit and advantage of the said railroad company, and the consequent equivalent loss to the plaintiff and other bondholders, amounting to a sum to be found, in interest which should have been in the sinking fund and applicable to the payment of the mortgage debt.

5. The diversion of the net earnings of the canal company, and the investment of the sinking fund moneys in said bonds, and the cancellation of the bonds, was done by the said railroad company in the name of the canal company, through its officers and agents, acting for and by command of the railroad company.

6. The said railroad company is answerable to the plaintiff for the loss she has sustained by reason of the said acts. The amount of said loss is found to be the sum of \$7,000, with interest from July 1, 1910.

7. The plaintiff is concluded by the decree of the court of common pleas No. 5, in and for the city and county of Philadelphia, Pa., sitting in equity, entitled as of December term, 1910, No. 4799, upon all questions involved in the issues raised in said cause and disposed of by said decree. The said plaintiff, however, is not precluded by said decree from making claim for the loss sustained by her and embodied in conclusions 1 and 2 herein.

8. The plaintiff is entitled to costs.

The draft of a decree carrying into effect the above findings may be submitted, and leave is granted plaintiff to move for further findings

upon any other claims for equitable relief set forth in the bill filed by her, should such findings be necessary to afford the plaintiff full relief. As we understand the practical mathematics of the case, no further findings are called for. Whether they are can be determined when a form of decree is submitted.

OTTS v. I. M. LUDINGTON'S SONS, Inc., et al.

NICHOLSON v. SAME.

(District Court, W. D. New York. October 15, 1914.)

1. CANALS Ⓒ18—OBSTRUCTION BY CONTRACTOR—INJURIES TO VESSELS.

A contractor for the widening and deepening of a state canal is bound in the exercise of reasonable care to ascertain from time to time as the work proceeds the depth of water in the canal and the condition of its prism in the locality, in order to avoid interference with navigation, and is liable for injuries to vessels caused by obstructions due to the work, whether by itself or by a subcontractor.

[Ed. Note.—For other cases, see Canals, Cent. Dig. §§ 20-24; Dec. Dig. Ⓒ18.]

2. CANALS Ⓒ18—OBSTRUCTION BY DREDGING CONTRACTOR—LIABILITY FOR INJURY TO VESSEL.

Injury to a canal boat forming part of a tow in the Erie Canal by striking a boulder left projecting from the bottom by respondents, who as contractors were engaged in dredging, *held* due in part to the negligent navigation of the tow, in failing to see or heed a buoy placed by respondents to mark the obstruction, and in part to the failure of respondents to sufficiently mark the place; there being four of the boulders at considerable distances apart.

[Ed. Note.—For other cases, see Canals, Cent. Dig. §§ 20-24; Dec. Dig. Ⓒ18.]

3. ADMIRALTY Ⓒ50—BRINGING IN NEW PARTIES.

Where the owner of canal boats comprising a tow in the Erie Canal brought suit to recover for an injury to one of such boats by striking an obstruction left in the bottom of the canal by respondents, who were contractors, and also as bailee of cargo lost, it is within the discretion of the court to permit respondents to file a cross-libel under admiralty rule 59 (29 Sup. Ct. xxxix) bringing in libellant's vessels, even after trial of the case has commenced.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 414-429; Dec. Dig. Ⓒ50.]

4. CANALS Ⓒ18—OBSTRUCTIONS LEFT BY CONTRACTOR—INJURY TO VESSELS.

A contractor and subcontractor, engaged in deepening the Erie Canal, *held* liable in part for injury to a passing canal boat by striking a rock left by them on the bottom of the canal; and the boat also *held* in fault for failure to exercise proper care, in view of a previous stranding, which caused her to leak and increased her draft.

[Ed. Note.—For other cases, see Canals, Cent. Dig. §§ 20-24; Dec. Dig. Ⓒ18.]

In Admiralty. Separate suits by Joseph W. Otts, individually and as trustee and bailee of the cargo late laden on the canal boat Cumberland, and also by Charles Nicholson, individually and as trustee and bailee of the cargo late laden on the canal boat C. E. Collard, against

I. M. Ludington's Sons, Incorporated, and George W. Beeman. Decrees dividing damages.

Decrees affirmed 229 Fed. 538, — C. C. A. —.

Brown, Ely & Richards, of Buffalo, N. Y., for libelants.

Lewis, McKay & McMillan, of Rochester, N. Y., for respondents.

HAZEL, District Judge. Two canal boats, the C. E. Collard and the Cumberland, sustained damages by stranding on a submerged obstruction at the bend of the Erie Canal between bridges 115 and 116 in August and October, respectively, of the year 1911. In the libel filed in each case it is substantially alleged that the obstruction resulted from the use of a dipper dredge in the excavation of the barge canal, by which stones or boulders and other material were loosened or raised and left unguarded, so that they became a menace to navigation. Both cases were tried as one, the parties stipulating that the testimony in the Cumberland Case be considered in the Collard Case in so far as it applied.

Under contract No. 62 with the state of New York the respondent I. M. Ludington's Sons, Incorporated, was engaged to widen and deepen a section of the canal, and it entered into a subcontract for a portion of the work with the respondent Beeman, the operator of the dipper dredge which rolled the stones or other obstruction in question over into the bed of the old canal, which was higher than the newly excavated portion, decreasing the navigable depth of the water, so that it became and was insufficient for canal boats drawing 6 feet or more of water. Under sections 17 and 23 of said contract I. M. Ludington's Sons, Incorporated, was no doubt liable for damages caused by obstructions such as rock, débris, etc., in the canal unless such obstructions were guarded by watchmen, or marked by placards, or warning of their presence given in some other way.

[1] In the performance of work of this character a contractor is bound in the exercise of reasonable care to ascertain from time to time, by dragging or by some other suitable means, the depth of water in the canal and the condition of its prism in the locality where he is engaged, in order to avoid interference with navigation. The authorities bearing on this subject are many, and it will no doubt suffice to cite *Adsit v. Brady*, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *French v. Donaldson*, 57 N. Y. 496; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; and in this district, *Huntley v. Empire Engineering Co.* (D. C.) 189 Fed. 516, affirmed 211 Fed. 959, 128 C. C. A. 457. The initial question therefore in each case is whether the injury to the canal boat was due to the fault or negligence of the contractor, the subcontractor, or both. The duty of keeping the canal free from obstructions, or of adequately warning navigators of the danger therefrom, rested upon the principal contractor, as well as upon the subcontractor, by whose negligence the obstacle to navigation was actually created. By section 23 of the contract in question it is provided that the contractor shall be liable for damages resulting to the work, or from the work, during its progress, and as the dredging which raised the stone or obstruction in ques-

tion had direct relation to the work, and was not merely a collateral undertaking, the principal contractor cannot avoid responsibility therefor. *Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485; *McCafferty v. S. D. & P. R. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267.

At the time of the accident to the Cumberland, she was made fast, pushboat fashion, ahead of the steam canal boat Columbia, which had three consorts in tow, including the pushboat, arranged in pairs and proceeding at the rate of $2\frac{1}{2}$ miles an hour. An exhibit photograph of the bed of the canal, taken after the water was let out, showing a point about 1,000 feet easterly from bridge 116, discloses four stones or boulders of different sizes, from 33 to 56 feet apart, laying in a line lengthwise of the middle of the canal. Such stones, projecting into the water from 1 to $1\frac{1}{2}$ feet above the adjacent ground and menacing navigation, concededly were not in the prism of the old canal in the spring of 1911. It is not definitely proven which of these stones or boulders the Cumberland struck; but, as several of them were rust-marked and indented, it is believed that such markings were caused by the stem irons of passing canal boats, and that the stem iron of the Cumberland contributed thereto. There was, however, other reliable evidence to justify the inference that she struck something, doubtless one of such stones, at about the point where the canal boat Collard had previously struck, and that she later drifted to the bridge at Holley, about one-half a mile away, where she sank.

The principal defenses are that, even though it be assumed that the mishap occurred through impact with a stone obstruction at the point specified, there is nevertheless no fault attributable to respondents, for the reason that with the water at normal depth there was ample space above the stone or other obstruction to permit the Cumberland to navigate in safety, and that a buoy sufficiently marked the immediate locality of the obstructions, so that, if the tow had been carefully navigated, the obstructions could, and no doubt would, have been avoided.

There was considerable conflicting testimony as to the depth of the water over the highest obstruction shown in the photographs in evidence, and the respondents assert that by their contract they were to provide a depth of water of simply 6 feet, and that, having done so, they cannot be held liable; and they claim further that they had received instructions from the superintendent of public works of the state, under whose supervision the barge canal is now in process of construction, that it would be sufficient to maintain 6 feet of water over stones, débris, or other obstructing material. In view, however, of my conclusions on the evidence relating to the maintenance of a buoy at the place of the accident to impart warning of obstructions, the question of the depth of the water over the obstructions, or the correct interpretation of the instructions given the contractor by the inspector, need not be passed upon. It is enough that the submerged obstruction upon which the Cumberland struck was in the prism of the canal and interfered with navigation of boats drawing 6 feet of water.

[2] I therefore pass to inquire whether the submerged stones or other obstruction with which the Cumberland came in contact were

distinctly and sufficiently marked. Testimony has been given tending to show that from August 11, 1911, the day the Collard grounded, throughout the months of September and October, and in fact to the close of navigation, the immediate vicinage of such stones or other obstruction was first marked by an iron rod, then by a scantling, and later by a beer keg painted white. If it is true that the obstruction upon which the Cumberland struck, or its reasonable vicinity, was distinctly and sufficiently marked at the time of the accident, respondents, in my opinion, performed their full duty to her, for the master of the tow was bound to take notice of all buoys or safeguards to navigation placed in or along the canal, especially where he perceived that work was going on. By the testimony of the witness McCarthy, an employé of the contractor, it appears that a lantern was placed each night on either side of the canal opposite a stake, scantling, or keg located in the canal at about where the Collard had struck, to indicate to boatmen the place of danger. There was much disputation as to the precise point where the buoy was placed and maintained. I am satisfied by the evidence that it was placed in the immediate vicinity of the stones shown in the exhibit photographs, 40 or 50 feet from the towpath side of the canal, but that it was not placed to specifically mark the said stones or boulders. The proofs are that the buoy was about 1,000 feet from bridge 116 over a high point in the canal bed, supposedly where the Collard had struck, or near thereto. There were many witnesses who testified that in passing on the towpath, or in performing their work on the canal, they often perceived the buoy or mark, others that they saw it daily, yet none was able to distinctly and definitely swear that it was in place at the precise time of the accident.

Importance is properly attached by respondents to the testimony of the witness Howe, who remembers that the keg was substituted for a stake because the stakes were usually knocked down by passing boats, and who from daily observation swears that such keg buoy was in place in the canal until the close of navigation. On cross-examination he declined to swear that the buoy was in place on the day of the accident, or on every day, yet his testimony impresses me favorably, and is not to be entirely ignored because he had no recollection of the precise position of the keg on the day of the accident, or on any other specified day. The witness Wise also testified that the buoy remained in place in the canal throughout the season, being replaced when knocked down by passing canal boats. The witness Fowler testified that he frequently saw the buoy, and that it remained in the canal until the water went out in the fall of the year; that at first there was a light on the stake, and that later lights were placed on the berm and towpath sides of the canal opposite thereto. He was unable to fix the day when the Cumberland sank, but was certain he saw the buoy from time to time up to such occurrence. The witness Campbell swore that it was his work to put out the lantern at night on the bank of the canal at, or near, the place of the accident, and to take it in in the morning, and that on such occasions he saw the buoy out in the canal.

The version of the witness Hiram Davis, a disinterested boatman, was that he also frequently saw the buoy while on his boat traveling from Hulberton to Rochester; that he saw the stakes that were driven into the bed of the canal, and later the white keg, together with the light on the berm side of the canal; and he testifies that there never was a time that the buoy was not there when he passed through. The witness Beeman substantially testified that after the keg replaced the stake it was anchored in the canal until the fall of the year. He conceded that occasionally passing boats would drag it out of place, but asserted that it was always put back, and that he saw it two or three times a day as he went back and forth to his work, and that on the day following the impact the keg was "in the canal, up where the Collard hit."

It is true that the witness Defendorf, for the libelant, testified that he was standing on the deck of the Cumberland at the time of the accident, alongside of the wheel, looking forward, and that he saw no keg in the canal in that vicinity, and that none was there at the time; still, as he was not on duty at that time, and the responsibility of lookout did not rest on him, I am disinclined to give absolute credence to his testimony on this point. Peter Quinn, the wheelsman at the time of the accident, was not produced, and no satisfactory explanation for not swearing him appears in the record. It should, however, here be stated that within the past few days, while this case was under consideration by the court, an application was made for leave to produce him and to take his testimony in rebuttal; but to grant such an application at this stage of the proceeding, on the excuse that he could not heretofore be found, in the face of the fact that he was in attendance on the court at the beginning of the trial, would not, in view of the circumstances, be a proper exercise of the discretionary power of the court. As Captain Otts, who was navigating the tow, was not on deck at the time of the accident, and as Quinn acted as steersman and lookout aboard the pushboat, his failure to give testimony cannot pass unnoticed. He was such an important witness that something should at least have been done to procure his testimony in rebuttal regarding the claim of respondents that a buoy marked the spot where the Cumberland struck. Under the circumstances the inference may, I think, fairly be drawn that his testimony would have shown that there was a buoy or mark, as claimed by the respondents, at or near the point where the accident occurred, which should have been sufficient notice to him to proceed at this point with carefulness and precaution away from the middle of the canal, over towards the towpath side, where the water was concededly of ample depth for safe passing. As the accident occurred at 1 o'clock in the afternoon, it should not have been difficult for him to have seen the white keg at a reasonably safe distance away, and failure to do so must be attributed to carelessness. If, on the other hand, he did see the buoy, the speed of the tow should have been reduced, and she should have proceeded at this point carefully and prudently. Having failed to do so, she must be held to have been negligently navigated, and therefore in partial fault for the injuries sustained by her.

Although in my judgment it was unnecessary for respondents to separately mark each obstruction in the canal, and while there are situations in which a single buoy might constitute sufficient warning to navigators to keep away from the middle of the canal, still I think the fact of there being a bend in the canal at the point in question, together with the fact that the canal boat Collard had previously struck in that vicinity, called for a better protection of navigation than was afforded by the maintenance at this point of a single buoy. The distance between the first and fourth stones was approximately 121 feet, with intervening spaces between the various stones of from 32 to 56 feet. If, after the accident to the Collard, the bed of the canal had been dragged with a rail, all the obstructions shown in the photographs would no doubt have been discovered and better protection given. Instead of this, the bottom of the canal was searched with a sounding rod, and a stake placed at what was supposed to be the highest point. The stones or boulders of the photographs were not found. The respondents were negligent in the performance of their contract with the state, because of their failure to sufficiently mark the place of danger. The burden of explanation was upon them, and their efforts to comply with the law by maintaining a single buoy at a point about 1,000 feet east of bridge 116 was insufficient notice or warning of the aforesaid obstructions. They were therefore also in fault for the mishap, and there must be a division of the damages.

[3] The libellant is the owner of the canal boats Columbia, Cumberland, Oswego, and Syracuse, comprising the tow at the time of the accident to the Cumberland. He has filed his libel as owner of such boats, and as bailee and trustee of the cargo aboard the injured boat. Neither the owners nor the insurers of the cargo have intervened herein. Under admiralty rule 59 (29 Sup. Ct. xxxix) a petition was filed by respondents while the trial was in progress for leave to file a cross-libel, in which it was prayed that in case the Cumberland and the respondents are both held in fault for the injuries sustained by the Cumberland, the other boats comprising the tow may be brought into the case and proceeded against, to the end that the entire loss may not fall on respondents. Libellant, however, objects to this petition on the ground that the rule did not contemplate the taking in of a party after the trial had commenced, maintaining that the issue to be presented by a cross-libel must be framed before the beginning of the trial. I am of the opinion, however, that the phrase "or within such further time as the court may allow," embodied in the rule, permits the bringing in of such other vessels or parties as in the judgment of the court ought to be proceeded against in the original action for a just and equitable settlement of the case. The cross-libel may be filed. Without the presentation of such issue the respondents would be obliged to pay the entire damage resulting to the boat and her cargo from the accident (*The Atlas*, 93 U. S. 302, 23 L. Ed. 863), unless they had recourse in personam against the libellants for contribution (*Erie R. R. Co. v. Erie & Western Trans. Co.*, 204 U. S. 220, 27 Sup. Ct. 246, 51 L. Ed. 450), and such action should not be enforced in this case, for the reason that the Cumberland and companion boats

were navigated as a single vessel, are owned by the same owner, and a proper adjustment of the damages without further litigation or expense can be had by bringing them into this proceeding.

[4] The mishap to the canal boat C. E. Collard may now be taken up. As heretofore intimated, she came in contact, in August, 1911, with an obstruction in the vicinity of the four stones shown in the exhibit photographs in evidence. Soon afterwards, under the direction of the subcontractor, the respondent Beeman, the obstruction was dynamited, and while there is no positive evidence to show that the Collard was injured by a stone or boulder, that she came in contact with a submerged refractory object in the bed of the old canal, which was raised or accumulated by respondents' dipper dredge, is fairly shown. Such obstruction was the approximate cause of her sinking, but I do not attribute to respondents the sole fault therefor.

It is shown that canal boats having a draft of 6 feet, drawn by horses or mules, require at least 6 feet and 1 inch of water in which to navigate with reasonable safety, and that at the time of the accident in question the water was at normal depth, or about 6 feet and 4 or 5 inches above the highest stone shown in the photographs. The witness Summer, the engineer in charge of the work for the state, testified substantially that there were 6 feet 7 inches of water in the canal over the highest obstruction, while the witness Wing, for libellant, assuming the correctness of respondents' testimony as to the water level, testified in effect that the highest obstruction was 6 feet 4.9 inches below the surface of the water at normal depth, and not 6 feet 7 inches, as testified to by the witness Summer. As the witness Wing is fairly corroborated by the respondents' witness Dernell, I incline to the belief that such lesser depth of water over the obstructions is fairly proven. Notwithstanding this discrepancy in the testimony as to the depth of the water over the obstructions, I think the Collard contacted the obstruction in question because she was at that point drawing considerably more than 6 feet of water as a result of her grounding at Hindsburg, five miles above Holley.

Libellant contends that this first grounding did not injure the Collard, and that she did not take on water as a result of it; but admittedly she was aground for upwards of half an hour, and her mules being unable to draw her off, it was necessary for a tugboat to release her. Her master and the witness Hudson, who was aboard the boat, deny that she leaked before she stranded at Holley; but I am in doubt as to such testimony, owing to the fact that three witnesses for respondents, who saw the Collard near bridge 116 at Holley before she fetched up on the obstruction, swore that just before grounding two of her crew were at her pumps, pumping fore and aft, which would seem to indicate that the Collard had received serious injury and that she was in fact taking on water. The probabilities arising from her difficulty in getting off the ground at Hindsburg and her advanced age—she was 17 years old—materially support the claim that she had sprung a leak, increasing her draft, and causing her to ground.

The dispute as to the depth of the water is complicated by the dynamiting done in that vicinity after the accident, but I am reluctant

to accept the view urged by libelants that the blasting was done to destroy evidence. It was, however, negligence on the part of the respondents to obstruct the highway of the canal upon which the libellant had the right to navigate, and such obstruction was, I think, the major, though not the sole, cause of the disaster. Although the Collard had the right to proceed to her destination without encountering obstructions placed in the bed of the canal by the contractor, yet it was her duty to exercise care and diligence in her navigation. Having taken on water in consequence of her grounding at Hindsburg, she should have delayed and reduced her draft, or in any event should have proceeded with care commensurate with the knowledge that an increase in her draft over the legal draft would subject her to risk and danger, especially where the barge canal work was in progress.

That respondents had no actual knowledge of the obstructions in question will not relieve them from responsibility therefor. It was their duty under their contract with the state to deepen and widen the canal, and in so doing to maintain it in navigable condition. They are therefore presumed to have known that to permit excavated stones, débris, or other material to remain in the canal would menace navigation, and even though they did not believe it dangerous they were nevertheless bound either to remove it or to see that it did not in any way interfere with the passage of canal boats or create a condition rendering it improper for them to use it as before.

The views expressed herein lead to the conclusion that as to the injuries sustained by both the Cumberland and the C. E. Collard the respondents I. M. Ludington's Sons, Incorporated, and George W. Beeman, jointly, are in fault with the libelants, and therefore the damages and costs must be equally divided between the wrongdoers; in the case of the Cumberland, the respondents jointly paying one half and the tow jointly paying the other half, and in the case of the Collard, the canal boat C. E. Collard and the respondents jointly must equally bear the loss.

Decrees may be entered accordingly.

RUSSELL et al. v. SHIPPEN BROS. LUMBER CO. et al. (BURTZ et al.,
Intervenors).

(District Court, N. D. Georgia. December 17, 1915.)

No. 71.

ATTORNEY AND CLIENT [↔](#)166—EMPLOYMENT OF COUNSEL BY CORPORATION—
VALIDITY OF CONTRACT.

A contract, made by a corporation, by its president, and ratified by its board of directors, employing attorneys to defend the corporation in a pending suit and to resist the appointment of a receiver, which they did successfully, *held* legal and valid, and to entitle the attorneys to recover the fee agreed upon therein, on their discharge by a subsequent board of directors.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 368-372; Dec. Dig. [↔](#)166.]

[↔](#)For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Equity. Suit by Charles Russell and others against the Shippen Bros. Lumber Company and others. In the matter of the intervention of A. H. Burtz and Charles T. & Linton C. Hopkins. On exceptions to master's report. Overruled, and report confirmed.

See, also, 224 Fed. 254.

Charles T. & Linton C. Hopkins, of Atlanta, Ga., and A. H. Burtz, of Ellijay, Ga., for interveners.

D. W. Blair, of Marietta, Ga., for defendants.

NEWMAN, District Judge. The intervention in this case was referred to Frank E. Callaway, Esq., standing master, and his report is as follows:

"I, Frank E. Callaway, standing master, to whom this intervention was referred by the court's order of July 10, 1915, for the purpose of investigating the issues of law and fact presented by the pleadings in said intervention, respectfully report as follows:

"The intervention was assigned for a hearing before me on September 21, 1915, by consent of parties, and came on for a hearing on that date. It proceeded from time to time and day to day, as is disclosed by the stenographer's report of the evidence, until the evidence was all in and argument made by counsel. The evidence introduced consists of the original record, pleadings, and the evidence introduced upon the various hearings of the above-stated cause before Hon. Don A. Pardee and Hon. Wm. T. Newman, with the orders thereon; also the testimony of various witnesses, which was stenographically reported.

"In response to a notice to produce by plaintiff in the intervention, an agreement was filed and is a part of the evidence in the case, same being signed by attorneys for plaintiff and defendant in the intervention, this agreement relating to the holdings of the Shippen Bros. Lumber Company, and also an agreement that Exhibit E, attached to the original intervention in this case, represents legal formal action had by the board of directors of Shippen Bros. Lumber Company, that said action is binding upon said company, and also that Exhibit F is a correct copy of a letter sent by Shippen Bros. Lumber Company through its president, Charles E. Patton, on February 20, 1915.

"All of said evidence is herewith filed and accompanies this report. All objections to the evidence are duly noted, as well as exceptions to the rulings of the master, and same are fully disclosed by the stenographer's report of the trial. After considering all of the evidence and argument, I make the following report:

"Findings of Fact.

"(1) I find that on September 5, 1914, the original bill for receiver against the Shippen Bros. Lumber Company was filed and presented to Hon. Don A. Pardee, United States Circuit Judge, who was authorized to hold the District Court of this district. Two or three days after the filing of that bill, interveners were employed by the president and general manager of the Shippen Bros. Lumber Company to defend the company in the litigation. At that time, it was directed alone against the corporation.

"(2) I find that supplemental bill and amendments filed by complainants brought in other parties as parties defendant, namely, W. H. and F. E. Shippen, but all of said bills and amendments reiterated the original prayers for the appointment of a receiver, and I find that interveners successfully represented the corporation in those matters.

"(3) I find that a verbal contract was made by W. H. Shippen, president of the Shippen Bros. Lumber Company, with interveners to represent the company in this litigation at the time that the original bill was filed, and I find that later on, namely, on October 2, 1914, this verbal contract was reduced to writing as follows:

“Georgia, Fulton County.

“Messrs. A. H. Burtz and Charles T. & Linton C. Hopkins are hereby employed to represent the Shippen Bros. Lumber Company in the case of Russell et al. v. Shippen Bros. Lumber Company et al., pending in the United States District Court for the Northern District of Georgia. In the event said litigation should be lost and a receiver appointed, the fee is to be forty-five hundred (\$4,500.00) dollars; in the event the litigation is successfully defended, and no receiver is appointed, then the fee is to be seventy-five hundred (\$7,500.00) dollars. This contract imposes no personal responsibility upon either W. H. or F. E. Shippen.

[Signed] Shippen Bros. Lumber Co.,

“W. H. Shippen, Pres.”

“(4) I find that the employment of interveners was ratified by the board of directors of the Shippen Bros. Lumber Company at a meeting held in October, 1914, and said board was adjudged by Hon. Wm. T. Newman, in the litigation, to be the legally constituted board of directors. I find that the following resolution was passed by the board:

“Be it resolved by the board of directors of the Shippen Bros. Lumber Company that:

“Whereas, Messrs. Charles T. and Linton C. Hopkins, attorneys at law, of Atlanta, Georgia, and Mr. A. H. Burtz, Ellijay, Georgia, appear of record as attorneys for Shippen Bros. Lumber Company in the litigation of Chas. S. Russell et al. v. Shippen Bros. Lumber Company et al. in the District Court of the United States of the Northern District of Georgia; and

“Whereas, there is a conflict of interest between Shippen Bros. Lumber Company and William H. and F. E. Shippen, it is not deemed by this board proper that the interest of this company and Wm. H. and F. E. Shippen should be represented by the same attorneys in said cases:

“Be it further resolved, that the president of this company is given the full power and authority of this company to discharge attorneys in any case now pending or which may hereafter be brought for or against said Shippen Bros Lumber Company, and to employ other counsel to represent the interests of this company in such cases now pending or to be hereafter brought and in such other matters which in the advice of counsel may be by him deemed necessary.”

“(5) I find that the duties of the president of the Shippen Bros. Lumber Company, as shown by the by-laws of the company, were as follows: ‘Subject to their by-laws and to such regulations as the board of directors may, from time to time, make, the president shall have the chief management, control, and supervision of the affairs of the company. It shall be his duty to preside at all meetings of the board, to preserve order, and promote the regular and speedy transaction of business. All purchases, repairs, and contracts shall be made under his authority, except when otherwise provided by the board. He shall fix the price for all lumber, shingles, lath, and all material sold by said company, and determine and regulate the terms upon which the same are to be sold, all of which is subject to the approval of the executive committee.’

“(6) I find that said employment in behalf of the corporation was recognized by adverse counsel and the court, and that upon the record and evidence produced in behalf of said corporation a receivership was denied.

“(7) I find that on February 20, 1915, the present board of directors of the Shippen Bros. Lumber Company impliedly recognized the employment of said interveners, in that said board authorized the president to sever interveners’ representation of the corporation, and that in pursuance of said authority the president did sever said representation.

“(8) I find that the services of interveners were beneficial to the corporation; that Hon. Wm. T. Newman has adjudged that no receivership could be had for the corporation upon any of the grounds alleged in any of the pleadings.

“(9) I further find that the fee stipulated for in the contract was reasonable. Expert testimony upon this point was to the effect that the importance of the representation and the work done, and the size and assets of the corporation, would have authorized a much larger fee.

“(10) I find, from the evidence produced, that the assets of the corporation amount to at least \$750,000, if not more, and that the liabilities did not exceed \$95,000.

"(11) I further find that the contract of employment was within the scope of the authority of the president, and ratified by the board of directors, which was the then legal board, and that same was not in conflict with the corporate interest, and that the services rendered were material and directly in line with the corporate interest.

"Findings of Law.

"I therefore find that interveners are entitled to recover of the Shippen Bros. Lumber Company the principal sum of \$7,500, with interest at 7 per cent. from February 20, 1915."

The conflict as to which of two boards of directors was the legal board of directors of the Shippen Bros. Lumber Company has already been determined; this court having held that the stockholders' meeting attempted to be held at Ellijay, Ga., on September 16, 1914, was without effect as to the election of a board of directors, on account of the confusion that existed. There was a ruling by the court to this effect in the opinion filed November 13, 1914, in which this was said:

"I am satisfied that the attempt to hold a stockholder's meeting and an election of directors at Ellijay in September was a failure. I do not believe that any proper and legal election of directors was held. The minutes of two meetings are presented, and they show such unsatisfactory proceedings held as, in my opinion, the court should decline to consider it a valid election either way."

So that, until the regular annual election held sometime thereafter, W. H. and F. E. Shippen and their associates were the regular authorized board of directors of the company. This board of directors employed Mr. Burtz and Messrs. Hopkins, as will be seen by the contract made, to resist the application for a receiver and the appointment of a receiver for the Shippen Bros. Lumber Company.

While it is true that there was a conflict of interest between the Shippens individually and the Shippen Bros. Lumber Company, I am not prepared to disagree with the master, who held in effect that that had nothing to do with this particular matter. The effort on one side was to have a receiver appointed for the company and on the other side to resist it. I thought then, and think now, that there was no necessity for a receiver, and I further thought then, and think now, that it would have been injurious to the interest of the Shippen Bros. Lumber Company if a receiver had been appointed for it.

I think the arrangement with Messrs. Burtz and Hopkins as attorneys must be considered a contract between them and the corporate entity, the Shippen Bros. Lumber Company. Certainly it cannot be considered so clearly otherwise as to justify the court in differing with the master's conclusions. The purpose of the bill originally, and at the time counsel were employed in the case, was mainly to have a receiver appointed for the company's property, and while this was subsequently changed by supplemental bill and amendments to include other defendants, the application for a receiver ran all through the proceeding and was continued until a receiver was denied by the court. Even if the court could interfere with the enforcement of this contract upon the ground that the fee was excessive, I am not prepared to say, in view of the amount involved, that it was so excessive as to

justify such interference. The master has found that it was a reasonable fee, and indicated in his report that it might well have been larger. He says:

"Expert testimony introduced upon this point was to the effect that the importance of the representation and the work done, and the size and assets of the corporation, would have authorized a much larger fee."

He further finds that the assets amounted to at least \$750,000, and that the liabilities did not exceed \$95,000.

I am satisfied that all of the exceptions to the master's report should be overruled, and the report confirmed; and it is so ordered.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
(and three other causes).

(District Court, S. D. New York. December 9, 1915.)

Nos. 2-149, 2-33, 3-27, 3-37.

1. CORPORATIONS ⚡566—RECEIVERS—DISTRIBUTION OF ASSETS—RIGHT TO PREFERENCE.

In determining the right of contract creditors for supplies, etc., to preference from the estate of an insolvent railroad company, special circumstances may justify the allowance of preference to claims accruing prior to the arbitrary period generally settled upon.

[For other cases, see Corporations, Cent. Dig. §§ 2283-2286; Dec. Dig. ⚡566.]

2. CORPORATIONS ⚡566—RECEIVERS—DISTRIBUTION OF ASSETS—RIGHT TO PREFERENCE.

Where a lessee of a street railroad system succeeded the lessor in its operation, the operating officers and employes being largely the same, the fact that an order for operating supplies received and used by the lessee was written on a blank form of the lessor is not sufficient to defeat the right of the person furnishing the supplies to a preference on distribution of the estate of the lessee in insolvency.

[For other cases, see Corporations, Cent. Dig. §§ 2283-2286; Dec. Dig. ⚡566.]

3. CORPORATIONS ⚡566—RECEIVERS—DISTRIBUTION OF ASSETS—RIGHT TO PREFERENCE.

Claims for supplies furnished to a street railroad company *held* properly allowed preference from its estate in insolvency, if (a) the material ordered is shown by the requisition, and by its quantity and nature, and by the department of the company for which it was intended, to be of an operation character, and was charged to operation; or (b) if it is of an operation character, or delivered to the engineer of maintenance of way or other operating head, and was not charged to construction stores; or (c) where, although charged to construction stores, it was in quantity and character adapted to purposes of operation, and actually used for such purposes. Various claims also considered as to whether or not they came within either of such classes.

[For other cases, see Corporations, Cent. Dig. §§ 2283-2286; Dec. Dig. ⚡566.]

In Equity. Suit by the Pennsylvania Steel Company and another against the New York City Railway Company and another, with three other causes. In the matter of claims for preference by certain contract creditors.

By decisions of this court (208 Fed. 168) and of the Circuit Court of Appeals (216 Fed. 471, 132 C. C. A. 518) it was determined that

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

certain type claims were to be paid in full, with interest at 6 per cent. from the average due date of each claim. These type claims generally covered supplies necessary for the daily maintenance of a railroad as a going concern. The Circuit Court of Appeals indicated the test by which the character of such supply claims was to be determined as follows:

"They must be of such a quantity and to be paid for at such times as to indicate that they are necessary for current operations and are to be met out of current earnings. Direct evidence as to the latter condition is not necessary. The court may draw the inference that this was the expectation of the parties from the circumstances attending the transaction."

In the light of these decisions more than 200 separate claims were taken up for investigation by the special master. Evidence was taken, and all the claims separately disposed of, such disposition being included in a single report, accompanied by an opinion (a copy of which will be reported as a note at the end of this opinion). Exceptions to parts of this report were duly filed, and the cause has come on for argument upon these exceptions.

Masten & Nichols, of New York City, for receiver of Met. St. R. Co.

Dexter, Osborne & Fleming, of New York City, for receivers of New York City R. Co.

Richard Reed Rogers and James L. Quackenbush, both of New York City, for New York City R. Co.

Byrne & Cutcheon, of New York City, for Pennsylvania Steel Co. and Degnon Contracting Co.

Benj. S. Cutching, of New York City, for tort creditors.

LACOMBE, Circuit Judge (after stating the facts as above). The hearing on these exceptions was had some time ago, the discussion was a long one, and many separate points were involved. Briefs were promptly filed, but the matter was not at once taken up because the court, mistakenly as it turns out, supposed that the contemplated adjustment of the entire proceeding would eliminate some of the controversies here presented. It is now understood that, whether such adjustment be or be not carried out, it is desirable that the findings of the special master as to these various claims be approved or disapproved by the District Court. The situation, however, apparently calls for no extended discussion of the law. A brief indication of the decision as to each group and the reason for it will be sufficient. We are more particularly concerned now with the disposition of this long drawn out proceeding than with the making of precedents for the disposition of future proceedings.

The various claims may be distributed into groups, according to the questions of law or practice presented. They will be treated here first by groups; thereafter individual claims which do not thus classify may be disposed of.

[1] First. The special master disallowed no claim, otherwise allowable, because of the time it accrued. No claim is asserted which accrued earlier than nine months prior to receivership. Exception has been taken to his allowance of any claims which accrued more than six months prior to receivership.

This brings up an interesting question of federal practice upon which there have been many opinions reported, by no means harmoni-

ous in their reasoning or conclusions. One proposition, however, is settled by repeated decisions of the United States Supreme Court, viz.: That special circumstances will justify the allowance of claims accruing earlier than the arbitrary period generally settled upon. Such special circumstance may well be held to exist in reference to the claims now under advisement, in the fact that in one of the type claims an item accruing before the six months period was allowed by the special master and by this court, certainly after argument upon the very point now raised. That item was a very small one, and may have escaped the attention of the Circuit Court of Appeals, which made no reference to it, nor to this question of time. It may be that, in the absence of an expression of its opinion, the decision is not citable as an authority on the point one way or the other; but it would seem that a uniform rule should be applied here to all claimants against this estate. Moreover, the amount of claims accruing prior to the six months is relatively small. The exceptions to the allowance of such claims, for reason stated, are therefore overruled.

[2] Second. The special master allowed certain claims against the City Company, where the blanks upon which orders for the supplies were given were forms of the Metropolitan Company. Exception was reserved to this ruling on the ground that it cannot be held that claimant relied on a preference against the City Company, when he knew, or had good reason to believe, that he was furnishing the supplies to the Metropolitan Company.

Legally these were two separate corporations; and this court and the Circuit Court of Appeals have repeatedly held that they are to be considered and treated as such in the accountings of these two estates. Nevertheless there are special circumstances to be considered. Undoubtedly it was generally understood in the community that the relations of the two companies were very close, that one had practically succeeded the other; of their mutual relations sellers knew or cared very little; what they sold they sold to the "system," which comprised both roads. There was the same purchasing agent for both roads; whether he used an old blank or a new one was not a matter the seller would be likely to give much thought to, so long as what the latter sold was of the nature and delivered in quantities to indicate it was needed for running the system. In some of these cases orders on "Metropolitan blanks" were given for supplies delivered in conformity with a written contract with the City Company; in others, a verbal order was given, and after it was filled a written order prepared as basis for a voucher. The exceptions to the master's decision on this point are overruled.

[3] Third. The special master allowed claims, whether on Metropolitan or on City blanks, as preferential (a) if the material ordered is shown by the requisition, and by its quantity and nature, and by the department of the railway company for which it was intended, to be of an operation character, and was charged by the City Company to operation; (b) if the material ordered is of an operation character, and was placed in general stores, or delivered to the engineer of maintenance of way or other operating head, and was not charged

to construction stores; (c) where, though charged to construction stores, it was in quantity and character adapted to purposes of operation, and actually used for such purposes.

I concur in these rules of disposition of the claims, and all exceptions to their application are overruled.

Fourth. In the Hugh Thomas proceeding it was held that there was a trust fund available to pay for certain supplies. Persons whose claims are presented here and now asked in that proceeding to have their claim decreed to be payable out of such trust fund. To a determination of that request it was not important to go into the question of intent of the seller at the time of sale. If his supplies were used for the purposes of the trust, the trust fund would pay for them. So much of these claims as were finally allowed against the trust fund are forever disposed of; the trust fund is abundantly solvent, and they have been or will be paid. To the extent, however, to which these claims were not allowed against the trust fund, the court differing from the special master as to some of his allowances, they are open to be disposed of as claims for operation supplies; if the evidence shows them to be such, they should be allowed preference here.

From the brief submitted by the Loraine Steel Company, which may be taken as an illustration of others, the special master in the apportionment proceeding allowed items aggregating \$77,940.61 as a charge against the trust fund. The same items being presented in this proceeding, he disallowed them, on the ground that they had been allowed in the former proceeding. But when the report in the former proceeding came before the court items amounting to \$47,044.57 were disallowed. These items should be passed upon in this proceeding in accordance with the rules above indicated. Quite probably this can be done by agreement of counsel upon settlement of the decretal order; if not, the special master can make a supplemental report on these items, and on any others where a similar complication exists.

Fifth. Items of supplies for repair and upkeep of the Cable Building and the Lexington Avenue Building.

These were large buildings, in part occupied by the corporation, but largely rented for offices and other commercial purposes. All these claims were apparently allowed. As to so much of them as covered supplies for the maintenance of the offices of the company in these buildings there can be no doubt about the propriety of their allowance. Supplies specifically for the convenience of tenants of portions of these buildings might be considered as standing on a different footing. In some instances, such as the claim of Otis Elevator Company, the claim should be allowed without pro rata, although it benefited the tenants. The offices of the company on the upper floors could not have been conveniently used without elevator service. The amounts involved are too small to call for any microscopic examination of the items. Exceptions to these findings of the master are overruled.

Sixth. Claims for liabilities incurred for the purpose of preserving or increasing fire protection; also claims for liabilities incurred in the restoration of property destroyed by fire.

Premiums paid for insurance of property devoted to the operation

of the system would seem to be a legitimate expense of operation. Commissions may be considered in the same class as premiums. Expenses incurred in making structural changes in the property, such as the substitution of concrete for wood in parts of a building, are not to be classified as operation expenses. Nor will such classification include supplies which the evidence shows were furnished for the restoration of property destroyed or damaged by fire. Tools, machines, and materials subject to destruction by use, and required for continuance of operation, are properly included in the special master's allowance. Exceptions are sustained or overruled as may be necessary to accomplish this result.

Seventh. The special master classified as preferred claims for material furnished to the department of the railroad company having charge of the defense of accident claims. I am inclined to differ from him on that point, but the amounts are small, and there is a plausible argument to support the classification; therefore his rulings on that branch of the case will not be disturbed. Exceptions thereto are overruled.

Eighth and Ninth. The special master's allowance of preference in the case of claims for materials furnished to the controlled companies, and his disallowance of claims for damages for breach of long-term executory contracts, are approved. Exceptions are overruled.

Tenth. As to the allowance of interest: The situation here seems more complicated than it really is by reason of the accidental circumstance that discussion and adjudication in reference to the trust came up earlier in time than did the questions now presented. If we consider the whole matter in logical sequence, all complications disappear. A person furnishes supplies to the railroad company; it goes into the hands of a receiver, and he files a claim for reimbursement out of its estate. He first proves sale and delivery of the supplies, and his claim is allowed against the estate for a specified amount. As to all, or as to some part, of his claim he thinks he can show himself entitled to a preference. He proves that the supplies were of such a character and were furnished under such circumstances as to give the preference, recognized by the law, for debts contracted for current operation supplies. In this proceeding that preference has been found to exist in the case of many of the claimants. It then appears that there is in existence a trust fund out of which payment will be made for all supplies actually used for a specific purpose. Some persons prove that they sold supplies with the express intention on the part of seller and purchaser that such supplies should be used for that specific purpose; also that they were so used. It is, of course, ordered that they be paid out of the trust fund. Other persons appear, who have proved that they sold supplies suitable for operation, with the understanding that they would be used for operation. They further prove that, contrary to such understanding, the supplies were actually used for the specific purpose contemplated by the trust. It is therefore ordered that they be paid for from the trust fund. If the amounts proved in both proceedings were alike, the claim would be paid out of the specific fund, if it were sufficient to pay all claims upon it, as it is. But the

amounts are not alike; a claim, when proved as a preferential one, is held entitled to a larger rate of interest (or increment) for a longer period than the same claim is held entitled to when proved against the trust fund.

Had the logical sequence been the chronological one, this is what would have happened: A.'s claim would have been proved as a preferential one for \$2,600; it would then have been proved as a claim against the trust fund for \$2,200. A. would have been required to take his pay first from the specific trust fund, so far as it would go; the balance (in that assumed case, \$400) he would then collect, as a preferred claim, from the general estate. As I understand it, this is substantially what the special master's findings as to interest results in, and upon that understanding the exceptions to those findings are overruled.

The findings of the special master as to general office supplies, etc., also as to the claims of the Brill Company and Sjoberge Company, separately briefed, are approved.

Any matters omitted may be brought up on settlement of the decree.

NOTE.—The following is the opinion of the special master, referred to in the opinion:

This memorandum indicates briefly rulings on general contentions suggested by disputed claims for preference, concerning which oral and written arguments have just been had. It is understood that they will determine the disposition of those of the claims for preference in assets of the City Estate upon which counsel have not been able to agree.

1. To the extent that claims, asserted both in the apportionment proceeding and in this proceeding, have been allowed in the former proceeding, such claims will be disallowed in this proceeding.

2. Where materials and supplies were furnished under circumstances and in quantities which justified the creditor in assuming that they were intended for purposes of operation, his status as a supply creditor was fixed at the time the receivers were appointed, and the fact that either before or after the receivership the materials and supplies were used for construction or were on hand on that date does not deprive him of such status.

3. A supply creditor, within the foregoing definition, whose claim has been wholly or partly allowed in the apportionment proceeding, is entitled to the difference between Trust Company accumulations received by him on the amount so allowed by the report in that proceeding, and the 6 per cent. interest allowed on the claims of the supply creditors in the Preference Matter. 132 C. C. A. 518, 216 Fed. 471. Claims for materials and supplies purchased for construction to the knowledge of the creditor, e. g., the gravel sold by the Hugh Thomas Company for use in the electrification of First Avenue, do not come within this ruling.

4. No claim for preference herein asserted, and otherwise entitled to allowance as such, is disallowed because of the time when it accrued. None is asserted which accrued earlier than nine months prior to the receivership, and the decision is that such a claim is not excluded solely for that reason. Same citation.

5. Claims for materials furnished to controlled companies are preferred under the ruling in the same case.

6. Claims for preference of amounts allowed for cost of repaving done, not at the instance of the authorities, but solely for purposes of repair necessitated by and necessary to operation, are allowed.

7. Preference of claims for material furnished to the department of the Railroad Company having charge of the defense of accident claims is allowed. Because accident claims which increase its difficulties have been held to be

not essential to operation (s. c. 216 Fed. at 471, 132 C. C. A. 518), it does not follow that obligations incurred in resisting them are not.

8. Claims for preference of amounts heretofore allowed for the repair and upkeep of the Cable Building and the Lexington Avenue Building are allowed. Both these buildings were acquired for and actually used in connection with operation, and in one, if not both, space was devoted to company offices in connection with administration. The fact that in either or both additional space had been rented for purposes not connected with operation should not, on the record here, deprive a creditor of his status as a supply creditor, and that, as it seems to me, without further specification, is the basis of the objection of Metropolitan interests to the allowance.

9. Preference of claims incurred for purposes of preserving or increasing fire protection is allowed. The City Company would have been compelled to incur such expenditures if it had owed no obligation whatever to lessors or mortgagees to effect insurance, unless it chose itself to assume the risk of the destruction of equipment and operating plant and a partial or complete cessation of operation. Such a risk the most solvent of operating companies would hardly care to assume, and it therefore seems to me that such expenditures were in a very real sense essential to operation. At all events, it must be remembered that there is absent in this case an element which in all the cases cited in opposition to preferences urged here was present there, viz., the necessity of displacing vested liens. Except in a very remote sense, if at all, neither the trustee of the Metropolitan mortgage nor the Railways Company, as assignee of the purchaser at foreclosure, can urge this very strong equity against the allowance of preferences in these unmortgaged assets constituting the City Company's estate, and this consideration may well be controlling where border line claims for preference are suggested.

10. Claims based upon Metropolitan blanks, which were disallowed in the apportionment proceeding are entitled to a preference (a) if the material ordered is shown by the requisition, and by its quantity and nature and by the department of the Railway Company for which it was intended, to be of an operation character and is charged by the City Company to operation; (b) if the material ordered is of an operation character, and was placed in general stores, or delivered to the engineer of maintenance of way or other operating head, and was not charged to construction stores; (c) where, though charged to construction stores, it was in quantity and character adapted to purposes of operation, and actually used for such purposes, facts which I have held in the Apportionment Matter deprive it of rank as a construction claim. In determining to recommend claims coming within any of these categories as preferred I am applying the law as stated by the court in this proceeding, and inferentially, if not expressly, affirmed on appeal, that "if, as matter of public policy, claims of this character are accorded special equity, they should have it, whether the vendor at the time of sale did or did not know that he was entitled to it." 208 Fed. 183; 132 C. C. A. 518, 216 Fed. 471.

11. No claims, whether originating on Metropolitan blanks or otherwise, which have not heretofore been allowed against the City estate, can be considered in this proceeding. A few of the claims have been briefed, and can be conveniently disposed of now in accordance with the foregoing rulings.

The items of the Eggleston claim allowed in the Apportionment Proceeding are disallowed, without prejudice to an allowance here of the difference in interest on such of the items as were not to the direct knowledge of the creditor purchased for construction, but on the facts disclosed by the record were entitled to rank as supply claims. The balance of \$1,122.68 not allowed there is allowed here.

The claim of the Degnon Contracting Company is allowed at \$11,173.22.

The claim of the Pennsylvania Steel Company for \$30 is allowed here; the balance of \$36,861 allowed in the Apportionment Matter being disallowed, with the qualification above indicated as to allowance for difference in interest on items not construction items in origin.

The claim of the Brill Company, having been allowed in the Apportionment Proceeding, is disallowed. This claim as to car bodies and items 2, 3, 4, and 6 is clearly a construction claim, and on these items no difference in interest

is allowable. Item 5, being the price of the balance of 50 sets of inside brakes, suggests a dispute in this connection which can be decided on the settlement of the report, if counsel do not agree.

The claim of the Vulcanite Portland Cement Company is allowed, except to the extent that it is allowed in the Apportionment Proceeding. A similar disposition is made as to any question of interest on this latter amount.

Claims to preference of Hyman & McCall, of the Otis Elevator Company, of the General Electric Company, and of the John Simmons Company are allowed.

Counsel for the contract creditors' committee may file with me a proposed report accordingly not later than May 20, 1915, and a date will be fixed thereafter for a hearing, at which amendments and objections will be passed on.

In re ZEIS.

(District Court, W. D. New York. February 8, 1916.)

No. 4828.

1. BANKRUPTCY ⇨196—LIENS—EXECUTION.

A lien on personal property levied upon under execution four months before bankruptcy is not lost, unless the execution creditor does something to hinder, delay, or defraud other creditors; but no actual intent need be shown.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. ⇨196; Execution, Cent. Dig. § 382.]

2. BANKRUPTCY ⇨196—LIENS—EXECUTION.

Where a sale under an execution issued more than four months before bankruptcy was adjourned about 18 different times, and there would have been no adjournment except with the consent of the execution creditor, other creditors were hindered or delayed, and the execution lien became dormant as against later execution creditors and the trustee in bankruptcy, though the instructions to the sheriff to adjourn the sale were not in writing, and there was no request made to him to release any portion of the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. ⇨196; Execution, Cent. Dig. § 382.]

3. BANKRUPTCY ⇨196—LIENS—EXECUTION.

Under Bankr. Act July 1, 1898, c. 541, § 47, 30 Stat. 557, as amended by 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, and as to all property not in the custody of the bankruptcy court with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied, a trustee in bankruptcy could attack an execution lien acquired more than four months before bankruptcy on the ground that it had become dormant because of repeated adjournments of the sale, as he was in the situation of a junior judgment creditor with an execution lien, and had a right to invalidate the preceding lien for laches, fraud, or dormancy as of the date of the filing of the petition in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. ⇨196; Execution, Cent. Dig. § 382.]

4. BANKRUPTCY ⇨196—LIENS—EXECUTION—"REVIVE."

Where because of repeated adjournments of a sale under execution resulting in hindering and delaying other creditors, an execution lien obtained more than four months before bankruptcy had become dormant,

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

It could not be revived, so as to restore the benefit of the original lien as against the trustee in bankruptcy whose rights had intervened, though the word "revive" implies bringing back to life or action after suspension.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. \approx 196; Execution, Cent. Dig. § 382.

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

In the matter of George J. Zeis, bankrupt. On review of a decision of the referee in bankruptcy, sustaining objections and disallowing a claim of lien and priority of payment. Claim disallowed, and report approved.

August Becker and J. Ralph Ulsh, both of Buffalo, N. Y., for petitioner.

Arthur J. Adler, of Buffalo, N. Y., for trustee.

HAZEL, District Judge. The referee in bankruptcy sustained the objections of the trustee to the claim of McCarthy Bros. & Ford to proceeds realized on sale of certain property of the bankrupt which had been levied upon by the sheriff of Erie county more than four months before the filing of the petition. The claim was disallowed on the ground that the execution lien had become dormant and was unenforceable against the trustee at the time the petition was filed.

[1, 2] The law is that a lien on personal property levied upon by virtue of an execution four months before bankruptcy intervenes is not lost unless the plaintiff does something to hinder, delay, or defraud other creditors. No actual intent need be shown. A mere acquiescence in adjournments of the sale by the sheriff has been held insufficient to render a lien dormant, but in this case the referee has found on the evidence before him that there would have been no adjournment of the sale without the consent of the petitioning creditor, and that such consent, on the authority of *Excelsior Company v. Globe Cycle Works*, 48 App. Div. 304, 62 N. Y. Supp. 538, was the equivalent of a direction to the sheriff to adjourn it, and thus the other creditors were hindered or delayed. In the absence of any other explanation accounting for such delay I incline to the view that the referee was correct in his conclusion. It makes no essential difference that the instructions to the sheriff to adjourn the sale were not in writing or that there was no request made to him, as in the *Globe Cycle Works* Case, to release any portion of the property. The evidence showed that the execution in favor of the petitioning creditor was issued in October, 1912, the property levied upon and advertised for sale, and that afterwards the execution sale was adjourned about 18 different times, until March, 1913, when an injunction issued in this proceeding. Under these circumstances there was such delay in the enforcement of the execution as to render the execution lien dormant against later execution creditors and the trustee in bankruptcy. *Freeman on Executions* (3d Ed.) vol. 2, § 206.

[3] The referee was right, too, in holding that the execution lien, although acquired more than four months before bankruptcy intervened, was subject to attack by the trustee. By the amendment of

1910 to section 47 of the Bankruptcy Act the trustee was vested with the rights, remedies, and powers of a creditor holding a lien. He was in the precise situation of a junior judgment creditor with an execution lien, and had a right to invalidate a preceding lien either for laches, fraud, or dormancy as of the date of the filing of the petition in bankruptcy. *Matter of Lane Lumber Co.*, 213 Fed. 587, 130 C. C. A. 167, 32 Am. Bankr. R. 469. Counsel for petitioner attaches importance to the case of *Bailey v. Baker Ice Machine Co.*, 239 U. S. 269, 36 Sup. Ct. 50, 60 L. Ed. —; but I think that case was decided upon another principle. It concerns a conditional contract of sale which had been filed within the four months period, and the Supreme Court of the United States held that as the contract was recorded under the recording act of the state the trustee could not assail it.

[4] The petitioner next contends that the execution issued on its judgment against the bankrupt was later revived in such a way as to restore to it the benefit of its original lien, but to this I do not agree. The word "revive," true enough, implies bringing back to life or action after suspension; a judgment upon revival becoming a new judgment. So, also, where the act of revival again brings into being an execution on a levy which had become dormant, the revival is in the nature of a recreation and dates from the act of revival. A dormant execution may still be, as between the parties, a lien, and the judgment may be satisfied on sale of the property, yet as against another, whose rights have in the meantime intervened and become vested, there can be no retrocession of legal rights.

The claim of lien and right to priority of payment is disallowed, and the report of the referee is approved.

In re MONARCH ACETYLENE CO.

(District Court, W. D. New York. February 8, 1916.)

BANKRUPTCY ⚡196—LIENS—EXECUTION.

Where a sale under an execution issued more than four months before bankruptcy was adjourned seven times with the consent of, though with no specific instructions from, the execution creditors, and the bankrupt was at all times in possession of the property levied upon, and no custodian was in charge, though negotiations were pending for a compromise of the judgments, the executions were dormant as against the trustee in bankruptcy, and he was entitled to assert their invalidity under Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557, as amended by 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 of the bankruptcy court shall be deemed vested with all the rights and remedies of a creditor holding a lien and as to all property not in the custody of such court with all the rights and remedies of a judgment creditor holding an execution duly returned unsatisfied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. ⚡196; Execution, Cent. Dig. § 382.]

In the matter of the Monarch Acetylene Company, bankrupt. On review of an order of the referee. Referee's report approved.

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

Frederick O. Bissell, of Buffalo, N. Y., for trustee.
August Becker, of Buffalo, N. Y., for Beals & Co.

HAZEL, District Judge. Substantially the same question here submitted for decision on review was this day decided in *Matter of George Zeis, Bankrupt*, 229 Fed. 472; but counsel for petitioning creditors urge that the facts herein are essentially different from those of that case. It appears that prior to filing the petition in bankruptcy herein, on March 18, 1914, five executions on judgments recovered in the state court were issued to the sheriff, to wit, in October and November, 1913, which severally remained unsatisfied. The judgment creditors claim to be entitled to priority of payment on the ground that their judgment liens attached four months prior to the bankruptcy and were in actual force at the time of filing the petition. The trustee contested such judgment liens, claiming that they were dormant and invalid as to him.

The record shows that the first sale on execution was advertised to be held on November 28, 1913, but that seven different adjournments followed, each time by and with the consent of attorney for the judgment creditors. In opposition to the claim of dormancy it was testified that the bankrupt, after the sheriff had levied on his property, endeavored through his attorney to obtain money to reorganize the business, and that negotiations were pending during the entire period of adjournments for effecting a compromise on the judgments. It is true the sheriff received no specific instructions from the creditors, Beals & Co., the petitioners, to adjourn the execution sales; but it is nevertheless shown that the attorney was consulted in advance and consented thereto. It also appears that the bankrupt at all times was in possession of the property and assets levied upon and that no custodian was in charge. Under the circumstances I think the doctrine of *Excelsior Co. v. Globe Cycle Works*, 48 App. Div. 304, 62 N. Y. Supp. 538, applies. In that case the learned court said:

"The law, therefore, seems to be settled that any direction by the execution creditor to the sheriff, which suspends the lien or delays the enforcement of the levy, renders the execution dormant against subsequent creditors or bona fide purchasers. However veiled may be the direction, however much it may be founded on a humane desire to protect the debtor, if it is tantamount to a mandate or instruction to the sheriff to withhold the execution of his process during the interim that he accedes to this demand, the levy ceases to be effective. That doctrine rests on public policy, and is necessary to prevent fraud, and it should receive a fairly rigorous enforcement."

Hence I hold that petitioner's claim was dormant against the trustee in bankruptcy, who had the right to assail its validity. *Matter of Lane Lumber Co.*, 213 Fed. 587, 130 C. C. A. 167, 32 Am. Bankr. R. 469; *Matter of Pittsburgh*, 215 Fed. 703, 132 C. C. A. 81, 32 Am. Bankr. R. 452; section 47a of the Bankruptcy Act, as amended 1910.

The report of the referee is approved.

THE TEASER.

THE ADDIE M. LAWRENCE.

(District Court, E. D. Pennsylvania. September 21, 1915. On Rehearing, February 15, 1916.)

Nos. 48, 63.

1. COLLISION ⚡95—MEETING TOWS—FAULT—VIOLATION OF TOWING REGULATIONS BY TUG.

While the tug Teaser was passing down Delaware Bay at night with the seagoing barges Powel and Allyn in tow tandem, and after, on request of the Powel, the tug and the Allyn had lengthened the hawsers to the Powel to 150 and 140 fathoms, respectively, the Powel sheered 600 feet from the course of the tug and came into collision with the schooner Lawrence, in tow of a meeting tug; neither the Lawrence nor her tug being in fault. *Held*, on the evidence, that the Powel was in fault for being insufficiently manned and for having as steersman an inexperienced deckhand, who could not control her; that the Teaser, being in charge of the tow, was also in fault, and liable for violation of the inspection board regulations promulgated by the Secretary of Commerce and Labor, effective February 1, 1909, adopted pursuant to Shipping Act May 28, 1908, c. 212, § 14, 35 Stat. 428 (Comp. St. 1913, § 7969), and which limited the length of hawsers of seagoing barges in inland waters to 75 fathoms.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 145; Dec. Dig. ⚡95.]

2. COLLISION ⚡144—LIABILITY OF TUG FOR INJURY TO TOW—MUTUAL FAULT.

The violation of the regulation by the Teaser, although at the request of the Powel, made her a joint participator in the fault, and rendered her liable to the Powel for one-half the damages sustained by the latter in the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 296; Dec. Dig. ⚡144.]

In Admiralty. Suits for collision by one Gardner, master of the schooner Addie M. Lawrence, against the tug Teaser, the barges Powel and Horace A. Allyn, and the tug Juno, and by the Baker Transportation Company, owner of the Powel, against the schooner Addie M. Lawrence, the tug Juno, the tug Teaser, and barge Horace A. Allyn. Decree for the Lawrence against the Teaser and the Powel only, and libels dismissed as against the Juno and the Allyn. Damage to the Powel to be divided between the Teaser and the Powel.

Henry R. Edmunds, of Philadelphia, Pa., for the Addie M. Lawrence.

Conlen, Brinton & Acker, of Philadelphia, Pa., and T. Catesby Jones, of New York City, for the Powel.

Lewis, Adler & Laws, of Philadelphia, Pa., for the Teaser and the Allyn.

H. Alan Dawson, of Philadelphia, Pa., for the Juno.

THOMPSON, District Judge. [1] On July 2, 1913, the steam tug Teaser, with the Powel and Horace A. Allyn, both large seagoing barges, in tow, left Philadelphia, bound for New England ports. The Teaser was towing the barges tandem, with the Powel between the tug and the Allyn. When taken in tow, the length of the hawser from

the Powel to the Teaser was about 75 fathoms, and the length of the hawser from the Powel to the Allyn about the same. When the Teaser, with her tow, was about off Ship John Light in the Delaware Bay, the hawser between the Teaser and the Powel was paid out to 150 fathoms, and that between the Powel and the Allyn to 140 fathoms. This was done at the request of the master of the Powel, but the hawsers were actually paid out by those on the Teaser and on the Allyn. Between Ship John Light and Cross Ledge Light, about 12 o'clock midnight, the Teaser and her tow met the tug Juno, with the schooner Addie M. Lawrence, bound up the river. It was a dark, clear night. The Teaser and her tow and the Juno and her tow were displaying proper lights. The tugs exchanged signals by whistle and passed to port of each other at a distance of about 600 feet. The Powel sheered out of her course and came into collision with the Lawrence, striking her on her port bow at about right angles. The schooner had some of her sails up for the purpose of drying them before stowing them when coming into port, but was steering after the lights of the Juno and following her course.

There is no proof that anything was done or left undone by the Juno or the Lawrence on account of which fault can be attributed to either. It is clear from the testimony that the Powel was insufficiently manned and improperly steered, and that the collision was primarily due to her sheering out of her course and failing to follow the Teaser. It appears that, while it was usual to have two deckhands on the Powel, but one was shipped at Philadelphia and on board at the time of the collision, and he was at the wheel. There was no one else on deck. That the deckhand was inexperienced and unacquainted with the duties of helmsman is apparent from his testimony. From some cause he did not see the Lawrence until within half a boat's length of her. He did not know whether he put his wheel to port or starboard, and did not seem to be entirely clear as to how the wheel was rigged to work the rudder.

The place where the collision occurred was within the inland waters of Delaware Bay, within the meaning of the regulations, effective February 1, 1909, promulgated by the Secretary of Commerce and Labor December 7, 1908, pursuant to section 14 of the act of May 28, 1908 (35 Stat. 428, c. 212 [Comp. St. 1913, § 7969]), limiting the length of hawsers to tows of seagoing barges to 75 fathoms. The length of the hawser between the Teaser and the Powel was 150 fathoms. This length of hawser was in violation of the regulations. If the hawser between the Teaser and the Powel had been of lawful length, and the Teaser had maintained the position which she did in passing the Juno and Lawrence, the collision could not have occurred, for the Powel could not then have sheered sufficiently to cause the collision without also pulling the tug out of her course. It was the duty of the master of the Teaser to see that the hawser did not exceed 75 fathoms in length, and, having failed to perform that duty, the Teaser must also be held in fault for the collision. Even though the hawser was lengthened at the request of the master of the Powel, it was a violation of duty on the part of the master of the Teaser to allow the hawser to be of unlawful length.

Section 15 of the act of May 28, 1908 (Comp. St. 1913, § 7970), imposes a penalty upon the master of the towing vessel for violation of the regulations, and he was in charge of the navigation of the tow. *The Margaret*, 94 U. S. 496, 24 L. Ed. 146; *The City of New York*, 49 Fed. 956, 1 C. C. A. 483; *The Doris Eckhoff*, 50 Fed. 134, 1 C. C. A. 494; *The Manhattan*, 186 Fed. 329, 108 C. C. A. 407. It does not follow, because the Teaser was in fault, that the act of the Allyn also contributed to the collision. There is no evidence that she left her proper course following the Teaser, and she was under no obligation to keep the Powel in her proper course.

[2] The duty imposed upon the Teaser by the regulations and the statute does not render her liable for the injuries to the Powel. It would be going beyond the intention of the act to hold that the lengthening of the hawser was a violation of a duty to the Powel, where it was done at the request of her master. The duty imposed is for the protection of other vessels in the waters where the towing vessel is navigating, but nothing in the act indicates an intention of Congress to make the towing vessel liable to the barge she has in tow for injuries caused by reckless steering or failure to be properly and sufficiently manned.

In No. 48 of 1913, a decree may be entered in favor of the Lawrence against the Teaser and Powel, with reference to a commissioner to ascertain and report the damages, and dismissing the libel as against the Juno and the Allyn.

In No. 63 of 1913, the libel is dismissed.

The motion on the part of the Lawrence to dismiss the libel as against the Teaser is denied.

On Rehearing.

In the light of the argument and authorities considered upon the rehearing, the court is of the opinion that there was error in the conclusion reached in the opinion filed September 2, 1915, that the Teaser is not liable for injuries caused to the Powel by reason of her collision with the Lawrence.

In view of the decision of the Circuit Court of Appeals for the Second Circuit in *The Manhattan*, 186 Fed. 329, 108 C. C. A. 407, and the application of the admiralty rule that all those who knowingly participate in a wrongful act are jointly and severally liable for the consequences, without consideration of the extent to which the negligence of any party contributes to the damage, it is now held that, though the lengthening of the hawser was at the request of the master of the Powel, and the Powel was in fault for reckless steering and failure to be properly and sufficiently manned, the damages to the Powel should be divided between that vessel and the Teaser.

A decree may be entered in No. 63 of 1913 accordingly.

UNITED STATES v. ASH SHEEP CO.

(District Court, D. Montana. February 4, 1916.)

No. 11.

1. INDIANS ⚡19—LANDS—TRESPASS—LIABILITY.

Rev. St. § 2117 (Comp. St. 1913, § 4107), providing that any one driving any stock of horses, mules or cattle to range and feed on any land belonging to any Indian or Indian tribe without the consent of such tribe, is liable to a penalty of \$1 for each animal of such stock, applies only to lands so far in Indian occupancy and control that grazing will be an injury to the Indians, and to which they may consent.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 51; Dec. Dig. ⚡19.]

2. INDIANS ⚡19—LANDS—TRESPASS—LIABILITY—"CATTLE."

Rev. St. § 2117 (Comp. St. 1913, § 4107), providing a penalty of \$1 a head for grazing horses, mules, or cattle on the land of any Indian or Indian tribe, does not apply to sheep, as the special mention of horses and mules, without so mentioning them as to indicate an enumeration of particulars of a general class following, indicates that Congress used the word "cattle" in its particular and limited sense, as meaning animals of the bovine genus, and not with its general and extended meaning, of all animals of domestic kind, especially as Congress almost invariably uses the word "cattle" in this limited sense.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 51; Dec. Dig. ⚡19.]

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

3. EQUITY ⚡39—RETAINING JURISDICTION ACQUIRED—ENFORCING PENALTIES.

In a suit to enjoin trespasses on Indian lands, a court of equity will not render a judgment for the recovery of statutory penalties for the trespass, since while equity having jurisdiction retains it for full relief, it does so for remedial, and not for punitive, purposes.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. ⚡39.]

4. APPEAL AND ERROR ⚡1207—PROCEEDINGS AFTER REMAND—JURISDICTION OF LOWER COURT.

Where a suit to enjoin trespasses on Indian lands was remanded by the Circuit Court of Appeals, with directions to enter judgment granting an injunction and awarding such damages as the court might find complainant entitled to, this was the law of the case, and the court could not render a judgment for statutory penalties for the trespass.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4696-4699; Dec. Dig. ⚡1207.]

In Equity. Suit by the United States against the Ash Sheep Company to enjoin grazing of sheep on Indian lands. Decree for the United States for an injunction and nominal damages.

B. K. Wheeler, U. S. Atty., of Butte, Mont., Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., and Frank Woody, Asst. U. S. Atty., of Butte, Mont.

C. B. Nolan and Wm. Scallon, both of Helena, Mont., for defendant.

BOURQUIN, District Judge. This is a suit to enjoin defendant from grazing sheep on lands now determined to be Indian lands held

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

in trust by plaintiff (221 Fed. 587, 137 C. C. A. 306), and for damages. Plaintiff contends that it is entitled to recover \$1 per head of sheep grazed, by virtue of section 2117, R. S. (Comp. St. 1913, § 4107), which provides that any one who drives any "stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock." This is impossible for several reasons:

[1] First. The statute contemplates lands so far in Indian occupancy and control that grazing will be an injury to the Indians and to which they may consent. The lands involved are otherwise.

[2] Second. The penalty expressly attaches to "horses, mules, or cattle," and sheep are not thereby included. It is apparent that Congress had in mind the particular and limited definition of the word "cattle," animals of the bovine genus, and not the general and extended meaning, all animals of domestic kind. Otherwise, horses and mules would not have been specially mentioned, or would have been so mentioned as to indicate but enumeration of particulars of a general class following. To illustrate, "horses, mules, or *any other* cattle." For horses and mules are within the general meaning of "cattle," even as sheep, swine, etc., are. Examination of the acts of Congress, and especially Indian legislation, makes manifest that Congress practically invariably uses the word "cattle" in the limited sense of bovine animals, and for general inclusion makes use of the words "stock," "useful domestic animals," and "live stock." In the earliest legislation to penalize grazing Indian lands, the prohibition was of "horses or cattle," and the same act provided that the Indians would be supplied with "useful domestic animals." Act March 3, 1799, c. 46, 1 Stat. 747. Range animals were intended, and sheep were not then ranged.

U. S. v. Mattock, Fed. Cas. No. 15,744, is to the contrary, but seems to lay too much stress upon the mischief intended to be remedied. A case is not within a penal statute though within the mischief of, unless also within the legislative intent as disclosed by the language used. It would seem Congress had in mind only the three classes of range animals, horses, mules, and bovines, and fixed a proportionate penalty for punishment, and not for confiscation, as it often would be if applied to sheep or swine.

[3] Third. If the complaint is sufficient for penalties, equity never aids the collection of statutory penalties. True, equity, having jurisdiction, retains it for full relief; but this for remedial and not punitive purposes—here for injunction and compensatory damages, and not for punishment, of which are penalties.

[4] Fourth. The appellate tribunal remanded the suit, "with directions to enter judgment for the complainant for the injunction prayed for, and for such damages as the court may find complainant entitled to." That is the law of the case. There is no evidence of substantial damages, and for the technical trespass nominal damages are awarded.

Decree will be entered for an injunction, \$1 damages, and costs.

LOW KWAI et ux. v. BACKUS, Commissioner of Immigration.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1916.)

No. 2522.

ALIENS \Leftrightarrow 32—DEPORTATION—PROCEEDINGS TO DEPORT—STATUTORY PROVISIONS.

Immigration Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899, as amended by Act March 26, 1910, c. 128, § 2, 36 Stat. 264 (Comp. St. 1913, § 4247), provides that any alien practicing prostitution after entering the United States shall be deported as provided in sections 20 and 21. Section 21 provides that, if the Secretary of Commerce and Labor is satisfied that an alien is subject to deportation, he shall cause such alien to be taken into custody and returned to the country whence he came. A commissioner of immigration applied to the Secretary of Labor for a warrant for the arrest of an alien on the ground that it was stated from an anonymous source that she was practicing prostitution. The Secretary signed a warrant directing that she be arrested, and granted a hearing, and transmitted such warrant to the commissioner of immigration, with a direction not to execute it unless his investigation developed facts justifying such action. *Held*, that under the statute it is the Secretary who must be satisfied that the alien is subject to deportation, and where the Secretary apparently was not satisfied of such fact he had no authority to authorize the commissioner of immigration to satisfy himself on this point, and thus decide the question committed by Congress to the Secretary.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. \Leftrightarrow 32.]

Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus by Low Kwai and wife against Samuel W. Backus, as Commissioner of Immigration of the Port of San Francisco. From an order discharging the writ, and remanding one of the petitioners to custody for deportation, the petitioners appeal. Reversed and remanded, with directions.

Wm. Hoff Cook and Geo. A. McGowan, both of San Francisco, Cal., for appellants.

John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

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

ROSS, Circuit Judge. This is an appeal from an order discharging a writ of habeas corpus in behalf of the female appellant, Mrs. Low Kwai, alias Ho Shee, and remanding her to custody for deportation.

It appears from the record that she was admitted into this country as the wife of the appellant Low Kwai, who, it appears, was a native of this country. Subsequently she was arrested by an immigration officer on the ground that she was practicing prostitution, and

after various proceedings set forth in the record, resulting in the finding that she was such prostitute and never was the wife of Low Kwai, was ordered deported.

If the immigration officer was legally authorized to proceed against the woman, we would not have the slightest difficulty in affirming the order; but was he so authorized? is the real, and the very important, question in the case. We say important, because if, after due examination, an alien is admitted into this country, an immigration officer can, without legal warrant and of his own motion, arrest such alien upon the ground that he or she is engaged in a business denounced by the law, and thus initiate proceedings that may result in an order for the deportation of such alien, as the present proceeding has done, there would be no safety for any alien so permitted to enter the country. No such provision of law has been cited, and we think it safe to say that no such provision can be found.

By the act of March 26, 1910 (36 Stat. 263), Congress so amended section 3 of the Act of February 20, 1907 (34 Stat. 898), entitled "An act to regulate the immigration of aliens into the United States," as to read in part as follows:

"Sec. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden: and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall, in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. * * * Any alien who shall be found, an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States * * * shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections 20 and 21 of this act"—namely, the act of February 20, 1907.

Section 21 of the last-mentioned act provides, among other things:

"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."

And by section 22 of the act of February 20, 1907, it is provided, among other things:

"That the Commissioner-General of Immigration, in addition to such other duties as may by law be assigned to him, shall, under the direction of the Secretary of Commerce and Labor, have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall have the control, direction, and supervision of all officers, clerks, and employes appointed thereunder. He shall establish such rules and regulations, prescribe such forms of bond, reports, entries, and other papers, and shall issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this act, and for protecting the United States and aliens migrating thereto from fraud and

loss, and shall have authority to enter into contract for the support and relief of such aliens as may fall into distress or need public aid; all under the direction or with the approval of the Secretary of Commerce and Labor."

It will be seen from the provisions of section 21 above cited that the power to cause an alien found in the United States in violation of the act to be taken into custody for return to the country whence he came is given to the Secretary of Commerce and Labor, and to no one else.

Now, turning to the record in the present case, it is seen that the proceeding against the Chinese woman here in question was initiated by this "Application for Warrant of Arrest under sections 20 and 21 of the Act of February 20, 1907":

U. S. Department of Labor,
Immigration Service.

No. 12020-190.

(Place) Angel Island Station, S. F. Cal.,
April 2, 1913, ——— 191—.

The undersigned respectfully recommends that the Secretary of Labor issue his warrant for the arrest of Ho Shee, or Haw Shee, the alien named in the attached certificate, upon the following facts which the undersigned has carefully investigated, and which, to the best of his knowledge and belief, are true:

(1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth the facts within the knowledge of the informants.)

Herewith find verification of landing. It is stated from an anonymous source that this woman is now practicing prostitution in either the Oriental Hotel or the Republic Hotel, keeping one of the rooms in either hotel from time to time.

She was landed as the wife of a native, but her husband deserted her.

(2) The present location and occupation of above-named alien are as follows: _____.

Pursuant to rule 22 of the Immigration Regulations there is attached hereto and made a part hereof the certificate prescribed in subdivision 2 of said rule, as to the landing or entry of said alien, duly signed by the immigration officer in charge at the port through which said alien entered the United States.

(Signature) [Signed] H. Edsell,
(Official Title) Acting Commissioner.

The record further shows that, based upon that application, the Secretary of Commerce and Labor on the 11th day of April, 1913, signed a warrant directing the commissioner of immigration at Angel Island station, San Francisco, Cal., to take the woman in question into custody, "and grant her a hearing to enable her to show cause why she should not be deported in conformity with law," and transmitted the said warrant with this letter:

Department of Labor,
Washington.

No. 53575/255.

April 11, 1913.

Commissioner of Immigration, Angel Island Station, San Francisco, Cal.

Pursuant to your request of the 2d instant, No. 12020/190, there is transmitted herewith warrant for the arrest of the Chinese alien Ho Shee, or Haw Shee, alias Ho Shi. This warrant should not be executed, however, unless your investigation develops facts justifying such action. Form 533, forwarded with your application, is inclosed, as requested.

[Signed] W. B. Wilson, Secretary.

It is perfectly manifest that by this action of the Secretary of Commerce and Labor he left it to the commissioner of immigration to decide what Congress committed to the Secretary of Commerce and Labor to decide. It is, according to the express language of the act of Congress, as has been seen, the *Secretary of Commerce and Labor* who shall be satisfied that the alien has been found in the United States in violation of law and therefore subject to deportation, and who, upon being so satisfied, "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" the act of February 20, 1907.

In this instance the acting commissioner of immigration undertook, as has been seen, to satisfy the Secretary of Commerce and Labor that the woman here in question had violated the law, by simply saying:

"It is stated from an anonymous source that this woman is now practicing prostitution in either the Oriental Hotel or the Republic Hotel, keeping one of the rooms in either hotel from time to time. She was landed as the wife of a native, but her husband deserted her."

The mere statement from an anonymous source that the woman referred to was violating the law evidently, and very properly, did not satisfy the Secretary of such fact, and, instead of requiring some sufficient evidence thereof, he undertook to depute to the *Commissioner of Immigration* at Angel Island, Cal., to satisfy *himself*, and thus to decide the question authorizing the arrest of the party charged that was committed by Congress to the Secretary of Commerce and Labor only. That course, in our opinion, was wholly unauthorized by the statute.

It results that the order appealed from must be reversed, and the cause remanded, with directions to discharge the petitioner.

It is so ordered.

GILBERT, Circuit Judge (dissenting). I dissent on two grounds.

First. The provisions of the statute were substantially complied with. The application for the warrant of arrest was made on April 2, 1913. Nine days later it was granted, but by the Secretary's order, which accompanied it, it was not to be executed "unless your investigation develops facts justifying such action." This instruction was obeyed, and the appellant was not arrested until October 17, 1913, and after evidence was furnished in the sworn statements of four witnesses which fully justified the arrest. "Irregularities in the order of arrest do not affect the status of an alien held upon a warrant of deportation after a fair hearing." *United States v. Uhl*, 211 Fed. 628, 128 C. C. A. 560; *United States v. Williams*, 200 Fed. 538, 118 C. C. A. 632. In *Healy v. Backus*, 221 Fed. 358, 137 C. C. A. 166, answering the contention that there was a fatal variance between the application and the warrant of arrest, this court said:

"The objections go rather to the regularity of the proceedings for the arrest and examination of petitioners than to the substance of the inquiry. The proceedings are by nature summary, and necessarily so. No formal charge or pleadings are required, nor does the doctrine of variance have application,

provided the alien be given sufficient information of the acts relied upon to bring him within the excluded classes to enable him to offer testimony at the hearing directed to be had by the warrant of arrest."

And in *Ex parte Hamaguchi* (C. C.) 161 Fed. 185, Judge Wolverton said:

"The summary proceeding provided by law does not require that technical regard for forms that is deemed essential in criminal proceedings, and, having had a full hearing, whereat it was developed that he is unlawfully within the country, and the finding and recommendation of the inspector in charge being against him, I am not disposed to require that the procedure be gone through with again for the sake of stricter observance of form; the law having been observed in substance."

So in *Siniscalchi v. Thomas*, 195 Fed. 701, 115 C. C. A. 501, it was held that the fact that a warrant of deportation of an alien was based in part on a fact not charged in the warrant of arrest is not a fatal objection, where it appears that the alien was given a fair hearing on his charge. In *Toy Tong v. United States*, 146 Fed. 343, 76 C. C. A. 621, Judge Gray, speaking for the Circuit Court of Appeals for the Third Circuit, said:

"But the sufficient answer to appellants' point is that the defendants were before the commissioner and before the court, and objections to the validity of the process of arrest were not available to oust the jurisdiction. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge, or the validity of the statute."

Second. This is a habeas corpus proceeding, and in such a case the rule is well settled that the petitioner cannot be discharged on account of defects in the original arrest or commitment. In *Nishimura Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146, the court said:

"A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment"—citing *Ex parte Bollman*, 4 Cranch, 75, 114, 125, 2 L. Ed. 554; *Coleman v. Tennessee*, 97 U. S. 509, 519, 24 L. Ed. 1118; *United States v. McBratney*, 104 U. S. 621, 624, 26 L. Ed. 869, and other cases.

This rule is made imperative by section 761 of the Revised Statutes (Comp. St. 1913, § 1289), which requires the court, justice, or judge granting the writ on the hearing "to dispose of the party as law and justice require." This means, not as law and justice required at the time of the arrest, but as law and justice require at the time of the hearing. *Iasigi v. Van de Carr*, 166 U. S. 391, 17 Sup. Ct. 595, 41 L. Ed. 1045. And in *Motherwell v. United States*, 107 Fed. 437, 455, 48 C. C. A. 97, 115, the Circuit Court of Appeals for the Third Circuit said:

"The intent of section 761 is that the party seeking a discharge through habeas corpus proceedings should be disposed of as law and justice at the time of such disposition shall require."

The judgment of this court discharging the petitioner is empty and futile and it does not affect the status of the petitioner. It leaves her subject to a repetition of the proceeding for her deportation. In

Re Boardman, 169 U. S. 39, 18 Sup. Ct. 291, 42 L. Ed. 653, the court said:

"The object of the writ is to ascertain whether the prisoner applying for it can legally be detained, and it is the duty of the court, justice, or judge granting the writ, on hearing, 'to dispose of the party as law and justice may require.'"

And in *Chow Loy v. United States*, 112 Fed. 354, 361, 50 C. C. A. 279, 286, the Circuit Court of Appeals for the Second Circuit, in holding that the prisoner could not be discharged on a writ of habeas corpus because of defects or irregularities in the form of commitment, said:

"Upon the record before the Circuit Court it appeared that the petitioner for the writ was a person not entitled to be within the United States, and liable to be deported; that he had no right to be discharged from custody, but only to be placed in charge of the officers of the United States for deportation. The Circuit Court therefore properly refused the petition for the writ of habeas corpus."

I submit that the court below very properly followed this rule in denying the discharge of the appellant.

KOBAY v. HOFFMAN et al.*

(Circuit Court of Appeals, Eighth Circuit. January 18, 1916.)

No. 4342.

1. **BILLS AND NOTES** ⇨145—**RIGHTS OF BONA FIDE HOLDERS—LAW GOVERNING.**

Whether a note executed and made payable in Missouri was negotiable, so as not to be subject to the defense of a failure of consideration in the hands of a bona fide purchaser, was to be determined by the laws of Missouri, though suit thereon was brought in the District Court for the District of Kansas.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 362; Dec. Dig. ⇨145.]

2. **COURTS** ⇨366—**UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.**

As to contracts executed before the construction of a state statute by its court of last resort, the courts of the United States are not conclusively governed by the construction thereafter placed upon it by the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. ⇨366.]

3. **BILLS AND NOTES** ⇨166—**BONA FIDE HOLDERS—DEFENSES AVAILABLE.**

There being no controlling construction of the Missouri law by the court of last resort of that state, a note executed and made payable in Missouri was not rendered nonnegotiable, so as to be subject to the defense of failure of consideration in the hands of a bona fide holder, by a provision therein accelerating its maturity if collateral security for its payment depreciated in value and additional collateral was not furnished.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 418, 421; Dec. Dig. ⇨166.]

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

*Rehearing denied March 24, 1916.

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

Action by Harris Kobey against Anna W. Hoffman and another. Judgment for defendants, and plaintiff brings error. Reversed, with instructions.

E. H. Gamble, of Kansas City, Mo., for plaintiff in error.

William B. Sutton, Jr., of Kansas City, Kan. (William B. Sutton, of Kansas City, Kan., on the brief), for defendants in error.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. This was an action instituted by the plaintiff, who is now the plaintiff in error, against the defendants, the administratrix and administrator of the estate of C. B. Hoffman, deceased, to recover on a promissory note executed by their intestate, and purchased by the plaintiff in good faith, before maturity, and for a valuable consideration. The following is a copy of the said note, with all indorsements thereon:

"\$4,500.00. No.

Kansas City, Mo., Sept. 18th, 1907.

"Due Six months after date, for value received, I promise to pay to the order of Merchants' Refrigerating Company, Kansas City, Mo., forty-five hundred and no/100 dollars at the office of the Merchants' Refrigerating Company, Kansas City, Mo., with interest from maturity until paid, at the rate of 6 per cent per annum. To secure the payment of this note and of any and all other indebtedness which I now owe to the holder hereof, or may owe him at any time before the payment of this note, I have hereto attached, as collateral security, the following: Stock certificate No. 137 of the capital stock of the Merchants' Refrigerating Company, calling for 50 shares of stock, par value \$5,000.00.
C. B. Hoffman."

On the left side of the signature the following appears:

"The above collateral has a market value of \$6,250.00. If, in the judgment of the holder of this note said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of said holder; otherwise, this note shall mature at once. Any assignment or transfer of this note, or other obligations herein provided for, shall carry with it the said collateral securities and all rights under this agreement.

"And I hereby authorize the holder hereof, on default of payment of this note or any part thereof, according to the terms hereof, to sell said collateral or any part thereof, at public or private sale and with or without notice, and by such sale the pledgor's right of redemption shall be extinguished."

On the back the following indorsements appear:

"Demand, notice, and protest waived. Merchants' Refrigerating Co., per
J. E. Brady, President. J. E. Brady."

There were several defenses set up, but as the case was decided by the court and appealed on the demurrer to the first paragraph of the answer, it is only necessary to state the allegations in that paragraph. The defendants in that paragraph pleaded that the note was obtained from their intestate, by the payee, the Refrigerating Company, without any consideration, and upon fraudulent representations of the value of some stock in the Refrigerating Company, which, at the time, was of no value whatever, and was so known to the payee.

A demurrer to this paragraph of the answer was by the court overruled, upon the ground that the instrument sued on was not a negotiable instrument under the Uniform Negotiable Instrument Law, which was in force in the state of Kansas (Gen. St. 1909, §§ 5247-5446), where the suit was instituted, and the state of Missouri (Rev. St. 1909, §§ 9971-10176), where the note was executed and made payable.

The plaintiff declining to plead further, but resting upon the demurrer, judgment was entered for the defendants, and this writ of error was prosecuted to reverse this judgment. Therefore the only question involved now is whether under the Negotiable Instrument Law this note was negotiable, so as not to be subject to the defense of a failure of consideration, when in the hands of a bona fide purchaser, for value, before maturity.

[1] The note was executed and made payable in the state of Missouri, and, although this suit was instituted in the United States District Court for the District of Kansas, must be governed by the laws of the state of Missouri, where it was executed and made payable. *Butler v. Goreley*, 146 U. S. 313, 13 Sup. Ct. 84, 36 L. Ed. 981; *Guernsey v. Imperial Bank*, 188 Fed. 300, 110 C. C. A. 278, 40 L. R. A. (N. S.) 377; *Ringer v. Virgin Timber Co.* (D. C.) 213 Fed. 1001.

In an action on the same note against these defendants, prosecuted in a state court in the state of Kansas, the Supreme Court of that state held that the note was not negotiable under the Negotiable Instrument Law of that state, which was merely a re-enactment of the law merchant, and reversed the judgment of the trial court, which had held that it was negotiable under the statutes of Kansas and the law merchant. *Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D, 1. When the remittitur reached the state trial court, the action was dismissed by the plaintiff, and this action commenced in the District Court of the United States.

The decision of the Supreme Court of Kansas, while entitled to the highest respect, is not conclusive on this court for several reasons. The note was a Missouri contract, having been executed and made payable in that state, and must therefore be controlled by the laws of the state of Missouri.

[2] Second. The Uniform Negotiable Instrument statute of the state of Kansas had not been construed by the Supreme Court of that state when this note was executed, nor, in fact, when the action on this note in the state court was instituted, and it is well settled that as to contracts executed before the construction of a state statute, by its court of last resort, the courts of the United States are not conclusively governed by the construction made thereafter. The leading cases on that subject are *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Great Southern Hotel Co. v. Jones*, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778, which have been followed ever since. Before the enactment of the Negotiable Instrument Law in the state of Kansas the Supreme Court of that state had held that such a note was negotiable under the law merchant. *Clark v. Skeen*, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337.

[3] The Missouri Negotiable Instrument Law has never been con-

strued by the court of last resort of that state. We must therefore determine for ourselves how this statute should be construed. As the Negotiable Instrument Law, on that point, is practically a reaffirmance of the law merchant, the decisions of the Supreme Court of the United States control this court, until the highest court of the state—in this case that of Missouri—construes it, and then it will only be authoritative on the courts of the United States as to notes and bills executed thereafter. The learned trial judge was governed by the decision of the Supreme Court of Kansas, in *Bank v. Hoffman*, supra, and the decision of this court in *Lincoln National Bank v. Perry*, 66 Fed. 887, 14 C. C. A. 273.

Ordinarily we would unhesitatingly follow former decisions of this court, unless in conflict with the decisions of the Supreme Court of the United States. In *Chicago Railway Equipment Co. v. Merchants' National Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349, it was expressly held that a promissory note containing an acceleration of maturity clause, such as the note in the instant case contains, does not destroy its negotiability under the law merchant. This case was evidently overlooked by the court in the *Perry Case*, as no reference is made to it in the opinion. In *Kennedy v. Broderick*, 216 Fed. 137, 132 C. C. A. 381, L. R. A. 1915B, 472, the United States Circuit Court of Appeals for the Seventh Circuit held that a note, identical with the one now in controversy, is under the Negotiable Instrument Law of Missouri and the general commercial law a negotiable instrument, free from such defenses as are set up in this case, if in the hands of a bona fide holder, acquired for value and before maturity.

For the error in overruling the demurrer to this paragraph of the answer the cause must be reversed, with instructions to set aside the judgment in favor of the defendants and sustain the demurrer.

Reversed.

In re PROGRESSIVE WALL PAPER CORP.

In re JUSTIN.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 77.

1. CORPORATIONS ⚡469—MAKING AND ISSUANCE OF BONDS—CONSIDERATION.

Under Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 55, providing that no corporation shall issue either stock or bonds, except for money, labor done, or property actually received for the use and lawful purpose of the corporation, bonds of a corporation could not be pledged to secure payment of a pre-existing debt, and an extension of the time for payment of the debt, or the surrender of the corporation's old note and the substitution therefor of a new note, with the same or different indorsers, did not satisfy the statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1832; Dec. Dig. ⚡469.]

2. CORPORATIONS ⇨469—MAKING AND ISSUANCE OF BONDS—CONSIDERATION—
“MONEY PAID.”

The payment by a creditor of a corporation to the corporation of money which the corporation immediately pays back to the creditor to extinguish an old indebtedness, so that a new indebtedness may be created for which bonds of the corporation may be pledged, is not an issuance of the bonds “for money paid,” within Stock Corporation Law N. Y. § 55.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1832; Dec. Dig. ⇨469.

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

3. CORPORATIONS ⇨474—MAKING AND ISSUANCE OF BONDS—CONSIDERATION.

Where, at the time corporate bonds were pledged by the corporation as collateral security for a pre-existing indebtedness, there was no agreement that they should not be sold by the creditor for less than their par value, the issuance thereof could not be validated by a stipulation, made after the bankruptcy of the corporation, that they should not be so sold, in view of Bankr. Act July 1, 1898, c. 541, § 70, subd. “e,” 30 Stat. 565 (Comp. St. 1913, § 9654), giving the trustee the title of the bankrupt as of the date he was adjudged a bankrupt, and providing that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and recover the property so transferred or its value.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1854; Dec. Dig. ⇨474.]

4. CORPORATIONS ⇨474—MAKING AND ISSUANCE OF BONDS—CONSIDERATION—
“HOLDER FOR VALUE.”

A creditor of a corporation, receiving its bonds as collateral security for a pre-existing indebtedness, contrary to Stock Corporation Law N. Y. § 55, was not a “holder for value,” entitled to the protection given one taking commercial paper before maturity as collateral security, as presumptively it knew that the law forbade the corporation to issue bonds, except for money, labor, or property actually received, and it also knew that it was receiving them without giving either money, labor, or property, and hence took the bonds with notice of the infirmity in its title.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1854; Dec. Dig. ⇨474.

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

5. CORPORATIONS ⇨474—MAKING AND ISSUANCE OF BONDS—CONSIDERATION—
“ISSUED.”

Bonds of a corporation, pledged by it as collateral security for a pre-existing debt, were “issued,” within Stock Corporation Law N. Y. § 55, forbidding the issuance of bonds, except for money, labor, or property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1854; Dec. Dig. ⇨474.

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

6. BANKRUPTCY ⇨290—PROCEEDINGS BY TRUSTEE—ILLEGAL TRANSACTIONS.

A corporation's participation in the illegal issuance of its bonds as collateral security for a pre-existing indebtedness, contrary to Stock Corporation Law N. Y. § 55, did not prevent the granting of relief to its trustee in bankruptcy, suing to compel the return of such bonds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 418-429, 451-455; Dec. Dig. ⇨290.]

7. CONTRACTS ⇨138(1)—GROUNDS—ILLEGAL TRANSACTIONS.

While, as a general rule, neither courts of law nor courts of equity will lend their assistance to either party to an illegal contract, either to enforce it or set it aside, or to recover back money paid or property transferred under it, there are exceptions to the rule as well established as the rule.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. ⇨138(1).]

Petition to Revise and Appeal from Order of the District Court of the United States for the Northern District of New York.

In the matter of the Progressive Wall Paper Corporation, bankrupt. A petition by Fred H. Justin, as trustee, for an order requiring the First National Bank of Ballston Spa, N. Y., to turn over to the trustee certain bonds of the corporation, was denied by the District Court (224 Fed. 143), and the trustee appeals and files a petition to revise. Reversed, and order of the referee affirmed.

The Progressive Wall Paper Corporation, hereinafter called the Corporation, is organized under the laws of the state of New York. It was adjudged a bankrupt on December 10, 1914, and Fred H. Justin was appointed trustee of the bankrupt estate and qualified as such. Its debts amounted to about \$345,000, and its property, exclusive of real estate, was worth about \$79,000.

In 1905 the Corporation borrowed \$10,000 from the First National Bank of Ballston Spa, hereinafter called the Bank, and gave to it its promissory note with certain indorsements thereon. The note was renewed from time to time, and partial payments were made on it. On January 22, 1912, the unpaid balance due on that day was for the sum of \$7,000. The note was unsecured, save for the individual indorsements of the officers of the Corporation, including one Asahel R. Wing. On the last-mentioned day a renewal note for \$7,000 was given, indorsed as before by the prior indorsers except Wing—who declined, he having sold his interest in the Corporation. In place of his indorsement and as further security the Corporation delivered to the Bank as collateral security for the payment of the note seven second mortgage bonds made by the latter or its predecessor in name for \$1,000 each. These bonds were secured by a mortgage on the real property and plant of the Corporation, which mortgage had been given to the Adirondack Trust Company as trustee, and was dated November 1, 1911. Prior to the time when these bonds were delivered to the Bank they had not been issued or used by the Corporation, but had remained in the possession of its officers. On November 2, 1911, the directors of the Corporation adopted a resolution authorizing its treasurer to issue the bonds secured by the mortgage above mentioned "to pay or to secure, as collateral, the payment of the notes of the Corporation, then outstanding or which might be given thereafter." In pursuance of that vote the bonds were delivered to the Bank on January 22, 1912, as above set forth. The note has been renewed from time to time at the same sum and with the same indorsers and the bonds have remained in the Bank's possession ever since as collateral for the note and debt.

On January 15, 1915, the claim on this note was filed with the referee in bankruptcy by one Ingalsbee, one of the indorsers on the note. It was filed as a secured claim, and it was stated that the security held by the Bank for the debt consisted of the seven \$1,000 bonds. On January 20, 1915, the Bank gave notice to the trustee in bankruptcy and to the indorsers that the bonds would be sold at public auction to the highest bidder at its banking house on January 30, 1915.

Thereupon the trustee in bankruptcy filed an answer, in which he alleged that the bonds were illegally issued and not valid, and that the Bank was not entitled to hold the same. He asked that the Bank should be restrained from enforcing the lien on the bonds and that they be declared invalid and be re-

turned to the trustee. The Bank appeared, evidence was taken, and the referee made an order adjudging that the bonds were illegal and never lawfully issued; that the claim of the Bank to hold them as collateral security was also illegal; and that the Bank be enjoined from enforcing the bonds and be required to deliver them up to the trustee.

The order of the referee holding the bonds invalid and void in the hands of the Bank was reversed by the court below, and the order for an injunction against a sale of the bonds was modified, so as to provide that the Bank be enjoined from disposing of the same at less than their par value. The District Judge in his opinion said: "If the Bank will file a stipulation that it will not sell or undertake to sell or dispose of these bonds for less than their par value, and stating that such agreement was a part of the contract of pledge, there may be an order reversing the order of the referee now under review."

Weeds, Conway & Cotter, of Plattsburgh, N. Y. (Frank E. Smith, of New York City, of counsel), for appellant.

Luther A. Wait, of Saratoga Springs, N. Y. (Edgar T. Brackett, of Saratoga Springs, N. Y., of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The trustee in bankruptcy seeks a decree adjudging that certain bonds held by the appellee Bank were unlawfully transferred to it by the bankrupt, and that these bonds do not constitute a lien upon the real property of the bankrupt, and that the Bank be required to return the bonds to his possession. This relief has been refused him in the court below, and he has come into this court asking that the order of the District Judge be reversed, and that the order made by the referee in bankruptcy be affirmed.

[1] At the time these bonds were transferred as collateral security to the Bank there was a valid indebtedness due to the Bank from the Corporation which amounted to \$7,000. As the Corporation was not ready to pay the note when it matured, and as one of the accommodation indorsers desired to be relieved from indorsing the new note to be given in place of the old one which was to be surrendered, it was agreed that such new note would be accepted without this indorser's signature upon the surrender to the Bank of the bonds now in question to be held as collateral security for the ultimate payment of the note. The validity of this transaction depends upon the construction to be placed upon section 55 of the Stock Corporation Law of the state of New York which provides that:

"No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purpose of such corporation." Consol. Laws, c. 59.

It is claimed that under this statute the corporation had no power to issue its bonds for an antecedent debt. That a real debt existed, and that the directors authorized the issue of the bonds and the surrender of them to secure the payment of it, is not disputed. The provision in the New York statute is not unusual. It may be found inserted in the Constitutions of some of the states, while in others it exists merely as a statutory prohibition.

The question we have to determine is one of local law. The construction placed upon a local statute by the highest judicial tribunal

of the state enacting it will as a rule be followed by the federal courts without criticism or further inquiry. *Supreme Lodge Knights of Pythias v. Meyer*, 198 U. S. 508, 25 Sup. Ct. 754, 49 L. Ed. 1146 (1905). There are some exceptions to the rule, as where the question involved is of general or commercial law (*Presidio County v. Noel Young Bond Co.*, 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402 [1908]), or violates the Constitution or statutes of the United States (*Elmendorf v. Taylor*, 10 Wheat. 152, 160, 6 L. Ed. 289 [1825]), or where the Supreme Court of the United States has first construed the statute, in which case it may not feel bound to surrender its convictions on account of a contrary subsequent decision of the state court (*Pease v. Peck*, 18 How. 595, 15 L. Ed. 518).

The courts have held that where the Legislature of one state enacts a provision taken from a statute of another state, in which the language of the act has received a settled construction, it is presumed to have intended that such provision should be understood and applied in accordance with such construction. See *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; *Rhoads v. Chicago, etc., R. Co.*, 227 Ill. 328, 81 N. E. 371, 11 L. R. A. (N. S.) 623, 10 Ann. Cas. 111. But if this provision of the statute of New York has been adopted from the legislation of some other state, and had received a settled construction in that state prior to its enactment in New York, the fact has not been brought to our attention by counsel on either side.

The question now presented to this court is one upon which the New York decisions afford little light. In the *Matter of Snyder*, 29 Misc. Rep. 1, 59 N. Y. Supp. 993 (1899) the question was as to the right to use the bonds not as collateral security for an antecedent debt but for the actual payment of the debt, the outstanding notes being surrendered. The right to use the bonds as payment was sustained. The court said:

"The company's creditors who received its notes had already given either money or property to the company; so that the substitution of bonds for their notes was equivalent to the issue, in the first instance of bonds for money or property actually received for the use and lawful purposes of the company."

In *Haule v. Consumers' Park Brewing Co.*, 150 App. Div. 582, 586, 135 N. Y. Supp. 900, 902 (1912), Judge McLaughlin stated that:

"The corporation could issue its stock only for money paid or property received. It could not issue it as collateral security for money borrowed or for the future delivery of bonds."

We passed on this provision of the New York statute in *Re Waterloo Organ Co.*, 134 Fed. 345, 67 C. C. A. 327 (1904), and held the bonds in that case validly issued. The facts in that case were that the corporation already indebted to the bank desired further credits which the bank was unwilling to grant except upon further security. Under those circumstances the company issued the bonds to the bank as security for past and future advances and under an agreement that the bank would account for them at their par value. We said that, as the company had actually received a consideration equal to the full value of the bonds and had enjoyed the benefits thereof, it should not

be permitted to escape payment therefor by alleging the invalidity of the bonds, and we affirmed the decision of the court below. The case was again before this court. 154 Fed. 657, 83 C. C. A. 481 (1907). The mortgage given to secure the payment of the bonds had been foreclosed and the question was upon the distribution of the proceeds of sale. We held that the bank which held the bonds was not entitled to share in the proceeds of sale of the mortgaged property unless it first surrendered the notes which it had taken for the advances made when or after it received the bonds.

The foregoing cases do not go to the question involved in the present case, and we shall therefore examine the cases elsewhere decided to see what the courts have held respecting similar constitutional or statutory provisions.

The Constitution of California (article 12, § 11) has a provision very similar to the New York statute. It reads:

"No corporation shall issue stock or bonds except for money paid, labor done or property actually received."

This was construed in the United States Circuit Court for the Southern District of California in *Farmers' Loan & Trust Co. v. San Diego Street Car Co.*, 45 Fed. 518 (1891), in a proceeding to foreclose a mortgage upon the property of the railroad company given to secure the payment of certain bonds which had been pledged to secure the payment of antecedent indebtedness and, at least in some cases, to obtain an extension of time. The court held that none of the bonds were ever legally issued. In its opinion the court said:

"This constitutional and statutory inhibition is plain, and has but one meaning--the money paid, labor done, or property actually received must be paid, performed, or received, as the case may be, on account of the issuance of the bonds; and any bonds issued contrary to this provision are of course illegally issued. The provision does not mean, and cannot be held to mean, that such bonds may be issued as collateral security for any sort of pre-existing indebtedness. Now none of the bonds in question are, or ever were, issued or held for money paid, labor performed, or property actually received on account of their issuance. On the contrary, all of them were delivered and are held as collateral security in part for pre-existing indebtedness of the defendant corporation, and in large part for pre-existing indebtedness, not of the defendant corporation, but of one of its creditors. As had already been said, not one of the bonds was ever sold, and not one of the holders of them paid a dollar on account of their delivery."

The same provision came before the Circuit Court of the Northern District of California in *Atlantic Trust Co. v. Woodbridge Canal & Irr. Co.*, 79 Fed. 842 (1897). But in this case the debt secured was not an antecedent debt. That case decided--what will not be questioned, we take it--that the prohibition under discussion does not prevent the use of bonds as collateral when issued at the time the debt is incurred. The case also decided that the word "issue," used in the constitutional provision, is broad enough to cover a pledge, as well as a sale, of the bonds. "In the contemplation of the law, bonds pledged by a corporation are just as much issued as when they are sold." That such is the law was settled for the federal courts by the decision of the Supreme Court in *Memphis & Little Rock Railroad Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595 (1887).

In *Nichols v. Waukesha Canning Co.*, 195 Fed. 807 (1912), the District Court for the Eastern District of Wisconsin had under consideration section 1753 of the Wisconsin Statutes, reading as follows:

"No corporation shall issue any stock or certificate of stock except in consideration of money or labor or property estimated at its true money value, actually received by it, equal to the par value thereof, nor any bonds or other evidence of indebtedness, except for money, labor or property estimated at its true money value, actually received by it, equal to seventy-five per cent. of the par value thereof, and all stocks and bonds issued contrary to the provisions of this section, and all fictitious increase of the capital stock of any corporation shall be void."

The court held that the issuance of bonds by a corporation for antecedent debts is not an issuance for "money, labor, or property," as the statute required. In its opinion the court said:

"Literally considered, these bonds are not within the statute, because they were not issued for money, nor for property estimated at its true money value. Existing debts are not money, and to say that they are property capable of estimation at its true money value does considerable violence to the words used. No property, claim, or debt was released or given up. Had the bonds been issued at the time of the respective loans, but for some reason the money not then paid over, subsequent payment of it might * * * be said to bring the case within the statute. The bonds would then be issued for money, as in the *Kenosha Case* they were issued for property. *Haynes v. Kenosha Electric Co.*, 139 Wis. 227, 119 N. W. 568, 121 N. W. 124. Again, if the notes or claims had been given up and canceled, and the bonds taken outright at not more than four to three, another question would be presented. This might be held the purchase of property at not less than three-fourths of its true value. No such novation, however, occurred. The intent and purpose of the statute will be presently considered; but from the language alone it is clear to a demonstration that the issue of bonds for a pre-existing debt not surrendered is not covered. Pre-existing debts are neither money nor property capable of being valued unless actually given up."

It added:

"In none of the transactions by which the bonds were pledged for the pre-existing debts was there anything paid on account of, or induced by, the delivery of the bonds. * * * Even if there had been an express agreement with every pledgee to account for the bonds at three-fourths their par value, they would still be invalid, because issued for a prohibited purpose."

The above case came before the Circuit Court of Appeals in the Seventh Circuit as *First Savings & Trust Co. v. Waukesha Canning Co.*, 211 Fed. 927, 128 C. C. A. 305 (1914). The court reversed the District Court on the proposition that if the holders of bonds taken as collateral to secure a pre-existing debt agreed to account for them at three-fourths their par value the agreement would still be invalid. It said:

"We are therefore of the opinion that in agreeing to take the bonds in question as collateral at the rate of not less than 75 per cent. of their face value upon their past-due claims, and in extending time of payment of the same, the present bondholders afforded to the corporation a valid property consideration equal to 75 per cent. of the face of the bonds, and are therefore satisfying the demands of the Wisconsin statute above set out, provided, of course, the creditors had agreed to accept the bonds on that basis."

The court agreed that, unless there was such an agreement to account for the bonds at three-fourths their face value, the collateralized bonds would be invalid.

In *Kemmerer v. St. Louis Blast Furnace Co.*, 212 Fed. 63, 128 C. C. A. 519 (1914), the Court of Appeals of the Eighth Circuit had before it the Missouri statute, which reads as follows:

"No corporation shall issue stock or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void." Const. Mo. art. 12, § 8.

"The stock or bonds of a corporation shall be issued only for money paid, labor done or money or property actually received." Rev. St. Mo. 1909, § 2981.

The court held that the bonds of a corporation issued and pledged to secure a pre-existing debt were invalid. The court said:

"But the great weight of authority is clearly to the effect that the money, labor, or property received for the bonds, whatever its value, must constitute a present consideration for the issuance thereof. Counsel for appellant have cited cases which they claim are authority for the proposition that a private corporation may pledge its bonds to secure an antecedent debt, under such constitutional and statutory provisions as are in force in Missouri. An examination of these cases discloses that not more than one of them can be said to support the proposition as stated, and it is doubtful whether that one, when rightly considered, does so. The case last referred to is *Nelson v. Hubbard*, 96 Ala. 238 [11 South. 428, 17 L. R. A. 375]. Under the Code of Alabama a private corporation has the power 'to borrow money, and to mortgage or otherwise convey or pledge its property, real or personal, and its franchises to secure the payment of the money so borrowed, or any other debt contracted by it.' The Constitution of Alabama has the same provision as that of Missouri. The Supreme Court of Alabama in the case cited decided that a difference between the amount of bonds issued and the debt does not create a fictitious increase of indebtedness, if they can properly be regarded as issued for money, labor done, or money or property actually received, and that the power to borrow money given by the Code included the power to pledge the bonds of the corporation, secured by its mortgage on property as collateral security for debts of the corporation presently created or already owing. Whether or not the bonds of a private corporation could be pledged for an antecedent debt was not the question directly in issue in the case, and we fail to find in it any strong support for the position of counsel."

The same court had the matter before it in *Mudge v. Black, Sheridan & Wilson*, 224 Fed. 919, 140 C. C. A. 397 (1915). The question again came up under the Missouri provision and the former decision was reiterated. The court declared that bonds issued by a Missouri corporation and pledged to secure its antecedent indebtedness without the receipt by the corporation of any valuable consideration for them except the consideration of the old debts and the extension of the time for their payment were invalid, and that under the clause of the constitutional provision that "all fictitious increase of * * * indebtedness shall be void" it was indispensable to the issue of valid bonds that they be issued only for money paid, labor done, or property actually received which is equal in value to the par value of the bonds.

We think the cases establish the law to be that under such a statute as that herein involved bonds cannot be pledged to secure payment of a pre-existing debt, and that an extension of the time for payment of a debt does not satisfy the requirement of the statute. The surrender of the corporation's old note and the substitution therefor of the corporation's new note in its place, either with the same or with different indorsers, cannot justify the issuance of the bonds, because

the corporation does not receive in return money, labor, or property within the meaning of the statute. If A. gives his note to B. for \$1,000, payable a year from date, and when it becomes due takes it up and gives another note in the same amount for the same debt, it requires a stretch of the imagination to see in the transaction that A. has received "any money, labor or property" as a result of what has taken place. If the maker of a note pays it, and it is returned to him, he does not in receiving it get either money or property, and the nature of the transaction is not changed by the fact that X., Y., or Z. had signed the surrendered note as sureties. And if, instead of paying it, A. gives a new note indorsed by only X. and Y., which B. has consented to accept in lieu of the old note, the nature of the transaction is not changed, and A. has not received "money, labor or property," in this case any more than he did in the former case.

[2] It may also be remarked of the statement that the course which the learned judge has assumed is not the case presented to this court, as the parties did not in fact adopt the course he puts. But if that course is to be regarded as equivalent to the course the parties in this case in fact pursued, then we do not agree with him in his conclusion that it did not involve a violation of the statute. On the contrary, assuming it to be equivalent, without so deciding it, we regard it as a positive violation of the statute, being merely an evasion of its terms. For the purposes of the statute the old indebtedness has not in reality been extinguished, although it is evidenced by a new note, and the pledge of the collateral is made to secure the old debt. The payment by the Bank to the Corporation of the money, which the Corporation immediately pays back to the Bank to extinguish the old indebtedness, so that a new indebtedness may be created for which the bonds may be pledged under the law, is not in our judgment an issuance of bonds "for money paid," within the meaning of the statute. If the statute can be evaded in this manner, it might as well be repealed. The District Judge in his opinion says:

"I think the provision of the New York statute quoted, fairly construed, means that the bonds may be issued for money borrowed at substantially their par value, or given in exchange for labor substantially equal in value to the par value of the bonds, or given in exchange for property to be used for the corporate purposes of the corporation of substantially equal value to the par value of the bonds. The right to sell and dispose of the bonds includes the right to pledge them, as we have seen; but when pledged by the corporation issuing them, with power in the pledgee to sell, the obligation must be imposed on the pledgee to dispose of them at substantially their par value."

[3] It is to be said respecting the above statement that at the time these stocks were pledged there was no agreement that they should not be sold for less than their par value; and the district judge, deeming such an agreement essential to the validity of the transactions, sought to correct the omission by a stipulation made after the bankruptcy of the pledgor corporation. But an issue of bonds illegal when issued clearly cannot be validated by anything done after the corporation which issued them has become bankrupt. The Bankruptcy Act (section 70) gives to the trustee by operation of law the title of the

bankrupt as of the date he was adjudged a bankrupt. And it provides in subdivision "e" that:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value."

The District Judge in his opinion said:

"It cannot be doubted that if the Progressive Wall Paper Corporation, finding itself unable to longer secure the indorsement of Wing, and through it a renewal of its note at the Bank, had executed a new note indorsed by Cunningham, Ingalsbee, and Derby for the same amount and due three or six months later, and had presented the same at the Bank for discount to obtain money to take up the old note, and had been refused on account of the insufficiency of the security of the indorsers, and the corporation had thereupon pledged \$7,000 of its mortgage bonds as additional security for the payment of such notes, and had thereupon secured the discount of such note at the bank and had the proceeds of such note passed to its credit, and thereupon had given its check to the Bank in payment of its old note and had thus secured a surrender of the old note, that the transaction would have been legal and binding, and that the issue of such bonds by so pledging them to the Bank would have been legal and binding under the statute."

It is to be observed of this statement that if the assumption of the District Judge were true, and if it followed from such assumption that what was done in the case at bar was valid, then the courts are wrong which hold that a deposit of bonds to secure an extension of time for the payment of a pre-existing debt is invalid; for the assumption of the District Judge might be equally applied to such a case.

[4] It is argued that the Bank, having taken these bonds as security for a pre-existing debt, is a holder for value under the doctrine of *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842), and that as one who takes commercial paper before maturity as collateral security for a debt of the seller, due or not due, is protected by the same estoppels as a purchaser for cash, the Bank is entitled to hold these bonds as valid obligations. The difficulty with this argument is that the bank is not a bona fide holder, and the construction contended for would nullify the statute and give validity to what the statute makes invalid. The purpose of the statute is the protection of the stockholders and the creditors against an indebtedness created by the issuance of bonds for which the corporation does not at the time receive either money, labor, or property. The Bank must be assumed to know that the law of the state expressly forbade the Corporation from issuing bonds, unless for money, labor, or property actually received. It also knew that it was receiving the bonds without giving the Corporation either money, labor, or property. It took the bonds with notice of this infirmity in its title, and is not therefore a bona fide holder.

[5] We have taken it for granted that in pledging the bonds herein involved the corporation "issued" them within the meaning of the New York statute. We have not, however, overlooked the appellee's argument that the pledging of the bonds was not an issue of the bonds.

Its counsel has argued that the bonds have not yet been issued, and will not be issued until the title of the pledgor has been divested. Until that has happened he would have us regard them as the pledgor's bonds, and therefore not yet issued. We have not been impressed by the argument. The construction he contends for is not that which the courts have put upon similar statutes. See *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 344, 49 Pac. 197 (1897).

[6] This brings us in conclusion to consider the right of the trustee to recover back these bonds. The maxims of the law are familiar doctrine. "Ex dolo malo non oritur actio," and "In pari delicto potior est conditio defendentis." In *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21 (1892), bonds were issued without complying with the terms of the Wisconsin statute, in that 75 per cent. of their par value had not been received in pledging them as security for a debt. Bonds to the amount of \$250,000 had been pledged as security for the loan of \$125,000. The court held that, while the bonds were void under the act, yet no action for the surrender or cancellation of them could be maintained by the corporation or by a stockholder in its right without a tender of the amount due to the pledgee. The court said:

"Seeking equity, the corporation or any one suing in its right, would be required to do equity, and make tender, as a condition of relief, of the debt for which they (the bonds) were pledged. Besides, both the corporation and *Hinckley*, as its president, participated in the unlawful issue of them, and occupy no position to ask the intervention of a court of equity, for they could neither of them make out a title to relief, except by showing a plain and positive violation of the statute. They are in equal wrong with *Pfister*, the party to whom the bonds were issued. * * * The law will leave the parties as they are, affording a remedy to neither."

[7] While it is true that neither courts of law nor courts of equity will as a rule lend their assistance to either party to an illegal contract, either to enforce it or to set it aside when it has been executed in whole or in part, and will not lend their aid to recover back money so paid or property so transferred, yet there are exceptions which are as well established as the rule. Whether the facts of *Hinckley v. Pfister*, *supra*, justified the conclusion the court reached in that case is not before us; but the doctrine of that case is clearly not applicable to the facts of this case which are materially different. In that case the corporation sought to regain possession of the bonds. In the case at bar the trustee of a bankrupt corporation brings the suit. The trustee of a bankrupt may urge, not only all the rights the bankrupt might have urged, had there been no bankruptcy, but in addition he may assert rights which the bankrupt could not assert. His rights are those of the bankrupt, and more, and he can set aside fraudulent transfers, representing, as he does, the rights of creditors.

The order of the District Court is reversed, and that made by the referee is affirmed.

In re PROGRESSIVE WALL PAPER CORP.
JUSTIN v. PEOPLE'S NAT. BANK OF HUDSON FALLS.
(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 78.

Petition to Revise and Appeal from Order of the District Court of the United States for the Northern District of New York.

In the matter of the Progressive Wall Paper Corporation, bankrupt. A petition by Fred H. Justin, trustee, for an order requiring the People's National Bank of Hudson Falls to turn over certain bonds to him and to have such bonds adjudged invalid was denied, and the trustee appeals and files a petition to revise. Reversed, and order of the referee affirmed.

Weeds, Conway & Cotter, of Plattsburgh, N. Y. (Frank E. Smith, of New York City, of counsel), for appellant.

Luther A. Wait, of Saratoga Springs, N. Y. (Edgar T. Brackett, of Saratoga Springs, N. Y., of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The trustee of the bankrupt filed his petition, in which he alleged that the People's National Bank of Hudson Falls, N. Y., is a secured creditor of the bankrupt, holding a note for \$5,000 made by the latter, dated September 13, 1914, and secured by a deposit of five bonds made by the bankrupt for \$1,000 each; the bonds being secured by a mortgage upon all the real property of the bankrupt. He asks for a decree adjudging that the bonds are invalid, that they were transferred to the bank by the bankrupt, that they are not liens upon the real property of the bankrupt, and that the bank be ordered to return the bonds to him.

The facts are similar to those in *Re Justin*, 229 Fed. 489, — C. C. A. —, decided by this court at this term. Indeed, the two cases were argued and submitted together. The only difference in the facts is that in this case there are only five bonds, of \$1,000 each, involved, while in that there were seven. The facts, therefore, need not be set forth, and it is sufficient to say that the decision in that case is equally applicable to this.

The order of the District Judge is reversed, and that made by the referee is affirmed.

LACOMBE, Circuit Judge. I am unable to concur with the majority of the court. My individual conclusions are sufficiently expressed in the following excerpts from the opinion of Judge Ray.

"It cannot be doubted that if the Progressive Wall Paper Corporation, finding itself unable longer to secure the indorsement of Wing, and through it a renewal of its note at the bank, had executed a new note indorsed by Cunningham, Derby, and Ingalsbe for the same amount and due three or six months later, and had presented same at the bank for discount to obtain money to take up the old note, and had been refused on account of the insufficiency of the security of the indorsers, and the corporation had thereupon

pledged \$7,000 of its mortgage bonds as additional security for the payment of such note, and had thereupon secured the discount of such note at the bank, and had the proceeds of such note passed to its credit, and thereupon had given its check to the bank in payment of the old note, and had thus secured a surrender of the old note, that the transaction would have been legal and binding, and that the issue of such bonds by so pledging them to the bank would have been legal, proper, and binding under the statute. Can it make any difference that this formality was not gone through with to the end, that the old note might be taken up and a further credit for the same amount obtained at the same bank? The result, so far as the corporation and its creditors are concerned, is precisely the same. Through the transaction as it actually occurred there was no violation of the true spirit and intent of the statute."

Since the collateral is not to be sold at less than par, the double indebtedness, about which much is said in the briefs, cannot be created. See *First Savings & Trust Company v. Waukesha Canning Company* (C. C. A. Seventh Circuit) 211 Fed. 927, 128 C. C. A. 305.

The statute contains a very wholesome provision, and it should, of course, be interpreted so as to give effect to that provision; but to me it seems like sticking in the bark of literal construction to hold it applicable to this cause as it is presented on this record.

CENTRAL R. CO. OF NEW JERSEY v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. December 29, 1915.)

No. 1963.

1. CARRIERS ↔38—INTERSTATE COMMERCE ACT—REBATES—PROVISIONS OF LEASE.

A coal mining company, owning a railroad with branches to its mines in the Lehigh mining district, in 1871 leased the same to defendant for 999 years; defendant agreeing to pay as rental a stated sum annually, and also to give to the mining company certain advantages in rates over other shippers in the same region by charging it only the rates in force from a designated point. After the enactment of the Hepburn Amendment (Act June 29, 1906, c. 3591, 34 Stat. 584) to the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), defendant attached a note to its tariff schedules filed, setting out the requirements of its lease, and thereafter, while charging the mining company schedule rates from points of shipment, as it did other shippers, it returned a portion of such charges in monthly settlements. *Held*, that such allowance was not for the use of an instrumentality of commerce furnished by the mining company, since by the lease defendant became for all practical purposes the owner of the road, and that on the enactment of the Interstate Commerce Act, and especially section 1, as amended by Hepburn Act June 29, 1906, § 2 (Comp. St. 1913, § 8597), the allowance became illegal as a rebate; its effect being to give the mining company an advantage over other and competing shippers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ↔38.]

2. CARRIERS ↔38—INTERSTATE COMMERCE ACT—PROSECUTION FOR VIOLATION—DEFENSES.

That defendant made such payments in good faith and in the belief that they were not prohibited by the act is not a defense to a prosecution for its violation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ↔38.]

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

Criminal prosecution by the United States against the Central Railroad Company of New Jersey. Judgment of conviction, and defendant brings error. Affirmed.

Charles E. Miller and Jackson E. Reynolds, both of New York City, for plaintiff in error.

Henry S. Mitchell and Alexander H. Elder, both of Washington, D. C., for the United States.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In the court below the Central Railroad Company of New Jersey was convicted and fined for violating the so-called Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [Comp. St. 1913, §§ 8597-8599]), as amended by the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584). The offense was carrying anthracite coal for the Lehigh Coal & Navigation Company at less than the published tariff rate. The indictment was found in November, 1914, and contained 200 counts, covering the unlawful carriage of 200 separate carloads during the period from December, 1911, to June, 1914. The defendant was found guilty on 185 counts, and on 25 of these the court imposed fines aggregating a large sum. The amount of the fine is not in controversy, but an attack is made upon the correctness of certain rulings and instructions during the course of the trial.

In a few words, each count charges the offense substantially as follows: The defendant, an interstate common carrier, transports anthracite coal for hire; the coal moving in carload lots. Being subject to the acts regulating commerce, it filed printed tariffs and schedules with the Commission, showing its rates and charges for carrying coal from Nesquehoning, in Carbon county, Pa., to points in other states. While these tariffs were in force, the carload described in the count was carried for the Navigation Company at the tariff rate; but a specified portion of the rate was afterwards unlawfully and knowingly repaid, so that the coal was really carried at less than the tariff rate, and the Navigation Company received the advantage of an illegal rebate.

Some shipments were carried to points on the defendant's own line, and others were carried to points on the lines of connecting carriers under agreements for through routes and joint rates. By stipulation some of the facts were agreed upon, and there was no real dispute about the others; the controversy being merely over the meaning they should bear. The defendant denied that the payments were rebates, asserting them to be compensation for the use of an instrumentality of transportation furnished by the Navigation Company. In order to present the situation fairly from the defendant's point of view, we follow its statement in the main, and condense the facts therefrom, but we think with sufficient fullness.

Not long after 1860 the defendant, a New Jersey corporation, was

operating a railroad that crossed the state from Elizabethport and Jersey City, on New York Harbor, to Easton, Pa., at the junction of the Delaware and the Lehigh rivers. At Easton it connected with the Lehigh Valley Railroad, a Pennsylvania road running westward up the Lehigh river to the anthracite coal field; and afterward it also connected at the same place with another Pennsylvania road, the Lehigh & Susquehanna Railroad, built and owned by the Navigation Company. The history of the Navigation Company is briefly this: Nearly a century ago, it was incorporated by the state of Pennsylvania to mine coal, and to operate a slackwater navigation on the Lehigh river. It dug a canal along the river from a point south of Wilkes-Barre to the Delaware river at Easton, and carried its coal to Easton by this canal before the railroad was built. The railroad was authorized and laid from time to time, and by the year 1867 or 1868 it was in operation from Wilkes-Barre to Easton, and (as already stated) was called the Lehigh & Susquehanna Railroad. Nesquehoning Junction is a station on this road, a few miles north of Mauch Chunk. A railroad, 18 miles long, ran from the Junction up the valley of the Nesquehoning creek to Tamanend, and in 1868 this was leased to the Navigation Company. Not long afterward another branch line was built that ran in the same general direction into the valley of the Panther creek, which lies south of the Nesquehoning. On this branch is a point called Hauto, and between Hauto and the valley of the Panther creek the branch passed through the Nesquehoning tunnel, which penetrates the mountain separating the two valleys.

The mines of the Navigation Company are in the Lehigh region; nine of its ten collieries being in the Panther creek valley, and the tenth being at Nesquehoning (not the Junction), a station about midway between Mauch Chunk and Hauto. All these collieries were in operation before the Lehigh & Susquehanna Railroad was built, and the coal then mined along the Panther creek was brought to the canal over a gravity road south of Nesquehoning Mountain. The coal from the Nesquehoning colliery at first reached the canal by another gravity road, but, after the Nesquehoning road was built, the coal from that colliery was brought by rail to Mauch Chunk; and, after the tunnel was finished through the Nesquehoning Mountain, the Panther creek coal passed north through the tunnel and also reached Mauch Chunk by way of the Nesquehoning valley road. After the roads referred to had been finished, all the coal carried by them, as well as the coal carried by the Lehigh Valley Railroad, was sold "f. o. b. Mauch Chunk"—that is, the shipper paid the freight from the mine to Mauch Chunk, and the buyer paid the freight from Mauch Chunk to destination. All these railroads were used by other miners and shippers, as well as by the Navigation Company.

Originally the Lehigh Valley Railroad ended at Mauch Chunk, a point on the Lehigh river 46 miles west of Easton. At Mauch Chunk it connected with two short local roads—one running up the river to Penn Haven, and thence westward into the Lehigh coal field; and the other running between Penn Haven and Hazelton, also a point in the Lehigh field. Afterwards these two roads became part of the Lehigh Valley system; but, as they had formerly been separate roads,

the freight rates from the mines to Mauch Chunk continued to be charged in two parts, one from the mine to Penn Haven, and the other from Penn Haven to Mauch Chunk—these rates being called “laterals.” Anthracite coal reaches the market in several sizes, but the same rate was charged on each size until late in the '80's. The rate was less, however, if the point of destination was the competitive market at tidewater than if it was an inland or way point. Tide “laterals” and way “laterals” were also charged, the former being less than the latter.

About 1870 or 1871 the coal-carrying roads furnishing traffic to the defendant at Easton had either acquired, or were about to acquire, their own outlets to tidewater, and accordingly the defendant was face to face with the alternative, either of securing a new connection that would furnish it traffic and also an outlet to the west, or of becoming again a local road across the state of New Jersey. The only new connection then available was the Navigation Company's road—the Lehigh & Susquehanna—and accordingly in March, 1871, the defendant leased it for 999 years. The lease included the main line and its branches—among them, the Nesquehoning valley branch—but did not include the tunnel through the Nesquehoning mountain or the road in the valley of Panther creek. The length of the leased line and branches was 150 miles. For many years the defendant's through traffic with the West has moved over the Nesquehoning branch. As rent or compensation for the use of the demised premises, the defendant agreed to pay one-third of the gross receipts from the traffic or business to be derived therefrom, making certain deductions. By the tenth covenant the defendant also agreed (and this is the heart of the case) that on coal delivered for transportation by the Navigation Company—

“ * * * on sidings at the northern end of the Nesquehoning tunnel, the rates of transportation shall not exceed the rates charged at the same time from Penn Haven to the same points on coal from the Lehigh region, either by the [Central Railroad] or by the Lehigh Valley Railroad Company.”

And on its part the Navigation Company agreed that all its coal should be sent—

“ * * * to market over the roads of the parties to this agreement, when destined to points or markets reached by the said roads; and when destined for markets not so reached, it shall be sent as far as practicable over said roads, excepting always coal destined for shipment by canal (and certain other exceptions): Provided, that one-fourth of the coal mined annually by the [Navigation Company] in the Wyoming region may be sent to markets by lines running towards the Delaware river.”

A supplemental agreement of May, 1883, provided that the rent, or compensation, or the Navigation Company's share of the gross receipts, under the original lease, should never be less than \$1,414,400, and after December 31, 1892, should not be more than \$2,043,000; if the maximum should be reached, a further sum should be paid, calculated by a method that need not be described. In 1887, a further amendment was made:

“Whereas, it is important for the interests of both the parties hereto—as tending to secure enough business for the Lehigh & Susquehanna Railroad

and branches to enable the Central Railroad Company of New Jersey to earn sufficient revenues on the Lehigh & Susquehanna Railroad and branches to pay the stipulated rental—that so much as possible of the coal product of the Lehigh Coal & Navigation Company's lands shall be sent to market over the lines of the Lehigh & Susquehanna Railroad and branches, and the Central Railroad of New Jersey: It is agreed between the parties hereto that the proviso in the first of the covenants of the [Navigation Company] in the agreement of March 31, 1871, shall be changed so as to read as follows: 'Provided, that one-fourth and no more of the coal to be mined annually by the Lehigh Coal & Navigation Company from lands owned, leased, or controlled by it, may be sent to market over railroad lines other than the Lehigh & Susquehanna Railroad and branches, in case that by so doing the Lehigh Coal & Navigation Company can realize a larger price or profit than it would have realized from the price at the mines together with its proportion of the freight earnings on such coal on the Lehigh & Susquehanna Railroad and branches if it had been shipped over that railroad; but the Central Railroad of New Jersey shall have the option in such cases of buying such coal of the Lehigh Coal & Navigation Company at its mines, paying therefor a price which, added to the proportion of the freight earnings on such coal accruing to the Lehigh Coal & Navigation Company, shall not be less than that which the Lehigh Coal & Navigation Company would have realized if its coal had been shipped over other lines of railroad. But nothing in this proviso shall be held to limit the shipment of coal by the Lehigh Coal & Navigation Company over the Lehigh & Hudson River Railway to points in the interior of New England, except that the amount of coal shipped by the Lehigh Coal & Navigation Company over the Lehigh & Hudson River Railway, added to the amount that may be sent to market by railroad lines other than the Lehigh & Susquehanna Railroad and branches, shall not in any year exceed 25 per cent. of the total production of its mines.'

Under the foregoing provisions—and especially under the tenth covenant in the original lease—the defendant made the payments charged to be illegal.

After the lease of 1871, the rates formerly charged to shippers continued without change; that is, all shippers (except the Navigation Company) over either the Lehigh Valley Railroad or the Lehigh & Susquehanna Railroad were obliged to pay two rates—a lateral from the mine to Penn Haven, and a second rate from Penn Haven to Mauch Chunk. The tenth covenant in the lease relieved the Navigation Company from paying the first. Nesquehoning station lies between Mauch Chunk and Hauto, and both parties to the lease understood the tenth covenant to include shipments from Hauto as well as from Nesquehoning; but as Nesquehoning was nearer to Mauch Chunk the rate from Nesquehoning was less than the rate from Hauto. Rates to tide from Nesquehoning were 2 cents less than from Hauto, and way shipments were 4 cents less. After the lateral to Penn Haven was fixed at 14 cents, tide shipments from Nesquehoning were moved for 12 cents, and way shipments were always moved for 16 cents.

From 1873 to 1878 the mines of the Navigation Company were operated by the Lehigh & Wilkes-Barre Coal Company. During this period no change was made in the rates on coal from the Navigation Company's mines. When the Navigation Company resumed mining in 1878, the same rates were continued, except for some variation in the case of shipments to tide. The change was this: All shippers of coal to tide had been charged a rate equal to a certain percentage of the average selling price, and from this rate the Navigation Company

received the allowance referred to. An arrangement was now made that continued the previous difference between the rates charged the Navigation Company and the rates charged the other shippers; that is, the Navigation Company was now charged a rate determined by the number of miles over which its coal was carried in comparison with the average mileage of other shippers. As a result, the Navigation Company only paid 86 per cent. of the average rates charged other shippers, because its mileage was only 86 per cent. of theirs. After 1883, the separate laterals—from the mines to Penn Haven, and from Penn Haven to Mauch Chunk—were abolished, a single charge from the mines to Mauch Chunk being substituted, and after 1885 lower rates were made on smaller sizes; but the relative position of the Navigation Company and the other shippers continued without change. This brings us to the Interstate Commerce Act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379).

Up to this time, the favoring rates to the Navigation Company were not forbidden by statute, and it is common knowledge that allowances to important shippers were frequent enough everywhere to be the rule instead of the exception. This was one of the principal abuses at which the act was aimed. After its passage the defendant fixed the rates on anthracite coal by a different method. It abolished the laterals from the mines to Mauch Chunk as separate charges, and it abolished also the percentage basis for calculating the rate on tidewater coal, substituting through rates to destination from all mines in the Lehigh region. In establishing such rates, it followed the long established practice and made the rates on tide shipments lower than the rates on inland shipments—the reason for the practice being the increased competition at tide. The through rates took the old tide rates as the basis, and reduced the inland rates accordingly. In these through rates the old lateral from the mines in the Lehigh region to Mauch Chunk was calculated at 13½ cents.

These through rates were applied to the Navigation Company's shipments, except where its coal competed with Schuylkill coal carried by the Pennsylvania Railroad and the Reading Railroad. The rate on each of these roads from the Schuylkill region was 5 cents less than the rate from the Lehigh region, and, as the Navigation Company's coal and the Schuylkill coal were in the same geological field, that company received a 5-cent reduction to the points of competition. But this practice was given up in 1895, and since that time the Navigation Company's coal has been formally charged the same rates as the coal of other shippers in the Lehigh region. While the 5-cent reduction was in force, it was taken off that portion of the rate representing the haul between the mines and Mauch Chunk; that is, from the old laterals.

As the through rates were formally applied to shipments from all points in the Lehigh region, they applied to the Navigation Company in common with all other shippers; and this might not have violated the tenth covenant in the lease of 1871, since a through rate from Penn Haven would have been the general Lehigh region rate and would have been the same as the rate from Nesquehoning. But—and we

now reach one of the defendant's important positions—it contends that both parties to the lease believed in 1871, as they believed in 1878, when they applied the percentage rate to tidewater shipments, that the real object of the tenth covenant was, not to guarantee a specific rate on the Navigation Company's coal, but to adopt a method of giving the company certain sums of money that should form part of the consideration for the defendant's use of the Lehigh & Susquehanna Railroad and its branches. In other words, although the sums thus to be paid were measured by the old lateral to Penn Haven, they were really not part of the freight rates, but a part of the rent. In 1887, therefore, in order to carry out their understanding and construction of the lease, the parties agreed that through rates should make no difference, and that the Navigation Company should still enjoy in substance the same advantage as in the beginning, and should still in effect pay only one of the two laterals from the mines to Mauch Chunk. The allowance was made in the following manner: In the through rates, 30 or 35 cents represented the old laterals; 14 cents being the Penn Haven lateral if the shipment should be from Hauto, and 12 cents being the same lateral if the shipment should be from Nesquehoning. The defendant therefore allowed the Navigation Company the difference between the through rates and the rates which the Navigation Company would have had to pay if the old percentage basis had been continued, deducting a certain amount that needs no particular attention. And these allowances have been made on all coal shipped from the Navigation Company's mines, whether the freight was paid by the company or by the consignee. Settlements were made each month; the Navigation Company was charged with the tariff rate on all shipments on which it was to pay the freight, and with all other sums due from it to the defendant, and was credited with the allowances referred to and with all other sums due from the defendant, and the balance was then paid to the party entitled thereto. The defendant contends that the allowances were a mere convenience in accounting, in order to ascertain what amount of revenue the leased lines were producing; the Navigation Company being entitled to receive one-third of this revenue under the lease of 1871.

After the Hepburn Act was passed in 1906, the defendant consulted counsel to learn whether these allowances should be referred to in its printed tariffs; it desired to comply fully with the law, and to do nothing that was even doubtful. As the result of this conference, the defendant has published the following note since 1906 in all of its tariffs:

"In compliance with the tenth covenant of the lease from the Lehigh Coal & Navigation Company under which the Central Railroad Company of New Jersey operates the Lehigh & Susquehanna Railroad, a lateral allowance is made out of herein-named rates to the Lehigh Coal and Navigation Company on all anthracite coal originating on the latter's tracks in the Panther creek, Nesquehoning, and Hacklebarnie districts mined and shipped by it, when coming by Hauto, Nesquehoning, and Mauch Chunk gateways.

"The covenant referred to is set forth in the lease of March 31, 1871, and recorded in Deed Book No. 262, page 480, of Luzerne county, and Deed Book No. 43, page 339, of Lackawanna county, Pennsylvania."

Before the indictment was found, 222 tariffs containing this note were filed with the Interstate Commerce Commission. The Commission accepted them all; its careful examination being shown by the facts that some tariffs containing the note were rejected because they were irregular in form, and that other tariffs were (for one reason or another) the subjects of conference between the defendant and members of the Commission. No question was raised by any one concerning the legality or the sufficiency of the note.

The defendant complains that the effect of the judge's charge was to disregard the position that the payments to the Navigation Company were merely part of the consideration for the use of the demised premises, asserting that the trial judge himself resolved this question of fact, and practically instructed the jury that the allowances were concessions from a rate, and could not lawfully be made unless the exact sum was published in the tariffs. The defendant admits that, if certain portions of the charge be read by themselves, the question seems to be left to the jury, but insists that the charge, taken as a whole, and especially in connection with the denial of the defendant's points, amounted to a binding direction to render a verdict of guilty.

[1] 1. The first subject to be considered is the true meaning of the agreement of 1871 in its bearing on the present dispute. In our opinion this is clear enough, and indeed is scarcely controverted, for the differences between the parties are rather verbal than substantial. In 1871 the Navigation Company leased its whole road for a term so long that for all practical and present purposes the defendant should be regarded as the owner, rather than the lessee. As payment for the property thus transferred, the defendant agreed to pay an annual sum, and in addition to give to the Navigation Company certain advantages over other shippers in the same region. By the tenth covenant, the defendant in effect agreed to make no charge for hauling the Navigation Company's coal from the mines to Penn Haven. This is the inevitable result of the covenant, and it makes no difference in what form of words the result is stated. In the end what happened was this: The Navigation Company put more money into its pocket than other shippers from the Lehigh region. They all received market prices for their coal, but the company was obliged to pay out less for freight than was paid by other shippers, and therefore was by so much the better off. Now, whether or not this advantage be stated as a reduction in rates, or merely as a part of the consideration for the lease, seems to be of little importance. What the two companies called it, and in reality understood it to be, appears plainly from the lease and from all the evidence. They chose to put it in the form of a reduction in rates and we shall do them no injustice if we accept their construction. In our opinion they were right in regarding it as part of the consideration, and the government is also right in regarding it as an advantage to the Navigation Company by a reduction in rates. That Congress had power to forbid the continuance of such a practice is not in doubt. *Railroad Co. v. Mottley*, 219 U. S. 468, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Railroad Co. v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911.

2. The next question in order need not detain us. Assuming as we do (and indeed as we must, in view of the verdict) that the allowances complained of were rebates, they were forbidden in express terms by the statutes regulating commerce, and especially by the Elkins Act, under which the indictment is framed.

3. The defense that the allowances were merely payments for the use of an instrumentality of commerce, and that the note appended to the tariffs was an adequate specification of these sums, requires only a word. The Lehigh & Susquehanna Railroad is not an instrumentality furnished by the shipper, for whose use the carrier may lawfully make compensation. For all present purposes the Lehigh & Susquehanna Railroad is not the property of the Navigation Company, but is the defendant's own property, for the use of which it can make no allowance to a shipper. And as there is no evidence that the Navigation Company rendered any service to the defendant in connection with the delivery of coal at Nesquehoning, nothing appears to support the defense just referred to.

4. Did the court err in the charge to the jury while submitting the question whether the allowances were rebates? In our opinion the instructions need not be considered. We think the court would have been justified in giving a binding instruction in favor of the government. No fact of any importance was in dispute; the only controversy was over the construction that should be put on the original lease and on the subsequent course of dealing between the parties, and, as we have already stated, this was in substance merely a dispute about words. The parties intended to give the Navigation Company an advantage over other shippers in the sale of its coal; they intended to measure that advantage by a certain proportion of the rate for transportation; they always did measure it in that manner, and the intended result was brought about. These facts were not, and could not be, in controversy, and since they constituted the offense denounced by the statute the court would have been justified in so instructing the jury. The defendant cannot complain that the jury was nevertheless allowed to pass upon the question, and manifestly it would be superfluous for us to consider the correctness of what the trial judge said. We must not be understood as criticizing the charge in any respect, but merely as declining to pass upon it.

[2] 5. This being so, it only remains to say that no question of the defendant's good faith could arise. We may assume its intention to comply with the law, and its effort to ascertain its duty; but we cannot relieve it from the consequences of mistake. This subject has been considered and decided by the Supreme Court in *Armour v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681. See, also, *New Haven R. R. v. United States*, 200 U. S. 398, 26 Sup. Ct. 272, 50 L. Ed. 515, *Railroad Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, and *Railroad Co. v. Lumber Co.*, 230 U. S. 316, 33 Sup. Ct. 887, 57 L. Ed. 1498.

The judgment is affirmed.

HUTCHISON v. NEW YORK & PENNSYLVANIA CO.

(Circuit Court of Appeals, Fourth Circuit. December 17, 1915.)

No. 1342.

LOGS AND LOGGING ⚡3—CONSTRUCTION OF EXECUTORY CONTRACT—PREMATURE ACTION FOR BREACH.

Plaintiff contracted to sell to defendant all the pine trees and wood on a tract of land which defendant should deem suitable for its use as pulp-wood, and which it should be able to cut and remove within five years, to be paid for by the cord. Defendant agreed to pay each month a part of the price for the wood which it removed and piled for seasoning at a railway station during the preceding month, and to pay the remainder on shipment to its mills. It also agreed to cut all suitable pine trees of a certain size as it went, at not more than one foot from the ground, and unless prevented by the elements or other causes beyond its control to cut not less than 10,000 cords per year. After three years plaintiff brought an action to recover damages, based chiefly on defendant's failure to cut and remove the required quantity in any one year, but also alleging breach of the other provisions and that defendant had failed to remove some of the wood cut, but left it in the woods to decay. *Held*, that the contract was executory, that the requirement that a certain quantity should be cut each year was an inseparable part of it, and that as plaintiff did not terminate it, but continued to receive the payments made, he could not maintain an action for its breach until the expiration of the term for complete performance. *Held*, further, that the provision for payment each month for the wood cut and removed during the preceding month was separable, and required defendant to remove and pay for all wood cut within a reasonable time, that for all wood cut and not so removed plaintiff was entitled to recover payment, and that whether defendant failed to comply with such requirement, and, if so, to what extent, were questions for the jury.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. ⚡3; Contracts, Cent. Dig. §§ 890-898.]

Woods, Circuit Judge, dissenting in part.

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

Action at law by H. B. Hutchison against the New York & Pennsylvania Company. Judgment for defendant, and plaintiff brings error. Reversed.

John S. Barbour, of Fairfax, Va., and C. E. Nicol, of Alexandria, Va. (Thos. H. Lion, of Manassas, Va., on the brief), for plaintiff in error.

Ridgely P. Melvin, of Annapolis, Md., and Samuel G. Brent, of Alexandria, Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOOD, Circuit Judges.

KNAPP, Circuit Judge. The plaintiff in error, plaintiff below and hereinafter so called, prosecutes this writ of error to reverse a judgment in favor of defendant, entered upon a directed verdict. The facts out of which the litigation arose appear to be these: The plaintiff is the owner of a tract of land in Prince William county, Va.,

comprising about 4,200 acres, on which there was a large quantity of pine timber. By contract dated March 31, 1911, but executed on the following day, he sold this timber to the defendant, a manufacturer of wood pulp. The contract of sale contains the following provisions:

"That said first party hereby agrees to sell, and by these presents does sell, to said party of the second part all the pine trees and pine wood the said second party deems suitable for its use, and which will make good, sound, merchantable pulpwood, on all or such portion of the aforesaid tract as said second party finds it will be able to cut and remove within five (5) years from date hereof. Said second party by these presents does hereby purchase the above-mentioned pine trees and pine wood under terms and conditions herein-after mentioned.

* * * * *

"The party of the second part will advance to the party of the first part on or before the 15th day of each month eighty-five (85) cents per cord for all wood received and piled for seasoning at the railroad station at Quantico during the preceding calendar month, and the party of the second part will pay to the party of the first part on or before the fifteenth day of each month fifteen (15) cents per cord of 160 cubic feet for all wood received at its mills at Lock Haven, Pa., during the preceding calendar month.

* * * * *

"The said second party hereby agrees to insert a clause in contracts with its contractors necessitating such contractors to cut reasonably low all the pine trees and pine wood referred to in this agreement, so that no stump shall be over twelve (12) inches high, and furthermore necessitating such contractors to cut all pine trees and pine wood suitable for use of said second party three (3) inches and over in diameter at a distance of five and one-half (5½) feet from the ground.

* * * * *

"The said second party hereby agrees to cut clean all the pine trees and pine wood which is suitable for its use as it passes over the said tract, and, unless prevented by the elements or other causes beyond its control, will cut not less than ten thousand (10,000) cords of wood per year, cutting under this contract to begin on or about May 1, 1911.

"It is further understood and agreed that all wood cut under this agreement may, at the option of said second party, be held before loading on cars and shipping to mill until such wood is thoroughly seasoned.

"The said first party hereby agrees to furnish to said second party satisfactory evidence as to the ownership of the said Landsburgh tract being vested in said first party, and to at once procure from the mortgagee mentioned in this agreement a proper release of the pine wood and pine trees to be cut by said second party as hereinbefore mentioned."

It is conceded that defendant did not cut 10,000 cords a year. An official of the company testified that the records of its contractor show:

"That from May, 1911, to May, 1912, they got out and shipped 4,300 cords; that from May, 1912, to May, 1913, they cut and removed about 9,000 cords; and from May, 1913, to May 1, 1914, about 4,000."

At the end of the three years, or a few weeks afterwards, this suit was brought to recover damages, as stated in the bill of particulars:

- (1) For failure to cut 10,000 cords in each of the years mentioned;
- (2) for failure to cut reasonably low all pine trees so as to leave no stumps exceeding 12 inches high;
- (3) for loss in quantity of pulpwood resulting from leaving stumps above the stipulated height;
- (4) for failure to cut clean as defendant went over the tract all pine trees suitable for pulpwood of the diameter of 3 inches and over 5½ feet from the ground;
- (5) for 3,000 cords of pulpwood cut and removed,

but not reported; (6) for failure to properly convert into pulpwood all trees that were suitable for that purpose; and (7) for failure to promptly remove all pulpwood that was converted and permitting the same to decay in the woods or otherwise become injured.

At the trial of the case plaintiff gave evidence tending to show, as we will assume without deciding, that he had suffered damage of the various kinds stated, and the amount of such damage. Without reference to other defenses which it claims were sustained by testimony, the defendant insists that it has paid all moneys due under the contract for wood cut and removed, and that as to the other items of damage the suit is prematurely brought and cannot be maintained. This brings up at the outset the question whether the contract gives a right of action, before the expiration of the five years allowed for full performance, for damages resulting from failure to cut 10,000 cords a year. In other words, is this such a separable part of the agreement as furnishes of itself the basis of an independent suit for each recurring failure to cut the stipulated quantity?

To begin with, we are of opinion that this is an executory contract. The subject of purchase and sale is the indefinite and uncertain amount of wood which the vendee might deem suitable for its use and be able to remove within a period of five years. The consideration to be paid was on a stumpage basis, measured by the number of cords actually cut and removed. It was not a sale of standing timber as such for an agreed sum of money, but rather of the uncertain quantity of pulpwood that the tract might yield. The compensation which plaintiff was to receive for the rights conveyed depended upon the results of defendant's future operations, and this we think had the effect of making the agreement executory. Moreover, relatively speaking, the promise to cut the stated number of cords each year was a subordinate part of the contract. The main agreement related to all the suitable wood which defendant might be able to get from the entire tract within five years; the obligation to cut 10,000 cords a year was a related, but minor, feature of the undertaking. The failure to keep it would not affect the aggregate sum to which plaintiff would ultimately be entitled, but merely postpone payment of a portion of the several installments, so to speak, as they accrued from year to year.

Whether failure to cut 10,000 cords a year was such a breach of the contract as would have justified plaintiff in rescinding it altogether, refusing to permit its further performance, and bringing suit for damages occasioned by the breach, we need not consider, because that is not the attitude he has assumed or the basis of his action. On the contrary, he has all along affirmed the contract, accepted the benefits that came to him thereunder, and demanded its full and complete observance. True, he protested because the agreed quantity was not cut in any of the three years named, and because of other alleged violations of the contract; but nevertheless he has taken what money he could get without seeking in any way to rescind the agreement. Granted that he had the right to annul the contract and hold himself no longer bound by it, because of defendant's failure to comply with its terms, he has not seen fit to take that course, but instead has accepted

payment from time to time, in each of the three years, for less quantities of wood than the defendant promised to cut.

The precise question presented is not easy of solution. We have examined all the decisions cited in the briefs of counsel, and many others referred to in standard text-books, without finding a case of sufficient similarity to have more than indirect bearing. But, so far as any guiding principle can be deduced from the multitude of decisions, we think it warrants us in holding, upon the facts here of record, that the contract in suit should be regarded, as respects the point now considered, as a single and indivisible contract, and that the promise to cut a given number of cords a year is not such a separable part of the agreement as affords the basis for an action for damages while the period of complete performance remains unexpired. We are also of opinion that the failure of plaintiff to terminate the contract because of this default, and his acceptance each year of payment for less than the stipulated quantity, operated as a waiver of full compliance with this provision and estops him from recovery for its nonobservance. Without reviewing the authorities or otherwise extending the argument, we content ourselves with this brief statement of our conclusions.

If we are correct in this view of the provision just discussed, it plainly follows that until the five-year period has expired plaintiff cannot maintain an action for damages based upon defendant's failure to cut the pine timber "clean" as it passed over the tract, nor upon the ground that stumps were left more than 12 inches high. It will be observed that these obligations are not limited by any yearly period or other time interval. If plaintiff is right in his contention, it would result, from the facts testified to by him, that he could bring an indefinite number of suits, since he would have an apparent cause of action for every instance in which a tree of the prescribed size was left standing, when any portion of the tract had been passed over, or whenever a stump was left more than 12 inches high. We think it clear that the promises in question are inseparable from the principal agreement, and that as respects these elements of damage the suit must fail because prematurely brought.

The contract provision in respect of payment for wood cut and removed is concededly separable, and that branch of the case remains to be considered. Without reviewing the testimony in detail, we are of opinion that sufficient was shown on behalf of the plaintiff to require submission of the case to the jury upon the question of fact as to whether the defendant had made full payment in accordance with the terms of the contract; and this for two reasons, or upon two grounds. In the first place, the testimony of defendant's officer above quoted was to the effect, as we understand it, that about 17,300 cords of wood were cut and removed during the three years. But the uncontradicted testimony of plaintiff shows that the aggregate payments were under \$14,000. We are unable to find in the record any satisfactory explanation of this discrepancy. As the case is presented to us, it would appear that a substantial balance was due the plaintiff, even on

defendant's theory, and for that reason it seems clear that the verdict in its favor was improperly directed.

In the second place, we are unable to sustain defendant's contention in regard to its obligation to pay for wood actually cut. The principal subject of agreement, as we have termed it, relates to such wood upon the entire tract as the defendant might be able to *cut and remove* within five years, while the subordinate clause merely requires it to *cut* 10,000 cords a year. From this difference in the words used defendant argues that it could cut down as much timber as it pleased without liability for payment, except upon so much of the wood as was removed from the tract and piled up at the railroad station. In other words, it is gravely contended in effect that defendant might have cut all the timber on the tract in say the first six months, and, by leaving it there on the land for the next four years or more, avoided any payment whatever until near the end of the five year period. It is manifest that the contract should not receive such an absurd construction, and we reject it without hesitation. While the contract does not specify when the wood should be removed after cutting, so that the 85 cents a cord would become due and payable, the law will imply that removal was to be made within a reasonable time, and what would be a reasonable time is a question of fact for the jury. Indeed, the obligation to remove promptly, or within a reasonable time, is plainly inferable from the language of the agreement. It provides for the payment of 85 cents a cord on or before the 15th day of each month "for all wood received and piled for seasoning at the railroad station at Quantico during the preceding calendar month." It also provides that all wood cut might, at the defendant's option, "be held before loading on cars and shipping to mill until such wood is thoroughly seasoned." The evident understanding and intention of the parties was that the seasoning was to take place at the station where the wood was to be piled for that purpose, and this obviously implies that the wood was to be taken to the station with reasonable promptness after it was cut, and not permitted to remain indefinitely on the land where the cutting took place. In like manner it must be held that the wood piled up at the station, on which 85 cents a cord would be due on the 15th of the following month, could not be allowed to remain there indefinitely, or for an unreasonable length of time, after seasoning; that is to say, after a reasonable time for seasoning, the defendant was under obligation to transport the wood to Lock Haven and pay thereon the remaining 15 cents per cord provided by the contract.

The plaintiff's testimony showed that considerable quantities of wood had been left for a long time on the tract where it was cut, some of it for two years or more, so that it had become more or less decayed and overgrown with vines, and this testimony was practically undisputed. It is true that the proof was rather indefinite as to the number of cords thus left on the land without timely removal, but we think it was sufficient to require submission to the jury.

This disposition of the fundamental issues of the case renders it unnecessary to consider the assignments of error based upon the rejection of evidence offered by the plaintiff, since such evidence relates

for the most part, if not altogether, to items of damage which cannot be recovered in the present action.

To sum up our conclusions, we hold that the suit is prematurely brought, and cannot be maintained, so far as it is based upon defendant's failure to cut 10,000 cords a year, to cut the timber clean as it passed over the tract, and to leave no stumps more than 12 inches high. But we also hold that plaintiff may recover for all wood actually cut before the suit was commenced and not removed within a reasonable time to the railroad station, and that there was evidence upon this issue which should have been submitted to the jury under proper instructions. It follows that the judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

WOODS, Circuit Judge. I concur in reversing the judgment and ordering a new trial, but I dissent from the conclusion of the majority of the court that the provision of the contract that the defendant should cut at least 10,000 cords of wood a year was not severable, and that the plaintiff, therefore, had no right of action for its breach until the expiration of the entire period of five years. The defendant's agreement was:

First. To buy all the pine trees and pine wood it deemed suitable to its use which it should be able to cut and remove within five years.

Second. To pay under conditions stipulated \$1 a cord for the timber.

Third. To leave no stump over 12 inches high, and to cut all trees suitable to its use 3 or more inches in diameter $5\frac{1}{2}$ feet from the ground.

Fourth. To cut all suitable timber clean as it passed over the tract.

Fifth. To cut not less than 10,000 cords a year, unless prevented by the elements or other causes beyond its control.

I cannot doubt that this last provision was intended by the parties to be severable. The whole tenor of the contract and the situation of the parties show that the intention was that the owner of the land should receive at the end of each year the amount due for the wood which the defendant had agreed to cut during the year. If this is not true, then the purchaser could have waited for the entire period of five years to commence operations, before he would have been subject to any action for the failure to pay the annual installments.

There is no general rule that can be applied in every case to determine whether the different provisions of a contract are severable. The guide is the intention of the parties to be inferred from the contract interpreted in the light of the conditions under which it was made. *Faw v. Marsteller*, 2 Cranch, 10, 2 L. Ed. 191; 6 Ruling Case Law, Contracts, §§ 246-250; note 59 Am. St. Rep. 279. Looking at the intention of the parties expressed in the contract and their situation when it was made, it seems to me clear that the seller was entitled to recover on that portion of the contract which provided for the cutting of at least 10,000 cords as a severable agreement on the part

of the purchaser. It could not have been contemplated that the purchaser would have a right to withhold the installments that he had agreed to pay at the end of each year until the end of five years. Such a conclusion negatives the expressed terms of the contract, and it seems to me it works a great hardship on the plaintiff.

The acceptance of payment for less than 10,000 cords each year could not be a waiver of the right to demand the yearly installments as they fell due, because the contract provides for payments through the year as the wood was cut, piled and shipped, and the seller could not tell until the end of the year what the deficiency would be. Mere failure to sue promptly for these yearly balances was not a waiver of the right to recover them at any time after they fell due. I cannot resist the conclusion that at the end of each year the purchaser was entitled to recover the purchase price of 10,000 cords of wood, less any wood cut and paid for, and less any quantity which the defendant was prevented from cutting by the elements or other causes beyond its control, and less the actual market value to the plaintiff on the land of the portion of the 10,000 cords which the defendant should have cut and did not.

MORRIS v. UNITED STATES.

CRAIG v. SAME.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1916.)

Nos. 4379, 4380.

1. BURGLARY ⇨2—COMMERCE ⇨5, 8—INTERSTATE COMMERCE—CRIMINAL OFFENSES—STATUTORY PROVISIONS.

Act Cong. Feb. 13, 1913, c. 50, 37 Stat. 670 (Comp. St. 1913, §§ 8603, 8604), prescribing the punishment for unlawfully breaking the seal of any railroad car containing interstate shipments or entering any such car, with intent to commit larceny, or stealing from any such car any goods which are a part of or constitute an interstate shipment, is constitutional, since, though the police power is reserved to the states, Congress, as to those powers expressly granted to it, possesses a power analogous to that of the police power, and it is immaterial that the breaking into a railroad car for the purpose of committing larceny therein, and the larceny itself, may also be punished under the laws of the state.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 1-3; Dec. Dig. ⇨2; Commerce, Cent. Dig. §§ 3, 5; Dec. Dig. ⇨5, 8.]

2. BURGLARY ⇨18—INDICTMENT—SUFFICIENCY.

Where an indictment for entering a railroad car containing an interstate shipment for the purpose of committing larceny followed the language of the statute, specifically described the car broken into, alleged that it was the property of a named railroad company, and contained an interstate shipment from the state of Massachusetts to the state of California, and gave the names of the consignor and consignee, and alleged that the breaking was with intent to commit larceny, it was sufficient.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 31, 32, 36; Dec. Dig. ⇨18.]

3. LARCENY ⚡28(1)—INDICTMENT—SUFFICIENCY.

Where an indictment charging defendants with stealing goods constituting part of an interstate shipment from a railroad car followed the language of the statute, charged that the shipment was an interstate one, described the property stolen, and described the larceny with all the particularity required by the common law, and charged all the facts necessary to enable defendants to prepare for their defense and to plead former jeopardy in case they were again indicted for the same offense after an acquittal or conviction on such indictment, it was sufficient.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 58, 99, 100; Dec. Dig. ⚡28(1).]

4. BURGLARY ⚡22—INDICTMENT—ALLEGATIONS AS TO INCORPORATION.

Under Rev. St. § 1025 (Comp. St. 1913, § 1691), providing that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form, which shall not tend to the prejudice of the defendant, an indictment for entering a railroad car containing an interstate shipment with intent to commit larceny and for stealing goods therefrom was not insufficient because it failed to allege that the railway company owning the car was incorporated; it not being apparent how this could have any tendency to prejudice defendant.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 55-61, 66; Dec. Dig. ⚡22.]

5. CRIMINAL LAW ⚡878(2)—CONVICTION FOR DIFFERENT OFFENSES UNDER SAME INDICTMENT.

Where an indictment in one count charged defendants with entering a railroad car containing an interstate shipment, with intent to commit larceny therein, and in another count with stealing goods from such car, they could be convicted on both counts, especially where the sentences on both counts were the same and concurrent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2099; Dec. Dig. ⚡878(2).]

6. BURGLARY ⚡31—TRIAL—ADMISSIBILITY OF EVIDENCE.

On the trial of railway employes for breaking into a car containing an interstate shipment and stealing shoes therefrom, the rear brakeman, who was not on trial, was asked what opinion he gave as to where the shoes were at a certain time, and was permitted to answer over objection. Two of the shoes stolen were for the same foot, and were sold by the witness to his brother, and the question was asked for the purpose of identifying them. He answered that he asked his brother where the shoes were, that his brother said he had sent them home by his boy, and that the witness told him that he was thinking of getting the shoes and giving them back to one of the defendants, as he was afraid there was going to be trouble over them. *Held*, that while the question, standing alone, seemed to be irrelevant, it was properly admitted when taken in connection with the other evidence.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 83, 86, 88; Dec. Dig. ⚡31.]

7. CRIMINAL LAW ⚡564—EVIDENCE—VENUE—SUFFICIENCY.

On the trial of railway employes for entering a car containing interstate shipments and stealing shoes therefrom, it appeared that, when the train had proceeded at least 14 miles in the Western district of Oklahoma, one of the defendants appeared with the shoes. *Held* that, even though the evidence was insufficient to establish beyond a reasonable doubt that the car was broken into in that district, it sustained a verdict of guilty on the count charging larceny, as that offense is a continuous offense, and, though committed in one district, may be tried in another district into which the stolen property is brought with intent to feloniously convert it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 726, 1277-1284; Dec. Dig. ⚡564.]

8. CRIMINAL LAW ⚡1177—HARMLESS ERROR—INSUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION ON ONE COUNT.

Where defendants were convicted of entering a railroad car with intent to commit larceny, and of stealing goods therefrom, but the punishment imposed on both counts was the same and ran concurrently, they were not prejudiced, even though there was no evidence to warrant the verdict of guilty on one count; the evidence clearly warranting a conviction on the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3183-3189; Dec. Dig. ⚡1177.]

9. BURGLARY ⚡42—SUFFICIENCY OF EVIDENCE—POSSESSION OF RECENTLY STOLEN PROPERTY.

Possession of property recently stolen, if unexplained, in connection with other evidence showing the presence of the defendant at the time and place where a theft was committed, justifies a finding of guilty.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 80, 104-107; Dec. Dig. ⚡42.]

10. CRIMINAL LAW ⚡829—INSTRUCTIONS—GOOD CHARACTER OR REPUTATION.

On a criminal trial, defendants requested an instruction that the good character of a defendant among his neighbors in the community in which he resided was of value, especially in doubtful cases, and that, if the jury believed from the evidence that one of the defendants bore a good character or reputation in the community in which he resided, they might consider such character in connection with all the other evidence, and that, if the evidence in regard to his character raised a reasonable doubt as to his guilt, they would find defendant not guilty. The court refused this instruction, but charged that testimony had been introduced for the purpose of showing defendants' good reputation in the community in which they lived, that this testimony was competent for the jury's consideration, that in the light of it they should view all the evidence in determining defendant's guilt or innocence, and whether they were convinced of defendant's guilt beyond a reasonable doubt, or entertained such a reasonable doubt of their guilt, but that if, after considering all the evidence, including that which had been introduced on the subject of reputation, they were satisfied beyond a reasonable doubt that defendants were guilty, it would be their duty to convict them, notwithstanding the evidence on the subject of reputation. *Held*, that the refusal of the requested instruction was not error, as the instruction given covered this phase of the case even more favorably to defendants than was asked by their instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⚡829.]

In Error to the District Court of the United States for the Western District of Oklahoma.

W. H. Morris and C. H. Craig were convicted of offenses, and they bring error. Affirmed.

Defendants requested the following instruction:

"You are further instructed that the good character of the defendant among his neighbors in the community in which he resides is of value, especially in doubtful cases, and if you believe from the evidence in this case that the defendant W. H. Morris bears a good character or reputation in the community in which he resides, you may consider such character in connection with all the other evidence in this case, and if the evidence in regard to his character raises a reasonable doubt in your minds as to the guilt of the defendant, then you will find the defendant not guilty."

S. B. Amidon and Jean Madalene, both of Wichita, Kan., for plaintiffs in error.

Isaac D. Taylor, of Guthrie, Okl. (John A. Fain, of Lawton, Okl., on the brief), for the United States.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER District Judge.

TRIEBER, District Judge. The defendants were indicted, charged with violations of the act of Congress of February 13, 1913 (37 Stat. 670). There were three counts in the indictment; but, as the defendants were only convicted on the first and second counts, the third need not be considered.

The first count charges the defendants with entering a car, in the Western district of Oklahoma, belonging to the Atchison, Topeka & Santa Fé Railway Company (giving a description of the numbers and letters on the car), containing a shipment of shoes consigned by the W. L. Douglas Shoe Company at Brockton, Mass., to the Boot & Shoe Hospital, at Los Angeles, Cal., while en route between these two points, with the intent to commit larceny therein, the shipment being an interstate shipment. The second count charges the crime of larceny from the same car.

[1] The sufficiency of the indictment is attacked upon several grounds. It is claimed that the act is unconstitutional, as Congress possesses no police power; that being reserved to the states. While it is true that the states reserved the police power to themselves, it is now equally well settled that as to those powers, which are expressly granted to Congress by the national Constitution, it possesses a power analogous to that of the police power. In *re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260; *Hoke v. United States*, 227 U. S. 308-323, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; *United States v. Shauver* (D. C.) 214 Fed. 154. In *Hoke v. United States*, Mr. Justice McKenna, delivering the unanimous opinion of the court, after reviewing the former decisions of the court, said:

"The principle established by the cases is a simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several states,' that the power is complete in itself, and that Congress, as an incident to it, may adopt, not only means necessary, but convenient, to its exercise, and the means may have the quality of police regulations."

By the commerce clause Congress has the power to regulate all interstate commerce, and consequently to protect it from destruction or depreciation, the same power which it possesses under that clause of the Constitution which grants it the power to establish the Post Office Department. Nor does it matter that the same offense, breaking into a railroad car, for the purpose of committing larceny therein, and the larceny itself, may be punished under the laws of the state where the offense is committed, as it is now well settled that certain acts may

be in violation of both state and national Penal Codes, and may be prosecuted in either of these courts. *Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19; *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213; *United States v. Marigold*, 9 How. 560, 13 L. Ed. 257; *United States v. Arjona*, 120 U. S. 479, 7 Sup. Ct. 628, 30 L. Ed. 728; *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287. There is no reason for doubting the constitutionality of the act.

The sufficiency of the indictment is also attacked upon a number of grounds. It is claimed that neither of the counts is specific enough.

[2] In the first count the indictment follows the language of the statute, and describes specifically the car which was broken into, that it was the property of the Atchison, Topeka & Santa Fé Railway Company, that it contained an interstate shipment from the state of Massachusetts to the state of California, gives the name of the consignor in Massachusetts, and the consignee in California, and that the breaking into the car was with the intent to commit larceny therein.

[3] The second count also follows the language of the statute, charging that it was an interstate shipment, as charged in the first count, describes the property stolen, and, in fact, describes the larceny with all the particularity required by the common law. It charges all the facts necessary to enable the defendants to prepare for their defense, and to plead former jeopardy in case they are again indicted for these offenses, after an acquittal or conviction on this indictment. This is all that is necessary. *Potter v. United States*, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214; *Jolly v. United States*, 107 U. S. 402, 18 Sup. Ct. 624, 42 L. Ed. 1085; *Considine v. United States*, 112 Fed. 342, 50 C. C. A. 272; *Bowers v. United States*, 148 Fed. 379, 78 C. C. A. 193; *Thompson v. United States*, 202 Fed. 401, 120 C. C. A. 575, 47 L. R. A. (N. S.) 206; *Breese v. United States*, 226 U. S. 1, 33 Sup. Ct. 1, 57 L. Ed. 97. The tendency of most of the courts at this day, and especially the Supreme Court of the United States, is to disregard technicalities, which can in no way be prejudicial.

[4] It is also claimed that the indictment is defective, as it fails to allege that the railway company, the owner of the car, was an incorporated company. In view of section 1025, Rev. Stat. (Comp. St. 1913, § 1691), this is unnecessary, as we are unable to see how that omission can have any tendency to the prejudice of the defendant. *Caha v. United States*, 152 U. S. 211-221, 14 Sup. Ct. 513, 38 L. Ed. 415; *Frisbie v. United States*, 157 U. S. 161-164-168, 15 Sup. Ct. 586, 39 L. Ed. 657; *Connors v. United States*, 158 U. S. 408-411, 15 Sup. Ct. 951, 39 L. Ed. 1033; *New York Central Railroad Company v. United States*, 212 U. S. 481-497, 29 Sup. Ct. 304, 53 L. Ed. 613; *Clement v. United States*, 149 Fed. 305, 79 C. C. A. 243, decided by this court, and in which certiorari was denied.

Under similar statutes of many states it has been held that it is unnecessary to charge in the indictment that the company, whose house was broken into, or whose property stolen, was an incorporated corporation. *Burke v. State*, 34 Ohio St. 79; *People v. Rogers*, 81 Cal. 209, 22 Pac. 592; *Fisher v. State*, 40 N. J. Law, 169; *State v. Simas*, 25 Nev. 432, 62 Pac. 242.

[5] It is next claimed that there can be no conviction on both counts. But this has been adversely decided in *Morgan v. Devine*, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153. Besides, the sentences on both counts are the same and concurrent.

[6] The next assignment of error complains of the admission of some of the testimony of H. S. Brookhauser, who was jointly indicted with the defendants in error, and who was called as a witness for the government. The question objected to was:

"What opinion, if any, did you give as to where the shoes were at the time?"

Standing alone, it would seem to be wholly irrelevant; but, when taken in connection with the other evidence, it was properly admitted by the court. This witness was the rear brakeman of the freight train; the defendants being other employés on that train. It appeared that two of the shoes stolen were for the same foot, and the mates were found when the box was opened by the consignee, upon its arrival in California. These were the two shoes which were sold by this witness to his brother, and the object of the question was for the purpose of identifying them. His answer was:

"I asked my brother where these shoes were. He said he had sent them home by his boy, who was call boy there. I told him that I was thinking of getting the shoes and giving them back to Mr. Morris, as I was afraid there was going to be trouble over them."

The court committed no error in permitting the witness to answer the question.

It is next claimed that the evidence was not sufficient to justify the submission of the case to the jury. It will serve no useful purpose to review the very voluminous evidence in this case. A large number of witnesses were examined by the government, for the purpose of tracing the shoes from the time they were packed and shipped from Brockton, Mass., until they arrived and were delivered to the consignee in Los Angeles, Cal. We have carefully read all the evidence in this case, and we entertain no doubt but that the evidence was sufficient to justify the submission of the case to the jury, and the verdict of guilty rendered by the jury.

[7] The learned counsel for the defendants strenuously insist that there was not sufficient evidence to warrant the finding that the crime, if committed by the defendants, was committed in the Western district of Oklahoma. The evidence shows that after the train had left the town of Kiowa, in the state of Kansas, which is about one mile north of the Oklahoma line, two men, whom he did not recognize then, as he was too far from them, were sitting at the head end of the train, and that some time after that the defendant Morris appeared with the shoes. When Morris appeared with the shoes, the train had proceeded at least 14 miles in the Western district of Oklahoma. Even if it be conceded that the evidence was not sufficient to establish, beyond a reasonable doubt, the breaking into the car in the Western district of Oklahoma, it certainly was sufficient to justify the verdict of guilty on the second count, that of larceny, for that offense is a continuous offense, and although committed in one district, if the stolen

property is brought into another district, with the intent there to feloniously convert the stolen property, the guilty party may be tried in either district. *Perara v. United States*, 221 Fed. 213, 136 C. C. A. 623, decided by this court.

[8] As before stated, as the punishment imposed on both counts is the same and runs concurrently, it can work no prejudice to the defendants, even if there was no evidence to warrant the verdict of guilty on the first count; the evidence clearly warranting a conviction on the second count.

[9] There was no error in the charge to the jury. It was as favorable as the law permits. Possession of property recently stolen, if unexplained, in connection with other evidence, showing the presence of the defendant at the time and place where the theft was committed, justifies a finding of guilty. *United States v. Jones* (C. C.) 31 Fed. 718; *Wiley v. State*, 92 Ark. 586, 124 S. W. 249.

[10] Nor was it error to refuse to give the instructions asked on behalf of the defendants as to the effect of their good reputation in the community in which they had lived, as the court covered this phase of the case even more favorably to the defendants than was asked by their instruction. The court charged the jury on that point:

"Testimony has been introduced here for the purpose of showing the good reputation of the defendants in the community in which they have lived. That testimony is competent for your consideration. In the light of it you should view all the evidence in the case in determining the guilt or innocence of the defendants, and whether you are convinced of the defendant's guilt beyond a reasonable doubt, or entertain such a reasonable doubt of their guilt. But you are instructed, if after you have considered all the evidence, including that which has been introduced here upon the subject of their reputation, you are satisfied beyond a reasonable doubt that the defendants are guilty, then it will be your duty to convict them, notwithstanding the evidence upon the subject of their reputation."

Edgington v. United States, 164 U. S. 361,¹ which counsel for these defendants rely on, does not sustain their contention. In that case the trial court had charged that such evidence "is of value only if the jury is in doubt as to whether the defendant is really guilty," which was held to be error, for, as stated by Judge Caldwell, in delivering the opinion of this court in *Rowe v. United States*, 97 Fed. 779, 38 C. C. A. 496, where the charge was similar to that condemned in *Edgington v. United States*:

"If the jury are not convinced of the guilt of the defendant beyond a reasonable doubt, then it is their duty to render a verdict of not guilty, without any evidence as to his good character."

Other alleged errors have been urged, and they have been carefully considered by us, but we have found none which were prejudicial to the defendants.

The judgment is affirmed.

¹ 17 Sup. Ct. 72, 41 L. Ed. 467.

McCLENDON v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. January 18, 1916.)

No. 4448.

1. COURTS ⇨366—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.

Indictments in the courts of the United States are not to be construed in conformity with the decisions of the highest court of the state in which the offense is committed, in construing the statutes of that state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. ⇨366.]

2. POST OFFICE ⇨48—USE OF MAILS TO DEFRAUD—INDICTMENT—REQUISITES AND SUFFICIENCY—DESCRIPTION OF PERSONS DEFRAUDED.

The failure of an indictment for using the mails in the execution or attempted execution of a scheme to defraud a bank to allege that the bank was incorporated did not prejudice the defendant, and hence the indictment would not be quashed because thereof, in view of Rev. St. § 1025 (Comp. St. 1913, § 1691), providing that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. ⇨48.]

3. POST OFFICE ⇨48—CRIMINAL OFFENSES—FRAUDULENT USE OF MAILS—INDICTMENT.

While an indictment for using the mails in the execution or attempted execution of a scheme to defraud must describe the particulars of the scheme with sufficient certainty to show its existence and character, and fairly acquaint the accused with the particulars of the fraudulent scheme charged, such particulars need not be pleaded with all the certainty as to time, place, and circumstances required in charging the gist of the offense, the mailing of the letter in execution or attempted execution of the scheme.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. ⇨48.]

4. POST OFFICE ⇨48—CRIMINAL OFFENSES—FRAUDULENT USE OF MAILS—INDICTMENT.

Where an indictment for using the mails in the execution or attempted execution of a scheme to defraud alleged that a letter mailed in such execution or attempted execution was inclosed in an envelope, a further description of which envelope was to the grand jury unknown, and then set out the letter contained in the missing envelope, it was not defective because of the failure to allege to whom the envelope was addressed.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. ⇨48.]

5. POST OFFICE ⇨48—CRIMINAL OFFENSES—FRAUDULENT USE OF MAILS—INDICTMENT.

An indictment charging defendant with using the mails in the execution or attempted execution of a scheme to defraud the estate of R. was not defective, where it alleged that R. was deceased, and that his estate was in the course of probate in the probate court of a county named, as this gave defendant all the information needed to prepare her defense, and sufficiently stated who was intended by her to be defrauded.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. ⇨48.]

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

*Rehearing denied March 24, 1916.

6. CRIMINAL LAW ⚡1129—APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY.
An assignment of error that the verdict is contrary to the law is too broad and indefinite, and cannot be considered.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. ⚡1129.]
7. CRIMINAL LAW ⚡586, 1151—APPEAL—REVIEW—DENIAL OF CONTINUANCE.
The refusal to grant a continuance was a matter addressed to the discretion of the trial court, and, unless clearly shown to have been a gross abuse of discretion, would not be reviewed.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 3045-3049; Dec. Dig. ⚡586, 1151.]
8. WITNESSES ⚡255—EXAMINATION—REFRESHING MEMORY.
On a trial for fraudulent use of the mails, it was not error to permit a post office inspector to refer to notes made at the time of his investigation of the case for the purpose of refreshing his memory, where he was not permitted to read his notes as his testimony.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. ⚡255.]
9. CRIMINAL LAW ⚡1059—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF EXCEPTIONS.
An exception "to the charge to the jury separately and as a whole, to each and every charge to the jury, and also to them in toto," was too general, and could not be considered, where any part of the charge was good; the court's attention not being called to any specific errors alleged to have been committed, so as to give it an opportunity to correct them.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. ⚡1059.]
10. CRIMINAL LAW ⚡829—INSTRUCTIONS COVERED BY THOSE GIVEN.
The refusal of a requested instruction that defendant should only be convicted of the offense charged in the indictment, and of no other, was not error, where the court had already charged to that effect.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⚡829.]

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

Ella McClendon was convicted of using the mails to defraud, and she brings error. Affirmed.

Frans E. Lindquist, of Kansas City, Mo. (Martin J. Ostergard and Luther N. Dempsey, both of Kansas City, Mo., on the brief), for plaintiff in error.

Vance J. Higgs, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The plaintiff in error, who will be referred to herein as the defendant, was indicted for violating section 215 of the Criminal Code (Comp. St. 1913, § 10385). There were four counts in the indictment. Upon the trial the jury found her guilty on all four counts, and thereupon she was sentenced by the court to five

years' imprisonment on each count; the terms of imprisonment to run concurrently.

[1] A demurrer was filed to each count of the indictment, and, having been overruled by the court, proper exceptions were saved and noted in the assignment of errors. The objections to the indictment are that the first, second, and third counts do not show whether the banks mentioned in the indictment, which the defendant is charged to have sought to defraud, were corporations or partnerships. Counsel relies upon decisions of the Supreme Court of the state of Missouri, which, in construing the criminal statutes of that state, hold that an indictment failing to state whether the party whose property is taken, or who is sought to be defrauded by a forgery, is a natural person or a corporation, is fatally defective. Neither in the brief nor in the oral argument did counsel for defendant refer us to any authorities to sustain the contention that an indictment in the courts of the United States must be construed in conformity with the decisions of the highest court of the state in which the offense is committed, in construing the statutes of that state. Nor do we know of any.

[2] Aside from this, the first and second counts specifically charge that the corporations sought to be defrauded were corporations existing under the laws of the state of Missouri. The third count fails to show that the Bank of Clear Creek County, at Georgetown, Colo., was a corporation; but this is immaterial, as the omission could in no wise prejudice the defendant, and unless such is the case an indictment will not be quashed in view of the provisions of section 1025, Rev. Stat. We have so decided in *Morris v. United States*, 229 Fed. 516, — C. C. A. —, opinion filed this day.

[3] It is also claimed that the first count, which charges the scheme to have been to send a forged check through the mail for collection, does not describe the forgery with the particularity required by the statutes of the state of Missouri in indictments for forgery. Counsel overlook the fact that this is not an indictment for forgery, nor even for fraud; but the gist of the offense is the mailing of the letters in execution or attempted execution of the scheme. It is true the particulars of the scheme must be described with certainty sufficient to show its existence and character, and fairly acquaint the accused with the particulars of the fraudulent scheme charged against her, but need not be pleaded with all the certainty as to time, place, and circumstances requisite in charging the gist of the offense, the mailing of the letter in execution or attempted execution of the scheme. *Colburn v. United States*, 223 Fed. 590, 139 C. C. A. 136, Judge Adams, who delivered the opinion of this court in that case, refers to the authorities, and it is unnecessary to repeat them here.

[4] Another objection is that, in the first, second, and third counts, the pleader fails to allege to whom the envelopes sent through the mails were addressed, and relies on *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709. But that case is squarely in point against the contention; the court holding that the allegation that the name of the addressee is to the grand jury unknown is sufficient. And this is alleged in this indictment. The indictment reads, "That letter

was inclosed in an envelope, a further description of which said envelope is to the grand jury unknown," and then sets out the letter contained in the missing envelope.

[5] Nor is the fourth count defective for the reasons hereinbefore stated, because it charges the scheme was to defraud the estate of John Rohan. This count alleges that John Rohan was then deceased, and that his estate was then in the course of probate in the probate court of Johnson county, Mo. This clearly gave to the defendant all the information needed to prepare her defense, and states who was intended by her to be defrauded. A careful examination of the indictment satisfies us that it complies fully with the requirements of the statute, as construed in numerous cases by the Supreme Court of the United States and this court, and that there was no error in overruling the demurrer.

[6] The next assignment of error is that the verdict is contrary to the law. This exception is entirely too broad and indefinite, and cannot be considered by this court. *Chicago, etc., Railway Co. v. Anderson*, 168 Fed. 902, 94 C. C. A. 241; *Tam Shi Yan v. United States*, 224 Fed. 422, 140 C. C. A. 116. No request for a peremptory instruction was asked on behalf of the defendant, but in view of the fact that the defendant's liberty is involved in this case we have carefully read the evidence, and are satisfied that it warranted the submission of the case to the jury, and its verdict is conclusive.

[7] The next assignment of error is that the court erred in refusing to grant a continuance. That was a matter addressed to the discretion of the court, and unless clearly shown to have been a gross abuse of discretion will not be reviewed by the appellate court. *Hardy v. United States*, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1137; *Itow v. United States*, 223 Fed. 25, 138 C. C. A. 439; *Clement v. United States*, 149 Fed. 305, 79 C. C. A. 243. The facts in this case fail to show any abuse of discretion.

[8] Objections were made to the introduction of some evidence. Some of these objections are too frivolous to require attention. One of the objections was that one of the witnesses, who was a post office inspector, was permitted to refer to notes, which he made at the time of his investigation of the case, for the purpose of refreshing his memory. This was clearly admissible. *Bailey v. Warner*, 118 Fed. 395, 55 C. C. A. 329; *Woodward v. Chicago, etc., Ry. Co.*, 145 Fed. 577, 75 C. C. A. 591. It might have been error if the witness should have been permitted to read his notes as his testimony, but he can certainly refer to them for the purpose of refreshing his memory.

[9] The exception to the charge of the court is too general to be considered by us. The record shows that, after the charge to the jury had been delivered, counsel for defendant stated:

"We except to the charge to the jury separately and as a whole, to each and every charge to the jury, and also to them in toto."

The court's attention was not called to any specific errors alleged to have been committed, and thus given an opportunity to correct them, if they were errors. Besides, the settled rule of law is that, if any part of the charge is good, such an exception cannot be considered.

Chicago Great Western Ry. Co. v. McDonough, 161 Fed. 657, 88 C. C. A. 517; Hindman v. First National Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108.

[10] Another exception is to the refusal of the court to give a special instruction asked on behalf of the defendant. That instruction, in substance, was that the defendant should only be convicted of the offense charged in the indictment, and of no other. As the court had charged the jury to that effect, it was not error to refuse to instruct the jury in the language requested by the defendant. Perovich v. United States, 205 U. S. 86, 27 Sup. Ct. 456, 51 L. Ed. 722; Weddell v. United States, 213 Fed. 208, 129 C. C. A. 552.

A careful reading of the record satisfies us that there was no prejudicial error committed by the trial court, and that the verdict of the jury is amply sustained by the evidence.

The judgment is affirmed.

ILLINOIS SURETY CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 86.

1. APPEAL AND ERROR ⇨5—TRIAL WITHOUT JURY—WRIT OF ERROR.

Comp. St. 1913, § 1584, provides that the trial of issues of fact in the Circuit Courts shall be by jury, except in certain specified cases. Section 1587 provides that issues of fact in civil cases in any Circuit Court may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury. Section 1668 provides that, when an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without a jury, according to section 1587, the rulings of the court in the progress of the trial, if excepted to and presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal, and that when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. *Held* that, where a case was tried without a jury on an oral waiver of a jury trial and without any written stipulation waiving such a trial, the questions decided at the trial could not be re-examined on writ of error, and no questions were open to review except those arising upon the process, pleadings, or judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. ⇨5.]

2. BONDS ⇨125—ACTIONS—PLEADING—REQUISITES.

Every plea in discharge or avoidance of a bond should state positively and in direct terms the matter in discharge or avoidance, and such matter is not to be inferred arguendo or upon conjectures.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 98, 180-197; Dec. Dig. ⇨125.]

3. APPEAL AND ERROR ⇨1008(2)—REVIEW—TRIAL WITHOUT JURY.

Where an action on a penal bond was tried without a jury on an oral waiver of a jury trial, whether there was any proof showing any breach of the condition of the bond, or that plaintiff had suffered any damages, could not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3957, 3964; Dec. Dig. ⇨1008(2).]

4. DAMAGES ⇨85—AMOUNT RECOVERABLE—PENALTY OR LIQUIDATED DAMAGES.

As a general rule the measure of damages in the case of a penalty is the actual loss sustained; but in the case of liquidated damages there can be a recovery of the whole amount, where such recovery is consistent with the policy of the law.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 179-181, 183-187; Dec. Dig. ⇨85.]

5. ALIENS ⇨54—BONDS—EXTENT OF RECOVERY.

In an action on a bond running to the United States and given to procure the admission into the country of alien children under 16 years of age, a breach of any of the various conditions in the bond entitled the government to recover the full penalty of the bond, whether it had suffered damages or not, since, while the sum mentioned in a bond is generally construed as a penalty, and as security for the damages actually sustained, and the recovery is limited to an amount compensatory therefor, this rule does not apply in the case of bonds running to the government, and which are given to secure performance by means of a forfeit.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⇨54.]

6. ALIENS ⇨54—IMMIGRATION—ADMISSION UNDER BOND—AUTHORITY OF SECRETARY OF LABOR.

Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (Comp. St. 1913, § 4244), specifies as one of the classes of aliens to be excluded from admission into the United States all children under 16 years of age, unaccompanied by one or both of their parents, at the discretion of the Secretary of Labor, or under such regulations as he may from time to time prescribe. Section 26 provides that any alien liable to be excluded, because likely to become a public charge, or because of physical disability other than tuberculosis or a loathsome or dangerous disease, may, if otherwise admissible, be admitted, in the discretion of the Secretary of Labor, upon the giving of a suitable bond holding the United States, or any state or territory, etc., harmless against such alien becoming a public charge. *Held* that, while there is no direct provision for a bond for the admission of alien children under the age of 16 years, the Secretary of Labor under section 2 was authorized to take a bond as a condition for the admission of such children, conditioned that they would attend public school until 16 years of age and during that time perform no work interfering with their regular attendance at school, that reports of their school attendance and labor, if any, performed should be made every three months, and that none of the children should become a public charge.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⇨54.]

7. ALIENS ⇨54—REVIEW—TRIAL WITHOUT JURY.

Where an action on a bond given to secure the admission into the country of alien children under 16 years of age was tried by the court upon an oral waiver of the jury, the question whether the evidence showed that the children were unaccompanied by their parents, or either of them, so as to authorize the Secretary of Labor to require such bond, was not reviewable on a writ of error.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⇨54.]

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against the Illinois Surety Company. Judgment for the United States, and defendant brings error. Affirmed.

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

Nelson L. Keach, of New York City (L. Laffin Kellogg and Alfred C. Pette, both of New York City, of counsel), for plaintiff in error.

H. Snowden Marshall, U. S. Atty., of New York City (Earl B. Barnes, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This action involves the right of the government of the United States to recover the full amount of a bond, \$1,000, given by the Illinois Surety Company as surety for the purpose of obtaining the admission into this country of four alien children under 16 years of age. The bond upon which the action is brought bound the defendant to pay to the United States the sum of \$1,000 in the event that the conditions of the bond were not complied with. There were four of these conditions: (a) That each of the children should attend public school until 16 years of age; (b) that none of them during said period should perform any work that would interfere with their regular attendance at school; (c) that one Biagio Di Goia should send every three months to the commissioner of immigration at the port of New York a written report as to their school attendance and labor (if any) performed; and (d) that none of the children should become a public charge. This action was brought to recover the amount of the bond by reason of breaches of the conditions with regard to the school attendance of Grace and John Pace, two of the children, and the making of the quarterly reports.

A jury was waived orally by both parties at the opening of the trial, and after hearing the testimony the trial court denied motions made by the defendant to dismiss the complaint, and found a verdict in favor of the plaintiff for \$1,000, the sum named in the bond. No findings of fact or conclusions of law were submitted to or signed by the trial court.

[1] The statutes require that issues of fact in actions at law be tried by jury (U. S. Comp. St. 1913, § 1584), unless the jury be waived by a stipulation in writing (U. S. Comp. St. 1913, § 1587), when the facts may be tried by the court and its rulings may be reviewed as provided in the statute (U. S. Comp. St. 1913, § 1668). This case having been tried without a jury, and there having been no written stipulation waiving a jury trial, it is well settled that none of the questions decided at the trial can be re-examined in this court on writ of error. *Ladd & Tilton Bank v. Lewis A. Hicks Co.*, 218 Fed. 310, 134 C. C. A. 106 (1914); *Erkel v. United States*, 169 Fed. 623, 95 C. C. A. 151 (1909); *City of Defiance v. Schmidt*, 123 Fed. 1, 59 C. C. A. 159 (1903). No questions, therefore, are open to review on error, except they arise upon the process, pleadings, or judgment.

The complaint alleges that on October 9, 1912, Grazia, Giovanni, Francesco, and Angela Pace, subjects of Italy, arrived at the port of New York, and it states that their ages were respectively, 15, 12, 4, and 1 years. It then avers that on October 25, 1912, the Illinois Surety Company, the defendant herein, executed and delivered to the plaintiff a bond in the sum of \$1,000, a condition of which bond was, among

others, "that if the said Grazia, Giovanni, Francesco, and Angela Pace should attend day school during the regular terms of the public school until June 30, 1913, June 30, 1916, June 30, 1925, and June 30, 1928, respectively, and if, during said period, the said aliens should not engage in any employment or perform any work or labor which should in any manner interfere with their studies, or with their regular attendance at school, then the said obligation should be void; otherwise, to remain in full force and virtue." It then alleges a breach of the condition and demands judgment in the full amount.

[2] The answer does not deny the execution and delivery of the bond, neither does it allege any matter in discharge or avoidance of it. And no rule in pleading is better settled or upon sounder principles than that every plea in discharge or avoidance of a bond should state positively and in direct terms the matter in discharge or avoidance. The matter in discharge or avoidance is not to be inferred *arguendo*, or upon conjectures. *United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448 (1836).

[3] The answer simply denies that the alleged breach of the bond has been committed, and also that the sum of \$1,000 is due and owing to the United States by reason of the premises set forth in the complaint. At the close of the case counsel for the defendant moved to dismiss the complaint. In so far as the motion was based on the absence of adequate proof showing any breach of the condition of the bond, this court is not at liberty, for the reason above stated, to consider it. And for the same reason this court cannot look into the record to discover whether there is proof that the plaintiff suffered any damages because of any omission on the part of defendant to perform the obligation imposed by the bond. But if we were at liberty to do so, and should find a total absence of proof that the United States had suffered any damages, it could not defeat the action or afford any reason for the dismissal of the complaint. If this bond had been given to an individual, instead of to the government, it might be important that it contained no less than 16 conditions of varying importance; for courts have held that where an agreement contains several distinct and independent covenants, upon which there may be several breaches, and one sum is stated to be paid upon the breach of performance, that sum is to be regarded as a penalty, and not liquidated damages. *Lampman v. Cochran*, 16 N. Y. 275; *Hoagland v. Segur*, 38 N. J. Law, 230; *Chase v. Allen*, 13 Gray (79 Mass.) 42; *Keck v. Bieber*, 148 Pa. 645, 24 Atl. 170, 33 Am. St. Rep. 846. That doctrine was applied by the Supreme Court in *Bignall v. Gould*, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491 (1886). But in the case at bar, as the bond was given to the government, it would not be in the least material whether the bond contained 16 conditions or only 1.

[4] The general rule is that in case of a penalty the measure of damages is the actual loss which has been sustained as a result of the breach where this can be ascertained. But in the case of liquidated damages there can be a recovery of the whole amount where such a recovery is consistent with the policy of the law. And generally the courts construe the sum mentioned in a bond as a penalty, considering

it merely as a security for the damage actually sustained by the breach of the condition and they limit the recovery to an amount compensatory therefor. But while the above doctrine is that which courts usually enforce they do not apply it in all cases. And they do not apply it in the case of bonds running to the government. The rule is correctly stated in Sedgwick on Damages (9th Ed., 1912) § 416a, as follows:

"In the case of a bond in a penal sum given to the state or a city not to secure it against actual ascertainable loss, but in order to secure performance by means of a forfeit, of a contract entered into for the public benefit, the recovery is for the full amount of the penalty; for the damages would usually be difficult or impossible of ascertainment and the intention of the parties is held to be that an absolute forfeiture is contemplated."

In Sutherland on Damages (3d Ed.) vol. 1, § 279, the law is stated as follows:

"Without express statutory authority, officers who are authorized by law to make contracts for a state or municipality have power to fix a sum as liquidated damages for their violation. The sum designated in the contract or subsequently agreed upon becomes, in the happening of the event on which its payment depends, the precise sum to be recovered and the jury are confined to it. Nor will equity relieve from it."

[5] The question came before Chief Justice Taney in *United States v. Montell*, Taney, 47, Fed. Cas. No. 15,798 (1840)—a case in the Circuit Court for the District of Maryland. The bond was conditioned that the registry of a vessel should be used solely for the vessel for which it was granted, and should not be disposed of to any person whatsoever, and that if the vessel should be lost or sold the registry should be delivered up to the collector. The condition had been broken and the government was allowed to recover the full amount of the bond. Chief Justice Taney said:

"The United States are entitled to recover the whole sum, for which the party is bound, if any one of the conditions is broken. Besides, how could the United States prove any particular amount of damages to have been sustained by them in a suit on this bond? What do they lose? It would be difficult, I think, by any course of proof, or any process of reasoning, to show that the United States had sustained any particular amount of damages in a case of this description, or to adopt any rule by which the damages could be measured by a jury, or be liquidated by agreement between the parties. The sum, for which the parties are to become bound, is manifestly a penalty or forfeiture, inflicted by the sovereign power for a breach of its laws. It is not a liquidated amount of damages due upon a contract, but a fixed and certain punishment for an offense. And it is not the less a penalty and a punishment, because security is taken before the offense is committed, in order to secure the payment of the fine if the law should be violated."

The leading case upon the subject is that of *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780 (1883). In that case a bond had been given to the state of Rhode Island in the sum of \$100,000 to secure the construction by a given date of a railroad extension. The bond was declared forfeited in the full amount by reason of the obligor's default, although no pecuniary damages were shown to have been sustained by the state. In the opinion Mr. Justice Matthews pointed out the distinction between private obligations and bonds given to the sovereign for the purpose of promoting a public interest or

policy, and he stated that in the latter class of cases there can be no intention of indemnification, for the reason that the state can gain nothing in its political or sovereign character by the performance of the conditions nor lose anything by a default.

[6] But counsel for the defendant strenuously urged that the complaint should have been dismissed on the ground that the provisions in the bond were not in accordance with the twenty-sixth section of the Immigration Act, being the Act of February 20, 1907, c. 1134 (U. S. Comp. St. 1913, vol. 2, § 4275), which reads as follows:

"Any alien liable to be excluded because likely to become a public charge or because of physical disability other than tuberculosis or a loathsome or dangerous contagious disease may, if otherwise admissible, nevertheless be admitted in the discretion of the Secretary of [Commerce and] Labor upon the giving of a suitable * * * bond or undertaking, approved by said Secretary in such amount and containing such conditions as he may prescribe, to the people of the United States, holding the United States or any state, territory, county, municipality, or District thereof harmless against such alien becoming a public charge. The admission of such alien shall be a consideration for the giving of such bond or undertaking. Suit may be brought thereon in the name and by the proper law officers either of the United States government or of any state, territory, District, county, or municipality in which such alien becomes a public charge."

Under the answer interposed counsel is not entitled to raise the question of the validity of the bond. It is not in issue under the pleadings. We are unable, however, to see that there is any reason for assuming that the bond was taken under that section of the act. That it was so taken is nowhere alleged in the complaint, and the bond makes no reference to it. It is quite evident to us that the bond was taken under section 2 of the act, which reads as follows:

"Sec. 2. That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons; * * * all children under sixteen years of age, unaccompanied by one or both of their parents, at the discretion of the Secretary of Labor or under such regulations as he may from time to time prescribe. * * *"

The fact that the section contains no direct provision for a bond for the admission of alien children under the age of 16 years is not of controlling importance. It provides for the admission of such children when unaccompanied by one or both of their parents "at the discretion of the Secretary of Labor." And in the exercise of that discretion he clearly would have authority to condition their admission upon the giving of just such a bond as was required in this case. The conditions of the bond appear to us to have been reasonable and proper, and we can discover no justification for holding them unlawful and void. No one of them violates either the statutory or the common law.

In *Moses v. United States*, 166 U. S. 571, 17 Sup. Ct. 682, 41 L. Ed. 1119 (1897), the Secretary of War directed that a bond should be exacted from an officer of the army assigned to duty in the Signal Service at Washington. There was no statute specially providing for the execution of a bond by one occupying that position. But the court held that the Secretary of War had power to make the order, and Mr. Justice Peckham, speaking for the court, said:

"The consideration or the condition of the bond must not be in violation of law; it must not run counter to any statute; it must not be either *malum prohibitum* or *malum in se*. Otherwise, and for all purposes of security, a bond may be valid, though no statute directs its delivery."

[7] There can be no doubt as to the right of the Secretary of Labor to take a bond from alien minors under 16 years of age, if unaccompanied by their parents. Whether in the case at bar the proof shows that Grazia, Giovanni, Francesco, and Angela Pace arrived at the port of New York unaccompanied by their parents, or by either of them, is a matter about which we cannot inquire. What the evidence shows or does not show upon that point is, because of the oral waiver of a jury, no more open in this court than is the question whether the evidence disclosed a breach of the conditions of the bond. The latter question we considered in an earlier part of this opinion, and the same reason which made it impossible and unnecessary to examine into the record upon that point applies with equal force to this one—whether these minors entered the country unaccompanied.

There was no error committed in refusing to dismiss the complaint. Judgment affirmed.

ILLINOIS SURETY CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 87.

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against the Illinois Surety Company. Judgment for the United States, and defendant brings error. Affirmed.

Nelson L. Keach, of New York City (L. Lafin Kellogg and Alfred C. Pette, both of New York City, of counsel), for plaintiff in error.

H. Snowden Marshall, U. S. Atty., of New York City (Harold A. Content, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The complaint alleges the arrival on November 25, 1913, at the port of New York of Gerra Basil, an alien aged 50 years, who was a native of Turkey; that the Secretary of Labor admitted her into the United States upon her giving a bond in the sum of \$500 so conditioned that the obligors should be bound to make written reports to the immigration officer in charge at the port of New York within thirty days prior to the expiration of six months and one year, respectively, from the date of the bond, showing as to said alien (a) residence and (b) occupation; that the bond was given as required, and that the Illinois Surety Company, hereinafter called the defendant, executed it as surety on December 6, 1913; that the defendant committed a breach of this condition of the bond not having sent to the immigration officer the written report as required; that by

reason of said breach the full penalty named in the bond, to wit, the sum of \$500 was due to the United States. The above condition of the bond was not the only one it contained, but as they do not need to be considered they will not be mentioned.

It is conceded that the bond was duly executed and that the written report as required by the bond was not furnished to the Commissioner of Immigration. The defendant claims that the bond was unauthorized by the act of February 20, 1907, c. 1134, § 26, 34 Stat. 906 (U. S. Comp. Stat. 1913, vol. 2, § 4275), and that the bond is therefore void. The defendant also claims that the complaint should have been dismissed, not only upon the above named ground, but because there is absolutely no proof of damages.

At the close of the case the defendant moved for the direction of a verdict, which motion was denied, and an exception was taken. Thereupon the plaintiff moved for the direction of a verdict in its favor, which motion was granted, and a verdict was directed for the full amount of the bond. The important questions involved in this case are similar to those involved in the case brought between the same parties on the bond of Giovanni Pace, just decided by this court, 229 Fed. 527, — C. C. A. —, and are governed by it.

Judgment affirmed.

DAY v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 17, 1915.)

No. 1264.

1. CRIMINAL LAW ⚡369—INTERNAL REVENUE—PROSECUTION FOR OFFENSES—EVIDENCE—OTHER OFFENSES.

In a prosecution for carrying on the business of a liquor dealer without having paid the special tax therefor required by law, evidence of sales by defendant prior to the years named in the indictment is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. ⚡369.]

2. INTERNAL REVENUE ⚡47—PROSECUTION FOR OFFENSES—EVIDENCE.

In a prosecution for carrying on the business of a wholesale liquor dealer without having paid the special tax therefor, the defense was that defendant made the sales as agent for his brother who was a bonded distiller, and as such entitled to make the sales of liquor on which he had paid the tax. *Held*, that evidence to show that defendant and not his brother was in fact the owner of the distillery was not competent to establish the offense charged.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. ⚡47.]

Woods, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge. On rehearing. Reversed.

For former opinion, see 220 Fed. 818, 136 C. C. A. 406.

Charles A. Hammer, of Harrisonburg, Va. (John Paul, of Harrisonburg, Va., on the brief), for plaintiff in error.

Richard E. Byrd, U. S. Atty., of Richmond, Va.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

KNAPP, Circuit Judge. The facts are sufficiently stated in our former opinion. 220 Fed. 818, 136 C. C. A. 406. On petition of the government a rehearing was ordered and the questions involved have been further considered.

[1] As the case appeared at the first hearing, a majority of the court were of opinion that proof of sales in 1909, the year preceding the two years named in the indictment, was improperly received, and for that reason mainly the judgment of conviction was reversed. In the light of the presentation now made, and on the authority of *Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162, and other cases brought to our attention, we are constrained to hold that evidence of prior sales was admissible in support of the substantive charge of carrying on the business of a wholesale liquor dealer without a license; and it follows that the judgment should not be reversed because this evidence was admitted.

[2] If this were the only question at issue, it would seem to be our duty to affirm the judgment; but we are of opinion that on other grounds the defendant is entitled to a new trial. The sole offense charged against him is the carrying on of the business named "without having paid the special tax therefor as required by law." He was not ostensibly engaged in that business, but there was proof of sales of liquor by him, apparently on his own account, and of payments to him for the same, by checks drawn to his order and deposited in bank to his own credit, from which the jury might have found, as we shall assume, that he was in fact carrying on business for himself and therefore guilty of the offense for which he was indicted. His defense was that in all the transactions shown he was acting, not for himself, but as agent for his brother, and this was the real question for the jury to determine. In the course of the trial, and as supporting the charge that defendant was not his brother's agent but was himself the principal in making the various sales proven, evidence was allowed tending to show that the distillery which produced the liquor sold, though bonded by his brother, was in reality owned and operated by defendant himself for his own benefit. Indeed, the record indicates that the question to which a considerable part of the testimony was directed, and upon which the controversy seems largely to have turned, was not so much whether defendant was a wholesale liquor dealer as whether he was the actual proprietor and beneficial owner of the distillery.

In point of fact the distillery was bonded by defendant's brother, T. T. Day, for both of the years named in the indictment, and had been bonded by him for a number of years before. The revenue officers appear to have always recognized T. T. Day as the proprietor, and to have dealt with the distillery at all times as owned and operated

by him. And it seems rather inconsistent that the government, whose officials in charge never raised any question as to the ownership of the distillery by T. T. Day, should now undertake to show that defendant was in fact the real proprietor, and this for the purpose of proving that he was a wholesale liquor dealer, and so guilty of carrying on that business without paying the special tax therefor. Moreover, it may be noted in this connection that there has been no fraud upon the government, so far as its revenues from this distillery are concerned. The tax has been paid, nominally, at least, by or for T. T. Day, in conformity with law and the obligations of his bond; and as a distiller he had the right to sell at wholesale, upon payment of the tax for which he had given security, without taking out a license. The government got the full revenue which it had the right to collect, and took the same as and for the tax on the brandy produced at this distillery, and to secure which it accepted the bond of T. T. Day and authorized him to operate the distillery during the years in question. In these circumstances it seems hardly fair to seek to convict the defendant for unlawfully carrying on the business of a wholesale liquor dealer by showing that he was also guilty of illicit distilling, which is an entirely different offense.

The prejudicial effect of the evidence that defendant was running the distillery on his own account, when he was on trial for carrying on another kind of business without a license, is not open to reasonable doubt. For, if the jury found that he was in fact the proprietor of the distillery, which was bonded in the name of his brother, it would almost follow that he was guilty of the offense charged in the indictment; whereas, if the proof had been confined, as in our opinion it should have been, to the question whether the sales and other transactions shown were those of a principal or those of an agent, the jury might have found a different verdict. The error in this regard, which we think has been committed, appears from comparison of the instruction asked and refused, which presented the single question of agency, with the instruction actually given, which coupled the offense charged in the indictment with the ownership of the distillery. The instruction asked was this:

"The court instructs the jury that if they believe from the evidence that Geo. S. Day was the agent of T. T. Day, and was authorized by T. T. Day to purchase the material for and market the products of the distillery mentioned in this case, and collect the money therefor, then such acts upon the part of George S. Day are the acts of T. T. Day, and for which Geo. S. Day is not answerable, and the jury must acquit the defendant."

The instruction given was as follows:

"If you believe from the evidence beyond all reasonable doubt that the defendant made the sales of brandy as testified by the government witnesses in chief, and if you also believe beyond all reasonable doubt that the defendant was in fact the owner and proprietor of the distillery in question at the time said sales were made, you should find him guilty as charged in the indictment, although you may believe that in making such sales the defendant was ostensibly acting as the agent of T. T. Day. On the other hand, if T. T. Day was in fact the proprietor of the distillery, and if, in making the aforesaid sales of brandy, the defendant was in fact acting as the agent of said T. T. Day, you should acquit the defendant."

It is of course well settled that a party is not entitled as matter of right to the precise instruction asked for, however correct and applicable it may be, provided the same instruction in substance is given in another form; and it may be conceded that the charge here considered includes the instruction which was refused. But the difficulty is that the issue of agency was so tied up with the ownership of the distillery that the instruction given was calculated to confuse and mislead the jury. Instead of confining inquiry to the offense charged against the defendant, which turned on the question of agency, the jury were instructed in effect to determine whether he was also engaged in illicit distilling, an offense for which he was not indicted; and, as already suggested, belief that he was operating the distillery without giving a bond led naturally to belief that he was guilty of wholesaling without a license. In short, it seems scarcely too much to say that as a practical matter the defendant was indicted for one offense and tried for another. If it be said that he cannot complain, because the charge in question put upon the government a greater burden of proof than the law imposes, in that illicit distilling had to be found in order to reach a verdict of guilty of wholesaling, the sufficient answer, as it seems to us, is that the former offense does not include the latter, and that there was no warrant for supporting the charge laid in the indictment by proof, perhaps more persuasive, that defendant was guilty of some other wrongdoing. The offense for which he was put upon trial is quite distinct from the offense of illicit distilling, and it seems plain to us that the emphasis placed, during the trial and in the charge, upon the ownership of the distillery was an injustice to the defendant for which a new trial should be awarded.

We adhere to the ruling heretofore made, and for the reasons stated in the former opinion, that the entire record, described as form 251½, should have been received in evidence, though we are not prepared to say that its exclusion, except as to certain entries, was of itself such an error as to require reversal.

Reversed.

WOODS, Circuit Judge (dissenting). I am unable to concur in a reversal of the judgment. The defendant was indicted for carrying on "the business of a wholesale liquor dealer without having paid the special tax therefor as required by law." There was no dispute that T. T. Day, the brother of the defendant, had given the bond and otherwise complied with the law which authorized him to conduct a distillery and to sell the product. The distillery was conducted in the name of T. T. Day by the defendant, claiming to be his agent. The government introduced evidence tending to show that the ownership of T. T. Day was pretensive, that the business was that of the defendant, and that he made sales in his own name and took the proceeds as his own. It seems plain that the defendant could not protect himself, either legally or morally, from the charge of selling liquor at wholesale without paying the tax, by claiming that another person had paid the tax and was authorized to sell. The conduct of the distillery and the sale of the liquor were indissolubly connected; and all evidence

tending to show that the defendant, and not his brother, was the real owner of the distillery, tended also to show that he was selling liquor on his own account, and not as agent for his brother. The defendant cannot complain, therefore, that the court in the following instruction put upon the government the double burden of showing that he had not only sold the liquor, but that he was the real owner of the distillery:

"If you believe from the evidence beyond all reasonable doubt that the defendant made the sales of brandy as testified by the government witnesses in chief, and if you also believe beyond all reasonable doubt that the defendant was in fact the owner and proprietor of the distillery in question at the time said sales were made, you should find him guilty as charged in the indictment, although you may believe that in making such sales the defendant was ostensibly acting as the agent of T. T. Day. On the other hand, if T. T. Day was in fact the proprietor of the distillery, and if in making the aforesaid sales of brandy the defendant was in fact acting as the agent of said T. T. Day, you should acquit the defendant."

As to the other point of difference, I repeat the view expressed after the first hearing. The testimony on both sides was very full as to the sales alleged by the government to have been made in the defendant's own name, including the book entries. This was a practical admission by the government that the other sales appeared regularly on the books as made and entered in the name of the defendant's brother, who was authorized to sell.

For this reason it seems to me the defendant was not prejudiced by the refusal to admit the books themselves.

OTTS v. I. M. LUDINGTON'S SONS, Inc., et al.

I. M. LUDINGTON'S SONS, Inc., et al. v. THE CUMBERLAND.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

Nos. 33, 159.

1. CANALS ⇨18—OBSTRUCTION BY CONTRACTOR—LIABILITY FOR INJURY TO BOATS.

A contractor engaged in work on the Erie Canal is liable for an injury to a boat using the canal, resulting from the negligent manner in which his work was performed.

[Ed. Note.—For other cases, see Canals, Cent. Dig. §§ 20-24; Dec. Dig. ⇨18.]

2. CANALS ⇨18—OBSTRUCTION BY CONTRACTOR—LIABILITY FOR INJURY TO BOATS.

A decree affirmed, holding contractors engaged in widening and deepening the Erie Canal into a barge canal liable in part for injury to two canal boats and their cargoes by stranding, and also holding the boats in fault; the evidence tending to establish that a number of large stones were thrown out by a dipper dredge in use by the contractors and left by them on the bottom of the old canal, which was in use, and that it was upon one of such stones that the boats struck, but that, if they had been carefully navigated, the injury might have been avoided.

[Ed. Note.—For other cases, see Canals, Cent. Dig. §§ 20-24; Dec. Dig. ⇨18.]

Appeals from the District Court of the United States for the Western District of New York.

Suit in admiralty by Joseph W. Otts, individually and as trustee and bailee of the cargo late laden on the canal boat Cumberland, against I. M. Ludington's Sons, Incorporated, and George W. Beeman, in which the Mannheim Insurance Company intervened, with cross-libel against the canal boats Cumberland, Columbia, Syracuse, and Oswego, in which Lena Beadle, mortgagee, intervened; also suit by Charles Nicholson, individually and as trustee and bailee of the cargo late laden on the canal boat C. E. Collard, against the same respondents, in which the Mosely & Motley Milling Company intervened, with cross-libel against the C. E. Collard. Cross-appeals from a decree dividing damages resulting from the stranding of the boats Cumberland and C. E. Collard in the Erie Canal, these cross-appeals are taken. Affirmed.

For opinion below, see 229 Fed. 454.

On cross-appeals from a decree adjudging I. M. Ludington's Sons, Incorporated, and George W. Beeman, on the one part, and the canal boats Cumberland and Columbia on the other, in fault for the sinking of the Cumberland in the Erie Canal near Holley, N. Y. The second of the above-entitled actions relates to the stranding of the canal boat Collard at the same bend in the Erie Canal.

The court found that the injuries sustained by the Cumberland were due to the negligence of the libelants, I. M. Ludington's Sons Company, which had a contract with the state of New York for widening and deepening the Erie Canal and transforming it into the so-called Barge Canal, and were due also to the negligence of George W. Beeman, who had a similar contract. The court also found the Ludington Company, Beeman, and the Cumberland, liable for the injuries sustained by the latter. Beeman has not appealed.

Lewis, McKay, McMillan & Bown, of Rochester, N. Y., for appellant I. M. Ludington's Sons, Incorporated.

Thomas C. Burke, of Buffalo, N. Y., for appellant Otts.

John B. Richards, of Buffalo, N. Y. (Brown, Ely & Richards, of Buffalo, N. Y., of counsel), for appellee Mannheim Ins. Co.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1] These appeals and cross-appeals bring here for review a final decree which holds in fault Ludington & Sons and George W. Beeman for the disaster which befell the canal boats Collard and Cumberland. The canal boats were also held in fault. Ludington's Sons and Beeman were held jointly liable with the libelants and therefore the damages and costs were equally divided between the wrongdoers. In the case of the Cumberland the respondents were directed to pay jointly one half and the tow, jointly, the other half. In the case of the Collard the respondents I. M. Ludington's Sons and George W. Beeman, on the one part, and the Collard, on the other part, were held in fault for the disaster and the consequent damages to the Collard and her cargo and the incidental damages arising therefrom. The injuries sustained by the boats and cargoes in question

were due as the pleadings allege, and as the judge finds, to the boats striking obstacles in the bed of the Erie Canal at a bend between bridges 115 and 116. It is alleged by the libellant in each of these cases that the obstructions were caused by the use of a dipper dredge which is a powerful machine capable of loosening and bringing to the surface large boulders which if not lifted out by the dipper will be left under water in the channel of the canal so that they become a menace to navigation. Beeman was employed as a subcontractor by Ludington and it was he who operated the dredge which loosened the stones which were thrown into the channel of the old Erie Canal thus, to quote the language of the District Judge, "decreasing the navigable depth of the water so that it became and was insufficient for canal boats drawing six feet or more of water."

There is no doubt that there were dangerous obstructions in the canal bed. The photographs show several large stones and the testimony is to the effect that no warning was given of their presence. In *Huntley v. Empire Engineering Co.*, 211 Fed. 959, 128 C. C. A. 457, this court said:

"The law is quite clear that the respondent is responsible for any damage resulting from its negligence in performing its contract within the state. * * * Therefore the single question is: Did the respondent displace the rock so as to reduce the depth of water in the canal?"

That is the question here and unless the finding that there were such obstructions is clearly against the weight of evidence we should not disturb the findings of the judge upon pure questions of fact.

The accident to the canal boat *Collard* occurred on August 11, 1911, at about 4 p. m. at a point about halfway between bridges 115 and 116, while she was being towed by three mules. She stranded upon an obstruction in the center of the Erie Canal and was not released until the next afternoon when she proceeded to Rochester, after being pumped out and having some of the damaged grain removed. The stranding of the *Collard* occurred nearly two months prior to the stranding of the *Cumberland* but by stipulation the cases were tried together and as the dredging west of bridge 116 was completed before August 11th, it is plain that the large stones in the bed of the Erie Canal, as shown in the photographs, must have been there at that time.

In short, in the *Cumberland* case the contractors were held liable for obstructing the Erie Canal by large stones rolled up by the dipper dredge used by them and for not maintaining an efficient buoy to warn navigators of their presence. The *Cumberland* was held in fault for not having seen in time a warning buoy, or if her navigator did see it, for not reducing speed and proceeding with prudence and caution.

In the *Collard* case the contractors were held liable for the same reason as in the *Cumberland* case and the *Collard* was held liable for not exercising care and diligence in delaying and reducing her draft and for not proceeding with the utmost skill and care after she grounded at Hindsburg.

[2] The questions here are mostly questions of fact, the trial judge seeing and hearing the witnesses is in a much better position to reach

a correct conclusion than judges who only read the testimony from a printed book. Especially is this so in a controversy where so many conflicting interests are represented and where there is danger that facts competent upon one issue may influence the disposition of another issue where such facts might not be admissible. However, there are some controlling facts about which there can be no controversy. There were in the vicinity of the place where the Columbia struck four large stones projecting above the bed of the canal from 1 to 1½ feet. The presumption is very strong, as these stones were not there in the spring of 1911, that they were rolled up by the dipper dredge at work in the Barge Canal proper. The photographs taken after the water had been drawn off discloses the dangerous situation, the iron rust marks on some of the stones strongly corroborating the other testimony that they had frequently been in collision with passing boats. Whether there was a buoy at this point at the time of the accident is in dispute but in any view it was, as the court found, inadequate to indicate that the steersman was nearing a bend 120 feet long where there were a number of large stones, some of the witnesses say nine, ten or eleven, projecting up from the bed of the canal, one of them, at least, about 18 inches. What further testimony as to the cause of the injury was needed? Upon what theory can a finding that the Cumberland struck on one of these boulders be disturbed by a reviewing court?

But it is said that there was a keg buoy in the vicinity, about this there is dispute, but, assuming that there was, we think the trial judge was correct in holding that it was an inadequate protection against the rock on which the Cumberland struck. The burden was on the respondents to show that there was a buoy guarding the boulder which caused the disaster—this burden has not been sustained. Again it is argued that the Ludington Company and Beeman are not liable because they were instructed by the state officials in charge of the barge canal construction to have 6 feet of water above all obstructions and that there was in fact 6½ feet above the obstructions at the time in question.

We are of the opinion that this proposition cannot be maintained. If the contention of the respondents be correct that there was 6 feet 7 inches of water over the largest boulder it is improbable that a boat drawing 6 feet could have struck it. We think the fact that these boats struck an obstruction in the prism of the canal is presumptive evidence that there was insufficient water there for safe navigation and that the burden is upon the contractors who placed the obstructions there to show that they were not at fault in doing so. Mr. Ludington testified that Mr. Govern, the division engineer, said regarding the depth of water to be maintained, "Give us at least 6 feet over everything" and it is asserted that this relieves the contractor and subcontractor if it appears that there was 6 feet or more over the boulder in question. We are not at all certain that instructions by the local inspector Abrams and the division engineer Govern, even if they were obeyed, can be regarded as a defense to a contractor who, working on the excavations of the Barge Canal, places dangerous

obstructions in the prisms of the old Erie Canal. But assuming this for the present, it is at least a question whether the instructions were carried out at the date of the injuries. Was there 6 feet of water over the boulder on which the Cumberland struck? It is enough to say that the question is in doubt, the fact of the grounding being against it. Many causes may have operated to reduce the depth of the water at that time. We think that, even if true that there was 6 feet of water over everything, this fact constitutes no defense to the contractors, because Abrams and Govern were not in a position to bind the state of New York by their directions which were directed to and confined by the theater of their work which related only to the cut on the berm bank side and not to the channel of the old Erie Canal. Their business had to do with the new cut and their directions related to that. They were not attempting to lay down rules for the regulation of traffic on the Erie Canal. McDonough, Superintendent of the Western Division of the Erie, says:

"Q. Can you tell us what the rules were? A. I do not know of any set rules, our instructions have been to see that the prism was ready and fit for navigation. Q. About the removal of obstructions from the old canal bottom? A. I have always given my instructions to see that there were no obstructions to the navigation previous to letting in the water. Q. To what depth? A. We try to maintain a depth of 7 feet of water above the miter sills of the locks and all other places."

Had this been done in the present case there would have been no injury to boats or cargo. The boats were in the old canal where, under normal conditions, navigators had a right to assume that the depth of the water was 7 feet. The contractors were operating to widen and deepen the channel so that at some future time the Erie would be enlarged into a barge canal but the work of the contractors had not yet reached the prism of the Erie and had not deepened its channel. One of the contractors operating a dipper dredge had rolled or pushed up a series of large boulders which materially reduced the depth of water over then so that it was impossible to navigate safely at that point with the ordinary draft of from 6 feet 1 to 6 feet 6 inches. Many causes may arise to change the depth of the water and the draft of the boats and it cannot be said that a boat is compelled to cease navigating because conditions change in these particulars. The damage here was produced by the respondents obstructing the Erie Canal by rolling up large boulders into the channel and not giving the libellants' boats timely and sufficient notice of their presence.

The decrees are affirmed with interest and costs.

STANDARD BREWERY CO. OF BALTIMORE CITY v. INTERBORO
BREWING CO., Inc.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 10.

1. TRADE-MARKS AND TRADE-NAMES ⇨45—REGISTRATION OF TRADE-MARK—
RIGHTS ACQUIRED.

The rights which a person obtains by registration of a trade-mark under the federal statutes are coterminous with the territory of the United States.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 53, 59; Dec. Dig. ⇨45.]

2. TRADE-MARKS AND TRADE-NAMES ⇨35—CONVEYANCES—ASSIGNABILITY OF
TRADE-MARKS.

In 1890 W. registered the words "Bismarck Brau" as a trade-mark for beer, but neither he nor his employer, nor the E. Co., with which his employer amalgamated, ever sold beer under such name. In 1894 the E. Co. assigned to H. & Co. an exclusive license under this registration to use the trade-mark in the New England States, and H. & Co. and its successor sold beer under such trade-mark until 1904, when it discontinued sales. In that year complainant commenced selling beer under the name "Bismarck," and in 1907 registered that word as its trade-mark, and thereafter continuously sold beer under such trade-mark. When the trade-mark was registered, it was the only party selling beer under that name. Some time prior to the registration it obtained from the E. Co. an assignment of the right to use such name, except in the New England States. In 1913 defendant commenced selling under the name "Bismarck" and later obtained from H. & Co.'s successor a license to use the trade-mark, except in New England. *Held*, that defendant acquired no trade-mark or title to the W. registration, and had no defense to a suit for infringing complainant's trade-mark, as the assignments from the E. Co. to H. & Co., and from H. & Co.'s successor to defendant, were merely attempts to transfer a name without any business or good will, and effected nothing.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 39, 40; Dec. Dig. ⇨35.]

3. TRADE-MARKS AND TRADE-NAMES ⇨21—RIGHT TO REGISTRATION—PERSONS
ENTITLED.

While complainant acquired nothing by its license from the E. Co., it was entitled to registration of its trade-mark at the time it was registered, and had a valid title to its registered trade-mark, as no one else was selling beer under such trade-mark, and it had been an exclusive dealer for over two years.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. ⇨21.]

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

Suit by the Standard Brewery Company of Baltimore City against the Interboro Brewing Company, Incorporated. From a decree dismissing a bill in equity to restrain the infringement of a registered trade-mark, plaintiff appeals. Reversed.

A. Cox and Robert W. Byerly, both of New York City, and E. Walton Brewington, of Baltimore, Md., for appellant.

W. H. Small, of New York City (Henry A. Rubino and Herman C. Rubino, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] Apparently the District Judge reached the conclusion that complainant was entitled to continue selling under its trade-mark within its own territory, Baltimore and vicinity and the West Indies while defendant was free to sell under the same trade-mark in its territory, New York and vicinity. Much the same result was accomplished, by applying the doctrine of laches, in the case of *Carroll v. McIlvaine*. Our opinion therein will be found in 183 Fed. 22, 105 C. C. A. 314. But in this case we are dealing with no question of laches in moving against the defendant as we were in the *Carroll* Case. Trade-mark registered under the statutes of the United States is declared upon. The rights which a person obtains by registration of a trade-mark under those statutes are coterminous with the territory of the United States.

Upon an application filed January 5, 1906, and which stated that the trade-mark had been used continuously in its business since July 1, 1903, complainant on March 15, 1907, obtained a registered trade-mark for the name "Bismarck" applied to packages of beer. The evidence shows that certainly since July, 1904, plaintiff has been selling its beer continuously under that name. The evidence also indicates that, except for defendant's sales to be referred to later, no beer was sold anywhere in the United States subsequent to May, 1904, under the name "Bismarck." We have, then, a registered United States trade-mark issued to an individual at a time when such individual was and for some time had been the only individual selling under that trade-mark; subsequent to the issue the same individual continues selling his goods under that mark for several years, with no one else selling goods under the same mark; finally, six years after registration, defendant begins selling under such mark. Manifestly a prima facie case of infringement of the statutory trade-mark is made out. It is in order, then, to consider the defenses.

In 1912 defendant decided to use the name "Bismarck" as trade-mark for beer of its brewing. Quite naturally it apprehended that a similar use of the name of the great Chancellor had been made before, and undertook to ascertain if this were so. Its investigation seems to have been quite carelessly conducted, because it wholly failed to discover the registration of complainant's trade-mark in the Patent Office in 1907. It did, however, discover, the registration in that office of the words "Bismarck Brau" by one Charles Weiler, of Moorestown, N. J., on December 8, 1890. Defendant tried to get into communication with Weiler, but found he was deceased, whereupon it began to market its beer as "Bismarck" in 1913. Subsequently learning of complainant's use of the trade-mark, it made a further search as to the Weiler trade-mark with the following results: Weiler was an employé of the Henry Muller Brewing Company. Apparently neither

he nor that company ever sold any beer under the trade-mark. The registration of Weiler, by mesne assignments, came into the possession of the Bergner & Engel Brewing Company, with which the Muller Company had amalgamated, but the Bergner & Engel Company has never "used the brand of beer known as Bismarck." In November, 1894, the latter company assigned to Habitch & Co. an exclusive license under this Weiler registration to use the trade-mark in the New England States. Habitch & Co. sold beer under this mark until 1900, when they amalgamated with other companies to form the Massachusetts Breweries Company. The latter company continued to sell beer under the trade-mark until May 26, 1904; since then it has discontinued sales. On May 8, 1913, defendant obtained from the Massachusetts Brewing Company a letter purporting to license defendant to use the trade-mark on condition that it would guarantee that its products would not be sold in New England.

[2] We are of the opinion that this series of transactions did not clothe defendant with title to the Weiler registration, or give it any established trade-mark. Since neither Weiler, nor the Muller Company, nor the Engel Company ever sold any beer under the trade-mark, the "exclusive license" to the Habitch Company, being merely an attempted transfer of name, without business or good will, conveyed no title. At the best its issuance might estop the Engel Company from interfering with sales by the Habitch Company. Since the Habitch Company ceased doing business in 1900, and the Massachusetts Company ceased selling beer under the trade-mark in 1904, the latter's license to defendant was merely an attempt to transfer a name without any business or good will, and effected nothing. The facts above cited do not establish a defense to the *prima facie* case.

[3] Defendant also attacks complainant's title to its registered trade-mark. It appears that, prior to its application for registration, complainant, wishing to use the name "Bismarck" and hearing of Weiler's registration, applied to the Engel Company and obtained from them an assignment thereof, excepting the New England States. Apparently it supposed that it thereby acquired some rights, for it at once (in 1904) proceeded to sell Bismarck beer. It had really obtained nothing by the assignment, since it purported to transfer a name only, without any business or good will. Indeed, there was no business or good will for the assignor to transfer, since neither Weiler, nor the Muller Company, nor the Engel Company had ever sold any "Bismarck beer." Thereupon complainant filed application January 5, 1906, for registration of the trade-mark "Bismarck" in its own name, on the strength of its continuous use since July 1, 1903, with the usual declaration that to the best of its knowledge no one else had any right to it. Interference was declared between its application and the Weiler registration, and eventually the registered trade-mark here sued on was granted May 19, 1907. Why this action of the Patent Office was not proper under the circumstances, and why it did not give to complainant the usual rights secured to a person who obtains such registration, we fail to see.

It is urged that the office was not fully informed as to the assignment from Engel Company to complainant with its exception of New England territory. But if everything here proved had been laid before the office, it would have been its duty under the statute to grant the registration. By the assignment from the Engel Company complainant had obtained nothing, but it showed that certainly since July, 1904, it had continuously sold "Bismarck beer" as part of its regular business. The so-called license to the Habitch Company from the Engel Company, which never had a Bismarck beer business, conveyed nothing. The sales of Bismarck beer in New England by Habitch Company ceased in 1900, and by Massachusetts Breweries ceased in May, 1904. So far as the record shows, no one else in the United States was selling beer under such trade-mark, and as exclusive dealer for over two years complainant was entitled to his registration.

The decree is reversed.

BISTLINE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1916.)

1. LIMITATION OF ACTIONS ⚡37(1)—ACTIONS FOR DAMAGES—LIMITATIONS.

Act March 3, 1891, c. 559, § 8, 26 Stat. 1093 (Comp. St. 1913, § 4992), providing that suits by the United States to vacate and annul any patent theretofore issued shall only be brought within five years from the passage of that act, and that suits to vacate and annul patents thereafter issued shall only be brought within six years after the issuance of the patent, had no application to an action at law for damages for the fraudulent acquisition of land by a patentee and for the subsequent fraudulent sale thereof by him to third parties, where it was not sought to vacate or annul the patent or recover the lands from the then owners.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182, 185; Dec. Dig. ⚡37(1).]

2. EQUITY ⚡85—LIMITATION OF ACTIONS ⚡11—ACTIONS BY THE UNITED STATES.

The United States are not bound by any statute of limitations nor barred by any laches of their officers however gross, in a suit brought by them as a sovereign government to enforce a public right or assert a public interest.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 221; Dec. Dig. ⚡85; Limitation of Actions, Cent. Dig. §§ 35-39; Dec. Dig. ⚡11.]

3. ELECTION OF REMEDIES ⚡11—NECESSITY OF EXISTENCE OF BOTH REMEDIES.

The filing of a suit by the government to cancel a patent to land for fraud was not an election of remedies, preventing the government from bringing an action at law for damages, where, though the suit was brought on the theory that defendant was the owner of the patented lands, he had in fact conveyed them to third parties prior to the filing of the complaint, as there can be no election of remedies, unless two separate and distinct remedies are in existence at the time of the commencement of the suit or action, and the government was not estopped from pursuing a remedy that it was entitled to pursue merely because it had endeavored to avail itself of a remedy which had been thought to exist.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 14; Dec. Dig. ⚡11.]

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

4. JUDGMENT ⇨570—CONCLUSIVENESS—JUDGMENTS OPERATIVE AS BAR—JUDGMENT OF DISMISSAL.

Where a suit in equity to cancel a patent to land was dismissed on motion of the United States attorney without any hearing or decision on the merits, the judgment of dismissal was not *res judicata* as to the issues involved in an action at law for damages for fraud in procuring the patent.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1034, 1036-1040, 1042-1045, 1165; Dec. Dig. ⇨570.]

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

Action at law by the United States against Joseph B. Bistline for damages for alleged false and fraudulent acquisition and sale by the defendant of certain public lands of the United States. Judgment for the United States, and defendant brings error. Affirmed.

Terrell & Terrell, of Pocatello, Idaho, for plaintiff in error.

J. L. McClear, U. S. Atty., and J. R. Smead, Asst. U. S. Atty., both of Boise, Idaho.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. On April 10, 1911, the Attorney General of the United States filed a bill in equity in the United States Circuit Court for the District of Idaho for the cancellation of a patent issued by the United States to the defendant herein on June 30, 1906, covering certain public lands of the United States situate in the state of Idaho. To the bill the defendant made answer on May 2, 1911. On September 17, 1913, the government filed a replication, and on the same date, upon motion of the United States attorney, a decree was entered dismissing the suit.

On the day of the dismissal of the suit in equity the United States attorney commenced the present action at law against the defendant for the recovery of the sum of \$8,000 as damages for the alleged false and fraudulent acquisition and sale by the defendant of the lands granted to him under the patent of June 30, 1906, being the same patent which was sought to be canceled by the bill in equity. The defendant demurred to the complaint on the ground that the facts therein set forth were not sufficient to constitute a cause of action, and, the demurrer being overruled, he answered the complaint denying the allegations of fraud therein set forth, and setting up two affirmative defenses by way of pleas in bar: (1) That the facts alleged in the complaint had been formerly adjudicated and finally determined on the merits. (2) That the government had, by commencing and maintaining the suit in equity, made election between two inconsistent remedies, and was bound by such election.

Upon the issues thus raised the case proceeded to trial before a jury, and a verdict was rendered against the defendant and in favor of the United States for the sum of \$600, upon which verdict judgment was entered. The assignments of error in this court relate to the action of the trial court in overruling the defendant's demurrer, in failing to give to the jury a peremptory instruction in favor of the defendant,

and in giving and refusing to give to the jury certain instructions. But they all in different form present the questions raised by the demurrer and the answer, to wit: The sufficiency of the complaint, the election of remedies by the government, and prior adjudication of the issues.

[1, 2] 1. It was alleged in the complaint that the patent in suit was issued to the defendant by the United States on June 30, 1906. The present action was commenced by the filing of the complaint on September 17, 1913—more than seven years thereafter. In support of its contention that the demurrer should have been sustained, the defendant invokes section 8 of the act of Congress of March 3, 1891 (26 Stat. 1093). That section provides as follows:

“Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.”

It is sufficient to say that the section has no application to the present case. This is an action at law to recover specific damages for the fraudulent acquisition of land by the defendant from the government and for the subsequent fraudulent sale thereof by him to third parties. It is not a suit to vacate or annul a patent. No attempt is being made by the government to recover the lands. They are left in the hands of the present owners. The act may not by construction be extended beyond the boundary fixed by its plain terms.

“The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt.” *United States v. Beebe*, 127 U. S. 338, 344, 8 Sup. Ct. 1083, 1086, 32 L. Ed. 121; *United States v. Inslay*, 130 U. S. 263, 266, 9 Sup. Ct. 485, 32 L. Ed. 968.

[3] 2. On the question of election of remedies, it is conceded by counsel for the defendant that, in case title to public lands has been divested through fraud, the government may either bring a suit in equity to cancel the patent, or, at its option, maintain an action at law to recover from the wrongdoer the value of the land. But it is contended that the option, being once exercised, cannot be revoked, and that in the present case the government, by filing the bill in equity for cancellation of the patent, forfeited its right to proceed at law for the recovery of damages.

It is a fundamental rule of the doctrine of election of remedies that there can be no election, unless two separate and distinct remedies are in existence at the time of the commencement of the suit or action. The bill in equity in this instance was framed upon the theory (and it was so alleged therein) that the defendant at the time of its filing was the owner of the patented lands, and the defendant alone was made defendant therein. But it was expressly alleged in the answer in the suit in equity that prior to the filing of the complaint the lands had been conveyed by the defendant to third parties. That remedy was therefore not open to the government at that time, and the suit was accordingly dismissed on its motion. The only remedy in existence

at that time was an action at law for damages, which was immediately instituted. The government was not estopped from pursuing a remedy that it was entitled to pursue, merely because it had endeavored to avail itself of a remedy which had been thought to exist. See *Brown v. Fletcher*, 182 Fed. 963, 105 C. C. A. 425.

[4] 3. The contention that the action in equity was *res judicata* as to the issues involved in the present suit is equally untenable. There was no hearing or decision on the merits. The suit was voluntarily dismissed upon the motion of the government. A judgment of dismissal based upon the voluntary act of a party is not *res judicata*. 23 Cyc. 1230. In *Hughes v. United States*, 71 U. S. (4 Wall.) 232, 18 L. Ed. 303, the rule was stated as follows:

"In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of a proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

The judgment of the court below is affirmed.

SCHROTH v. MONARCH FENCE CO.

(Circuit Court of Appeals, Sixth Circuit. February 11, 1916.)

No. 2698.

1. SALES ⇨45—RESCISSION FOR FRAUD—PURCHASE WITHOUT EXPECTATION OF PAYMENT.

On May 29th, when a milling company ordered goods from the claimant to be paid for January 1st following, the milling company was doing a large business. It for a long time had been insolvent, but it had excellent credit at a bank which was its principal creditor, and until August 18th continued to do business, making regular payments of indebtedness. In August the bank failed, forcing the milling company to close its mill. There was nothing to show that the milling company had any reason to anticipate the failure of the bank. *Held*, that the facts did not show that the goods were purchased without any reasonable expectation of being able to pay for them, so as to entitle the claimant to reclaim the goods, though the relation of the milling company to the bank was abnormal on the part of the bank, and though, the milling company's manager having disappeared, there was no direct testimony on behalf of that company that it had a reasonable expectation of being able to pay.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 94; Dec. Dig. ⇨45.]

2. BANKRUPTCY ⇨303—RECLAMATION PROCEEDINGS—BURDEN OF PROOF.

One seeking to reclaim goods from a trustee in bankruptcy, on the ground that they were purchased on credit by the bankrupt while insolvent, without reasonable expectation of being able to pay for them, has the burden of showing the fraud alleged.

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

3. BANKRUPTCY ⇨140—SALES—RESCISSION FOR FRAUD—PURCHASE ON CREDIT BY INSOLVENT.

Under the rule pertaining in Ohio, or that prevailing in Michigan, a seller of goods on credit cannot, in the absence of fraud, reclaim them from the buyer's trustee in bankruptcy, though the buyer was insolvent at the time of the purchase and the seller was ignorant thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⇨140.]

4. BANKRUPTCY ⇨140—RECLAMATION OF GOODS SOLD ON CREDIT.

The claimant sold goods to a milling company on credit at a time when it was insolvent, but was continuing to do business because of a large credit extended to it by a bank. *Held* that, in the absence of any purpose on the bank's part to defraud or prejudice those dealing with the milling company, the fact that the bank was the milling company's principal creditor created no equity in claimant's favor, entitling it to reclaim the goods so sold from the milling company's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⇨140.]

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

Proceeding by the Monarch Fence Company against George E. Schroth, trustee in bankruptcy of the Sycamore Grain & Milling Company. From an order reversing a decision of the referee and allowing the reclamation of certain property, the trustee appeals. Reversed and remanded, with directions.

George E. Schroth, of Tiffin, Ohio, and David C. Parker and Carter, Carter & Carter, all of Upper Sandusky, Ohio, for appellant.

R. V. Sears, of Bucyrus, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Appeal from an order allowing reclamation of certain property sold by appellee to the bankrupt, on the ground that the purchase was fraudulent, in that the purchaser was insolvent and had no reasonable expectation of being able to make payment when due. The referee was of opinion that the claim of fraudulent purchase was not made out, and denied the right to reclaim. The District Judge took the opposite view, and so reversed the referee.

[1] The case turns upon a determination of the question of fraudulent intent in the purchase, which question is purely one of fact. The goods were ordered May 29, 1913, were delivered July 2, 1913, and were to be paid for January 1, 1914. At the time of purchase and delivery the milling company was doing a large and active business. It was insolvent in fact, and had been in that condition for a long time prior thereto. It had, however, excellent credit at the bank, which was its principal creditor. By the bank's failure, which occurred about the middle of August, 1913, the milling company's affairs came to an abrupt crisis, resulting in the immediate closing of the mill on August 18th, the appointment of a receiver at about that time, and involun-

tary bankruptcy proceedings on September 6th. That the milling company did not anticipate failure in at least the near future is evidenced by the fact that between May 29th and August 18th it continued to do business in the regular course; its receipts and disbursements during that period being each about \$60,000. It made regular payments of indebtedness, including \$500 paid appellee June 29th upon a previous bill. Had the bank not failed, the milling company's credit would have continued apparently indefinitely, and it ceased business only because of the bank's failure, which the evidence does not indicate the milling company had any reason to anticipate. These facts, on their face, are inconsistent, in our opinion, with a lack of reasonable expectation on the part of the milling company of being able to pay the bill in question when due. Such conduct was not the natural course of a debtor realizing that it stood on the brink of failure. As was suggested by the referee, if the evidence presented is sufficient to show that the property in question was bought without intent to pay for it, the evidence would as clearly show that a purchase made a year earlier was likewise fraudulent and without intent to pay, although it appears that such purchases were all paid for.

In reaching his conclusion the District Judge was impressed by the view that the milling company could not reasonably have expected that the existing abnormal relation between it and the bank would continue until the bill in question matured, and so must have anticipated its own early collapse, and by the fact that no one on the milling company's behalf testified directly to a reasonable expectation of being able to pay. The disappearance of the milling company's manager at the time of its failure made such direct testimony apparently impossible. While the considerations which controlled the mind of the judge have weight, and while the bank's action in carrying the milling company's indebtedness, not only in an excessive amount, but, as it did, largely by way of overdrafts, shows an abnormal condition, yet these facts do not, in our opinion, outweigh the evidence leading to the conclusion reached by the referee. The circumstances are in many respects similar to those which we considered in *Kimmerle v. Farr*, 189 Fed. 295, 111 C. C. A. 27 (involving alleged preferential payment), and the rules there applied are pertinent here.

[2, 3] It scarcely need be said that the appellee has the burden of showing the fraud alleged, and that in its absence the goods in question cannot be reclaimed from the trustee in bankruptcy, notwithstanding the buyer's insolvency and the seller's ignorance of it, whether the transaction is judged by the rule pertaining in Ohio or by that prevailing in Michigan. *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 472, 78 N. W. 547, 75 Am. St. Rep. 413. A careful consideration of the record fails to convince us that the milling company was without reasonable expectation of paying for the bill in question.

[4] The fact that the bank is the principal creditor of the milling company does not impress us as creating an equity in appellee's favor. While the large credit extended to the milling company was unbusinesslike, the record does not even tend to show a purpose on

the bank's part to defraud or prejudice those who should sell to the milling company.

In our opinion the order of the District Court should be reversed, with costs, and the cause remanded, with directions to dismiss the petition for reclamation.

ÆTNA LIFE INS. CO. v. PORTLAND GAS & COKE CO.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916.)

No. 2646.

INSURANCE ◊435—LIABILITY INSURANCE—RISKS ASSUMED—"ACCIDENTAL."

Defendant insured plaintiff against loss and expense arising from damages on account of bodily injuries or death accidentally suffered by plaintiff's employes by reason of a business described in its policy. In the course of their work certain employes contracted typhoid fever from drinking water furnished them by the employer, who was compelled to pay damages to the injured employes. *Held*, that the workmen were bodily injured within the meaning of the policy and such injury was accidentally inflicted, as the accident consisted in this unexpected happening; "accidental" meaning the happening of something unexpectedly or unintentionally.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. ◊435.

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

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action by the Portland Gas & Coke Company against the Ætna Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Senn, Eckwall & Recken, of Portland, Or., for plaintiff in error.

John A. Laing and H. W. Strong, both of Portland, Or., for defendant in error.

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

ROSS, Circuit Judge. The defendant in error Gas & Coke Company, being engaged in the construction of a gas plant on its property adjoining the government moorings in Multnomah county, Or., and having employed in the work a large number of men, secured from the plaintiff in error Insurance Company a policy entitled by the latter "Contractor's Employers' Liability Policy," by which, in consideration of certain premiums which the case shows the defendant in error paid, it agreed to indemnify the assured (within certain amounts within which the present case falls) against loss and expense arising or resulting from claims upon the assured for damages on account of bodily injuries or death accidentally suffered, or alleged to have been suffered, by an employe or employes of the assured by reason of the business as described and conducted at the locations named in the policy, with

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

certain exceptions not applicable here. In the course of the work certain of the employés of the Gas & Coke Company contracted typhoid fever from the water furnished them by the latter, on account of which that company was compelled to pay damages to such injured employés, to recover the aggregate amount of which from the Insurance Company the present action was brought. And the sole point here presented is whether the harm so done to the workmen constituted a bodily injury accidentally received or suffered by them, within the meaning of the policy in question.

Of course it is not and cannot be doubted that the workmen were bodily injured by the drinking of the water in the course of the work, for it contained typhoid germs, which gave them typhoid fever; but it is insisted on the part of the plaintiff in error that in drinking the water they were but satisfying a natural want, and that in doing so there was no accident about it. It is readily conceded, of course, that there could be no accident in merely drinking water; but it is just as certain that the men would not have drunk it, had they known that the water contained typhoid germs. The accident consists in that unexpected happening. Among the definitions of the word "accidental," in most, if not in all, of the dictionaries, is the happening of "something unexpectedly, unintentionally." Suppose, instead of containing typhoid germs, as in the present case, the water that the employés of the assured consumed had contained some of the most virulent poisons, would any one contend that the injuries resulting therefrom could not be properly held to have been accidentally inflicted? We think not, and yet, in our opinion, there is no substantial distinction between the case supposed and the case at bar.

The policy involved in the case of *H. P. Hood & Sons v. Maryland Casualty Company*, 206 Mass. 223, 92 N. E. 329, 30 L. R. A. (N. S.) 1192, 138 Am. St. Rep. 379, was similar to that involved in the present case. There one Barry, who was employed by the plaintiff in that action as a hostler in its stables, had the care of horses which were afterwards found to have been suffering from glanders, and Barry was directed to assist in cleaning up the stalls; no notice being given him that the horses had suffered from glanders. Subsequently he was attacked by that disease, and recovered judgment against the assured in that case for damages, which the assured paid, and sued the insurance company to recover the amount so paid, with costs and expenses of suit. In the course of its opinion the court said, among other things:

"The policy is entitled 'Manufacturer's Employers' Liability Policy.' The contract which it contains is one of indemnity, in which the defendant engages to make good to the plaintiff any loss or damage which it may sustain by reason of its liability to its employés for bodily injuries accidentally suffered by them while engaged in doing the work which they were employed to do. It is a kind of insurance that has grown out of modern industrial and business conditions, and it is intended to afford full protection to employers in all cases where their employés have accidentally received bodily injuries for which they are liable. It also accomplishes the economic result, with which, however, we have nothing to do, of distributing more or less widely some of the loss or damage which falls on those engaged in industrial occupations. It is to be noted that the policy does not contain the words 'violent

and external,' in addition to the word 'accidental,' as is the case in many, if not most, accident policies. The insurance is liability insurance, so called, and not insurance against accidents. The liability insured against is that 'imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered * * * by any employe.' Although the policy contains many conditions, there is no limitation or exception in regard to the kind or nature or cause of the accidents out of which the liability insured against may arise. The fact that the accident may have been occasioned through negligence on the part of the insured is therefore immaterial."

After alluding to the fact that Barry suffered bodily injury in consequence of becoming infected with glanders, as much so as if he had had a leg or an arm broken by a kick from a vicious horse, the court further said:

"Was the injury brought about accidentally, within the fair scope and meaning of the policy, or was it the result of disease contracted while in the employ of the plaintiff, but for which the defendant is not liable? It is clear, we think, that the infection which caused the disease from which Barry suffered was due to accident. It was in the nature of an accident that he was set to work upon or cleaning up after horses that had glanders, and it was in the nature of an accident that he became infected with the disease. The language used by Mathew, L. J., in *Higgins v. Campbell & Harrison and Turvey v. Brintons*, [1904] 1 K. B. 328, 337, where the judgment of the Court of Appeal was sustained by the House of Lords (*Brintons v. Turvey*, [1905] A. C. 230), though there was a vigorous dissent by Lord Robertson, is appropriate here: 'It was an accident that the workman, in dealing with the wool, was brought in contact with that which might infect him with this disease of anthrax, and it was a further accident that the disease attacked him.' If the disease was the result of an accident, then we do not see why it does not follow that the bodily injury which Barry suffered as the result of the disease was not accidentally suffered, nor why the case does not come within the terms of the policy. The language is 'bodily injuries accidentally suffered.' It hardly could be broader. The intention is, as has been said, to afford full protection and indemnity to the assured. Any accident that causes bodily injury in any way is included. Bodily injury is more commonly associated, perhaps, with physical force of some sort, but in the absence of anything in the policy limiting it to that we do not see how or why it can or should be so restricted. A liability growing out of an accident which results in infecting the workman with a loathsome and dangerous disease, and thereby causes him great and perhaps lasting physical injury, would seem to be as much within the spirit and intent of the contract as if the injury had been caused by a blow or some other equally obvious manifestation of force."

Numerous other cases will be found cited by the Supreme Judicial Court of Massachusetts in the case referred to, in support of its ruling, which we think, as did that court, rest upon sound principles.

The judgment is affirmed.

DALLAM v. REBER.

In re HEILBRON BROS., Inc.

(Circuit Court of Appeals, Third Circuit. February 12, 1916.)

No. 2066.

BANKRUPTCY ⤵340—CLAIM FOR RENT—SURRENDER OF PREMISES.

After merchants had gone into bankruptcy, their stock had been sold, and the premises vacated, with no prospect of a continuance of the business, and there was no property on leased premises to secure payment of rent for any further occupation, a clerk in the office of attorneys for

the receiver in bankruptcy took the keys for the leased premises to the lessor's office and stated that she had been sent by the receiver's attorneys and would leave the keys. On being told by the lessor to take them to his attorney, she replied that her orders were to leave them at his office, whereupon she left them upon a table and left. The keys were immediately taken into the possession of the lessor, who afterwards entered the premises, cleaned them out, and displayed thereon a "For Rent" sign, which remained thereon until the expiration of the term. *Held* that, under the rule recognized in Pennsylvania, it was a question of fact whether the surrender of the premises was accepted by the lessor, and findings of the referee in bankruptcy and the bankruptcy court that there was such an acceptance were not erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ↻340.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Proceedings in bankruptcy on a claim by D. E. Dallam, trustee, against J. Howard Reber, trustee of the bankrupt estate of Heilbron Bros., Incorporated. From a decree disallowing the claim in part, the claimant appeals. Affirmed.

E. M. Finletter and Walter B. Saul, both of Philadelphia, Pa., for appellant.

Alfred Aarons, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the administration of the bankrupt estate of Heilbron Bros., Incorporated, a claim for rent was presented by the landlord, D. E. Dallam, trustee, and, saving \$351.33, which was not disputed and was allowed, the balance was denied by the referee. On petition to review, the action of the referee was approved by the court. Thereupon this appeal was taken.

The case turns on whether, after bankruptcy, the landlord accepted a surrender of the leased premises. The facts on which that question depends were stipulated as follows:

"In June, 1914, Heilbron Bros., Incorporated, a corporation, was the tenant of premises 932 Arch street, Philadelphia, under the terms and provisions of a lease executed between it as lessee and D. E. Dallam, trustee, as lessor, on January 18, 1909. On June 8, 1914, the goods and chattels of said Heilbron Bros., Incorporated, being upon said premises and liable to distress for rent, were levied upon by George H. Rahn, deputy sheriff of Philadelphia county, under a writ of fieri facias issuing out of the municipal court of Philadelphia as of April term, 1914, No. 368, at the suit of Simon Goldman v. Heilbron Bros., Incorporated. Said writ of fieri facias was subsequently stayed by order of the plaintiff and so returned by the deputy; no evidence of the levy appearing upon the record. On June 9, 1914, a petition in bankruptcy was filed and a receiver appointed. On July 1, 1914, a clerk in the office of Wessel & Aarons, attorneys for the receiver, entered the office of D. E. Dallam, the lessor, and approached D. E. Dallam, Jr., telling them that she would leave the keys for premises 932 Arch street, with which she had been sent by the attorneys for the receiver. D. E. Dallam told her to take the keys to his attorney. She replied that her orders were to leave the keys at Mr. Dallam's office, whereupon she left them upon a table and left the premises. Immediately thereafter the keys were taken into the possession of Mr. Dallam, who after-

wards entered the premises, cleaned them out, and displayed on them a 'For Rent' sign, which remained thereon until after the expiration of the tenant's term."

On these facts the referee held the landlord had accepted a surrender of the lease, and his finding was approved by the court. We thus have in effect two tribunals reaching the same conclusion. We have not been convinced there was error in such finding. While there are certain general principles laid down in the Pennsylvania decisions on the surrender of leases, each case must be determined on its own particular facts and surroundings. Thus we have here the case of merchants in a city store gone into bankruptcy. The stock has been sold, the premises vacated, and there is no prospect of the continuance of the business. The tenant has no further use for the premises, and there is no property on them to secure payment of rent for any further occupation. We have the further fact, also, that when the keys were tendered to the landlord, instead of refusing to receive them, he directed them to be taken to his attorney. On this request being refused, he himself retained them without further objection. These and other circumstances bearing on the relation of the parties are facts to be considered in determining the real significance of the acts of the parties.

The case therefore resolves itself into the question whether a court should refuse to submit the issue of surrender and acceptance to a jury. An examination of the Pennsylvania authorities inclines us to the view the case was one for a jury. In *Auer v. Penn*, 99 Pa. 375, 44 Am. Rep. 114, the landlord coupled his taking the key with a refusal to accept a surrender of the lease and notified the tenant he would hold him for the rent. Accordingly the court held:

"When, therefore, the lessor retains the keys, and at the same time notifies the lessee that he will hold him for the rent, there is no room for the presumption of a surrender."

Breuckmann v. Twibill, 89 Pa. 58, was an affidavit of defense case. In the affidavit of defense the defendant averred certain facts which would have been evidence to go to the jury on the question of surrender and acceptance, but omitted to allege there was any acceptance. The court, regarding the facts stated as consistent with a landlord either accepting or rejecting a surrender, granted judgment for want of a sufficient affidavit, saying:

"The plaintiff in error in his affidavit of defense very carefully avoided alleging that there was a surrender of the lease accepted by the landlord. Certain facts are averred, which, standing by themselves, would be evidence from which a jury might infer a surrender, but yet entirely consistent with a distinct refusal."

In *Gardiner v. Bair*, 10 Pa. Super. Ct. 80, the only proof to support the alleged acceptance of surrender of the term was that the tenant's clerk took the keys to the landlord's agent, who refused to receive them. The clerk then took them to the landlord's home, rang the bell, and when the latter came to the door handed him an envelope containing the keys, saying, "The keys of Eighteenth and Wharton," and walked away. There was no proof that the landlord knew the clerk, or from whom he came. Under these facts the trial court charged:

"The second question of fact that you will have to determine is: Was there a surrender of the lease? And in order that there should be a surrender, it is not enough that the tenant gives up the keys, nor is it enough that the landlord takes the keys. The tenant must give up the term, and the landlord, or his agent on his behalf, must accept the surrender of the term. And that is a question of fact, which I leave to you under the evidence. Did the landlord accept the surrender of the term?"

From these cases it will be seen that the mere fact of the return of the keys by the tenant to the landlord, and their retention by him, does not in itself constitute a surrender of the term. Where these are the only facts, the court will so hold, but where there are other facts and circumstances from which an acceptance of surrender might be reasonably inferred, then it is the province of a jury to draw the proper inference. In this case the referee drew the inference of acceptance by the landlord. His finding of fact has commended itself to the court below as well as to this court.

The decree of the court below is therefore affirmed.



THE VERA.

THE MELROSE.

(Circuit Court of Appeals, First Circuit. January 27, 1916.)

Nos. 1089-1093.

COSTS ⇐184—WITNESS FEES—WITNESSES ATTENDING IN MORE THAN ONE SUIT.

Under Rev. St. § 848 (Comp. St. 1913, § 1452), providing that, when a witness is subpoenaed in more than one cause between the same parties at the same court, only one travel fee and one per diem compensation shall be allowed for attendance, where, though the District Judge refused to consolidate libels in admiralty, they involved substantially the same issues and were tried as one cause of action on the same testimony, the witnesses being sworn and testifying but once, and only one decree being entered, only a single fee should be allowed, as the libels were within the spirit of the statute, if not within its precise terms.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 715-736; Dec. Dig. ⇐184; Witnesses, Cent. Dig. § 55.]

On rehearing on certain questions of costs. Decree amended.

For former opinion, see 226 Fed. 369, — C. C. A. —.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass. (Edward E. Blodgett, of Boston, Mass., of counsel), for appellants Pearce and others.

Barry, Wainwright, Thacher & Symmers, of New York City (James K. Symmers, of New York City, of counsel), for appellant New England Coal & Coke Co.

Edward S. Dodge, of Boston, Mass., and Benjamin Thompson, of Portland, Me., for appellees.

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

PER CURIAM. Counsel having been permitted to submit briefs on certain questions of costs, on consideration thereof we have disposed of the same as follows:

Complaint is made of taxation of costs in Nos. 1091 and 1092, because the libelants were permitted to tax witness fees and mileage on each libel. It appears that, while there had been an application for a consolidation of the libels, they were in fact never consolidated, the motion for consolidation having been denied by the District Judge. It is claimed that the cases should have been consolidated, and that the owners of the Melrose and the Baxter should not be affected by the refusal of the District Judge to grant this motion for such consolidation.

The application for an allowance of only a single bill of costs rests on section 848 of the Revised Statutes (Comp. St. 1913, § 1452) which reads as follows:

"When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one per diem compensation shall be allowed for attendance."

This, of course, is an excerpt from the statute, but there is nothing in the context which throws any light upon it. The rule is an artificial one, and must therefore be applied strictly; and this case does not come within the precise terms of the statute. The reference to *The Gov. Ames*, 187 Fed. 40, 109 C. C. A. 94, does not avail us, as that case speaks of a different subject-matter from that involved here. Nevertheless, as these libels were tried, it becomes, so far as these costs are concerned, within the spirit of section 848 of the Revised Statutes. The consolidation was in fact effected. The issues on the two libels to which we have referred are substantially the same, and the two libels were tried as one cause of action. They were heard together at the same time and on the same testimony, the witnesses being sworn and testifying but once, and one decree was entered relating to the two. Only a single fee for the attendance and travel of each witness should be allowed, to be apportioned between the two libels as the libelant may desire.

The other proposition brought to our attention is one which has been before the District Court in this circuit, and even the Circuit Court when the Circuit Court sat on appeal; but it never has been before us in a manner which commanded our attention. We have at times remarked that the practice in this circuit has been to tax travel for the distance actually traveled by witnesses, though in excess of 100 miles from the place of testifying. We have, however, never been compelled as an appellate tribunal to meet the question directly; and we find that finally in the present case the complaint of taxation for travel of more than 100 miles is not insisted on, so we make no ruling about it.

The petitioners in Nos. 1091 and 1092 may submit amendments to the decree or decrees entered in these cases, to bring the taxation of costs therein in harmony with the views expressed in this opinion.

AMERICAN CAR & FOUNDRY CO. v. SCHACHLEWICH.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1916.)

No. 4452.

MASTER AND SERVANT ⇨278—ACTIONS FOR INJURIES—EVIDENCE—RES IPSA LOQUITUR.

In an employe's action for injuries, the evidence showed that, while he was working under a car which was being repaired, a door in the floor of the car suddenly opened and fell upon him. There was no evidence tending to show what caused the door to fall, or that the employer was negligent, except such as arose from the falling of the door without plaintiff's fault. *Held*, that a verdict for defendant should have been directed, since in actions in the federal courts the maxim of "res ipsa loquitur" does not apply, where the relationship of master and servant exists, and to hold the master responsible for injuries the servant must show by substantive proof that the master was negligent in the manner alleged in the complaint, and that such negligence was the cause of the injury.

[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 Eastern District of Missouri; David P. Dyer, Judge.

Action by Onuffrey Schachlewich against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

William R. Gentry, of St. Louis, Mo. (M. F. Watts, Edwin W. Lee, and G. A. Orth, all of St. Louis, Mo., on the brief), for plaintiff in error.

Emerson E. Schnepf, of St. Louis, Mo. (Sigmund S'Renco, of St. Louis, Mo., on the brief), for defendant in error.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The defendant in error brought this action against the plaintiff in error to recover damages for personal injuries sustained by him while in the employ of the plaintiff in error. He alleges in his petition that he was required by the defendant's foreman to work underneath a car which was being repaired, and that the car was so constructed that a door in the floor opened outward, and that whilst he was engaged in his work said door suddenly opened and fell upon his arm, inflicting injuries upon it. It was further alleged that the door was usually held in place by a bar, but that the bar was not, on the occasion in question, adjusted so as to project over the edge of the door, but the door was held in place only by an accumulation of ice, which permitted the door to fall. It was further alleged that the plaintiff was unfamiliar with the construction of said car and did not know of the condition of said door, but that defendant's foreman in charge of the work knew of it, or could have known of it by the exercise of ordinary care, and could have prevented the falling of the door and injuring of the plaintiff, but that he negligently

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

failed to put said door in a safe condition, failed to apprise plaintiff of the dangerous condition, and failed and neglected to provide a safe place for plaintiff to do the repair work on the said car, all of which acts of negligence directly caused plaintiff's injuries.

The answer was a general denial. The evidence introduced on the part of the plaintiff tended to show that he was in the employ of the defendant, and that while he was working under a car, as alleged in the petition, the door suddenly fell upon his arm, inflicting the injuries complained of. There was no evidence whatever tending to show what caused the door to fall, or that the defendant was guilty of any negligence, except such as arises from the fact that the door fell without any fault of the plaintiff. The defendant requested a peremptory instruction in its favor, which the court refused. The defendant introduced no evidence. The jury returned a verdict in favor of the plaintiff.

The only question involved is whether the court erred in refusing a directed verdict in favor of the defendant, as requested. It is the established law of the courts of the United States that, to hold a master responsible for injuries to a servant, the servant must show by substantive proof that the master was negligent in the manner alleged in the complaint, and that such negligence was the cause of the injury. The maxim of "res ipsa loquitur" does not apply where the relationship of master and servant exists. *Patton v. Texas & Pacific Railroad Company*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Looney v. Metropolitan Railroad*, 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; *American Car & Foundry Company v. Dietz*, 121 C. C. A. 593, 203 Fed. 469. In the opinion of the writer of this opinion, all that can be said in favor of this rule is that it has the sanction of age, and the rule of stare decisis does not permit the courts to disregard it. The law-making department of the government alone can change the rule.

The court erred in refusing to direct a verdict as requested by the plaintiff in error, and the cause is reversed, with directions to grant a new trial.

PENNSYLVANIA RUBBER CO. v. DREADNAUGHT TIRE & RUBBER CO.

(Circuit Court of Appeals, Third Circuit. February 12, 1916.)

No. 2054.

1. TRADE-MARKS AND TRADE-NAMES ⇔79—UNLAWFUL COMPETITION.

Where a bill alleging unfair competition made no mention of any trade-marks of complainant, or the violation thereof, and it appeared that, when complainant called defendant's attention to defendant's alleged violation of its rights, no mention was made of the use of any alleged trade-mark, the case would be treated as one of alleged unfair competition, though argued as though it involved a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 89, 90; Dec. Dig. ⇔79.]

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

2. TRADE-MARKS AND TRADE-NAMES ⇐93—UNFAIR COMPETITION—IMITATION.

Where it did not appear that any intending purchaser of complainant's automobile tire had been misled, or could be misled, by the markings of defendant's tire, into buying defendant's tire under the belief that he was getting complainant's, no case of unfair competition was established.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. ⇐93.]

Appeal from the District Court of the United States for the District of Delaware; Edward G. Bradford, Judge.

Suit by the Pennsylvania Rubber Company against the Dreadnaught Tire & Rubber Company. From a decree (225 Fed. 138) for complainant for insufficient relief, it appeals. Affirmed.

Christy & Christy, of Pittsburgh, Pa., and Ward, Gray & Neary, of Wilmington, Del., for appellant.

Harry E. Karr, of Baltimore, Md., and Marvel, Marvel & Wolcott, of Wilmington, Del., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. [1] In this bill the Pennsylvania Rubber Company, averring itself a corporation of Pennsylvania, and the amount in controversy exceeding \$3,000, charged the Dreadnaught Tire & Rubber Company with unfair competition in the sale of automobile tires. Although the case was discussed in this court as involving a trade-mark, it will be observed that no mention of any trade-marks of complainant, or the violation thereof, are alleged in the bill, and, as noted in the opinion below, when the plaintiff called the defendant's attention to the alleged violation of its rights, no mention was made of the use of any alleged trade-mark. Accordingly, we treat the case as one of alleged unfair competition.

On final hearing, the court below, in an opinion reported at 225 Fed. 138, held the Dreadnaught Company was guilty of unfair competition in its markings and sale of certain tires known in the trade as "seconds," and entered a perpetual injunction enjoining such markings. From this part of the decree the Dreadnaught Company has not appealed. As to the other acts complained of, viz., the sale of other tires, the court held "that, unless in connection with the sale and disposition of the defendant's 'seconds,' the bill cannot be sustained," and entered a decree "that in other respects the bill of complaint be and the same is hereby dismissed." From such part of the decree the plaintiff took this appeal.

[2] The testimony has had our careful attention, for the case turns on the question whether the markings on the defendant's tires caused confusion of product or misleading of customers. The proofs fail to show that any intended purchaser of complainant's tire has been misled, and we are satisfied that no purchaser could be misled by defendant's markings into buying one of defendant's tires under the belief he was getting complainant's. In that regard, Judge Bradford well said:

"The package containing the complainant's tire has on each side in large and unmistakable type the word 'Pennsylvania' in connection with the monogram hereinbefore mentioned. The package containing the defendant's tire is of a different color and has running completely around its periphery the words and figures 'Dreadnaught Tires 5000 Miles' several times repeated. It is quite as difficult to conceive that any ordinarily intelligent and careful purchaser should be misled by the package of the defendant into a false belief as to its contents as that he should be deceived by seeing the defendant's tire when unwrapped. There is not the slightest evidence so far as the appearance of the defendant's tire or its package is concerned of any design or intention on its part that either of them should be mistaken for the tire or package of the complainant. It is further to be observed that it is reasonable to expect closer attention on the part of a retail purchaser to such articles as automobile tires than to pocket knives or packages of chewing gum. Further, nowhere in the circulars, advertisements or other literature of the defendant is there disclosed anything intended or calculated to deceive or create confusion in the minds of the purchasing public as to the origin or ownership of its tires. Distinguishing words are so used as to prevent deception or misunderstanding. Still further, it does not appear from the evidence that there was any case in which one desiring to purchase the complainant's tire was misled into a belief by the appearance of the defendant's tire or its package that the defendant's tire was that of the complainant. I am satisfied that unless in connection with the sale and disposition of the defendant's 'seconds' the bill cannot be sustained."

No present or prospective confusion of product being shown, and the court below having fully and satisfactorily discussed the case, we refrain from needless repetition and restrict ourselves to adopting its opinion and affirming its decree, with this addition, that the bill be dismissed without prejudice to complainant's right to renew the same, if any confusion of goods should hereafter develop in the course of trade.

PACIFIC MAIL S. S. CO. v. BALDERACH.

(Circuit Court of Appeals, Fifth Circuit. February 7, 1916.)

No. 2778.

1. COURTS ⚡405—CIRCUIT COURT OF APPEALS—JURISDICTION—AMOUNT INVOLVED.

Where, in an action in the District Court for the Canal Zone, the amount sued for was over \$14,000, a verdict was rendered for plaintiff for \$930.60, a counterclaim was interposed by defendant of \$421.95, which did not appear to have been passed upon by the jury, and the plaintiff in error submitted in the court below an affidavit that the amount in controversy exceeded \$1,000, the amount involved was sufficient to give the Circuit Court of Appeals jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. ⚡405.]

2. APPEAL AND ERROR ⚡695—RECORD—SUFFICIENCY TO SHOW ERROR.

The refusal to charge the jury not to consider one of the claims asserted in plaintiff's complaint, because of the absence of any evidence in its support, was not shown to be erroneous, where the bill of exceptions did not purport to set out all, or the substance of all, the evidence offered to support such claim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2914; Dec. Dig. ⚡695.]

In Error to the District Court of the United States for the Canal Zone; William H. Jackson, Judge.

Action by Alfred L. Balderach against the Pacific Mail Steamship Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Donelson Caffery and Lamar C. Quintero, both of New Orleans, La. (Caffery, Quintero & Brumby, of Franklin, La., on the brief), for plaintiff in error.

Felix E. Porter, of Ancon, Canal Zone, for defendant in error.

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

PER CURIAM. [1] A motion is made to dismiss this case on the ground that the amount involved is not sufficient to give this court jurisdiction. The amount sued for was \$14,332.23. The verdict of the jury in favor of the plaintiff was for \$930.60. The defendant (plaintiff in error here) made a counterclaim of \$421.95, which does not appear to have been passed upon by the jury. The record shows that the plaintiff in error submitted in the court below an affidavit that "the amount in controversy in said cause is in excess of \$1,000." The motion to dismiss is overruled. See *Clark v. Sidway*, 142 U. S. 682, 12 Sup. Ct. 327, 35 L. Ed. 1157.

[2] It may be assumed, without it being decided, that the instrument set out as a bill of exceptions was duly made a part of the record presented for review, as the result is the same in either event; an examination of that instrument having led us to the conclusion that it does not show the commission of any reversible error. The principal assignment of error directed against action by the court shown only by that instrument is based upon a refusal of a request to charge the jury not to consider one of the claims asserted in the complaint, because of the absence of any evidence to support that claim. The instrument does not purport to set out all, or the substance of all, the evidence offered to support the claim referred to. For anything that is made to appear, that claim may have been well supported by evidence proper to be submitted to the jury. The result is that there is a failure to show that the court erred in refusing the requested instruction. We find no reversible error in the record.

Judgment affirmed.

NATIONAL BRAKE & ELECTRIC CO: v. CHRISTENSEN et al.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1915. Rehearing Denied January 3, 1916.)

No. 2163.

1. PATENTS ⚡139—SURRENDER FOR CANCELLATION—REISSUE—INFORMALITY OF PROCEDURE.

The surrender of a patent for cancellation because of an error therein is conditioned on the grant of a valid legal substitute, and if for any reason the commissioner was without authority to issue the second the cancellation of the first is ineffective. In such case, although not so applied for, the second patent might properly have been designated as a reissue, and the fact that it was not, but was granted for the full term from date of issue, does not render it invalid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 204; Dec. Dig. ⚡139.]

2. PATENTS ⚡328—VALIDITY AND INFRINGEMENT—COMBINED AIR PUMP AND ELECTRIC MOTOR.

The Christensen patent, No. 635,280, for a combined air pump and electric motor specially designed for use in connection with air brakes for railway and electric cars, claims 1, 3, and 4 being for the complete structure, and claim 2 for the pump alone, *held* not anticipated, valid, and infringed as to each claim.

3. PATENTS ⚡157—CONSTRUCTION OF CLAIMS—"ATTACHED."

While the word "attached," used in a patent, conveys primarily the conception of a union of one piece to another, but detachable therefrom, it is also properly used to describe the relation between two parts of a single structure, each having its own function, whether integral or originally separate and then joined together, and in the latter case irrespective of whether or not the parts are detachable without injury.

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

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

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

Suit in equity by Niels A. Christensen and the Allis-Chalmers Company against the National Brake & Electric Company. Decree for complainants, and defendant appeals. Affirmed.

Charles A. Brown, of Chicago, Ill., and Thomas B. Kerr and J. Snowden Bell, both of New York City, for appellant.

Joseph B. Cotton, of Duluth, Minn., William R. Rummeler, of Chicago, Ill., Willet M. Spooner, of Milwaukee, Wis., and James T. Watson, of Duluth, Minn., for appellees.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge. Letters patent No. 621,324 were issued March 21, 1899. Included therein was a sheet of drawings which had

formed part of the original application, but had been eliminated therefrom and made part of a separate application after a division. The patentee at once rejected the letters patent, returned them for cancellation, and because of the error there was issued to him letters patent No. 635,280 on October 17, 1899. The latter patent in terms ran for 17 years from its date.

Suit was begun on both patents, alleging an infringement of the invention, and asking that, if the latter should be deemed invalid because not issued in conformity with the reissue statute (R. S. § 4916 [Comp. St. 1913, § 9461]), the attempted cancellation of the former should be deemed a nullity.

The four claims of the patent, all of which are here involved, read as follows:

"1. In a combined air pump and electric motor the combination of the frame having a chamber adapted to contain oil, a shaft provided with a crank or eccentric inclosed in said chamber, a cylinder formed with or attached to said frame and opening at one end into said chamber, a piston fitted to work in said cylinder and connected with said crank or eccentric, a motor base attached to said frame and forming a cover for said oil chamber, an armature supported upon said base and connected by gears with said crank shaft, and a gear case attached to said frame and motor base and forming therewith an inclosure for said gears and a receptacle for holding oil, said frame, gear case and motor base completely inclosing and protecting the driving connection of the pump and the crank shaft terminating within said gear case, whereby a stuffing box therefor is dispensed with, substantially as and for the purposes set forth.

"2. In a pump the combination with a frame or case formed or provided with a closed chamber adapted to exclude dirt and to contain oil, a shaft having bearings in said frame or case and provided with a crank or eccentric within said chamber, a cylinder formed with or attached to said frame or case, a piston fitted to work in said cylinder and connected with said crank or eccentric, a shaft mounted on said frame or case and connected by gearing with said crank shaft, and a gear case forming an oil-tight closure over said gearing and the end of the crank shaft with which the driving connection of the pump is made, whereby a stuffing box for said crank shaft is dispensed with, substantially as and for the purposes set forth.

"3. The combination of a frame provided with boxes and formed with an oil chamber or well between said boxes, a shaft supported in said boxes and provided between them with a crank or eccentric, a cylinder attached to said frame and opening at one end into the oil chamber or well therein, a piston fitted in said cylinder and connected with said crank or eccentric, a motor base mounted upon said frame and forming a closure for said chamber, an armature shaft supported in bearings upon said base parallel with said crank shaft, and provided at one end with a pinion which meshes with a gear on the crank shaft, and a case inclosing said pinion and gear forming a receptacle for holding oil, a part of said case over said pinion being detachable, substantially as and for the purposes set forth.

"4. The combination of a frame formed with an oil well or chamber and provided with boxes in communication with said chamber, a shaft supported in said boxes and provided with a crank or eccentric, a cylinder attached to said frame and opening at one end into said oil chamber, a piston fitted in said cylinder and connected with said crank or eccentric, an electric motor mounted upon said frame and comprising a base which covers said oil chamber and is provided on the upper side with oil wells and box housings having detachable caps and with an armature housing and yoke having also a detachable cap, an armature and its shaft supported in said housings parallel with the crank shaft and provided at one end with a pinion which meshes with a gear on said crank shaft, and a gear case forming an oil receptacle and

composed of two parts, one attached to the frame and motor base, and the other to and removable with the cap of the adjacent box housing, substantially as and for the purposes set forth."

As stated in the specifications, the main object of the invention was :

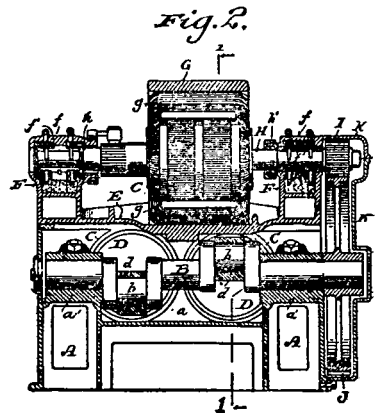
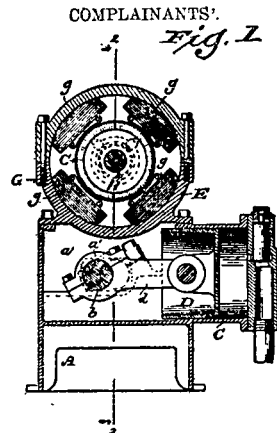
"To provide within small compass or in compact form a combined pump and motor of simple and durable construction that will not be affected by dust, mud, ice, or snow, that will be efficient and economical in operation, and that will require little attention."

The particular use of the combined pump and motor was, as further stated therein :

"In connection with air brakes for railway cars on which the pump and motor are usually exposed to dust, mud, and snow, and the working parts if unprotected soon become worn and inoperative, besides requiring constant or frequent attention."

Complainants' and defendant's devices are shown in the following drawings:

The modern electric trolley car requires for efficient operation a brake operated by compressed air. The air pump or compressor maintains a supply of air under heavy pressure, available when the brake is to be applied. An electric motor is advisable, inasmuch as the same electric current that supplies the car can give the motive power to operate the pump. Combining motor and pump is essential for compactness; thoroughly inclosing the parts enables the device to be placed in what is economically the best place, underneath the car, without endangering the construction and operation from the dirt, snow, and ice that gather about it. The problem presented to Christensen was to secure this compactness, efficiency of operation, durability of the parts, and, despite its location, accessibility for repairs. No device then on the market operated satisfactorily. Christensen's structure solved the problem. The evidence clearly establishes that it met an immediate need, and was extensively adopted both in the United States and in other countries; that appellant, having become the purchaser of the works of a corporation, organized by the inventor for the manufacture of the device, through a bankruptcy sale, continued the manufacture under a



license from 1905 until December, 1906; that it then canceled the license and began to manufacture the alleged infringing equipment. The case is before us on appeal from a decree of the District Court, holding the patent valid and infringed as to all of the claims.

DEFENDANT'S.
FIG. 1.

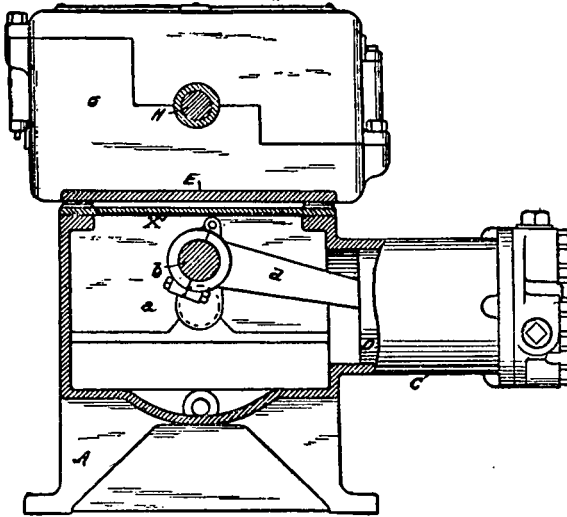
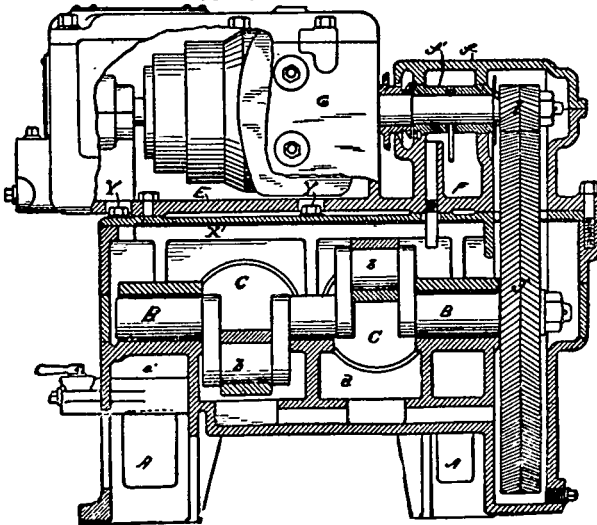


FIG. 2.



[1] 1. It is of no moment which of the two patents be held to be in force. The surrender for cancellation of the one was conditioned upon the grant of a valid legal substitute. If the Commissioner of Patents was without authority to issue the second, then, in our judgment, his action in canceling the first must be deemed legally ineffective. We agree, however, with the learned trial judge that, while Christensen's procedure did not aim at a reissue, the situation is identical with that presented on an application for reissue, and that, without formal application, the later patent might have been designated as a reissue. This is a case of a pure clerical error, not of double patenting. While two documents have been issued, there is but a single grant of one and the same right to the same person.

That the second patent was erroneously granted for a term of 17 years from its date does not nullify it. The law itself prescribes the term of a patent; 17 years is the maximum. It may for several reasons expire at an earlier date. The failure properly to limit the term no more affects the validity in this case than it does in a case where, because of a prior foreign patent having a shorter term, the United States patent by law expires before the end of the 17 years specified in the document.

[2] 2. Claims 1, 3, and 4 are for the complete structure; claim 2 is for the pump alone. The several defenses will be considered separately as to these two classes of claims.

(a) As to claims 1, 3, and 4: Concededly there is no direct anticipation. Novelty and invention in combining old elements is not controverted, if the claims be limited to the form indicated in the drawings and in the literal language of the claims; but, in that event, infringement is denied.

The conceded element of novelty is the creation of a unitary structure, instead of a mere aggregation of air pump and electric motor by the use of the motor base for a cover of the compressor; that is, by the use of a single piece of metal. This, defendant says, alone saves the structure from the charge of aggregation. It admits that thereby, in addition to slightly greater compactness and a readier accessibility to the compressor parts, valuable in cleaning and repairing, the cooling of the motor by the direct splashing of the oil in the compressor on this single metal sheet is obtained. It is important for the durability and efficiency of the motor that the heat therein be reduced as far as possible.

In defendant's structure, the metal sheets forming the motor base and compressor cover are bolted separately to their respective compartments. The air space between them is, in actual practice, only $\frac{1}{16}$ to $\frac{3}{16}$ of an inch, and is not uniform in any one machine. Defendant claims that its motor is cooled by means of this air space, and that thus it secures an identical result without infringement, through the use both of a different construction and a different method. This is based on the theory that the space is a medium through which cooling air circulates and an insulator by which the heat of the compressor compartment is prevented from passing to the motor parts.

The thinness and lack of uniformity of the air space, and particularly its tendency to fill with dirt and mud, however, practically nullify its usefulness as an air circulating medium; the tests, moreover, demonstrate the falsity of the insulation theory, upheld by one of defendant's experts. They prove conclusively that more heat is generated in the motor than in the compressor compartment, and that, therefore, in so far as the air space could fulfill its alleged function of insulation, it would check the desirable conduction of heat from the motor parts; it would act detrimentally, not beneficially.

The union of the motor and compressor boxes by a single sheet of metal serves, however, another function than that of enabling the splashed oil to act as a motor cooling medium. The metal sheet connection is a heat conductor; through it some of the greater heat of the motor compartment is conducted to the compressor chamber and dissipated. And this same function is attained in the same way in defendant's structure, for while it purports to separate the two sheets by a worse than useless air space, it actually joins them together by the bolts and bosses, and also, when in operation, by the dirt and mud that gathers in the space. These form a heat conductor less efficient, but substantially equivalent, to complainant's single metal sheet.

We can see in defendant's structure merely an attempt to evade complainant's patent by first dividing the one sheet of metal into two parts without any reason therefor, and at the sacrifice of the desirable results of greater compactness and accessibility to the parts, and by then separating these two parts for an alleged purpose which, far from being attained, is reduced or lost in the measure that the intervening space actually remains an air chamber. If one plate were cast, and a center space cored out, this piece of metal would be literally both motor base and compressor cover. Infringement is not avoided by completing the separation and then partially reuniting the parts.

Christensen himself made 120 devices, having the base cover in two parts with a space between; but, as he says, he "abandoned" it because of its inferiority. This, however, was after his application had been filed; the so-called "abandonment" involved merely the practical substitution of the preferable for the less desirable form; it was not a legal abandonment to the public of any rights covered by his application and secured to him by the patent issued thereon.

Even if complainants are to be restricted to a very narrow range of equivalents, defendant's two plates joined by bolts and bosses, though separated in part, must be deemed substantially equivalent to complainants' single plate. The gear case is variously described. Claim 1 reads:

"A gear case attached to said frame and motor base and forming therewith an inclosure for said gear and a receptacle for holding oil, said frame, gear case and motor base completely inclosing and protecting the driving connection of the pump and the crank shaft terminating within said gear case, whereby a stuffing box therefor is dispensed with."

Claim 3:

"A case inclosing said pinion and gear forming a receptacle for holding oil, a part of said case over said pinion being detachable."

Claim 4:

"A gear case forming an oil receptacle and composed of two parts, one attached to the frame and motor base, and the other to and removable with the cap of the adjacent box housing, substantially as and for the purposes set forth."

Defendant's gear case is cast in part at least integrally with the pump box, and is thus not a completely detachable attachment. For the reasons which we shall state in considering claim 2, infringement is not thereby avoided. Claims 1, 3, and 4 were therefore properly held valid and infringed.

(b) As to claim 2: This claim is for the pump alone. Anticipation, lack of invention, and noninfringement are the defenses urged.

(aa) As to infringement: The two gear cases differ, in that complainants' is a separate casting, attached detachably to the frame *A* by bolts, whereas defendant's is cast integrally as part of the crank case up to the cover with an opening through which the upper part of the spur gear passes, and above that, integrally as part of the motor case.

While defendant's compressor and gear chambers thus form one and not (like complainants') two compartments, they may be separated in defendant's device, so as to permit the use of different oils in the two chambers, and the two chambers in complainants' device are in fact so connected as to permit the use of the same oil in both chambers. Thus, whether so cast as to form one or two chambers, separation or connection is feasible in both; with their detached caps and covers they form in practically equal measure an oil-tight closure over the gearing and the end of the crank shaft, thus dispensing with the stuffing box for the crank shaft; irrespective of the number of separate pieces of metal of which they are composed or of the presence or absence of complete detachability from the rest of the structure, they have the same function of inclosing and protecting all the working parts of the transmission and of permitting the use of the same or different oils for the compressor parts and the gears. Defendant secures no new function by its construction; it loses some of complainants' advantages of easier access for alignment of the shafts and adjustment of gears. The two are substantially equivalent, unless complainants are to be limited to a detachably attached gear case.

[3] While the word "attached," which is used in claims 1, 3, and 4, conveys primarily the conception of a union of one piece to another, but detachable therefrom, it is also properly used to describe the relation between two parts of a single structure, each having its own function, whether cast integrally, or originally separate and then joined together, and, in the latter case, irrespective of whether or not the parts are detachable without injury to one or both. And a comparison of the several claims indicates that Christensen used the word in its broadest meaning, as including the relation to the rest of the structure of a case which was either separate and detachable from or a portion of which was cast integrally with the crank case. In claim 3, in which the gear case is not specifically stated to be attached to the frame, its cover is described as detachable; and in claim 4, while

one part of the case is described as attached to the frame and motor base, the other part is stated not only to be attached to but to be removable from the adjacent box housing.

So far, however, as claim 2 is concerned, the gear casing, while stated as an element, is not further described as to its attachment to or detachment from the other parts of the device. There is no limitation, other than that it forms part of a unitary structure. That the drawings and specifications show a detachably attached case indicates merely the preferred construction; it does not limit the claims to that form. In a somewhat analogous case the court said, in *National Tube Co. v. Mark*, 216 Fed. 507, 133 C. C. A. 13 (C. C. A. 6th Circuit):

"We find nothing upon the face of the patent requiring the claim to be limited to rolls which had these flanges attached to and integral with the rolls. It is true that neither by drawing nor specification does Fell suggest the performance of this function by stationary parts of the frame, but this is not necessary. In the absence of something clearly showing that the patentee did intend to have his grant confined to a specific form, a broad and generic claim may rightfully stand on a mere specific disclosure; and the invalidity of such a claim (if it is invalid) will result, not from the applicant's failure to use more sweeping language in his specification, but from the state of the art limiting the actual invention. The claims are part of the description required by statute, and in them, and not in that part of the description which is now commonly called 'specification,' is the proper place in which to define the breadth of the invention, as was most accurately apprehended by Fell's solicitor when he (though quite unnecessarily) said that various changes might be made 'without departing from my invention as defined by the appended claims.'"

The specifications, moreover, specifically state:

"It is obvious that various modifications in the details of construction and arrangement of parts may be made within the spirit and intended scope of my invention."

The concluding words of the claims, "substantially as and for the purposes set forth," are, if possible, even weaker than the phrase "substantially as described" (very fully considered in *National Tube Co. v. Mark*, supra) to indicate a limitation of the claim to the preferred form shown in the drawings and specifications. There is nothing in the history of this claim in the Patent Office which limits complainants to a detachably attached case.

(bb) As to anticipation: The nearest reference is claimed and conceded to be the Ward patent, No. 443,020, for refrigerating apparatus. The compact form of structure necessitated by the use for which the complainants' device is primarily designed makes the complainants' arrangement of the parts essential. Ward's machine, designed for a totally different purpose, enables him to locate the gearing, which connects the driving shaft and the crank shaft, between the bearings, at the middle instead of at the end of the shaft, and to place the cranks on the ends. The gearing is partitioned off; no splashing effect of the oil from the gears onto the crank or vice versa, is possible. Moreover, these partitions form an inclosing gear case separating the crank compartments into two separate chambers; neither end of the crank shaft terminates in and is inclosed by this gear casing; intermittent

lubrication is provided for these two crank chambers by openings in the top of the case. There could be no cooling effect of any oil on the working fluid or on the motor, as there is when, in accordance with the specifications and the other claims, the motor base covers the Christensen pump chamber.

In the next nearest reference, the General Electric Company's duplex electric sinking pump, described in 21 *Electrical World*, 380 (1893), there is no communication between the gear and the crank chambers, so that the oil in one cannot flow into the other.

While an inclosed gear chamber, obviating the need of a stuffing box for the crank shaft end, is shown by the Grillenberger patent, 209,673, and other references, to be old, its use in a pump like complainants', designed or adaptable for the purposes to which it is to be put, and separably united, as this is, with the compressor chamber, has not been anticipated.

(cc) As to invention: The line between mechanical and inventive genius is often difficult to draw. This structure met a great need; highly skilled engineers familiar with the old elements failed thus to utilize them; the bringing of them together in this compact, ingenious form concededly amounted to invention. True, this applies to the combination of motor and pump; claim 2 is limited to the pump alone. The pump, however, necessarily requires some motive power; for the purposes for which it was primarily designed, the electric motor obviously was the only one that would be selected. The combination of (a) An oil-holding, gear-inclosing case in which the one end of the crank shaft terminated and by which it was protected, dispensing with the undesirable stuffing box, and (b) The compressor case with its parts so arranged as to utilize the oil for both lubricating and cooling purposes, if the motor should be attached to the pumps as stated in the other claims, united in such a way as to secure the highly desirable compactness, ready accessibility to the parts, and adaptability, through their possible connection, to the flow of the same lubricant from one to the other, or by their possible separation, to the use of a different lubricant for each of them, required more than mere mechanical skill. No pump is shown to have anticipated Christensen's; none was adapted to this particular service, or had all of these functions; the utilization of old elements for this new form of construction to meet this specific need was, in our judgment, an exercise of inventive genius.

The decree of the District Court is affirmed.

DICKS PRESS GUARD MFG. CO. et al. v. BOWEN.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 103.

PATENTS 328—INFRINGEMENT—SAFETY ATTACHMENT FOR PRESSES.

The Dicks patent, No. 618,065, for a safety attachment for stamping and other power presses, claim 1, held infringed on review of order granting preliminary injunction.

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

Suit in equity by the Dicks Press Guard Manufacturing Company and another against George W. Bowen, doing business as the Bowen Manufacturing Company. From an order granting a preliminary injunction, defendant appeals. Affirmed.

This cause comes here on appeal from an order of the District Court, Northern District of New York, granting preliminary injunction in a patent suit. The patent sued upon is No. 618,065, granted January 24, 1899, to Thomas A. Dicks and another for a "safety attachment for presses." The validity of the patent is not attacked on this appeal; the sole issue being the defense of noninfringement. The District Judge wrote no opinion; he stated merely that he had arrived at the conclusion that preliminary injunction should be granted.

Arthur E. Parsons, of Syracuse, N. Y. (E. H. Bottum and F. E. Dennett, both of Milwaukee, Wis., of counsel), for appellant.

Frederick P. Randolph, of New York City, and A. F. Nathan, of Cincinnati, Ohio, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The specifications and claims cover 5 pages and are illustrated by 19 figures. Nevertheless the ideas of the patentee are clearly expressed and, so far as the subject-matter of the first claim (the only one in issue here) is concerned, are readily understandable. It covers a safety attachment for presses—and by disclaimer duly filed for *power* presses only. In such presses there is a plunger, operated by power, which descends on a die and there does its work. The operator has to place the piece of metal to be stamped between the die and the plunger. He thereby takes the risk of having the plunger descend while his fingers are in a place where they may be hurt. To remedy this there is a guard between him and the plunger, which also moves up and down. The idea is that, the metal to be stamped being in place, the guard shall descend before the plunger does and effectually shield his fingers. In the patent the guard is called a guard, detector, or controlling device.

The plunger is connected with and disconnected from the power by the use of a treadle which the operator moves with his foot; when he bears down on it the power is thrown on. The same treadle through a connecting rod operates the guard, bringing it down when his foot

depresses the treadle. Now if by the operation of the treadle the plunger is started down under power and at the same time (or rather just prior thereto) the guard is started down, and some obstruction, such as the operator's fingers, being still in the pathway, its progress is arrested, the plunger might continue moving under the operation of the power and crush his fingers. The device of the patent remedies this defect by so arranging parts and connections that the power cannot be thrown in on the plunger until the guard is fully down. The object of the invention is thus set forth in the patent:

"This invention has for its object to produce a safety attachment for stamping and other presses whereby injury to the hands of the operator is prevented; and it consists, briefly stated, of a guard, detector, or controlling device, which moves down in advance of the downward movement of the punch and prevents the punch from being moved down by its actuating mechanism if the guard or detector encounters in its downward movement an obstruction—for instance, the hand of the operator—so that as a result of this arrangement the punch is prevented from moving down if the hand of the operator has not been removed before the guard or detector descends."

The patentee accomplishes his desired results by somewhat different arrangements of parts. One of these combinations is shown in Figs. 1 to 8, another in Figs. 9 to 15, and the third in Figs. 16 to 19. Claim 1 reads as follows:

"1. The combination, with the punch or plunger of a press, of a controlling device or detector which is independent of said punch or plunger, and which is caused to move toward the die before the punch or plunger begins its effective movement, and a stop mechanism which is controlled by said controlling device or detector, and which prevents the effective movement of the punch or plunger when the normal movement of the controlling device or detector does not take place, substantially as set forth."

There is no file wrapper and contents in the record; apparently the Patent Office found merit in the patentee's improvement. In the first claim he did not confine himself to any specific variety of stop mechanism; he described three forms in specifications and figures. There is no such prior art shown as would require a strained construction to be given to the claim in order to save it, by confining it closely to the exact details shown in these figures.

The mechanism, which is so arranged that it will arrest the application of the power when the guard is obstructed in its descent, consists of a combination of parts, some new, some old, and the parts and the way in which they are combined are not identical in the three types which the patentee shows; neither is defendant's combination of parts exactly like either of the three. Nevertheless defendant's combination does accomplish the same result in substantially the same way, the claim reads upon it, and there is nothing in the record which would warrant a holding that it does not infringe.

The order is affirmed, with costs.

GALE MFG. CO. v. MAY et al.

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

No. 1377.

PATENTS 328—INVENTION—CULTIVATOR.

The Beall patent, No. 654,125, for a pivot axle cultivator, claims 12 and 13, held void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Alexandria; Edmund Waddill, Jr., Judge.

Suit in equity by the Gale Manufacturing Company against John W. May, trading as W. H. May & Son, and the Ohio Rake Company. Decree for defendants, and complainant appeals. Affirmed.

Geo. A. Prevost, of Washington, D. C. (L. P. Whitaker, of Washington, D. C., on the brief), for appellant.

Alfred M. Allen, of Cincinnati, Ohio, for appellees.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. The appellant was the plaintiff below; the appellees, the defendants. They will be so designated here.

On July 24, 1900, United States letters patent No. 654,125, for a pivot axle cultivator, were issued to the plaintiff as an assignee of one William L. Beall. The claims in suit are the twelfth and thirteenth. If they are valid, infringement is admitted. The court below dismissed the bill on the ground that, in view of the prior art, nothing more than mere mechanical skill was required to devise the combinations described in the claims in question.

We are of the same opinion. The alleged novel feature of the twelfth claim is the adjustability of the foot rest, by which the driver of the cultivator steers its wheels, and the means by which such adjustability is secured. The foot rest and the lever are made out of separate pieces of metal. The rest is made with a sleeve, which can be secured to the lever at any point in the length of the latter, and in such manner as to give any desired angle or slant to the rest itself. Such a sleeve and such a means of securing it were not new in similar arts. They would at once occur to any ordinarily skilled mechanic, who thought it desirable that the rest should be adjustable. The plaintiff, in a brief filed on its behalf, says that the purpose of the thirteenth claim was to cover another way of arriving at the same result which the twelfth was intended to secure, viz. to provide a steering gear which could be adjusted to the various peculiarities of the driver.

In the device described in the thirteenth claim, the adjustment was brought about, not by moving the foot rest upon the lever, but by making the lever itself movable in its socket. Such a method of adjustment was not new in allied arts, but the combination described in the claim has for one of its elements an axle adjustably secured in its sleeve. Such an adjustably secured axle is not new, but plaintiff urges

that it is novel to combine in one structure such an adjustable axle and such an adjustable lever. It may be admitted that the record does not disclose any structure in which both are present. But, as this case presents itself, that is not material. The axle and the lever do not work together to produce any new result. Uniting them in the same machine constitutes aggregation, as distinguished from invention. Affirmed.

UNITED STATES ENVELOPE CO. et al. v. TRANSO PAPER CO. et al.

(District Court, D. Connecticut. February 15, 1916.)

No. 1748.

1. PATENTS ⇨288—SUITS FOR INFRINGEMENT—JURISDICTION—DISTRICT IN WHICH SUIT MAY BE BROUGHT.

Under Judicial Code (Act March 3, 1911, c. 231) § 48, 36 Stat. 1100 (Comp. St. 1913, § 1030), providing that in suits for infringement of letters patent the District Court shall have jurisdiction in the district in which the defendant shall have committed acts of infringement and have a legal and established place of business, the facts that defendant has committed acts of infringement within the district and has a legal and established place of business therein must concur, or the court is without jurisdiction; and where a defendant had no such place of business, the court had no jurisdiction, though it had an agent in the district, who in the course of his business used infringing articles; and it was immaterial whether he had power to complete contracts, or was merely authorized to solicit orders and forward them to the home office for execution.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460-466; Dec. Dig. ⇨288.]

2. PATENTS ⇨288—SUITS FOR INFRINGEMENT—JURISDICTION—WAIVER OF OBJECTIONS.

Where, in a suit for infringement of a patent, after the District Judge had overruled a defendant's plea to the jurisdiction, and held that it had a legal and established place of business and had infringed the patent within the district, the defendant answered, submitted to the interlocutory judgment, referring the case to a master, and filed exceptions to the master's report, it did not waive the question of jurisdiction, so as to prevent it from raising such question by a motion to dismiss for want of jurisdiction, on the ground that it had no place of business within the district, since an interlocutory judgment in equity or admiralty is always subject to review or reversal until final judgment, and may be opened at a subsequent term, notwithstanding the right to appeal therefrom, and moreover consent can never confer jurisdiction upon a federal court, where any jurisdictional fact prescribed by the statute is lacking.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460-466; Dec. Dig. ⇨288.]

3. COURTS ⇨37—UNITED STATES COURTS—JURISDICTION—WAIVER OF OBJECTIONS.

Consent of the parties can never confer jurisdiction upon a federal court, and any jurisdictional fact prescribed by the statute is absolutely essential, and cannot be waived, and the want of it may be raised at any stage of the cause.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-149, 151, 156; Dec. Dig. ⇨37.]

4. COSTS ⇨8—DISMISSAL FOR WANT OF JURISDICTION.

Where a patent infringement suit was dismissed for want of jurisdiction, no costs could be taxed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 16; Dec. Dig. ⇨8.]

In Equity. Suit by the United States Envelope Company and another against the Transo Paper Company and another. On motion by the defendant named to dismiss for want of jurisdiction. Motion granted.

See, also, 221 Fed. 79.

Robert H. Parkinson, of Chicago, Ill., and Louis W. Southgate, of Worcester, Mass., for plaintiffs.

Thomas A. Banning, of Chicago, Ill., Arthur L. Shipman, of Hartford, Conn., John P. Bartlett, of New York City, and Samuel Adams, of Chicago, Ill., for defendant Transo Paper Co.

THOMAS, District Judge. This is a motion on the part of the defendant Transo Paper Company, a nonresident corporation, to have the court set aside and vacate, as to it, the interlocutory decree and reference to the master entered in this cause on or about December 29, 1913, and all orders entered in this cause since the filing of the bill of complaint herein, and to dismiss the bill as to this defendant for want of jurisdiction.

This motion involves two questions: (1) Whether the defendant corporation had any regular and established place of business in this district, and, if it had, whether it had committed any acts of infringement, either by manufacture or use, in this district; and (2) whether the fact that, after Judge Mayer had overruled its plea to the jurisdiction and held that the defendant corporation did have such regular and established place of business, and had by use infringed the patent in suit in this district, the defendant corporation by its answer, and by submitting to the interlocutory judgment referring the case to a master and filing exceptions to the master's report, had waived the question of jurisdiction, so as to now not permit its being raised.

[1] I. The first question to be determined is whether the defendant, being a nonresident corporation, was doing business in this district in such a manner and to such an extent as to warrant the inference that it was present here through its agent. If it was, it is liable to service in this district, providing that it has manufactured or used the alleged infringing article here; and, if it has not, such service cannot be made here, for it is a sine qua non of liability to service in a suit for infringement of a patent that a nonresident corporation shall have "a regular and established place of business" in the district where the suit is brought. Act of March 3, 1897, c. 395, 29 Stat. 695; Judicial Code, § 48.

In *Green v. Chicago, Burlington & Quincy Ry.*, 205 U. S. 530, 533, 27 Sup. Ct. 595, 596 (51 L. Ed. 916) where the question of jurisdiction was made to depend upon the diverse citizenship of the parties, it was held that a railroad company, which had no tracks within the

district, was not in business therein, in the sense of liability to service, because it hired an office and employed an agent for the merely incidental purpose of solicitation of freight and passenger traffic. In the course of the opinion the court said:

"The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business,' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district, so that process can be served upon it. This view accords with several decisions in the lower federal courts. *Maxwell v. Atchison, etc., Railroad* [C. C.] 34 Fed. 286; *Fairbank & Co. v. Cincinnati, etc., Railroad*, 54 Fed. 420 [4 C. C. A. 403, 38 L. R. A. 271]; *Union Associated Press v. Times Star Co.* [C. C.] 84 Fed. 419; *Earle v. Chesapeake, etc., Railroad* [C. C.] 127 Fed. 235."

In *Tyler v. Ludlow-Saylor Wire Co.*, 236 U. S. 723, 35 Sup. Ct. 458, 59 L. Ed. 808, the Supreme Court, in disposing of a question involving substantially the same facts as are here presented, referred to its opinion in *Green v. Chicago, Burlington & Quincy Ry.*, supra, as defining the words "regular and established place of business," and held that paying an agent, who was also employed by another corporation, to solicit orders to be executed at its home office, and sharing expenses with such other corporation of an office in the district in which suit for infringement of a patent is brought, did not give the court jurisdiction of a suit against a nonresident corporation for infringement of a patent.

And it follows that if the defendant does not have "a regular and established place of business" in this district the court is without jurisdiction, and the fact that the defendant's agent may have used in this district in the course of his business infringing envelopes, and the question whether the agency in question was to solicit orders and forward them to the home office for execution, as in *Tyler v. Ludlow-Saylor Wire Co.*, supra, and *Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co.* (C. C.) 116 Fed. 641, or whether the agency was carried on with a power to complete a contract in this district binding on the defendant, as in *Chicago Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co.* (C. C.) 118 Fed. 852, are immaterial. In other words, in suits for infringement of letters patent against a nonresident corporation, both the fact that the defendant has committed acts of infringement and has a regular and established place of business must concur; otherwise, the court is without jurisdiction.

[2] II. Has the defendant, by its failure to have reviewed immediately the jurisdictional question decided on the plea, precluded itself from now raising that question? In my opinion there are two conclusive answers to this question:

(a) An interlocutory judgment in equity or admiralty is always subject to review or reversal until final judgment, and may be opened at a subsequent term. As was said by Judge Wallace in *Celluloid Manufg. Co. v. Cellonite Manufg. Co.* (C. C.) 40 Fed. 476, 477:

"The cause remains under the control of the court until disposed of by a final decree, and until then it can revise the interlocutory decree, or any proceeding in the cause; and it is its duty to correct any error of the master affecting the merits, as well as any error of its own, properly brought to its

knowledge. *Wooster v. Handy* [C. C.] 22 Blatchf. 308, 21 Fed. 51; *Perkins v. Fourniquet*, 6 How. 206 [12 L. Ed. 406]; *Fourniquet v. Perkins*, 16 How. 82 [14 L. Ed. 854]."

Other authorities directly in point are *Green v. Fisk*, 103 U. S. 518, 26 L. Ed. 485, *Northwest Transp. Co. v. Boston Marine Ins. Co.* (C. C.) 41 Fed. 793, and *Harmon v. Struthers* (C. C.) 48 Fed. 260. The right of a party aggrieved to appeal from an interlocutory order granting or refusing an injunction must be regarded as permissive solely, and does not in any way change the interlocutory judgment into being a final one.

[3] (b) Consent of the parties can never confer jurisdiction upon a federal court. Any jurisdictional fact prescribed by the statute is absolutely essential, and cannot be waived, and the want of it may be raised at any stage of the cause. *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 420, 421, 31 Sup. Ct. 460, 55 L. Ed. 521; *M. C. & L. M. Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Cameron v. Hodges*, 127 U. S. 322, 326, 8 Sup. Ct. 1154, 32 L. Ed. 132; *Martin v. Baltimore & Ohio Railway*, 151 U. S. 673, 689, 14 Sup. Ct. 533, 38 L. Ed. 311; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 62, 63, 24 Sup. Ct. 598, 48 L. Ed. 870; *Thomas v. Board of Trustees*, 195 U. S. 207, 211, 25 Sup. Ct. 24, 49 L. Ed. 160.

[4] As the case is dismissed for want of jurisdiction, no costs can be taxed. *Hornthall v. Collector*, 9 Wall. 560, 19 L. Ed. 560; *Inglee v. Coolidge*, 2 Wheat. 363, 4 L. Ed. 261; *McIver v. Wattles*, 9 Wheat. 650, 6 L. Ed. 182; *Strader et al. v. Graham*, 18 How. 602, 15 L. Ed. 464; *Miller v. Clark* (C. C.) 52 Fed. 900.

Let the motion be granted as against the Transo Paper Company, without costs.

ROLLMAN MFG. CO. v. UNIVERSAL HARDWARE WORKS.

(District Court, E. D. Pennsylvania. February 8, 1916.)

No. 633.

1. EQUITY Ⓒ395—REFERENCE TO MASTER—POWERS OF MASTER.

A master, to whom a patent infringement suit was referred, had ample power, which he should not hesitate to use, to speed the cause and prevent unreasonable delay.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 854-856; Dec. Dig. Ⓒ395.]

2. EQUITY Ⓒ407—REFERENCE TO MASTER—REPORT—MATTERS TO BE INCLUDED.

While equity rule 51 (198 Fed. xxxii, 115 C. C. A. xxxii) does not specifically refer to proceedings before a master, the provision thereof that objections to evidence before an examiner or like officer shall be in short form, stating the grounds of objection relied upon, but that no transcript filed by such officer shall include argument or debate, the report of a master in a patent infringement suit should not be incumbered with unnecessary and voluminous statement, argument and debate having no proper place in the record, and the line should be drawn between such unnecessary matter and the statement of reasons for objections.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 893-900, 903; Dec. Dig. Ⓒ407.]

3. PATENTS ⚡321—UNFAIR COMPETITION—IMPROPER USE OF DECREE.

The plaintiff in a patent infringement suit may notify the defendant's customers of an interlocutory decree finding that defendant's cherry seeder infringes certain specified claims of plaintiff's patent, and warn them against buying or vending such infringed cherry seeder, and inform them of an intention to sue for damages, and propose terms of compromise of liability without litigation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 588, 589; Dec. Dig. ⚡321.]

4. PATENTS ⚡321—UNFAIR COMPETITION—IMPROPER USE OF DECREE.

Where circular letters sent out by the plaintiff in a patent infringement suit, in which an interlocutory decree was granted finding that defendant's cherry seeder infringed certain claims of plaintiff's patent, to defendant's customers, did not inform them of the limits of the interlocutory decree, or what patent was in suit, or what claims were infringed, nor in what respect defendant's seeder was held to infringe, but bore the inference that the interlocutory decree declared infringement against any or all cherry seeders manufactured by defendant, and that plaintiff was entitled to recover from defendant's customers profits made on sales of any or all seeders purchased from defendant, it was making an improper and unlawful use of the decree, entitling defendant to have it prohibited from making representations to defendant's customers concerning such decree, without stating its limits and effect, and definitely informing them of the character of infringement adjudged.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 588, 589; Dec. Dig. ⚡321.]

5. PATENTS ⚡321—UNFAIR COMPETITION—IMPROPER USE OF DECREE.

Where the plaintiff in a patent infringement suit was making an unfair use of an interlocutory decree finding infringement in certain respects in letters sent to defendant's customers, the court in which the suit was pending had authority on motion to control it in its use of such decree.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 588, 589; Dec. Dig. ⚡321.]

In Equity. Suit by the Rollman Manufacturing Company against the Universal Hardware Works. On defendant's motion to suppress circular letters sent out by plaintiff. Order in conformity with the opinion granting a part of the relief sought.

See, also, 207 Fed. 97; 218 Fed. 651.

Coyle & Keller, of Lancaster, Pa., and Archibald Cox, of New York City, for plaintiff.

John A. Hipple, of Lancaster, Pa., and Wm. R. Davis, of New York City, for defendant.

THOMPSON, District Judge. The defendant moves for various forms of relief pertaining to the proceedings before the master. No substantial ground has been shown for interference at this time with the exercise of the master's discretion in the regulation of the proceedings before him under equity rule 60 et seq. (198 Fed. xxxvi, 115 C. C. A. xxxvi).

[1] At the hearing there were charges and countercharges of responsibility for delay. The master has ample power, which he should not hesitate to use, to speed the cause and prevent unreasonable delay. The length of time already consumed suggests the probability of ap-

proaching necessity for such action, or for a certification to the court of the reason why the plaintiff's case is not concluded.

[2] It may be well at this point to call the attention of the master and of counsel to the provisions of rule 51 (198 Fed. xxxii, 115 C. C. A. xxxii), providing that:

"Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate."

Reports are frequently returned to the court in which the notes of the proceedings before masters, examiners, and other officers are needlessly increased by many pages of statement, argument, and debate of counsel. While rule 51 does not specifically refer to proceedings before a master, the first paragraph, in relation to the form of objections to evidence, may be well taken to apply to any proceedings in which testimony is taken. No useful purpose is served by causing the record to be incumbered in this manner, and the line should be drawn between the statement of reasons for objections and the unnecessary and voluminous statement, argument, and debate which have no proper place in the record.

[3, 4] The question raised by the defendant's first motion is whether the circular letters sent out by the plaintiff on October 20, 1915, and the "follow-up" letters sent out on or about November 12, 1915, contain matter constituting an improper use of the interlocutory decree of the court and of its orders for production for inspection of the defendant's books and papers, and, if improper use has been made of the decree and order, whether the court has authority to control the plaintiff's action in sending out such letters.

It is not to be denied that the plaintiff may notify the defendant's customers of the decree finding that the cherry seeder manufactured by the defendant, which was offered in evidence before the court, infringed certain specified claims of the patent in suit, and may warn the defendant against buying or vending such infringing cherry seeders. And it is not to be denied that the plaintiff may lawfully inform a vendor of an intention to sue him for damages for the sale of the infringing article, and may propose terms of compromise of liability prior to litigation. *Tuttle v. Matthews* (C. C.) 28 Fed. 98; *Philadelphia Trust Company v. Edison Electric Light Co.*, 65 Fed. 551, 13 C. A. 40.

The letters sent out by the plaintiff, however, did not inform the defendant's customers of the limits of the interlocutory decree—did not inform them what patent was in suit, nor what claims were held to be infringed, nor in what respect the defendant's cherry seeder was held to infringe. The defendant had contended upon the argument of various motions before the court that the master should have acted upon its offer to show the character of the cherry seeders made and sold by it after March 1, 1911, and should have thereupon determined whether they infringed.

In the opinion filed December 4, 1914, the court held that the plaintiff was not obliged to accept the statements and affidavits of the

defendant as to what character of cherry seeders it had manufactured and sold after March 1, 1911, but might, within the limits defined in the order of May 13, 1915, examine the books and papers of the defendant, and obtain information regarding the character of the cherry seeders from the defendant's customers.

The terms of the circular letters sent out bear the inference that the interlocutory decree declared infringement against any or all cherry seeders manufactured by the defendant, and that the plaintiff was entitled under that decree to recover from the defendant's customers profits made on sales of any or all cherry seeders purchased from it.

The plaintiff contends, first, that the purpose of the letters is to obtain the information to which it is entitled, in order that it may perfect its claim for profits; and, second, that it is within its rights in informing the defendant's customers of their liability to suit as infringers and in offering immunity from suit if they will give the information desired. The defendant contends that the plaintiff's purpose is to injure the defendant's business by alarming its customers with threats of litigation, and to obtain its business in the sale of cherry seeders.

The purpose of the plaintiff must be judged by its acts. The letters contain no false representation of the scope of the decree, but undoubtedly suppress information as to its effect and limits. In that respect the plaintiff must be held to have made an improper and unlawful use of the decree which prima facie would entitle the defendant to maintain a suit to protect it from injury to its trade. *Dittgen v. Racine Paper Goods Co.* (C. C.) 164 Fed. 84; *Id.*, 171 Fed. 631, 96 C. C. A. 433; *Adriance, Platt & Co. v. National Harrow Co.*, 121 Fed. 827, 58 C. C. A. 163.

[5] Under these circumstances, I am of the opinion that the court has authority, as was held in *Asbestos Shingle Co. v. Johns-Manville Co.* (C. C.) 189 Fed. 611, to control the plaintiff in its use of the interlocutory decree. In that case the court said:

"In view of all these facts I think the complainant should say expressly what are the limits of his rights as fixed by the decree. I will not ask him not to claim that his patent covers the defendant's shingles, for I do not think he is obliged to take the defendant's word for the fact that it sells no shingles made on a paper machine, and, besides, that is outside the scope of this suit altogether; but if he advertises the decree in connection with shingles he must make it clear that the only shingles which it purports to protect are those made on a paper-making machine."

The application here is not for punishment for contempt, nor does the question of preventing a multiplicity of suits arise, as in many of the cases in which the power to grant relief has been discussed. Inasmuch, however, as the letters disclose a purpose, in addition to that of obtaining the information necessary for the prosecution of the plaintiff's case, to unfairly affect the defendant's trade and to unfairly secure the business of its customers, an order will be entered prohibiting the plaintiff from making representations to the defendant's customers as to the interlocutory decree and the orders of the court without stating the limits and effect of the decree and orders, and without

definitely informing the defendant's customers of the character of infringement adjudged.

Counsel may prepare and submit an order in conformity with this opinion.

HOOD RUBBER CO. v. UNITED STATES RUBBER CO. et al.

(District Court, D. Massachusetts. January 11, 1916.)

No. 5.

1. MONOPOLIES ⚡17—COMBINATIONS PROHIBITED—SALES OF GOODS.

Six of the defendants, all of whom were citizens of and doing business in Massachusetts, were manufacturers of lasts or forms used in making rubber boots and shoes, and were the only makers thereof in the United States. A rubber company acquired control of other corporations engaged in the manufacture and interstate sale of rubber footwear, for the purpose of controlling them and controlling prices of such goods, and with the intent of restricting and controlling the interstate sale and transportation of lasts made separate agreements with each of the last manufacturers whereby they agreed to sell no lasts for a certain period, except to persons and corporations specified by it. By means of these agreements it restricted and controlled the interstate sale of lasts, and deprived other persons engaged in the interstate sale of rubber footwear, including plaintiff, of the ability to procure lasts. *Held* that, where it did not appear that any of the last manufacturers intended to restrict and control trade, or knew of the contracts between the rubber company and the other last manufacturers, or knew of its purpose or intent to restrain and control trade, and none of such manufacturers occupied any dominating position in the trade in lasts, there was no combination or conspiracy in restraint of the trade, and the last manufacturers were within their rights in making the contracts, and were not liable under Sherman Act July 2, 1890, c. 647, 26 Stat. 209, for having done so.

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

2. MONOPOLIES ⚡28—ACTIONS FOR DAMAGES—COMBINATIONS DISTINGUISHED FROM CONTRACTS.

A declaration, setting out the facts mentioned, stated no combination or conspiracy in restraint of trade, as against the rubber company, and was to be supported, if at all, as alleging contracts made by it in unreasonable restraint of interstate trade, or a monopolization of that trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⚡28.]

3. MONOPOLIES ⚡28—ACTIONS FOR DAMAGES—PERSONS ENTITLED TO DAMAGES.

The fact that plaintiff was a citizen of Massachusetts, manufacturing rubber footwear in that state, and was not a dealer in lasts, and only desired to buy lasts for its own use, and not for resale, did not deprive the restraint of trade, so far as it affected plaintiff, of the interstate character necessary to bring it within the Sherman Act, as the restraint or control obtained by the rubber company was a single thing, not confined to Massachusetts, and restricted the trade of the last manufacturers with everybody, including citizens of their own state.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⚡28.]

4. MONOPOLIES ⇨28—ACTIONS FOR DAMAGES—PLEADING—"TRADE"—"CONTROL"—"MONOPOLY."

A declaration, in an action for damages against the rubber company, alleging that by means of such contracts it illegally restricted, limited, and controlled the interstate sale and transportation of lasts, though not explicitly and in the language of the statute alleging a monopolizing, or an attempt to monopolize, stated a cause of action under Sherman Act, § 2 (U. S. Comp. St. 1913, § 8821), prohibiting every person from monopolizing or attempting to monopolize any part of the trade or commerce among the several states, as "trade" necessarily involves both buying and selling, and a complete domination of either is a domination of the trade, and "control," as used in the declaration, was the substantial equivalent of "monopoly," as used in the statute.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⇨28.

For other definitions, see Words and Phrases, First and Second Series, Monopoly; Trade; Control.]

Action by the Hood Rubber Company against the United States Rubber Company and others. On demurrer to the declaration. Demurrer of the defendant named overruled, and demurrers of the other defendants sustained.

Henry E. Warner and Arthur H. Brooks, both of Boston, Mass., for plaintiff.

Robert M. Morse, Wilford D. Gray, George L. Huntress, and Homer Albers, all of Boston, Mass., for defendant United States Rubber Co.

Chamberlain & Fletcher, of Brockton, Mass., for defendants DeLand and Cary.

MORTON, District Judge. This is an action at law under the Sherman Act (26 Stat. 209) to recover threefold damages. The defendants are the United States Rubber Company, a New Jersey corporation engaged in the manufacture of rubber footwear (which will be referred to as the defendant where not otherwise indicated), and six other persons and corporations, all citizens of Massachusetts, and engaged separately in that state in the manufacture of lasts used in making rubber boots and shoes. The defendants have demurred, and the question is whether the declaration states a cause of action.

It contains seven counts, the first of which, as I construe it, describes the following business situation: Lasts or forms are necessary tools or appliances in the manufacture of rubber boots and shoes. In April, 1896, the only makers of them in the United States were the six last-named defendants, who, as it happened, were all citizens of Massachusetts, and did business here, and nowhere else. They sold their product extensively in interstate commerce. In the month referred to the principal defendant acquired control of ten different corporations, organized under the laws of several different states, each of which was engaged in the manufacture and interstate sale of rubber footwear. It did this for the purpose of controlling such rubber companies as were then, or might thereafter be, engaged in

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

the interstate sale of rubber boots and shoes, and of controlling the prices asked for such goods.

In manufacturing rubber footwear, lasts are absolutely essential. The United States Rubber Company, with the intent of restricting and controlling the interstate sale and transportation of them, made in April, 1896, agreements with every one of the last manufacturers, whereby they separately agreed to sell no lasts until January 1, 1897, except to such persons and corporations as might be specified by the defendant. By means of these agreements the defendant restricted and controlled the interstate sale of lasts for rubber boots and shoes from the time when the agreements were made, in April, 1896, until they expired on January 1, 1897, and during that interval deprived other persons engaged in interstate sale of rubber footwear of all opportunity to procure lasts in this country.

In April, 1896, F. C. Hood and A. N. Hood left the employ of one of the rubber companies then controlled by the defendant, and began a rubber business under the name of the Hood Rubber Company. They bought land, and contracted for buildings and machinery to manufacture rubber boots and shoes, and took steps to form a corporation for that purpose. Before the corporation was chartered, F. C. Hood "on behalf of such corporation to be formed as aforesaid sent an order for" lasts to one of the defendant last companies (declaration, clause 9). This company wrote to the principal defendant, asking to be released from its agreement not to sell to other than designated persons. The defendant declined to grant such release by a letter which is set out in the declaration, and might be found, in connection with the other facts alleged, to evidence an intent to restrict or monopolize the trade in lasts by the contracts referred to. Thereafter F. C. Hood, "doing business as the Hood Rubber Company, and acting on behalf of himself and others who were forming the plaintiff corporation of the same name, endeavored to procure lasts from each and every one of said last companies, * * * and each and every one of the last companies refused to furnish lasts to the plaintiff, or to any rubber company not named in its contract with the defendant" (declaration, par. 10). Hood, on behalf of the plaintiff, made every endeavor to procure lasts within the United States, but was unable to do so. On or about October 12, 1896, the plaintiff corporation received its charter, and immediately afterward made further efforts to buy lasts from the manufacturers of them, but was unable to obtain any suitable ones until the expiration of said contracts relating to them.

The contracts between the United States Rubber Company and the last companies greatly restricted the trade in such lasts and subjected such trade to the absolute control of the principal defendant; and the contracts, conspiracies, and monopolies between the defendant and the last companies were made with that intent, and to accomplish that result. There are allegations of damage to the plaintiff by the defendants' acts. This is the case stated in the first count.

Each of the remaining counts relates especially to some particular one of the contracts referred to between the defendant and the last

companies; each incorporates by reference the first count, so far as material, alleges that "said contract, agreement, or conspiracy was illegal and void," and claims damages on account thereof.

[1] There are no allegations that any one of the last companies knew that the rubber company was making contracts with other last companies, or was aware of any purpose or intent by the rubber company to restrain and control trade by the contract made with it, or was informed in any way that its contract was part of an effort by the rubber company to control and restrict interstate commerce by a series of such contracts tying up all the last companies. No one of the last companies, apparently, occupied any dominating position in that trade. Upon the allegations of the declaration, nothing more is shown than that each independently agreed to hold all its product adapted to rubber footwear for the defendant, or subject to its orders.

In the absence of any purpose or intent on the part of any of the last companies to restrict and control trade by its contract, and of any knowledge that the other party to the contract was making it in pursuance of a plan to restrict, control, or monopolize interstate commerce, and of any sufficient reason to believe that such would be the natural effect of the contract with the defendant, the last companies were, in my opinion, clearly within their rights in making the contracts in question, and are not liable under the Sherman Act for having done so. Upon the same reasoning, it seems to me apparent that this declaration does not allege any combination or conspiracy in restraint of the trade in lasts. There is an entire absence of that joint or common purpose and action which are the essence of a combination or conspiracy. The attempted control was reached for by the rubber company on its own account, and, so far as is alleged, without taking any other person into its confidence or apprising any other defendant of its intent. No other person participated or knowingly assisted in the illegal plan afoot. As to the last companies, no cause of action under the Sherman Act is stated.

[2] As against the United States Rubber Company, the declaration does not set out any combination or conspiracy in restraint of trade. It is to be supported, if at all, as alleging contracts made by the rubber company in unreasonable restraint of interstate trade, or a monopolization of that trade. It plainly relates to restraint or control of trade in lasts, not in boots and shoes, and it alleges a complete and intentional restraint and control thereof by the defendant.

[3] The first important contention of the defense is that the restriction and control relied on by the plaintiff cover only the manufacture and sale of lasts by companies within a single state, Massachusetts; that the plaintiff is a citizen of Massachusetts, and manufactures only in that state; that the plaintiff is not a dealer in lasts, but only desired to buy them for its own use; that all purchases of lasts by the plaintiff would have been intrastate transactions; and that the alleged restraint, so far as it affected the plaintiff, was not of an interstate character, and is not within the Sherman Act.

If the defendant's agreements with the last companies had related only to trade within Massachusetts, unquestionably the plaintiff would

have had no right of action under the Sherman Act. *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. But the restraint and control actually and intentionally obtained are not so limited; they include all the United States, Massachusetts among them; and they restrict the trade of the last companies with everybody, including, of course, citizens of their own state. The defendant's control within the state was part of the larger complete control which it designed to secure; there was no separate agreement relating only to the trade in lasts within Massachusetts. If the plaintiff had happened to reside out of Massachusetts, it would seem clear, on this branch of the case, that the Sherman Act applied and had been violated. If the plaintiff, though residing in Massachusetts, had been a dealer in lasts, selling them beyond the borders of that state, the defendant's alleged conduct would have interfered with the flow of that interstate trade in which the plaintiff was engaged, and the case would have come within the decisions in *Gibbs v. McNeeley*, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152 (C. C. A. 9th Circuit), and *Hale v. Hatch & North Coal Co.*, 204 Fed. 433, 122 C. C. A. 619 (C. C. A. 2d Circuit).

Does the fact that the person injured by an interstate restriction or control of an illegal purpose and character happens to reside within the same state where the entire trade which is the subject of the restriction or control originates deprive him of the right to a remedy under the statute? In other words, is the statute applicable to such a case? It seems to me that it is. The restraint or control obtained by the defendant, and by which the plaintiff was injured, was a single thing, not confined to Massachusetts, but extending to and including New York and Pennsylvania, for instance, and other states into which the trade might reach. Such a control the defendant had, upon the allegations of the declaration, no right to acquire, and, having done so intentionally and unlawfully, it is liable for the consequences of its illegal conduct. I do not think that the decision in the *Addyston Pipe Case*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, is inconsistent with these views. What was excepted from the injunction in that case, as I understand it, was separate agreements among defendants within a single state, relating only to trade within that state. The restraint condemned in the *Reading Case* (*U. S. v. Reading*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243) occurred almost entirely within the state of Pennsylvania; but it was intended to reach and did reach beyond the borders of that state, and it was held illegal. See *Chatanooga Foundry Co. v. City of Atlanta*, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241; *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; s. c., 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341.

[4] The declaration does not explicitly and in the language of the statute allege a monopolizing or an attempt to monopolize. It does charge that "by means of such contracts the said defendant the United States Rubber Company illegally and unlawfully restricted, limited, and controlled the interstate and foreign sale and transportation of lasts" (count 1, par. 8). Trade necessarily involves both buying and

selling, and a complete domination of either side is a denomination of the trade in question. Taking the declaration as a whole, it clearly alleges that the defendant acquired a complete and exclusive control of the selling trade in lasts for rubber footwear. It seems to me that the word "control," as used in the declaration, is the substantial equivalent of "monopolize," as used in the statute, and that by the contracts in question the defendant, upon the allegations of the declaration, obtained an illegal monopoly of the trade in lasts for rubber footwear. A cause of action is therefore stated under the second section of the statute. It should perhaps be noticed that the declaration was filed July 2, 1902, when the law on this subject was not so far developed as it has since become, and when the technical terms applicable to cases of this character were less certain than at present.

The demurrers of all the defendants except the United States Rubber Company should be sustained; the demurrer of the United States Rubber Company should be overruled.

So ordered.

INTERURBAN GENERAL CONTRACTING CO. OF NEW YORK et al. v.
UNITED STATES, to Use of VICTORIA WHITE GRANITE
CO. OF OHIO, et al.

(District Court, D. Massachusetts. January 12, 1916.)

No. 692.

1. JUDGMENT ⚡437—EQUITABLE RELIEF—NEGLIGENCE AND MISTAKE OF COUNSEL.

A surety company, which permitted judgment to be taken against it by default because of a misunderstanding between its New York counsel and its Massachusetts counsel, each of whom understood that the other would attend to the matter, was not entitled to equitable relief against the judgment, as a court of equity does not interfere with judgments at law unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 827, 828; Dec. Dig. ⚡437.]

2. COURTS ⚡365—UNITED STATES COURTS—FOLLOWING STATE PRACTICE.

In determining whether a defendant, against whom a default judgment was obtained by reason of a misunderstanding by the different attorneys representing it, was entitled to equitable relief against the judgment, the court was not bound by the decisions of state courts, as the matter was one concerning its power rather than its procedure.

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

In Equity. Suit by the Interurban General Contracting Company of New York and another against the United States, for the sole use and benefit of the Victoria White Granite Company of Ohio, and others. On motion to dismiss the bill. Bill dismissed.

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

Ham, Frederick & Yont, of Boston, Mass., for plaintiffs.
Franklin N. Newell, of Springfield, Mass., for defendants.

MORTON, District Judge. The defendant in this suit obtained on June 21, 1915, in an action of law brought by it in this court, a judgment by default for nonappearance against the complainants herein. The term at which the judgment was entered expired and was adjourned sine die. This is a suit in equity, entitled "Bill of Review," brought by the defendant in that action to enjoin the enforcement of the judgment so obtained, or to set it aside. The present defendant, the judgment creditor, has filed a motion to dismiss the bill, which is equivalent to a general demurrer.

[1] The case stated in the bill is in substance as follows: The New England Equitable Insurance Company, which is the principal complainant, and will be referred to as the complainant, was formerly the New England Casualty Company. Under that name it became surety for the Interurban General Contracting Company, upon a bond to the United States of America to secure the performance of a contract between the United States and the Contracting Company. The action referred to was brought against the Insurance Company on that bond, and service of process was duly made upon the defendant. The bond had been issued through the New York office of the Insurance Company, and the summons served upon the company was sent by its counsel in Massachusetts to its counsel in New York with the expectation that the New York counsel would thereafter attend to the matter. The Massachusetts counsel, therefore, took no steps to see that an appearance was entered. The company's New York counsel was advised of the commencement of the action, but he supposed that the complainant's interests as defendant therein were being attended to by its Massachusetts counsel; and he accordingly did not appear for it. The result of this misunderstanding was that the Insurance Company was defaulted, and the judgment by default before mentioned was rendered against it for the amount of the declaration, \$687.08 and costs. The complainants admit that one of the original plaintiffs had a valid claim in the sum of \$160.43, payment of which is offered in the bill. The bill further alleges:

"13. That the claim which was the foundation of the judgment which the defendants have against your complainants was unjust and unfounded and that your complainants have a good defense to the said action, and that except for the negligence and mistake of their employés would have defended the said action and contested the assessment of damages; the defense is that your complainants have paid the defendants and therefore owe them nothing."

The question is whether this bill sets up a case entitling the complainants to any relief. The principle by which it is to be determined is clear.

"A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmingled with negligence of himself or his agents." *Gray, J., Knox County v. Harshman*, 133 U. S. 152, 154, 10 Sup. Ct. 257, 258 [33 L. Ed. 586].

There is here no question of any equitable defense which was unavailable at law, nor of any fraud on the part of the original plaintiff in obtaining the judgment in question, nor of any mutual mistake. The real question is whether, upon the allegations in the bill, the judgment was obtained by accident, without negligence on the part of the Insurance Company. It is to be assumed, as the bill alleges, that there was a good defense to the action, except as to \$160.43.

[2] As the matter is one which concerns the power of the court, rather than its procedure, the courts of the United States are not bound by the decisions of the state courts. *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Wetmore v. Karrick*, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745; *City of Manning v. German Ins. Co.*, 107 Fed. 53, 57, 46 C. C. A. 144 (C. C. A. 8th Circuit).

In *City of Kansas City v. U. P. R. Co.*, 192 Fed. 316, 114 C. C. A. 1 (C. C. A. 8th Circuit), the Railroad Company had brought a bill against the city. The subpoena was duly served upon the mayor and clerk, and was by them left on the city solicitor's table for attention by him. He did not notice it, no appearance was entered for the city, judgment against it was obtained by default, and the term expired. In proceedings to set aside the judgment it was averred that the city solicitor, in gathering up papers from his desk, had, by accident and mistake, taken up and disposed of the subpoena without noticing what it was. It was held, apparently upon demurrer, that the city was not entitled to relief. In *Village of Celina v. Eastport Savings Bank*, 68 Fed. 401, 15 C. C. A. 495 (C. C. A. 6th Circuit), the savings bank had brought an action against the village. The summons was duly served upon the mayor. He consulted a firm of attorneys, inquired if they would undertake the defense of the action, received an affirmative reply, and left understanding that he had arranged for them to represent the village. The attorneys did not so understand the transaction and entered no appearance. Neither the mayor nor the attorneys paid further attention to the case until some months after judgment had been rendered on default and the term at which that was done had expired. It was held by Taft, Lurton, and Severens, JJ., that no case was stated which warranted relief in equity. In *Travelers' Protective Association v. Gilbert*, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538 (C. C. A. 8th Circuit), Gilbert had brought an action at law against the association on an insurance certificate issued by it. The summons was served upon the secretary of a subordinate lodge, who did not understand its significance and failed to apprise the defendant of it. Judgment was entered against the association on default for nonappearance. At the next term the defendant began proceedings to have the judgment set aside, and finally filed a bill of review. It was held that the association was not entitled to relief. No case has come to my attention in which, on facts at all similar to those here, relief was granted in the United States courts.

This bill explicitly alleges that the reason why the complainant did not defend the action was "negligence and mistake of their employes." If this statement be taken as true, it is clear that no case for relief

is stated. If it be disregarded, I feel obliged, under the decisions referred to, which represent the general law of the federal courts, to hold that upon the bill as a whole the complainant is not entitled to relief in equity against the judgment in question, and that the motion to dismiss must be allowed.

The result is certainly a hardship to the original defendant, and strongly suggests the desirability of legislation, giving to the federal courts power to review judgments by default, such as has been given to the courts of many states. See, *inter alia*, Rev. Laws Mass. c. 193, § 14 et seq.; Rev. Stats. Maine, c. 91; Gen. Laws N. H. c. 234; Gen. Laws R. I. c. 297. Pending action by Congress, an amendment has been made to the rule of this court relating to entry of judgment, which it is hoped will to some extent prevent similar cases in the future.

Motion to dismiss allowed; the defendant may present a decree dismissing the bill.

SANITARY STREET FLUSHING MACH. CO. v. STUDEBAKER CORP.

(District Court, D. New Jersey. October 9, 1914.)

No. 313.

INJUNCTION ⇨26—INFRINGEMENT SUITS—ENJOINING PROSECUTION OF OTHER SIMILAR SUITS.

In a suit against a contributory infringer for conniving at or facilitating the unlawful use of a lawful assemblage of parts, capable of lawful use not infringing plaintiff's patent, defendant moved for an order enjoining the institution or prosecution of suits against its customers pending the final determination of the issue between it and plaintiff. Its affidavits showed that the various parts of the machine were identical, and contained no explicit explanation that such parts could not be used in infringement of the patent, or that they had not in fact been so used. *Held*, that the injunction would be denied, there being a substantial distinction between an action for procuring and contributing to an infringing use, and an action against customers who have bought and taken possession of the machine, and used it in a way specifically prohibited.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. ⇨26.]

In Equity. Suit by the Sanitary Street Flushing Machine Company against the Studebaker Corporation. On motion for a stay of proceedings in another action. Motion denied.

See, also, 226 Fed. 797.

HUNT, Circuit Judge. Defendant has moved that an order be entered directing plaintiff to stay all proceedings in the case pending in the United States District Court for the Northern District of New York in Sanitary Street Flushing Machine Company v. City of Amsterdam (see 225 Fed. 389), pending final decision and determination of the issue herein, and directing that plaintiff and its representatives be further enjoined from instituting any other or further suits on the patent herein involved against the defendant or its representa-

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

tives, or purchasers of defendant's machines, pending the final decision and determination of the issue between the parties herein, and from threatening to institute such suits.

Passing all questions of power in the premises, and assuming that the court may enjoin the parties from proceeding with other suits pending in other courts, as prayed for, I am clear in my mind that this court ought not to use any power so possessed to issue the injunction here prayed for. As I am engaged in the trial of cases from day to day, I shall not be able at this time to elaborate the somewhat complicated history of this litigation. It is enough to say that the suit is one against a contributory infringer in conniving at or facilitating the unlawful use of a lawful assemblage of parts, yet capable of lawful use not infringing the patent.

Defendant may be sued as a user, and it should follow that plaintiff, upon proof of necessary matter on the trial, may enjoin, and may assert rights which will prevent, unlawful use, and may, it would seem, pursue a right of action against customers who have bought and taken possession. At all events, there must be a distinction, which has a substantial foundation, between an action for procuring and contributing to an infringing use and an action against customers who have bought and taken possession of the machine, and who have used it in a way specifically prohibited. Avoiding any confusion of these propositions, and examining the affidavits filed by the defendant, it would appear generally that the various parts of the machines are identical; and yet there is, in the affidavits, no explicit explanation that such parts cannot be used in infringement of the patent in suit, or that they have not in fact been used in such infringement. This matter cannot be overlooked, in view of the vitally important point that it is the particular use of the elements specified in the claims of the patent in suit that may form the basis for a monopoly which plaintiff may maintain.

The case of *Kryptok Company v. Stead Lens Company*, 190 Fed. 767, 111 C. C. A. 495, 39 L. R. A. (N. S.) 1, is well reasoned, and, as applied to the motion for an injunction, constrains a conclusion against any interference at this time by this court with the right of the plaintiff to sue in another court of co-ordinate jurisdiction. Of course, nothing said herein in any way can conflict with the general rule that a court of equity may upon proper showing so regulate the trial of its calendar as not to require parties to go to unnecessary expense and duplication of work.

Motion for injunction denied.

LAUDERDALE COUNTY v. KITTEL et al.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1916.)

No. 2803.

1. HIGHWAYS ⇨113—CONSTRUCTION CONTRACTS—PARTIES LIABLE.

Const. Miss. 1890, § 170, provides that the board of supervisors shall represent the county in the management of its affairs and have full jurisdiction over the roads of the county. Laws Miss. 1910, c. 149, was entitled: "An act authorizing the board of supervisors to construct and maintain public roads in any one or more supervisors' districts of the various counties of the state; to issue bonds and levy taxes for that purpose; and providing for the manner in which said roads shall be constructed and maintained; and how bonds shall be issued and taxes levied for that purpose." It was amended by Laws 1912, c. 145. In the original act the caption of section 1 read: "Board of Supervisors Authorized to Construct Highways and Provide Funds Therefor." That section provides that the board of supervisors of any county is thereby authorized and empowered to construct and maintain one or more highways by contract in any one or more supervisors' districts, and for that purpose to issue and sell bonds, levy and collect taxes, and maintain such roads as therein provided. Section 5 provides for the appointment of road commissioners in districts in which roads are so to be constructed, and provides that they shall have the management and supervision of the construction and maintenance of roads built thereunder, subject to the approval of the board of supervisors, and subject to such approval shall determine and fix the roads to be constructed and maintained, let all contracts, etc., all acts done by them to be subject to ratification or rejection by the board of supervisors. It divides the county into road districts, and provides for the issuance of bonds of the district in which roads are to be constructed, and for the levy of taxes on the property in such district, but the bonds are to be executed by the president of the board of supervisors and countersigned by the clerk, and to be under the seal of the county. The taxes and proceeds of the bonds are to be kept as a separate fund by the county treasurer, and it is provided that the board of supervisors shall levy an annual tax on the recommendation of the commissioners, which shall be used to supplement the general road fund of the county in maintaining the roads provided for therein. *Held*, that the road districts are not corporate entities, separable from the counties, but are mere geographical subdivisions thereof for administrative purposes, and the road commissioners are mere subordinate county officers, and in signing contracts represent the county, and hence the county may be sued on such a contract.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-352, 355; Dec. Dig. ⇨113.]

2. COURTS ⇨366—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.

The decision of a state court of last resort as to the construction of a state statute is binding upon a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. ⇨366.]

3. APPEAL AND ERROR ⇨1039—HARMLESS ERROR—RULINGS ON PLEADINGS.

Where, under the declaration and the general issue, with notice of special matters of defense, the parties were permitted to give in evidence all matters of offense, defense, and reply, they could have suffered no injury from any rulings on the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. ⇨1039.]

4. APPEAL AND ERROR ⚡1052—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE.

An objection to the admission of a letter in evidence on the ground that it was a copy was cured by the subsequent introduction of the original.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. ⚡1052.]

5. EVIDENCE ⚡121—RES GESTÆ.

In a contractor's action for damages from the refusal of the defendant county to permit him to complete a highway construction contract, evidence that plaintiff replied to a notice to discontinue work under the contract, and did not by silence acquiesce in the decision of the road commissioners, was a part of the *res gestæ* and admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. ⚡121.]

6. TRIAL ⚡54—RECEPTION OF EVIDENCE—LIMITING EFFECT—REQUEST.

In a contractor's action against a county for damages from the county's refusal to permit him to complete a highway construction contract, there was admitted in evidence a letter written by plaintiff in reply to a notice from the road commissioners to discontinue the work. *Held* that, as this was admissible to show that plaintiff did not acquiesce in the decision of the commissioners, the failure to restrict its effect to this purpose was not error, in the absence of a request that it be so limited.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 126-128; Dec. Dig. ⚡54.]

7. PLEADING ⚡381—ISSUES—EVIDENCE ADMISSIBLE.

In a contractor's action for damages from the refusal of the defendant county to permit him to complete a highway construction contract, where the pleadings presented the question of the good faith of the county's engineer in reporting to the road commissioners that plaintiff was unnecessarily delaying the work, evidence that the engineer was in collusion with the representative of plaintiff's surety to substitute another and favored contractor in the completion of the work was admissible, as any evidence tending to show good faith or lack of good faith was admissible, though not specially pleaded; the pleadings not being required to set out the evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1238, 1253-1279; Dec. Dig. ⚡381.]

8. EVIDENCE ⚡116—RELEVANCY—ACTIONS FOR BREACH OF HIGHWAY CONSTRUCTION CONTRACTS.

Where, in a contractor's action for damages from the refusal of the defendant county to permit him to complete a highway construction contract, plaintiff was permitted to prove that one of the county's attorneys admitted that the county had retained a fund of \$25,000 to answer any judgment that might be recovered against it by plaintiff, the county should have been permitted to show that no such fund was retained, as the alleged admission could be rebutted, either by evidence tending to show that it was not made or by evidence tending to show that it was in fact untrue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 134, 135; Dec. Dig. ⚡116.]

9. APPEAL AND ERROR ⚡1058—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where, in such action, a witness had, without objection, testified that no such fund had been retained, and that the sum in the road fund did not amount to the sum said to have been retained, defendant was not injured by the refusal to permit the witness to reiterate this statement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. ⚡1058.]

10. WITNESSES ⇨268—EXAMINATION—CROSS-EXAMINATION.

In a contractor's action for damages from the refusal of the defendant county to permit him to complete a highway construction contract, plaintiff claimed that the county's engineer, in reporting that he was unnecessarily delaying the work, did not act in good faith, but was in collusion with a representative of plaintiff's surety and the H. Co., and made such report for the purpose of eliminating plaintiff and substituting the H. Co. in the completion of the work. Witnesses for the county were permitted on cross-examination to testify to previous transactions between the county, through its road engineer and road commissioners, and the H. Co., tending to prove that favoritism had been shown that company. *Held* that, in view of the suggestion of collusion, it was within the discretion of the court to permit this cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. ⇨268.]

11. TRIAL ⇨45(3)—OFFER AND PROOF.

In such action, the exclusion of evidence as to the circumstances attending the payment to the H. Co. on former contracts of the retained percentage in advance of the time when it was legally payable was not erroneous, where defendant made no specific statement as to what it expected to prove, other than that the engineer had nothing to do with this premature payment, and the witness was permitted to and did testify that the engineer had nothing to do with procuring the reserved percentages to be paid in advance of the legal time of payment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 113; Dec. Dig. ⇨45(3).]

12. HIGHWAYS ⇨113—HIGHWAY CONSTRUCTION CONTRACTS—ACTIONS—QUESTIONS FOR JURY.

In a contractor's action against a county for breach of a highway construction contract, which stated the price of one item of work as 19¾ cents a yard, defendant contended that the understood price was 19¼ cents a yard, and there was evidence that at the meeting of the road commissioners, at which plaintiff's bid was accepted, the clerk read the bid as 19¼ cents for such item, and that plaintiff said nothing. There was also evidence, however, that subsequent estimates were made and paid on the basis of 19¾ cents, and that after the contract was taken over by plaintiff's surety payments were made to it on the same basis. *Held*, that this practical construction of the contract by the parties made it a question for the jury as to whether there was a meeting of the minds when the contract was executed regarding the price to be paid.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-352, 355; Dec. Dig. ⇨113.]

13. HIGHWAYS ⇨113—HIGHWAY CONSTRUCTION CONTRACTS—BREACH—DECISION OF ENGINEER.

A highway construction contract provided that the good roads commission reserved the right to declare the contract forfeited if at any time it should appear to the engineer that the work or any part thereof was being unnecessarily delayed, and that under such conditions the contractor would be notified in writing to discontinue the work, and that all money due him, as well as his bond, would be held to protect the county from any loss in the completion of the work. The contractor's bond provided that the surety should at its option have the right, upon default of the contractor, to complete the work, and should be entitled to such benefits and emoluments as might then be due the contractor. The engineer reported to the commission that the work was being unnecessarily delayed, and the commission adopted a resolution providing that notice be given to the contractor and the surety for the contractor to discontinue work, and that unless the surety should forthwith take charge of

the work and undertake the performance of the contract the commission would forfeit the contract, and contract with other parties for the performance of the contract. *Held*, that the opinion of the engineer that the work was being unnecessarily delayed was not final and conclusive, unless the commission forfeited the contract, and as the commission purposely refrained from declaring the contract forfeited, and merely threatened to forfeit it, in order to avoid releasing the surety, the engineer's opinion was not final, and in the contractor's action for breach of the contract the issue was whether the work had in fact been so unnecessarily delayed that it could not reasonably have been completed within the time allowed by the contract.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-352, 355; Dec. Dig. ⚡113; Contracts, Cent. Dig. § 1335.]

14. APPEAL AND ERROR ⚡1033—HARMLESS ERROR—ERRORS FAVORABLE TO APPELLANT.

As the county in such action was entitled to no instruction whatever as to the conclusiveness of the engineer's opinion, an instruction on that subject was favorable to it, and could not be complained of by it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. ⚡1033.]

15. HIGHWAYS ⚡113—HIGHWAY CONSTRUCTION CONTRACTS—ACTIONS—INSTRUCTIONS.

In such action, instructions that the burden was on plaintiff to establish by a preponderance of the evidence all of the facts necessary to sustain its insistence, that if plaintiff was not in good faith prosecuting the work required of him, or was so environed that it could not in reason be expected that he would complete the work within the time specified in the contract, the verdict should be for defendant, and that if plaintiff began work under the contract, and was prosecuting it with such diligence that he would reasonably have completed the work within the time allowed by the contract, the verdict should be for plaintiff, fairly presented the issue which was determinative of the merits.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-352, 355; Dec. Dig. ⚡113.]

In Error to the District Court of the United States for the Eastern Division of the Southern District of Mississippi; Henry C. Niles, Judge.

Action by J. O. Kittel, trading as the Tennessee Stable & Transportation Company, and others, against the County of Lauderdale. Judgment for plaintiffs, and defendant brings error. Affirmed.

This is a writ of error from a judgment in favor of the plaintiff in the court below, Kittel, who is the defendant in error in this court, and against the defendant in that court, the county of Lauderdale, which is the plaintiff in error in this court. The action was for the alleged breach of a contract, entered into between the plaintiff, Kittel, and the road commissioners of district No. 1, Lauderdale county, for the building by the plaintiff of certain public roads, on the terms therein prescribed and for the compensation therein fixed. The plaintiff entered into the performance of the contract, and after having been engaged thereon some six months was notified by the road commissioners, pursuant to a resolution adopted by them on December 27, 1913, to discontinue work, which the plaintiff thereafter did, whereupon the road commissioners permitted one of the sureties on the bond given by the plaintiff to secure the performance of the contract to enter upon and complete the work under the original contract, through a construction company employed by the surety for that purpose. The plaintiff thereupon instituted this action to recover the damages claimed to have been suffered by him because of not having been allowed to complete his contract. The suit was instituted against the county

of Lauderdale, and not against the road commissioners of district No. 1 of that county. The plaintiff recovered a judgment in the court below, to review which this writ of error was sued out by the county of Lauderdale. There are 59 errors assigned on the record, not all of which were relied upon in the briefs or upon the argument. The two principal questions presented are: (1) The liability of the county of Lauderdale to be sued upon the contract of the road commissioners of district No. 1, Lauderdale county; and (2) the effect to be given the finding of the engineer of the road commissioners that the work, under the contract by the original contractor, Kittel, at the time it was ordered discontinued, was being unnecessarily delayed. Other assignments relate to various rulings during the progress of the trial, and such as are stressed in argument or brief are considered by us in this opinion.

C. C. Dunn, A. S. Bozeman, and A. B. Amis, all of Meridian, Miss., for plaintiff in error.

C. D. Christian, of Meridian, Miss., and Harry S. Stokes and T. T. McCarley, both of Nashville, Tenn., for defendants in error.

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

GRUBB, District Judge (after stating the facts as above). [1] The question which presents itself on the threshold is the liability of the defendant to be sued on the contract of the road commissioners of district No. 1. The first and fifty-sixth assignments of error present the question. The contention of the plaintiff in error, in that respect, is that the act of the Legislature of Mississippi, authorizing the creation of road districts in the various counties of the state, and authorizing the commissioners of such districts, when created, to contract for the building of roads in such districts, should be construed as having the effect of creating the districts, when organized, municipal corporations, which were separate legal entities from the counties in which they existed, and alone responsible for and suable on the engagements entered into by them. The defendant in error's opposing contention is that the effect of the act was merely to provide administrative agencies of the existing county governments, through the creation of the road districts, through which the work of road building in the counties could be subdivided into smaller units, and more conveniently and efficiently accomplished, than by the general officers of the county, such general officers being required to retain the supervision of the work and the expenditure of funds in the various districts and of the commissioners in their management thereof, and that the road districts provided for by the act were not separate corporate entities, were not subject to be sued as such on the contracts made by their commissioners; that such contracts were the engagements of the counties, whose representatives the commissioners were; and that the counties were alone suable thereon.

The act of the Legislature of Mississippi, authorizing the creation of road districts and the appointment of road commissioners for them, was approved March 3, 1910, and is known as chapter 149 of the Laws of Mississippi of 1910. It was amended by an act approved March 11, 1912, and known as "chapter 145 of the Laws of Mississippi of 1912." The record shows that district No. 1, Lauderdale

county, was legally organized under these acts, and that the contract sued on was entered into by road commissioners of that district with the defendant in error.

We have reached the conclusion that the suit was properly instituted against the county of Lauderdale as defendant. The title of the original act, viz., "An act authorizing the board of supervisors to construct and maintain public roads in any one or more supervisors' districts of the various counties of the state; to issue bonds and levy taxes for that purpose; and providing for the manner in which said roads shall be constructed and maintained; and how bonds shall be issued and taxes levied for that purpose," clearly indicates that the board of supervisors of the counties, and not the road commissioners of the districts, were regarded by the Legislature as the body intrusted with the ultimate duty of road construction and maintenance in the districts created by it. The caption of section 1 of the act is also persuasive of the idea that the Legislature intended to place on the supervisors, as representing their counties, the duty of road construction, and the caption of this section in the amended act is consistent with this idea. The former is "Board of Supervisors Authorized to Construct Highways and Provide Funds Therefor;" that of the amended act, "Public Highways—How Counties may Construct the Same." The section itself imposes the duty of the construction and maintenance of highways, and the issuance and sale of bonds therefor, and the levy of taxes to pay the bonds issued, and to maintain the roads constructed, on the supervisors of the county. Section 5 provides for the appointment of road commissioners by the county board of supervisors and their duties. Their duties are defined to be:

"To have the management and supervision of the construction and maintenance of the roads built under the provisions of this act, subject to the approval of the board of supervisors; and for their services shall be paid their actual expenses, not exceeding fifty dollars each, per annum; and it shall be the duty of such commissioners, subject to the approval of the board of supervisors, to determine and fix what road or roads shall be constructed and maintained in such district or districts out of the proceeds of the sale of such bonds and the levy of such taxes; and it shall be their duty to let all contracts for the construction and maintenance of such roads in the manner now provided by law for the letting of contracts for public work by the board of supervisors; and it shall be their duty to employ a competent engineer to survey and lay out such road or roads in such district or districts, as they shall determine upon."

The section then proceeds to define the duties of the engineer so selected and to provide that his estimate and survey shall be adopted or rejected by the commissioners, and their action spread upon their minutes, and that all acts done by the commissioners shall be subject to ratification or rejection by the board of supervisors.

The character of the duties imposed on the commissioner, and the requirement that in the performance of them they are subject to the approval of the supervisors, clearly demonstrates that the purpose of the Legislature was merely to create a subordinate administrative agency to relieve the supervisors of the direct management and supervision of road construction and maintenance in the road

districts, just as might have been done by the appointment of an individual road supervisor in each district. The purpose of the division of the county into road districts, the bonds of which were to be issued to provide for the construction of roads in each district, and to be paid by the levy of taxes on the property in each district, was to geographically distribute the burden according to the special benefits and to reduce the size of the unit, so that the management and supervision might be the more effective. The ultimate control in all matters was retained in the county through its supervisors. The letting of all contracts, the employment of the engineer, the determination of the particular roads to be built, and the approval or rejection of the engineer's survey and estimates were all administrative details, not beyond the authority of an employed superintendent, in view of the fact that they were all subject to the approval or rejection of the board of supervisors. The contracts of the commissioners were of no force till approved by the county supervisors, and they then became the contracts of the counties.

The bonds are expressly required by the act to be executed by the president of the board of supervisors, and countersigned by the clerk of that board, and to bear the impress of the seal of the county. They are the bonds of the county, though issued for the account of a particular road district, the property in which is primarily liable for their payment. The county, however, is the obligor, and would be the proper party defendant in an action to enforce them. It is true that the proceeds of bonds sold and the taxes levied are directed to be kept as a separate fund by the county treasurer, whose bond is made liable for their safe-keeping; but this is made necessary, since the bonds are payable primarily out of the fund derived from taxes collected on the property in each road district, and the proceeds of the bonds are to be used exclusively for the construction of roads in that district. That there is not an entire separation of the administration of the district roads from that of the county roads appears from section 6 of the act. It provides:

"That the public highway or highways, so surveyed and adopted by such commissioners, shall be constructed and maintained out of the proceeds of such bonds; proceeds of such bonds to be used alone in their construction; and the board of supervisors shall levy an annual tax on the recommendation of such commissioners on all the taxable property in such district or districts of not exceeding one mill on the dollar, which shall be used to supplement the general road fund of the county in maintaining said road or roads and the culverts, bridges and levees thereon."

That the Legislature of Mississippi intended to divest the county, through its supervisors, of jurisdiction over all roads in the various districts, is unlikely in view of the probable conflict of such an attempt with section 170 of the Constitution of the state, which provides that the board of supervisors shall represent the county in the management of its affairs, and have full jurisdiction over the roads of said county.

Looking at the language of the act, and the purpose to be subserved, and the constitutional provision necessarily considered by the Leg-

islature, we are of the opinion that the road districts are not separable corporate entities from the counties, but mere geographical subdivisions thereof for administrative purposes, and that the road commissioners are mere subordinate county officers, exercising their functions within the limits of such subdivisions, and that in signing contracts for the construction of roads the corporate entity they represent was the county, and not the road districts.

The case of *Meath v. Phillips County*, 108 U. S. 553, 2 Sup. Ct. 869, 27 L. Ed. 819, is different in its facts from this case. In that case levee districts were created by the Legislature out of lands in different counties for the purpose of reclaiming the lands in such districts and of taxing the lands in the districts created to provide for the expense incurred. The act provided for levee inspectors and a treasurer, officers independent of any county organization. The levee districts might comprise lands in more than one county, and hence were not mere subdivisions of the county territorially, and could not be considered such for administrative purposes. The unit created was more extensive than the county, and so could not be a political subdivision of it. The county courts and the sheriffs were required by the act to perform certain services for the levee district, in the doing of which the Supreme Court held they acted as the representatives of the district, and not of the county. The conclusion reached was that the districts used the machinery of the counties already in existence for district purposes, and that the counties were not thereby involved. The Supreme Court in its opinion, distinguishing that case from the cases of *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416, and *Davenport v. Dodge County*, 105 U. S. 237, 26 L. Ed. 1018, as presenting entirely different facts, say (108 U. S. at page 555, 2 Sup. Ct. at page 870 [27 L. Ed. 819]):

"In the case of the County of Cass, the law provided in terms for an issue of bonds in the name of the county, and in that of Davenport we construed the law to be in effect the same. Consequently there were in those cases obligations of the counties, payable out of special funds. Here, however, there was a manifest intention to bind the levee districts only by the obligations incurred, and not to make the county, in its political capacity, responsible for the payment of the debts that were created for levee purposes under these laws. The machinery of the county was to be used in the levy and collection of the special taxes required, but the county, as a county, was to be in no way involved."

In this case the act imposes on the county the duty of building the roads, and makes the bonds issued therefor the obligations of the county, and merely creates additional county machinery, in the road commissioners distributed among the various districts, for convenience of administration. As the use of the machinery of the county by the levee districts in the Cass and Davenport Cases was held not to involve the county, so the creation of additional machinery by the Legislature for the use of the county, in performing its constitutional functions with relation to public roads, should not be held to release the county from liability, where it would otherwise have been so.

The Supreme Court of Mississippi has so construed this same act in the case of *Prather v. Googe*, 67 South. 156. The court said (page 159), referring to assignments of error based upon the claimed conflict of the act with section 170 of the Mississippi Constitution:

"They all proceed upon the idea that the Legislature has undertaken to create taxing districts or corporations with powers of taxation, or to carve out of a supervisor's district a separate and distinct taxing district, with indefinite powers. The vice of this conception is made apparent by a mere reading of the law. The bill is drawn with due regard to the plenary jurisdiction over roads vested in boards of supervisors by section 170 of the state Constitution, and this thought runs through every word and phrase of the act. The exercise of the powers given by the act and the carrying out of the scheme is placed where it belongs, in the control and under the jurisdiction of boards of supervisors. The methods for the construction and maintenance of public roads, and the means through which the funds necessary to this end may be obtained, is a proper subject of legislation, and are without objection, unless they in terms or by necessary implication take away from boards of supervisors the powers conferred by the Constitution. Nothing can be found in the act justifying the inference that the Legislature was undertaking to confer upon a separate taxing district, or corporate entity, jurisdiction over public roads, or the power to levy taxes upon persons or property. For convenience, and in order to identify the property to be assessed for the purpose of securing funds to liquidate the bonds to be issued, the act provides that boards of supervisors will issue the bonds of the district, upon which special benefits are conferred. The district gets the benefit of the general plan for working roads, and something more, and this something more is the thing the district is required to pay."

[2] The validity of county road bonds, issued under this act, was under consideration by the court. The act was assailed as being in conflict with section 170 of the Mississippi Constitution, in that it infringed upon the plenary jurisdiction of the county boards of supervisors over public roads, by conferring a part of this jurisdiction on separate entities; i. e., the road commissions of the road districts created under it. The court reached the conclusion that the act did not conflict with section 170, by holding that the road districts were not separate entities, but parts of the machinery of the counties; that the bonds were the bonds of the counties, though having as security for their payment the taxing power of the governments of the counties to be exerted upon the property peculiarly benefited by the special improvement. It cannot be said that this holding was unnecessary to the decision of the case, since it was an important and necessary part of the process of reasoning by which the court reached its decision. The decision of the state court of last resort upon the construction of its statute is binding upon us, had we not reached the same conclusion.

[3] The assignments of error which relate to questions of pleading (numbered 3, 53, 54, and 55) may be dismissed with the statement that the parties, under the declaration and the general issue with notice of special matters of defense, were permitted to give in evidence all matters of offense, defense, and reply, and could have suffered no injury from any rulings on the pleadings.

[4-6] The sixth assignment is based upon the introduction against plaintiff in error's objection and exception of a letter which the de-

defendant in error wrote to Broach, the then chairman of the road commissioners. The letter was objected to, because it was a copy; but this objection was cured by the subsequent introduction of the original. The further objection was that it was a self-serving declaration of the defendant in error, after the controversy had arisen. It was written in reply to the notice served upon defendant in error by the road commissioners to discontinue work under his contract, because the work had been, in the opinion of the engineer, unnecessarily delayed. The fact that defendant in error did reply to the notice, and did not by silence acquiesce in the decision of the commissioners, was a part of the *res gestæ*, and admissible. If the plaintiff in error had asked the court to so limit the effect of the letter, it would doubtless have charged the jury not to consider the statements in the letter as evidence of the truth of the facts stated. The objection was to its admission at all. If admissible for any purpose, the court cannot be put in error for not restricting its effect, in the absence of a request to do so.

[7] The assignments numbered 8, 10, and 11 relate to the admission against the objection and exception of plaintiff in error of evidence of conferences and dealings between defendant in error and his wife and the representative of the surety on his bond, after the alleged forfeiture of the contract. One question, arising on the trial, was as to the relation that existed between the road commissioners' engineer, whose opinion was relied upon by the commissioners in taking the action they did, and the representative of the surety company. The claim was advanced by defendant in error that the engineer did not act in good faith, but was induced to report to the board that the work was being unnecessarily delayed by defendant in error, in order, in collusion with the representative of the surety company, to substitute for the defendant in error in the completion of the work another and favored contractor. The objection was based upon the ground that the pleadings disclosed no such issue. The pleadings are not required to set out evidence. The question as to the good faith of the engineer was presented in the pleadings. Any evidence tending to show good faith or lack of good faith was admissible, though not specially pleaded.

[8, 9] The sixteenth assignment is based on the sustaining by the court below of an objection interposed by defendant in error to questions asked the witness Pistole by plaintiff in error, intended to elicit from him that the county had not retained a fund of \$25,000 from the road fund, to answer any judgment that might be recovered against it in this suit. The defendant in error was permitted to prove, without objection, that an admission was made by one of the attorneys for the county to that effect. To rebut that evidence the plaintiff in error offered to make the proof objected to. We think the plaintiff in error was entitled to rebut the alleged admission, either by evidence tending to show it was not made, or by evidence tending to show that it was in fact untrue, which would include proof, such as that offered, that no such fund was in fact retained. However, the record affirmatively shows that the same witness had already, and without objection, testified that no such fund had been retained, and that the road fund did

not amount to that sum. It cannot be said that the plaintiff in error suffered any injury because the witness was not permitted to reiterate the statement.

[10] But one question is presented by assignments numbered 22, 25, 26, 28, and 32. The witnesses Moore, Kinard, and Lockhart were permitted on cross-examination, and against the objection of plaintiff in error, to testify to previous transactions between the county, through its road engineer and road commissioners, and the Healy Construction Company, which was substituted for defendant in error in the completion of the contract, tending to prove that favoritism had been shown that company, on the recommendation of the engineer, by the road commissioners under former contracts. In view of the suggestion of collusion between the engineer, the representative of the surety company, and the Healy Construction Company, because of which it was claimed that the defendant in error was wrongfully eliminated from the contract and the Healy Construction Company substituted for him, we think it was within the discretion of the court to permit such cross-examination.

[11] The forty-second assignment of error is based upon the refusal of the court to permit the witness Brodnax to explain the circumstances attending the payment to the Healy Construction Company on former contracts of the retained percentage in advance of the time when it was legally payable. This was offered in rebuttal of evidence introduced by plaintiff in error, upon cross-examinations of the road officials, that such advance payments had been made; the purpose being to show previous instances of favoritism by them to the Healy Construction Company under former contracts. The court below ruled the evidence out because of the nonproduction of the former contracts. The plaintiff in error made no specific statement as to what was expected to be proved by the witness, other than that the road engineer, Moore, had had nothing to do with the premature payment to the Healy Construction Company of the retained percentage. The witness was permitted to, and did, answer a subsequent question to the effect that Moore, the road engineer, had had nothing to do with procuring the reserved percentages to be paid in advance of the legal time of payment. We think that this answer covered all the plaintiff in error was entitled to, in view of the fact that there was no other information given the court as to what was proposed to be proved by the witness.

[12] The fifty-sixth assignment of error is based on the overruling of the plaintiff in error's motion to exclude the testimony at its conclusion. The ground of the motion relied upon was that there had been a fraudulent alteration of the contract sued on, after its execution, and by the defendant in error, which avoided it, or that there had been no meeting of minds upon the contract as finally reduced to writing. The plaintiff in error makes no insistence here that the evidence supports the contention that there was a fraudulent alteration of the contract. It is insisted that the minds of the parties to it failed to meet as to the price of one item, which the written contract stated to be 19 $\frac{3}{4}$ cents a yard, while the plaintiff in error's contention is that

the understood price was $19\frac{1}{4}$ cents a yard. The evidence shows that at the meeting of the road commissioners at which the defendant in error's bid was accepted the clerk read the bid in the presence of defendant in error at $19\frac{1}{4}$ cents for this item and that defendant in error said nothing. However, the evidence is convincing that subsequent estimates were made and paid to the defendant in error on the basis of $19\frac{3}{4}$ cents, and that after the contract was taken over by the surety payments were made to it on the same basis. This practical construction given the contract by the parties made it a question for the jury to determine as to whether there was the necessary meeting of minds when the contract was executed.

[13] The fifty-seventh, fifty-eighth, and fifty-ninth assignments of error all present the question as to whether the court, in the instructions given and refused, gave proper effect to the opinion of the road engineer that the work was being unnecessarily delayed, expressed to the commissioners, when they ordered defendant in error to discontinue work under the contract. The plaintiff in error excepted to a portion of the oral charge of the court, and requested verbally a modification of it, which was refused, and also requested a number of written instructions, none of which were given. These are the bases of the three assignments. The clause of the contract in point is as follows:

"Progress of Work and Forfeiture of Contract.—The good roads commission reserves the right to declare the contract forfeited, if at any time it should appear to the engineer that the work or any part thereof is being unnecessarily delayed or that the contractor is willfully violating any of the conditions of the contract, or is executing the same in bad faith. Under such conditions the contractor will be notified in writing to discontinue the work, and all money due him, as well as his bond, will be held to protect the county from any loss in the completion of the work."

This is the only provision of the contract which gives a special effect to the opinion of the engineer on this subject-matter. It confers on the good roads commission the *right to forfeit the contract*, upon report to them by the engineer that it appears to him, either (a) that the work or part of it is being unnecessarily delayed, or (b) that the contract is being willfully violated or is being executed in bad faith. In all other cases the rights and remedies of the county for a breach or contemplated breach of the contract by the contractor are unchanged from the common law. The plaintiff in error, in order to avail of the special effect given the engineer's opinion by the contract, must bring itself clearly within the terms of the provision and act strictly in accord with the remedy there provided. It is conceded that to give the engineer's opinion conclusive effect, even in the absence of fraud or bad faith on his part, the contract must provide either in express terms or by necessary implication (if that is sufficient) that it shall be final or conclusive. It has no such weight, in the absence of such an express or necessarily implied provision in the contract, and the remedy, then given, must be strictly pursued. By the terms of the provision of the contract relied upon by plaintiff in error, the report of the engineer as to what appeared to him only gave the good roads commission "the right to declare the contract forfeited." If they did not declare the

contract forfeited, then the opinion of the engineer would not protect them in any other action taken by them, unless his opinion was justified by the facts.

The inquiry then presents itself as to whether the good roads commission did forfeit or declare forfeited the defendant in error's contract with it. This is to be determined by what took place in their meeting of December 27, 1913, and by the resolution spread upon their minutes, and a copy of which was sent to defendant in error. The resolution was in these words:

"Therefore, be it resolved by said good roads commission in pursuance of the terms of said contract and the specifications, which are made a part thereof, that notice be given forthwith to the said contractor and the United States Fidelity & Guaranty Company, surety on the contractor's bond, that said contractor discontinue work, and that unless said surety shall forthwith take charge of said work, and undertake the performance of said contract, and so advise this commission, then the said good roads commission will forthwith forfeit the said contract, and will contract with other parties for the performance of the said contract, and will hold the said contractor and the said surety for any loss or damage incurred by their failure to perform said contract. Be it further resolved, that a copy of this resolution be delivered forthwith to said contractor and said surety."

This resolution was afterwards approved by the county board of supervisors. A copy of it was sent defendant in error and his surety. Thereupon his corporate surety undertook to complete the contract, and did in fact do so, the defendant in error protesting. Does this constitute a forfeiture of the contract? The defendant in error was required, when he entered into the original contract, to execute a bond with surety for its faithful performance. The bond contained this provision:

"Provided, however, that the surety shall, at its option, have the right, upon default of said contractor, to complete the work, and shall be entitled to such benefits and emoluments as may then be due the contractor."

The contract, as between the county and defendant in error, gave the former the immediate right to forfeit it, when it appeared to the engineer that the work was being unnecessarily delayed. The bond, however, provided that the surety should have an option to take over the contract and complete the work, when the contractor was in default. If the county had exercised its right to forfeit the contract, without giving the surety the option to complete the work under it, the surety would have been released. It was not the purpose of the county to release the surety, and it was not its purpose to forfeit the contract, since to do so would have had that effect. Its purpose was, as expressed in the language of the resolution, to declare the contractor in default and notify the surety to exercise its option to take over and complete the contract, and only to forfeit the contract in the event and after the surety had declined to exercise the option.

A forfeiture would have the effect to terminate the contract, and leave the parties only with a right to sue for its breach. To call upon the surety to complete the contract on behalf of its principal and for its own protection, while the effect might be equally disastrous to the

principal as a forfeiture would have been, clearly is not a forfeiture, since the contract, in that event, would not be terminated, but its provisions would still be fully carried out and the work completed under and by its terms by the surety, which was one of the parties to it, and which by the terms of the bond, which was a part of it, was given that right, in the event of a default by the contractor. The original contract, instead of being ended, and the work relet and finished under a different and subsequent contract, would, in that event, be carried on till it was fully performed, and the rights of the parties would then be determined upon the basis of a fully performed, and not upon that of a forfeited and broken, contract.

The resolution did not declare a forfeiture, but only threatened to do so, in the event the surety did not exercise its option to complete the contract. The surety did exercise that option, and the occasion for the declaration of the forfeiture did not arise.

A forfeiture never having been declared by the road commissioners or county supervisors, the provision relied upon by the plaintiff in error, giving final and conclusive effect to the opinion of the engineer, to the effect that the work was unnecessarily delayed, had no appropriate place in the decision of the cause. If the road commissioners had forfeited the contract, without calling in the surety to complete it, or if the surety, having been called upon, had declined to take it over, and the road commissioners had then declared it forfeited, and relet the work to other parties, their action, under the provisions relied upon, would have been justified, if it had appeared to the engineer that the work was unnecessarily delayed, though in fact it was not so, provided the engineer acted without fraud and without bad faith. But this was not what the road commissioners in fact did. On the contrary, they purposely refrained from declaring the contract forfeited, but accomplished its performance by notifying the surety to perform and by its agreeing to perform and in fact fully performing the contract of its principal. The contract did not provide that the opinion of the engineer, even when entertained in good faith, was to be final and conclusive, and a protection to the county in ordering the defendant in error to discontinue work, unless the county also elected to forfeit the contract. The language of the contract, in terms, restricts the application of this clause to the case of a declaration of a forfeiture, and it is not within the power of the court to enlarge or extend its application to a case not provided for by the parties.

The engineer's opinion is final, only when made so by the express or necessarily implied agreement of the parties, deduced from the language of their contract. As in this case the evidence without dispute shows the contract was never forfeited, and as the engineer's opinion was made final only in case of a declaration of forfeiture, we conclude that the only issue presented to the jury was whether the work had been in fact so unnecessarily delayed by the contractor at the time he was notified to discontinue work, as that it could not reasonably have been completed within the stipulated 500 working days.

[14] It follows that the plaintiff in error cannot complain of the instruction excepted to by it, since it was entitled to none on that subject-matter, in view of the only real issue involved, and the instruction given was therefore more favorable to it than it had the right to expect. For the same reason the plaintiff in error was not entitled to the instructions requested by it.

[15] The court instructed the jury that the burden was on the defendant in error to establish by a preponderance of the evidence all of the facts necessary to sustain its insistence, and that if the plaintiff was not in good faith prosecuting the work required of him by the terms of his contract, or was so environed that it could not in reason be expected that he would complete the work within the time specified in it, their verdict should be for the plaintiff in error. The court also instructed the jury that if they found from the evidence that the defendant in error began work under the contract, and was prosecuting the same with such diligence that he could reasonably have completed the work within the 500 working days allowed by it, their verdict should be for the defendant in error. We think these instructions fairly presented to the jury the issue which was determinative of the merits.

We find no error in the record that was prejudicial to the plaintiff in error and would justify a reversal of the case, and the judgment is affirmed.

ROLLER v. GEORGE H. LEONARD & CO.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1915.)

No. 1333.

1. DAMAGES ⇨208(1)—ACTION FOR BREACH—QUESTIONS FOR JURY—DAMAGES.

Plaintiffs were engaged in the business of buying and selling oak extract used by tanners. They did not store the extract, but on securing an order from a purchaser sent a similar order to a manufacturer, with whom they had a contract, for shipment direct to the purchaser. They made a contract for the purchase at a stated price of not less than 5,000 barrels of extract from defendant, who had a plant which was then uncompleted and the quantity it could produce in a given time uncertain. By a supplemental contract no stated time for delivery was fixed, but defendant was required to report each week the material on hand and the estimated quantity of extract which would be made the following week, and to make shipments as instructed as rapidly as possible until the contract quantity was delivered. After that defendant made but one shipment, did not make the weekly reports, and later, on the ground that his plant had become incapacitated, notified plaintiffs that he would make no further deliveries. Subsequently plaintiffs sent orders on the same day, aggregating over 2,600 barrels, which were not filled, and they brought an action for damages for breach of the contract. *Held*, that the two contracts must be construed together, and that in view of the surrounding circumstances and the known condition of defendant's plant, so construed, the large order was not such as was contemplated, and plaintiffs were not entitled to recover as damages the profit they would have made by resales if such order had been filled; that the only way to fairly estimate their damages was to determine the quantity of extract defendant could

have produced weekly by using diligence in procuring materials and operating his plant and the difference between the contract price and the market price each week of such production, both of which were questions for the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 533, 534; Dec. Dig. ⚡208(1).]

2. CONTRACTS ⚡313 — RENUNCIATION — RIGHTS AND REMEDIES OF OTHER PARTY.

On the express repudiation of an executory contract by one party, the other party may at his election accept such repudiation as ending the contract, or may treat it as inoperative; if he elects the latter the contract is kept alive as to both parties, and he can enforce it only in accordance with its terms.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. ⚡313.]

3. CONTRACTS ⚡169 — CONSTRUCTION — EXTRINSIC EVIDENCE TO AID CONSTRUCTION.

In construing a contract with respect to the damages recoverable for its breach, the surrounding conditions and circumstances when it was made must be considered, to ascertain what damages in case of breach might reasonably have been in the contemplation of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. ⚡169.]

In Error to the District Court of the United States for the Western District of Virginia, at Harrisonburg; Henry Clay McDowell, Judge.

Action by George H. Leonard & Co., to the use of Marden, Orth & Hastings, against John E. Roller, trading as the Excelsior Oak Extract Company. Judgment for plaintiffs, and defendant brings error. Reversed.

For prior opinion, see 201 Fed. 886, 120 C. C. A. 224.

Rudolph Bumgardner, of Staunton, Va. (Bumgardner & Bumgardner, of Staunton, Va., and John E. Roller, of Harrisonburg, Va., on the brief), for plaintiff in error.

R. T. Barton, of Winchester, Va. (Barton & Barton, of Winchester, on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge. [1] The record, read in connection with the record in the writ of error in the same case, decided by this court on December 21, 1912 (201 Fed. 886, 120 C. C. A. 224), and the opinion of Judge Rose, discloses the history of the transaction out of which the controversy arose and the questions presented upon the assignments of error. The defendants in error, hereinafter referred to as plaintiffs, were, on and prior to September 12, 1904, engaged in business in Boston, Mass, as dealers in tanning materials, and in their course of business bought and sold oak extract. Their principal witness, Mr. Orth, says:

"The custom of business was for us, when we received orders from our customers, to send an order, with shipping directions, to the manufacturers, with whom we had contracts, to ship the extract necessary to fill the sale direct

to our customers. In other words, as we received our orders from our purchasing customers, we gave directions in the form of 'orders' to the plants under contract with us to furnish extract, so that the extract would be shipped direct from the plant to the customers, thus placing buying orders with us. We allotted these orders to the plants under contract with us, as convenience would dictate. In order to enable us to carry on this business, in which we acted in the sense of intermediaries, or sale brokers, it was essential that we know when and in what quantities the extract will be delivered by the manufacturers as without this information we have no guide to enable us to make sales to customers, calling for delivery of a specific quantity of extract at a given time and place. * * * We store no extract ourselves, as our business was to buy for the purpose of selling again. We would sell extract to the tanner and if the tanner did not get his extract on time his hides were injured. In some instances the tanners had facilities for storing a given quantity, but ordinarily they bought as they needed it for current use. Some of our contracts of sale to customers called for as much as a tank car a week. It is the custom of manufacturers to store extract; one concern I know of * * * insisted on carrying 2,000 barrels all the time."

The manner in which the testimony of plaintiff in error, hereinafter referred to as defendant, is printed, does not present a connected story. For the purpose of discussing the questions presented upon the record, it discloses: That defendant, John E. Roller, was a lawyer residing in Harrisonburg, Va. He says that he "had about quit the practice and was engaged in other operations." During the year 1903 he organized the Excelsior Oak Extract Company for the purpose of making and selling oak extract used for tanning hides. The plant was located some distance from Harrisonburg. Gen. Roller, the president and principal owner, says that he knew nothing about the details of the business—the method of manufacturing and selling the extract—relied entirely upon the men employed by him. "I didn't know a thing in the world about it. I didn't even know the meaning of certain technical words you use now. I was absolutely without experience." There is evidence tending to show that the plant, or machinery, used in manufacturing the extract, was in September, 1904, incomplete. G. S. McCarty, president of the American Aniline & Extract Company, engaged in selling extract, visited Gen. Roller at Harrisonburg. Mr. McCarty says:

"During this trip here he took me out to the plant and I looked it over, and while on that trip we made this arrangement, for me to sell his extract on a commission basis. * * * I was to represent him and be his agent. I looked over the plant and made recommendation to him in great detail as to what he might do to make the plant as economically as I then knew. I returned to Philadelphia, and, of course, immediately undertook to dispose of what we estimated he would produce that year."

After describing his efforts to make contracts for the sale of the extract, and of a contract made with Grattan & Knight, he says that he met Leonard & Co., who were "great buyers" of extract, and became, through his efforts, "interested." Mr. Orth, of the firm of Leonard & Co., came to Philadelphia, "and we went over the question pretty thoroughly and he said that he could market the extract, and, resulting from that, Gen. Roller came up at my solicitation, of course, to deal directly with Leonard & Co., as I did not wish to make a deal with Leonard & Co. for the output of his plants." After some

negotiation, during which it was agreed that McCarty was to receive a commission of 4 per cent., the parties entered into and signed a contract, the essential terms of which are:

"Philadelphia, Pa., Sept. 12, 1904.

"American Anniline & Extract Co.—Gentlemen: We hereby buy from you, and you sell to us, a certain quantity of extract to be made by the Excelsior Oak Extract Company, hereinafter specified, at the following prices and under the following conditions, terms, and provisions: Four thousand (4,000) barrels to eight thousand (8,000) barrels or equivalent in tank cars of chestnut oak extract. This contract shall be made entirely from chestnut wood, or three-quarters chestnut wood and one-quarter oak wood, with the bark on, or from 85 per cent. chestnut wood and 15 per cent. chestnut oak bark, as we may direct from time to time. As to quantity, it is our option whether we shall take more than four thousand (4,000) barrels, we to declare our option within ten days after you let us know definitely whether you can ship us more than the four thousand barrels. Shipments filling this contract shall be made at fairly regular intervals between September 15, 1904, and September 15, 1905, as we order from time to time."

The contract contains stipulations as to price, terms of payment, guaranty of percentage of tannic acid, etc., and an agreement for sale of 1,000 barrels of pure oak bark extract at a price fixed "under the same terms and conditions set forth above as to time of delivery, terms of payment, etc.," and an option to Leonard & Co. to take any further quantity that the other party might make, etc. It was also stipulated that:

"You agree to make no further sales of extract, except the acceptance of the two options you have out, until the settling of the above options. It is further agreed that shipments in tank cars shall be made only when convenient and satisfactory to both parties."

This proposition was signed by Leonard & Co. and accepted by the American Anniline Extract Company and the Excelsior Oak Extract Company. The entire evidence is in the record, showing the attitude of the parties and the conditions under which the contract of September 12, 1904, was entered into. For reasons not necessary to set forth the defendant did not ship the quantity of extract called for by the contract. On July 22, 1905, the parties again met in Philadelphia, and, after discussion and negotiation, entered into a supplemental contract, the essential terms of which are:

"In consideration of our having failed to make deliveries on our contract with you, dated September 12, 1904, according to its terms, and in consideration of your having given us further time in which to fill said contract, we hereby agree to: Report each Wednesday approximate quantity of wood, bark extract, and tank cars on hand, estimated quantity extract will make the next week. The shipments of extract made since prior report. Make shipments, as instructed by you, as rapidly as possible, until the contracted quantity, 5,000 barrels, is delivered. Make shipments for nobody except Grattan & Knight Manufacturing Company, if there is still any extract due them on your contract with them made prior to September 12, 1904. To procure this year as much bark as possible, and make it into our bark extract, from time to time, as instructed by you."

The other portions of the contract relate to price, terms, etc. Defendant failed to make the reports on each Wednesday, in accordance with the terms of the contract of July 22, 1905, although plaintiffs re-

peatedly called upon him to do so. On August 8, 1905, defendant wired plaintiffs that he could ship one car bark extract "this week and another middle of next week." In response to this telegram, plaintiffs sent defendant, August 9, 1905, orders and shipping direction for the two cars. He filled only one of them. No other extract was delivered by the defendant on the contract. On August 19, 1905, Gen. Roller wrote plaintiffs that his plant was "again in bad shape"—that, "as you know, I am not an expert in such matters, and I am compelled to intrust the management of the plant to others"; that his foreman reports that he is unable to make extract until his stock is completed, because the boilers are not of sufficient capacity to make steam to run the several parts of the plant; that he "sees no way to escape the delay"; that he intends to put in new and sufficient machinery. He concludes:

"I am perfectly willing to stand whatever loss or damage I should pay, reasonably and justly, for I have no purpose to do anything else than what is right between us."

No orders were sent defendant for extract subsequent to August 9, 1905, until September 19, 1906. Plaintiffs wrote and wired defendant frequently in regard to his failure to make reports, etc. On September 12, 1906, Mr. Orth had an interview with Gen. Roller in regard to the situation. He says:

"I asked him what he was going to do about the contract. I had heard that he was selling extract to other parties. I had caused one of my friends to purchase some of his extract in order to assure myself that he was selling. Roller said in the beginning that, no matter what I would say, he would not feel called upon to make an answer, but asked me to let him know what our demands were. He said that the existing contract with Spencer, which he was now filling, had been made by Wise, and he could cancel whenever he wanted to. I told him that our demand was that he comply with his contract. When asked what he proposed to do about his contract with us, he said he would do nothing until he had seen his brother, O. B. Roller (an attorney). He said that the costs of making extract had advanced. He requested me, however, to take no action until he had consulted his brother, and to put our demand in writing. This I did when I returned to Boston, in my letter dated September 19, 1906, which is here read to the jury. This letter was not answered."

The letter will be noted later.

Gen. Roller says:

"I made no reports under the contract of July 22, 1905. My plant, at that time, to April 30, 1906, was out of commission. I was making no extract, and had no reports that I could make such as was required by this contract. * * * I made no reports under the contract of July 22, 1905, for from that date up to April 30, 1906, the plant was not in condition, and I had nothing to report, and I made no reports, because I could not make such as the paper contemplated. Coming in the next place to the interview with Mr. Orth and myself on the 12th of September, 1906, one of the things that occurred then was that I charged him with knowing that the plant was not in operation, and had not been in operation, and that no report was necessary, or could have been made, and he didn't deny it, and also to what occurred then. I then and there repudiated the idea that I was going to carry out that contract; I told him in as distinct words as I could employ. I told him that it would be a great hardship on me to perform that contract. I asked him what demands he would make on me to settle that contract. When the letter came

of September 19, 1906, with the statement of what the demand was, he simply demanded the last item he could demand, the last pound of flesh, so to speak. I told him that I declined to carry out that contract, and had sold Mr. Spencer, and that my contract with Mr. Spencer was for the sale of the extract on commission, but that I could cancel my contract with him at any time; that all being in view of the fact that we could make a settlement, and I told him that we would not even do that until I saw my brother, Col. Roller, and took his advice upon the subject."

Upon returning to Boston, Mr. Orth, on September 19, 1906, wrote defendant, reciting the terms of the contract and the failure on the part of defendant to make reports, the conversation of September 12, 1906, and inclosing four orders for extract, aggregating 2,640 barrels of pure oak extract and chestnut oak extract. These orders called for "prompt" shipments. The defendant did not fill either of them. Plaintiffs, by a method of calculation, which it must be conceded, as claimed by defendants' counsel in his brief, is somewhat confusing, arrives at the conclusion that, by reason of defendants' breach of the contract, they have been endamaged to the amount of \$9,965.79.

Plaintiffs instituted this action for the recovery of the damages alleged to have been sustained by them by reason of defendants' failure to deliver the quantity of extract called for by the contract. Plaintiffs, on November 25, 1909, filed a declaration containing three counts. It is not deemed necessary to analyze the declarations at this time. Upon defendants' motion a bill of particulars was filed. The cause was brought to trial upon the pleadings and bill of particulars. At the conclusion of the evidence, the judge, having excluded evidence offered by plaintiff to show damages alleged to have been sustained subsequent to July, 1906, to which exception was duly taken, judgment was rendered for defendant, and a writ of error prosecuted to this court. The opinion of Judge Rose (201 Fed. 886, 120 C. C. A. 224) states the course taken at the trial and the ground upon which the court based its ruling. After a recital of the allegations of the declaration, he says:

"The learned judge below was of the opinion that by a fair construction of the contract of July 22, 1905, the buyers were bound to order, and the seller bound to deliver, the extract in fairly regular quantities. He held that the failure of the seller to make the weekly reports called for by his contract relieved the buyers of any obligation to give orders, but that such failure did not, of itself, extend the time for the performance of the contract. He ruled that such time expired not later than July, 1906. He reached this conclusion by assuming that the contract of July, 1905, called for substantially the same rate of delivery as that of September 12, 1904, which was 5,000 barrels in 12 months, or 416 $\frac{2}{3}$ barrels per month. He said that 3,974 barrels, which were undelivered when the contract of July 22, 1905, was made, should, at this rate, have been delivered in 9.53 months—that is to say, by some time early in May, 1906—and that it could not be assumed that the parties had contemplated that the time of such delivery would extend beyond July, 1906. He thereupon notified counsel for the buyers and the seller that, at the trial, he would not allow the former to offer evidence in support of any item of damage alleged in their bill of particulars."

As explained by Judge Rose, this announcement resulted in a judgment for defendants. Upon the hearing in this court, the sole question presented, and decided, was whether the judge was in error in

excluding plaintiff's evidence offered for the purpose of showing damage alleged to have been sustained, and specified in their bill of particulars, by reason of the failure to fill orders given subsequent to July, 1906. Upon this question this court decided:

"That upon the allegations of the declaration it was error to rule, as a matter of law, that the time during which the buyers could call for deliveries had necessarily expired before September 18 and 19, 1906 (the dates upon which the last orders were placed)."

This conclusion is supported by reasons set out in the opinion; the learned judge writing for the court carefully refraining from expressing any opinion in regard to other phases of the case.

Upon the second trial it appeared that, with the exception of the telegram of August 8, 1905, followed by the shipping orders of August 9, 1905, defendant made no report of quantity of extract on hand. Plaintiffs wired and wrote a number of letters calling for reports, and complaining of defendants' failure to make reports, or respond to their letters. Upon the conclusion of the evidence, plaintiffs moved the court to direct the jury to return a verdict for this amount. The motion was allowed. Defendant excepted.

Postponing the consideration of questions of subordinate interest, the assignments of error present several questions the answer to which are determinative of this writ of error. Defendant attacks the validity of the contract, alleging that he was induced to enter into it by false representations of plaintiff Orth, co-operating with his own agent, McCarty. He says that they entered into a conspiracy to induce him, by making false and fraudulent representations respecting the manufacture of the extract, to execute a contract which, as they well knew, he could not under the conditions known to them perform. While in his letter of August 19, 1906, he gives as a reason for not complying with the contract that his mill, or plant, did not have sufficient capacity to enable him to make the extract, it is manifest from what he said to Mr. Orth on September 12, 1906, that he determined to repudiate the contract because of the alleged fraud practiced upon him by Orth and McCarty. In the trial of the case, the defendant took an active part, conducting the cross-examination of plaintiffs' witnesses and testifying in his own behalf. He was also represented by counsel. In this court he filed a brief in propria persona, a large part of which is directed to his contention that he was induced to execute the contract by the fraudulent representations of Orth and McCarty. Defendant excepts to the instruction given the jury for that:

"The court erred in taking away from the jury the right to pass upon the question of fraud in the procurement of the contract sued upon and fraud in the contract itself, and in not allowing them to pass upon said issue."

This exception is saved in the assignment of error No. 3. The defendants' contention in regard to this phase of the defense is based upon the conversation between Orth and McCarty and himself on July 22, 1905. His theory seems to be that they had entered into a con-

spiracy to defraud him by making certain representations to induce him to execute a contract which was unfair to him and which they knew he could not perform. McCarty was the agent of defendant, and the amount of compensation which he was to receive for the services rendered was dependent upon sales made by him. It is difficult to understand why he should have induced defendant to make a contract which, by reason of impossibility of performance, deprived him of his commission. While it may be that the terms of the contract were difficult of performance and wanting in mutuality of obligation, we are unable to find in the testimony any evidence of a conspiracy on the part of Orth and McCarty, or any false representations of essential facts upon the part of either, sufficient to invalidate its obligations. The defendant's exception, in that respect, is without merit.

Coming to the consideration of the contract of July 22, 1905, read in the light of the contract of September 12, 1904, the question arises: What obligations were assumed and what rights were secured to the respective parties? That we may ascertain their intention, it is essential that we understand the subject-matter, the relation of the parties thereto, and the purpose which they had in view in entering into the contract. While, in the contract of September 12, 1904, words appropriate to an executed contract of purchase and sale are used, it is manifest that no sale, in a legal sense, of extract was made or intended. Both contracts are in all respects executory. Reading them together, it appears that defendant agreed to sell to plaintiffs as much as 5,000 barrels of extract to be thereafter manufactured by defendant, at his plant in Virginia, at the prices and upon the terms named. The time fixed for its delivery in the contract of September 12, 1904, 12 months, is omitted from that of July 22, 1905; the only limit in that respect being that defendant was to make shipments "as instructed by plaintiff, as rapidly as possible, until the contracted quantity, 5,000 barrels, is delivered." For the purpose of enabling plaintiffs to be advised as to the ability of defendant to make shipments, he agreed "to report each Wednesday approximate quantity of wood, bark extract, and tank cars on hand, the estimated quantity of extract which defendant would make during the following week, and the shipments of extract made since prior report." The reason which induced the parties to make these provisions in the contract are made apparent by reference to the extrinsic evidence.

Defendant concedes that he made no reports as called for by the contract and assigns his reason therefor. The reasons given do not constitute a valid excuse for his failure to make the weekly reports. For this breach of the contract defendant is liable to an action. Plaintiffs insist that the failure of defendant to make the reports as stipulated relieved them from the duty of sending orders. If, by this, it is meant that plaintiffs were entitled to sue for such damages as they sustained by reason of defendants' failure to make the reports, we concur with them. It is difficult to perceive how more than nominal damages would have been recoverable for this breach of contract. The question, however, is not of practical importance as affecting the plaintiffs' cause of action.

[2] Defendant, on September 12, 1906, expressly repudiated the contract and notified plaintiffs that he did not intend to perform or discharge its obligations. The reasons assigned by him, alleged fraud in the inducement, being, as we have held, invalid, his attempted renunciation was without legal justification. The declaration on the part of defendant not to perform the terms or discharge the obligation of his contract gave to plaintiffs a right to elect between two courses of conduct. The condition brought about by defendant's renunciation of the contract is described by Chief Justice Fuller in *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, as "an anticipatory breach of an executory contract by an absolute refusal to perform it." In this condition it is held that:

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for * * * the other party, as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." *Roehm v. Horst*, supra.

This principle is stated by Lord Esher, Master of the Rolls, in *Johnson v. Milling Co.*, 16 Q. B. Div. 467:

"When one party assumes to renounce the contract, that is, by anticipation, refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract; such a renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot, by himself, rescind it, but by wrongfully making such a renunciation of the contract, he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect to such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he, too, treats the contract as at an end, except for the purpose of bringing an action upon it, for the damages sustained by him in consequence of such renunciation." Page on Cont. 1441.

Applying this principle to the condition in which the parties were placed by the declaration of defendant, on September 12, 1906, that he renounced, repudiated, and did not intend to perform the contract, plaintiffs were entitled to "take him at his word" and sue at once for the breach of the contract. Plaintiff's declaration, drawn with much care, contains three counts. In each count the contracts are set out, and at much length a recital of the several defaults, or breaches on the part of defendant, followed by the averment that:

"By reason of the tortious conduct of the defendant, and his total disregard for, and repudiation of, his obligation, and breach of his contract, as aforesaid, and his failure to answer plaintiffs' letters and telegrams, plaintiffs were wholly prevented, and therefore excused, from any and all obligation on their part to give to defendant specific orders and directions for shipments,

and are entitled, without such specific orders and directions, to demand and recover from the defendant the loss which plaintiffs incurred and sustained by reason of the failure of defendant to perform and his disregard and breach of his contract as aforesaid."

Following is the ad quod damnum clause. It appears, as said by counsel, that much difficulty was encountered before the parties joined issue—demurrers were interposed, one sustained, an amendment made, and a second demurrer overruled, followed by demands for bills of particulars. We construe the first count to mean that plaintiffs elect to treat the contract as breached by the renunciation on the part of defendant on September 12, 1906, and sue for such damages as they sustained thereby, without averring that orders for shipments were made. It is said:

"If a contract is broken by renunciation, before performance, the adversary party may recover damages occasioned by such breach, but he cannot, without performance, recover upon the contract, as if he had performed the same." Page, Cont. § 1441.

This view does not affect the right of action, but merely the measure of his damages. When suit is brought for a breach of contract before the time for performance, as in *Roehm v. Horst*, supra:

"The plaintiff is entitled to compensation, based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself."

In that case the defendant was under contract to deliver a fixed quantity of hops, in four installments, at specified periods of time, without any further demand on part of vendee. He renounced his contract before the time arrived for all of the deliveries. Plaintiff, without waiting for the expiration of the period fixed by the contract for delivery, sued for damages. He was permitted, on the question of damages, to show at what price he could have made subcontracts for forward deliveries according to the contracts.

In *Weld v. Manufacturing Co.* (D. C.) 205 Fed. 770, the plaintiff was under contract to buy from defendant cotton to be delivered in specific quantities at fixed dates. Prior to the date of delivery it renounced the contract and notified plaintiff that it would not take the cotton. Suit was brought without waiting for the expiration of the period fixed for delivery. The damage was fixed upon the basis of the price of cotton at the date delivery was to be made and accepted.

"The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding, * * * which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June (the due date of the first delivery) is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in

looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial." *Roehm v. Horst*, supra.

Mr. Justice Crompton, in *Hochster v. De La Tour*, 2 El. & Bl. 678, said:

"The injured party, not in default, may say to the other party: Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained, and I will proceed to make that damage as little as possible by making the best use I can of my liberty."

The distinction between the instant case and *Roehm v. Horst*, supra, *Weld v. Mfg. Co.* (D. C.) 205 Fed. 770, and the cases cited in the opinions therein, is found in the fact that in those cases the time at which the articles contracted to be delivered was fixed in the contract, whereas here the extract is to be shipped "as instructed" by "plaintiffs, as rapidly as possible"; the orders were to be given from "time to time," all of which is of necessity uncertain in point of time. When the date of delivery is fixed, the measure of damages is declared to be the difference between the contract price and the market price of the article at the time when, under the contract, it should have been delivered. *Benj. on Sales*, § 1012; *Boorman v. Nash*, 9 B. & C. 145. No definite time being fixed for the shipment of the extract, it being evident from the terms of the contract, construed in the light of the extrinsic evidence, that it was to be shipped at different periods of time and in uncertain quantities—both to be fixed by instructions from plaintiffs, complied with as rapidly as possible. These elements of uncertainty, in regard to the right of plaintiffs and the obligation of the defendant, render it difficult to fix, as a matter of law, the measure of damages or the method of ascertainment.

[3] It is manifest, however, that the contract was of value to plaintiffs and of binding obligation upon defendant—that in wrongfully renouncing and repudiating its obligations the defendant has deprived plaintiffs of a legal right for which he is liable to an action. If, by reason of the uncertainty in the terms of the contract, the value of this right is so indefinite, incapable of ascertainment by any process known to the law, plaintiffs must be content with nominal damages, which always follow from a breach of contract. Actual compensatory damages must be proved with at least reasonable certainty. They cannot be ascertained by mere speculation and conjecture. Accordingly, if there is no data for computing damages, no substantial damages can be given, even if it is clear from the evidence that some damage has been sustained. *Page on Cont.* § 1575. Certain elementary principles have been established, for the guidance of courts and juries, in fixing the measure of damages recoverable for breach of contract. In *Hadley v. Baxendale*, 9 Exch. 341, Baron Alderson said:

"When two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally—i. e., according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

This language is cited with approval in *Howard v. Stillwell, etc.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147. Applying this principle to this record, the case comes to this: Plaintiffs, engaged in buying and selling oak extract, used by persons engaged in tanning hides, receiving and accepting orders, from such persons, of uncertain time and quantity, for the purpose of enabling them to accept such orders as came in the course of their business, made contracts with manufacturers of the extract. Defendant owned a plant, or mill, which was, at the date of the first contract, incomplete, located in a section where oak wood, from the bark of which the extract was made, was accessible. The capacity of the mill and the quantity of bark which he would reasonably expect to secure was uncertain, but capable of estimation. He desired to sell extract as it was made. Plaintiffs did not store the extract, but, upon receipt of orders from their customers, sent shipping directions to those with whom they had made contracts. The extract was shipped direct to the plaintiffs' customers. The profit which plaintiffs made from their business consisted in the difference between the price for which they purchased, fixed in the contract, and the price at which they sold to their customers, dependent upon the market prices at such dates as sales were made.

In the light of these conditions, known to both parties, they entered into the contract out of which this controversy has arisen. The language used by them, in so far as it is uncertain, or open to construction, must be construed in the light of, and with reference to, these conditions, and their intention, so far as possible, ascertained. The two contracts must be read together, and the terms of both must be considered as an entirety, and their meaning, as a whole, ascertained. It is said:

"The parties to a contract choose to express their intention, in view of all the surrounding circumstances. It is practically impossible to state these facts in the contract, and is rarely, if ever, attempted. The court which construes the contract must therefore either disregard all the material facts which led the parties to express their intention as they did, or else admit extrinsic evidence of the surrounding facts and circumstances. In this dilemma, the courts have chosen the latter alternative. It is a recognized rule of construction that the court will place itself in the position of the parties who made the contract, as nearly as can be done, by admitting evidence of the surrounding facts and circumstances, the nature of the subject-matter, the relation of the parties to the contract, and the object sought to be accomplished by the contract. * * * Even though the contract is in writing, extrinsic evidence of the surrounding circumstances is admissible to aid the court to determine the intention of the parties." Page, Cont. 1123.

This principle is illustrated in a large number of cases cited by the author. Plaintiffs acquired, by the contract, the right to instruct defendant to make shipments of the extract to their customers at such points as they directed. The time and quantity of each shipment was to be fixed by plaintiffs. The entire quantity was fixed at 5,000 barrels. The only limit in respect to the time of shipments, fixed in the contract, was they should be "from time to time" (and this, in view of the course of plaintiffs' trade and business, should be construed to mean as they received orders from their customers) and "as rapidly as possible" (this must be construed as referring to the capacity of

defendant's mill properly operated). It is manifest that neither of the parties contemplated an immediate, or at any time a single, order for the entire quantity.

Light is further thrown on the intention of the parties by referring to the provision which required defendant "to procure this year as much oak bark as possible and make it into our bark extract, from time to time, as instructed by you." As further indication of what was in the minds of the parties in respect to the quantity and time of giving instructions for shipments, it will be observed that defendant obligated himself to—

"report each Wednesday approximate quantity of wood, bark extract, and tank cars on hand. Estimated quantity extract will make next week. The shipments of extract made since prior report."

It is manifest that the purpose of requiring defendant to make the weekly reports was to enable plaintiffs to know the extent to which they could safely accept orders and enter into contracts with customers. It was this contract which defendant breached, and it is the value of this contract which plaintiffs are entitled to recover as compensation for the injury sustained. For the failure to fill specific orders placed by plaintiffs, within the terms of the contract, prior to September 12, 1906, plaintiffs are entitled to recover the difference between the contract price, which they were to pay defendant and the price at which they sold. This is fixed at \$119.58.

In regard to the remainder of the quantity called for by the contract, plaintiff's claim is substantially as follows:

(1) That on September 19, 1906, they had a call from Grattan, Knight & Co. for 120 barrels pure bark extract at 2 cents per pound, which they instructed defendant to supply. His failure to do so disabled them from making the sale, whereby they lost the difference in contract price at which the sale would have been made, \$165.

(2) That on the same day they had a call for 60 barrels pure bark extract from Grattan & Son at 2½ cents per pound, which they directed defendant to fill; that by reason of his failure to do so they were not able to make the sale, sustaining by the same method of computation \$254.58. If the jury should find the facts to be as testified, and that these orders came within the terms of the contract, it would seem that they would constitute elements of damage for which defendant would be liable.

(3) That on the same day they received from Grattan & Knight Manufacturing Company a verbal offer to purchase a large quantity of pure bark extract, which they could not accept on account of defendant's renunciation of his contract, and thereby lost a profit of \$2,976. They did not place any order with defendant for this extract. The theory upon which plaintiffs base this claim is that the failure to make reports and the renunciation of the contract relieved them of the duty of placing orders. This contention presents a number of questions of fact. It cannot be held, as a matter of law, that defendant was, upon a fair construction of the contract, under obligation to ship on one day so large a quantity of extract, or that plaintiffs were

entitled to charge him up with profits alleged to be lost in this manner. The questions upon which the right and liability of each party depends upon this claim should be submitted to the jury under proper instructions.

(4) That plaintiffs on the same day, September 19, 1906, had a call from the American Leather Company for 1,200 barrels chestnut oak extract, at a price not stated. For this they gave defendants shipping order. Plaintiffs had purchased from Young & Kimball, two days before, a quantity of extract, and from this they shipped their customer 840 of the 1,200 barrels called for. The difference in the price which they paid for this extract and the price fixed in their contract with defendants they charged to defendant—\$1,564.60.

(5) That on the same day they had a call from the Anglo-Canadian Leather Company for 1,200 barrels chestnut oak extract, for which they gave defendant a shipping order, which was not filled. This order they filled from extract purchased from Wilson & Kimball and charged defendant with difference in price, as in the next preceding order—\$2,234.40.

(6) The same course was pursued with this item, by which they charge defendant \$132.30.

(7) Plaintiffs, by some method of reasoning which is not very clear, allotted certain other orders to defendant, and, without giving him any shipping orders therefor, charged him with alleged loss—\$1,801.58. It is quite difficult to understand and describe the processes by which these results were reached.

The testimony of Mr. Orth, in regard to the basis upon which he assessed plaintiffs' damages, is not at all clear, and leaves many questions and inferences open for the consideration of a jury, under proper instructions by the court. In respect to much of his testimony, reasonable men may very well differ. Without expressing an opinion in regard to the weight which should be attached to it, which is entirely for a jury, we can easily perceive that a number of his methods of fixing the measure and amount of alleged damages may not be accepted by the jury.

We are of the opinion that the contract did not authorize plaintiffs to arbitrarily, or otherwise than in their regular and usual course of business, and the capacity of defendant's mill properly operated, call upon defendant to ship extract in quantities, or at periods of time, not within the contemplation of the parties, as expressed in the written contract, and conditions under which it was executed. While defendant, by failing to make the weekly reports, relieved plaintiffs of the duty of basing orders on such reports, and by notifying plaintiffs that he would not ship any extract relieved them of the duty of sending orders, and by these breaches of his contract subjected him to an action for damages, they did not entitle plaintiff to demand of him that which he never promised or contracted to do, or to create arbitrarily conditions which were not contemplated by either party at the time the contract was entered into. The principle upon which the rights of plaintiffs and liability of defendant is fixed is stated by Mr. Sedgwick:

"When a contract is performable in installments, such, for instance, as a contract to manufacture and deliver goods in stated amounts from time to time, and there is a repudiation during the period of performance, the damages for a breach consisting in the nonperformance of subsequent installments is to be estimated as at the time of performance of each [installment], and not as at the time of the performance of the last installment. If, for instance, between the time of the first breach, the value of the goods to be delivered fluctuates, the buyer who has failed to receive the installment due him cannot demand damages, based on the value of the goods at the time the last installment should have been delivered, but he must be content with a basis of compensation which will give him the value of each installment at the time it should have been delivered." 2 Dam. § 636b.

The principle upon which damages are to be assessed in such cases is illustrated in *Brown v. Miller*, L. R. 7 Ex. 319. Defendant contracted to sell and deliver to plaintiff a large quantity of iron to be delivered in about equal portions—September, October, and November, 1871. During the month of August defendant notified plaintiff that he did not intend to deliver any iron. Plaintiff, after the expiration of the time for the last delivery had passed, sued defendant for damages for breach of their contract. Kelly, C. B., said:

"Now the proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed. The plaintiff might, if he had so elected, have treated the contract as at end, when the defendant announced his intention to break it. But that is a matter of election on plaintiff's part, and even although he had elected then to treat the contract as broken, yet in considering the question of damages they would still be estimated with reference to the time at which the contract ought to have been performed; that is, in this case, at the ends of the months of September, October, and November."

In *Joslin v. Irvine*, 6 H. & N. 512, 30 L. J. Ex. 78, defendant contracted to deliver naphtha in weekly parcels. He failed to perform his contract. Wilde, J., said:

"I want to know the market price at the end of the first, second, and third weeks, when the naphtha was to have been delivered. The damages must be assessed with reference to the market price on each of the days fixed for the delivery of the naphtha."

In *Long v. Conklin*, 75 Ill. 32, defendant contracted to deliver wood—the quantity plaintiffs would need as they required it for their brick-making business. He failed to deliver the wood. The court sustained the trial court in admitting evidence of the value of wood throughout the brick-making season as plaintiffs required it, saying:

"Appellees had a right to make purchases at the times when, by the contract, appellant was to have delivered the wood; that is, at the times they should need it through the season for use. The law would not compel them to buy all at once that which they could only use in parcels from time to time, nor would it compel them to enter into a continuing contract with any other person."

For the same reason plaintiffs would not be permitted to demand of defendant all of the wood on a day arbitrarily fixed by them. In *Del. & Hudson Canal Co. v. Mitchell*, 92 Ill. App. 577, defendant contracted to furnish coal as required by plaintiff. For failure to do so the court said:

"Appellee * * * was entitled to have his damages measured by the market values obtaining at the * * * times when he required the portions * * * in his season's business." *Hill v. Chipman*, 59 Wis. 211, 18 N. W. 160; *Roper v. Johnson*, L. R. 8 C. P. 167; 1 Sedgwick, Dam. 558.

It will therefore be for the jury to fix what according to the terms of the contract and its subject-matter—relevant facts and circumstances under which it was entered into and the plaintiff's course of business; orders received; the capacity of defendant's mill, if operated with due diligence—would be a reasonable quantity of extract plaintiff was entitled to call upon defendant to ship weekly, and the market price at which plaintiffs either did, or could have, filled such orders. The price to be paid defendant was fixed by the contract; the difference between such price and the price at which plaintiffs could have filled orders will be the measure of the damages which plaintiffs are entitled to recover. A basis may be stated for approximate ascertainment that will not work injustice to either party. No date is fixed for shipments in the first contract; "fairly regular shipments" being altogether indefinite and uncertain. The second contract affords the only basis of computation in saying that the quantity subject to the order of the plaintiffs should be reported once a week. Therefore, under the peculiar circumstances, the fairest measure would be the difference between the contract price and the average weekly market price from the date of the second contract, July 22, 1905, to the date when the whole 5,000 barrels would have been delivered if the defendant had used due diligence in the operation of his plant.

The jury should be instructed as follows: Ascertain from the testimony the weekly output which the defendant could have made and reported by due diligence. Divide the 5,000 barrels by the number of barrels so found as the proper weekly output, and you have the total number of weeks the defendant had to deliver. Ascertain from the testimony, for the weeks so found, the average weekly market price for a barrel. Take the difference between the agreed price and the average weekly market price so ascertained, and multiply by the number of barrels not shipped. The result will be the nearest approach to the actual damages.

We do not deem it necessary to pass upon several questions of practice presented in the bills of exception. They may not arise upon another trial. While we do not doubt that the pleadings are skillfully drawn, we cannot avoid the reflection that the real cause of action, the facts upon the proof of which the rights and defenses of both parties depend, might have been set out more concisely and the real issues presented more clearly to the court and jury. For the reasons set out, we are of the opinion that there was error in directing a verdict. There must be a new trial.

Reversed.

GOLDSMITH SILVER CO. v. SAVAGE.

(Circuit Court of Appeals, First Circuit. December 10, 1915. Rehearing Denied March 1, 1916.)

No. 1120.

1. APPEAL AND ERROR ⚡697(5)—RECORD—MATTERS REVIEWABLE—FINDINGS OF FACT BY MASTER.

A master's finding of facts upon the evidence taken by him cannot be impeached, in the absence from the record of the certificate, or other competent proof, either that the evidence presented is the entire evidence taken by him, or that it contains all the evidence which was before him relative to the specific finding or findings challenged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2925; Dec. Dig. ⚡697(5).]

2. APPEAL AND ERROR ⚡931—REVIEW—REPORT OF MASTER—PRESUMPTION AS TO EVIDENCE RETURNED.

While it will be presumed that the report of a master, made under an order directing him to report the evidence, contains all the evidence taken before him, there is no such presumption where he was directed only to report his findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 372S, 3762-3771; Dec. Dig. ⚡931.]

3. TRADE-MARKS AND TRADE-NAMES ⚡65, 70—INFRINGEMENT—UNFAIR COMPETITION.

There is one element common to the right to recover for infringement of trade-mark and for unfair competition, and that is that the dress of the alleged infringing or competing article is so similar to the one competed with that it is probable that the purchasing public, while in the exercise of reasonable care, will be deceived.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 64, 81; Dec. Dig. ⚡65, 70.]

4. TRADE-MARKS AND TRADE-NAMES ⚡55, 69—INFRINGEMENT—UNFAIR COMPETITION.

In case of infringement of trade-mark, the intention of the infringer is immaterial; but, to establish unfair competition, complainant must prove a fraudulent intent, or show facts and circumstances from which it may reasonably be inferred.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 63, 80; Dec. Dig. ⚡55, 69.]

5. EQUITY ⚡409—REFERENCE BY CONSENT—MASTER'S FINDINGS—CONCLUSIVENESS.

Under a reference of an entire case to a master by consent of parties, to report his findings of fact and conclusions of law, without the reservation of a right of review, his findings of fact are conclusive, if there is any competent evidence to support them.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 904, 920-923; Dec. Dig. ⚡409.]

Putnam, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Suit in equity by the Goldsmith Silver Company against Llewellyn W. Savage. Decree for defendant (211 Fed. 751), and complainant appeals. Affirmed.

See, also, 206 Fed. 1001.

Maurice E. Rosen, of Portland, Me., for appellant.
Phillips B. Gardner, of Bangor, Me., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. This is a proceeding in equity, brought by the complainant, appellant, against the defendant, in which it alleges and claims (1) that it is the owner of a trade-mark in the numerals "108," as adopted and used by it with reference to a certain cigar, which it manufactures and puts upon the market, and that the defendant has infringed its right by employing the numerals "208" on a cigar which he manufactures and puts upon the market; and (2) if it is not entitled to an exclusive right in the numerals "108" as a trade-mark, that by the adoption of them and their use through a series of years in connection with the sale of a certain cigar it has established a trade therein, and that the defendant, by putting upon the market his cigar numbered "208," is guilty of unfair competition.

By agreement of the parties the case was sent to a special master under an order of the court, with directions "to take the testimony and report the findings of fact and conclusions of law to the court, with all convenient speed, subject to exceptions according to the usual course of chancery practice." Having heard the parties, the master made his report, in which he found in substance (1) that the complainant's predecessors in title adopted the numerals "108" to denote the origin and source of manufacture of a certain cigar that it manufactured, which mark the complainant and its predecessors have continued to use in connection with the manufacture and sale of said cigar for more than 20 years, but ruled that the complainant had no exclusive right to the use of such numerals, in that they would not constitute a valid trade-mark when not associated with some name or device to characterize and distinguish them. Having thus disposed of this question, he proceeded to consider whether the business, which the complainant had built up by the use of the numerals "108" in connection with its cigar, had been unlawfully interfered with by the defendant.

With reference to this subject, he states that one question is whether the natural and probable tendency and effect of the conduct of the defendant in his sale of the cigar marked "208" was such as to deceive the public, so as to pass off his goods for those of the complainant. He then finds that the box containing the cigars manufactured and sold by the defendant, when compared with the box containing the cigars manufactured and sold by the complainant, presented no such resemblance as would cause deception on account of similarity; that the shape, size, and general appearance of the boxes were very dissimilar, and that the labels upon them were entirely different; that the numerals occupied different places on the respective boxes, and were so different in size as to present no real similarity to the eye; that, while the size of the cigars was practically the same, there were a million other makes of like size; and that the complainant's cigar was branded "108" while the defendant's was not. He summarizes his finding as follows:

"From a comparison, therefore, of the cigars and boxes, including labels, general appearance, and make-up, I find that there would be little or no possibility of a dealer thinking that they were the cigars manufactured and sold by complainant."

As to the contention that the defendant, by manufacturing his cigars and selling them under the numerals "208," put into the hands of retail dealers the means of deceiving the ultimate consumer by substituting cigars of his brand for those of the complainant's brand, he ruled that:

"To warrant the issuing of an injunction, either actual or probable deception and confusion must be shown, and that mere possibility of deception was not enough."

After setting forth and analyzing the evidence bearing on this question, and showing that the complainant's and defendant's cigars are of the same size, shape, and color, and that there are numerous other cigars on the market of like size, shape, and color, he finds that the parties sent by the complainant to purchase cigars from retail dealers, and who testified in the case, were not deceived, and that the boxes were so marked and the marks on the boxes containing defendant's cigars were so open to observation that there was no likelihood of purchasers being deceived; that there is no uniform rule followed by retail dealers in the display of the boxes, but that generally their covers are torn off or bent back and put under the boxes, so that only the boxes themselves are seen in the cigar case; that if an unscrupulous retail dealer, who did not have the "108" cigar, wished to palm off on the purchaser a different one, he could do this as well by substituting any other cigar of the same shape and size, of which there were many on the market; and that to take cigars from a box marked "208" would assist him very little in accomplishing his purpose.

He then considers the evidence bearing upon the question of the purpose and intention of the defendant in adopting the universal London shape and size of cigar for his cigar, with the numerals "208" upon the box, and concludes, inasmuch as the boxes were dissimilar, and the size, shape, and color of the cigars were the same as many others on the market, that in the adoption of the numerals "208" the defendant did not intend to encroach upon the complainant's trade by deceiving the public, and that this conclusion was not overcome by the fact that the defendant had at one time handled the complainant's cigar as a jobber in practically the same territory in which he later sold the cigars "208."

The report having been filed, the complainant excepted to the following findings of fact and conclusions of law of the master:

"First. That the master finds as a matter of law that the numerals '108' as used by your petitioner are not the subject of a trade-mark.

"Second. That the master finds that the petitioner is not entitled to an injunction on account of an infringement of the defendant on the alleged trade-mark.

"Third. That the master finds that the petitioner has not established his case of unfair competition on the part of the defendant as will entitle him to an injunction as prayed for.

"Fourth. That the master finds that the petitioner is not entitled to an accounting for damages."

There was a general exception to the report as against the law, the evidence, and the weight of the evidence.

In the District Court the findings and rulings of the master were sustained, and a decree was entered affirming the same. From this decree an appeal was taken to this court, and the errors assigned were that the District Court erred: (1) "In finding that the name '208,' as used by the defendant in connection with the defendant's sale of his cigars, was not an infringement upon the complainant's trade-mark rights to use the name '108' as used by it"; and (2) "in finding that the use by the defendant of the name '208' in connection with the sale of his cigars was not unfairly competing against the complainant in the complainant's use of the name '108' in connection with its sale of cigars." The third, fourth, fifth, sixth, and eighth assignments were mere subdivisions of assignments 1 and 2. The seventh was that the court erred "in not finding from all the evidence that the conduct of the defendant in placing upon the market his '208' cigars was for the fraudulent purpose of unfairly competing with the complainant." The ninth, tenth, and eleventh assignments were general.

[1, 2] The report of the master was filed February 3, 1914, and the opinion of the District Court dismissing the bill was filed March 16, 1914. On March 15, 1915, the depositions of certain witnesses, whose testimony purports to have been taken in the case, were filed in the District Court. The record contains no stipulation that these depositions embrace all the evidence presented before the master, and the order of the court sending the case to the master contained no direction to him to report the evidence. Under these circumstances the evidence contained in the depositions cannot properly be considered by us for the purpose of determining whether the findings of fact by the master are correct or otherwise. "The true rule upon this subject is that the master's finding of facts upon the evidence taken by him cannot be impeached, in the absence from the record of the certificate, or other competent proof, either that the evidence presented is the entire evidence taken by him, or that it contains all the evidence which was before him relative to the specific finding or findings challenged." While it would be presumed, in the absence of countervailing proof, in case the order to the master had contained a direction to report the evidence, and on filing his report he had accompanied it therewith, that he had faithfully discharged his duty and returned all the evidence, no such presumption can be indulged in this case, for the order to the master contained no such direction, and the record does not disclose that the evidence was returned by the master. *Guarantee Gold Bond Loan & Savings Co. v. Edwards et al.*, 164 Fed. 809, 811, 90 C. C. A. 585, and cases there cited.

The complainant has argued his case as though the finding and ruling of the master—that the numerals "108," as used by the complainant, were not a valid trade-mark—had been assigned by him as error. The record discloses that an exception of this kind was taken to the master's report, but that it was not assigned as error on this appeal. The question, therefore, is not before us, and we are not required to pass upon it. Whether naked numerals may constitute a valid trade-mark

has never been determined. The cases, however, are not without expressions of opinion upon the subject, some viewing the matter from one standpoint and some from another, and text-writers have entertained equally divergent views.

[3, 4] But if we assume that the complainant has a valid trade-mark in the naked numerals "108," it does not follow that it is entitled to the relief asked, unless the finding that the defendant is not guilty of infringement cannot be sustained. Whether the complainant's action proceeds upon the ground of infringement of a trade-mark or upon the ground of unfair competition, there is one element common to both rights which it is essential for it to establish, and that is that the dress of the alleged infringing or competing article is so similar to the one competed with that it is probable the purchasing public, while in the exercise of reasonable care, will be deceived and led to purchase the competing article for that of the complainant with consequent injury to his trade. In the case of infringement of a technical trade-mark the intention of the infringer is immaterial, as the essence of the wrong lies in the injury to a property right; while in the case of unfair competition the intention is material, to establish fraud on the part of the defendant in the use of the imitative device to beguile the public into buying his goods as those of his rival. In the former case fraud, if material, is presumed; while in the latter the complainant must prove a fraudulent intent, or show facts and circumstances from which it may reasonably be inferred. In either case, however, it must be shown that the dress or device employed by the defendant is such that it has deceived, or is calculated to deceive, ordinary purchasers buying with usual care, and that they have purchased or will probably purchase the goods of the defendant under the mistaken belief that they are those of the plaintiff, to the serious damage of the latter. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Regis v. Jaynes*, 185 Mass. 458, 460, 70 N. E. 480; *Paul on Trade-Marks*, §§ 196, 280.

[5] As heretofore pointed out, the master has found in favor of the defendant on the last proposition, and the court below has affirmed the finding. Findings so made are not to be lightly disregarded, and this is especially true where, as here, it appears that the case was sent to the master under an agreement of the parties that he should hear the evidence and report his findings of fact and conclusions of law thereon. In *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764, the order sending the case to the master read as follows:

"By consent and request of all the parties herein, it is ordered by the court that Hon. R. D. H. be and is hereby appointed a special master herein to hear the evidence and decide all the issues between the parties and make his report to this court, separately stating his findings of law and fact, together with all the evidence introduced before him, which evidence shall thereby become part of the report, which report shall be subject to like exceptions as other reports of masters."

This order differed in no respect from the one under consideration, except that it directed the master to report the evidence introduced before him and make it a part of his report. In determining the

effect to be given to findings of a master under such a reference, Mr. Justice Field said:

"A reference by consent of parties of an entire case, for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise. * * * To disregard the findings and treat the report as a mere presentation of the testimony is to defeat, as we conceive, the purpose of the reference and disregard the express stipulation of the parties. We are therefore constrained to hold that the learned court below failed to give to the findings of the master the weight to which they were entitled, and that they should have been treated as so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of the evidence upon which they were made."

In *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289, the order of reference to the master, as in *Kimberly v. Arms*, was by consent of the parties to hear the case and report his findings and conclusions of law, but it did not contain a reservation of the right to review his findings, and it was there held that, under such an order, the findings of fact by the master were conclusive, if there was any evidence upon which they could be made. In the opinion of Mr. Justice Brown, it was said:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Rev. Stat. § 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

And again he says:

"As there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive."

The views of the Supreme Court, as expressed in the above cases, have been recognized and followed in the various circuits. See *Connor v. United States*, 214 Fed. 522, 131 C. C. A. 68; *Hattiesburg Lumber Co. v. Herrick*, 212 Fed. 834, 842, 843, 129 C. C. A. 288; *Guarantee Gold Bond Loan & Savings Co. v. Edwards*, 164 Fed. 809, 811, 90 C. C. A. 585.

We have carefully examined the report of the master with reference to his finding of fact upon the question material to both grounds of complaint and the exhibits particularly relating thereto, and are of

the opinion that the proofs show that the master was right, rather than that he was clearly wrong.

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

PUTNAM, Circuit Judge (dissenting). In the middle circuits the practice had been formerly common for the court, sometimes on its own motion, to send a case to a master to try at the outset all the issues, without proceeding to dispose of them in any part as the result of its own investigation and judgment. Clearly this was not a lawful practice under any equity rules, and this was so announced in *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. The announcement in *Kimberly v. Arms* as to the effect of such a reference when agreed to by the parties was mainly incidental. While the case has since been followed without question, it did not attract the notice of either court or counsel in the present suit. Clearly that case should not be applied beyond what the law really requires.

The appeal before us presents two distinct questions: One is whether, independently of a technical trade-mark, the respondents have been guilty of unfair competition. This is properly a mixed question of both law and fact, but it contains so much fact that the disposition of the facts, if accepted as found by the master and the District Court, disposes of it. On this part of the case the District Court and the master agree; therefore, accepting the law as given as early as *Crawford v. Neal*, 144 U. S. 585, 596, 12 Sup. Ct. 759, 36 L. Ed. 552, and perhaps earlier, and as continuing down to the last volumes of the Supreme Court Reports, this concurrent conclusion should control our decision, as it is very evident that there is much to be said about this on both sides.

Upon the other branch of the case, which relates strictly to the trade-mark "108," the complainant assigned as error as follows:

"That the United States District Court for the District of Maine erred in finding that the name '208' as used by the defendant in connection with the defendant's sale of his cigars was not an infringement upon the complainant's trade-mark rights to use the name '108' as used by it."

This might be criticized as perhaps too general, but it is sufficiently comprehensive to cover all questions involved, and to give full notice that the complainant still rests on its trade-mark. The complainant also proceeded in good faith to argue this proposition fully, and there is no technical rule which requires us to throw him out.

There has never been any authoritative decision sustaining the claim of the respondent that a number like "108" may not be properly held to be a trade-mark. In this particular case it seems to have been taken from the street number of the building where the complainant's factory or place of trade was. In *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, there is a full and complete discussion by Mr. Justice Clifford of the law of trade-marks; and he makes it sweeping enough to cover in a mere number. As we have said, there has been no authoritative decision throwing out numbers as trade-marks, though there has been considerable discussion on the

topic. As applied to the present case, the numerals answer all the demands for a proper trade-mark, indicating nothing except such elements as are proper to establish trade mark rights; and, in the lack of any authoritative hostile decision, we might accept the position of the complainant in view of the general observations of Mr. Justice Clifford (96 U. S. at pages 250, 254, 24 L. Ed. 828), especially about "symbol, figure, letter, form, or device." These observations are sufficient to show the position of the federal courts.

In the state courts we have not only the cases cited therein, but we have also, in Coddington's Digest of Trade-Marks (1878) at page 260 and sequence, a discussion of the use of numerals entirely favorable to our view; also, from pages 361 to 374, there is a long schedule of various kinds of inscriptions which have been sustained as trade-marks, which illustrate the observations of Mr. Justice Clifford, and confirm them to such an extent as to cover this case. *Gillott v. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553, and sequence, sustains our view of the law fully, and leaves it without doubt, so far as the New York courts are concerned. That case relates to the figures "303" on writing pens. The figures were connected in the trade-mark with the words "extra fine" and the name of Joseph Gillott, in whose behalf the adjudication was made. The infringement was by Esterbrook & Co., and did not use the name of "Gillott," but used their own name, so that by the very substance of the matter it was impossible to attribute the decision to anything except the number, and it appears all through the case that that was the view of the court. This is all the more evident on looking at the report of the case in the Supreme Court, 47 Barb. (N. Y.) 455. It will appear from the decisions in these two courts that this case was very thoroughly considered by the courts, and was maintained on each side by very distinguished and painstaking counsel, including John Sherwood and F. R. Sherman in the Court of Appeals. The frame of the injunction appears plainly in 47 Barbour, and there can be no question on reading the whole case that the courts aimed at those figures as the essential part of the trade-mark; the name of the manufacturers having been dropped out, and the name of Esterbrook & Co. substituted. It is observed by Judge Ingraham in 47 Barb. (N. Y.) 481 that it was "303" that the complainants claimed a right to as a trade-mark, and that the injunction would be perpetual as to the use of that number.

We also remark, as to the difference between "108" and "208," that Mr. Justice Clifford (96 U. S. at page 255, 24 L. Ed. 828), stated that:

"Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser, * * * it is sufficient to give the injured party a right to redress."

Also, in the *Gillott Case*, the fact that the trade-mark used by the respondents omitted Gillott's name, and used another name, did not affect the result. With reference to an established trade-mark, the rule of law in this respect is more liberal than with reference to matters of unfair dealing. In the same line is the observation in *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 603, and the whole mass of author-

ities as to trade-marks proper. It is difficult to understand why this "208" should have been used, except for the purpose of misleading.

Kimberly v. Arms does not interfere with these propositions, because the questions involved in this trade-mark are substantial questions of law, and *Kimberly v. Arms*, which has been many times explained and restricted in its application, certainly does not affect a question of that character. No ruling of the Supreme Court has ever held that any finding of a master in chancery on a merely legal proposition is conclusive.

It is true that the respondent has not mathematically taken the complainant's trade-mark, but within the practical rules it made use of it, and no suggestion has been made anywhere that he had any other purpose which induced him to use the figures "208," and no other purpose is conceivable.

We will add that *Gillott v. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553. has never been reversed, or even authoritatively questioned, so far as the principles which we are discussing are concerned. It has been approved. This was done, as well as elsewhere, by the very marked opinion by Judges Sedgwick and Van Vorst, in 1879, in 45 N. Y. Super. Ct. 258, in the well-known Rubber Comb Case, where the peculiar reason for accepting numerals as trade-marks when used as in the case at bar was strongly stated. This case is found in *Price & Stuart*, at page 191, where it was pointed out that the numbers there involved were selected arbitrarily, and of themselves expressed no size or quality. This is the very pith of one fundamental requirement ordinarily demanded in a trade-mark. In *Shaw Stocking Co. v. Mack* (C. C.) 12 Fed. 707, decided in June, 1882, a case always recognized as a leading case, Judge Coxe, who is admittedly of large experience in such matters, lays down the rule as broadly as that we have cited from Mr. Justice Clifford, to the effect that:

"A trade-mark may consist of a token, letter, sign, or seal. Names, ciphers, monograms, pictures, * * * may be used, and numerals united."

In this case, the use of the numerals "830" was expressly restrained. The latest and most comprehensive work on trade-marks in existence, the fifth edition of Sebastian's *Law of Trade-Marks*, published in 1911, gives undoubted prominence to *Gillott v. Esterbrook*, at pages 94, 183, 223, and elsewhere.

A thorough investigation of all the leading works on trade-marks, including Bump, Kerly, and Sebastian, which latter is the latest and standard work covering the law as understood in America, although an English publication, fails to give any case of any importance decided by any court in the United States which would reject the trade-mark in this particular case, although some expressions, if not read carefully, might give a different impression, as, for example, *Burton v. Stratton* (C. C.) 12 Fed. 696, which runs off into a general discussion of the trade-mark question, stating, on page 700 that no person can obtain a monopoly by the use of "the ordinary numerals or letters." It immediately says, however, that this proposition has been disputed, and cites *Gillott v. Esterbrook*, already referred to. It rests

this expression, however, immediately on *Manufacturing Co. v. Train-er*, 101 U. S. 51, 25 L. Ed. 993, which will be found to start out with, as a recognized rule, that letters or figures affixed to merchandise for the "purpose of denoting its quality only" cannot be appropriated as a trade-mark. The word "only," by reflection, sustains the trade-mark in this particular case.

It seems to be admitted, however, that there is some doubt whether, under the English decisions, the rule is sustained to the extent relied on by us. Under the English statutes, as under our own statutes, a numeral may be registered as a trade-mark, although it is only a single distinctive figure. *Sebastian's Law of Trade-Marks* (5th Ed., 1911) 19, 37, 90, 368, and elsewhere. *Browne on Trade-Marks* (2d Ed.) § 225, and sequence, seems to sustain a hostile position; but it cites no authority, and fails to appreciate those to which we have referred. Mr. Browne, in discussing this question, assigns decided cases to the class of mere unlawful competition; but he adds nothing to the law, because he attempts this without giving in any instance any special reason for doing so. In fact, we may reassert without hesitation that there is no authority in the United States which directly impugns the use of a numeral arbitrarily applied merely to distinguish the origin of the goods, without reference to their quality, being the precise purpose for which this trade-mark is authorized to be maintained.

On the whole, in conclusion, we rely confidently on the expression of the opinion delivered in behalf of the Supreme Court of Rhode Island in 1888, in *American Solid Leather Button Co. v. Anthony*, 15 R. I. 338, 339, and 340, 5 Atl. 626, 627, 2 Am. St. Rep. 898, as follows:

"The first question presented for our decision is whether the use of an arbitrary combination of figures to designate the styles of goods which a person makes is entitled to protection. The defendants claim that no protection can be given because such figures, by denoting the style or quality simply, and not origin of the goods, deceive nobody, and hence the rights of the complainant are not infringed. There is some diversity in decisions upon this point, arising mainly from different assumptions of fact by the courts. Undoubtedly, if it be assumed that a given mark indicates quality only, and not origin, it will follow that purchasers of goods so marked have not been misled thereby into the supposition that they were buying a complainant's goods, and hence he would show no cause for relief. All of the cases cited by the defendants, in support of their claim that numbers indicating style or quality cannot be protected, are based upon such an assumption. Where the premises are true, no fault can be found with the conclusion. But it by no means follows, as a rule of law, that marks indicating style or quality may not also indicate origin, and thus be a subject of trade-mark. A person has the right to affix to his goods any device, symbol, or name which he may invent, to distinguish such goods from those made by other people. When the symbol becomes known, in connection with his name, it serves as a sign and pledge of the origin of the goods. People do not often stop to read all that may be printed on a label; nor do they always know the changes that are made in firms or business names. Hence it is that the sight of the familiar symbol, inducing one to purchase goods to which the symbol does not properly belong, to the injury of him who devised it to mark his own goods, is the gravamen of the law of trade-marks.

"Within limits which are well defined, a combination of letters or figures, arranged for convenience or to attract attention, may serve the purpose of a trade-mark, as well as a device intended or arbitrarily selected. So a person

may have different symbols for different grades of goods, which, in the same way, will indicate both quality and origin with respect to the goods so marked.

"A manufacturer may adopt such symbols, not simply to mark *a* style or quality, but *his* style and *his* quality as well. He is entitled to have *his* style and *his* quality protected from misrepresentation, and to have the benefit of any favorable reputation they may have gained. The doctrine applicable to cases of this character is clearly set forth in *Shaw Stocking Co. v. Mack* (C. C.) 21 Blatchf. 1, 6 [12 Fed. 707], as follows: 'It is very clear that no manufacturer would have the right exclusively to appropriate the figures 1, 2, 3, and 4, or the letters A, B, C, and D, to distinguish the first, second, third, and fourth quality of his goods respectively. Why? Because the general signification and common use of these letters and figures are such that no man is permitted to assign a personal and private meaning to that which has, by long usage and universal acceptance, acquired a public and generic meaning. It is equally clear, however, that if, for a long period of time, he had used the same figures in combination, as "3214," to distinguish his own goods from those of others, so that the public had come to know them by these numerals, he would be protected. The courts of last resort in Connecticut, in Massachusetts, and in New York have distinctly held this doctrine, *Boardman v. Meriden Britannia Co.*, 35 Conn. 402 [95 Am. Dec. 270]; *Lawrence Co. v. Lowell Mills*, 129 Mass. 325 [37 Am. Rep. 362]; *Gillott v. Esterbrook*, 48 N. Y. 374 [8 Am. Rep. 553]; the numerals sustained being respectively "2340" "523," and "303."'"

These observations, with all their limitations, apply exactly to the case at bar, even with such detail as to render the change from "108" to "208" ineffectual in behalf of the respondent below.

DAVIS v. VIRGINIA RY. & POWER CO. et al.

BOWLING GREEN TRUST CO. v. VIRGINIA PASSENGER & POWER
CO. et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1915. On Rehearing,
December 13, 1915.)

No. 1366.

1. COURTS ⇨352—CONTINUANCE—EFFECT OF END OF TERM AFTER HEARING AND BEFORE DECREE.

New equity rule 57 (198 Fed. xxxiv, 115 C. C. A. xxxiv), providing that after a cause has been placed on the trial calendar it shall not be continued over the term, save in exceptional cases by order of the court on cause shown, does not apply to a cause which has been heard where the term ends before entry of the decree.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. ⇨352.]

2. APPEAL AND ERROR ⇨173—GROUND FOR DISMISSAL.

An appeal will not be dismissed on the ground that there was no proof of complainant's ownership of the cause of action sued on, where the point was not made before the trial court.

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

3. PARTIES ⇨48—PLEADING—AMENDMENT.

Denial of a motion to amend an intervening petition after a delay of four years held not error, where intervening rights would be affected by the amendment.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 75; Dec. Dig. ⇨48.]

4. MORTGAGES Ⓒ199—RELATION OF MORTGAGOR TO PROPERTY—DUTIES ASSUMED TO MORTGAGEE.

A mortgagor or his agents, operating the property in due course of business, is not technically a trustee for the mortgagee, and is under no obligation to pay over the income or profits to the mortgagee, even where the mortgage covers income, until demand is made for the income, or for surrender of possession of the property; but the mortgagor holds the stable property under the implied confidence reposed and obligation assumed to preserve it intact as security for the mortgage debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 513-525; Dec. Dig. Ⓒ199.]

5. MORTGAGES Ⓒ205—CONVERSION OF PROPERTY BY MORTGAGOR—RIGHTS OF MORTGAGEE.

A mortgagor is liable if he wastes or converts to his own use the mortgaged property, and the property itself may be followed by the mortgagee in the hands of third persons, except purchasers without notice, without the necessity of proving fraud.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 460, 544-550; Dec. Dig. Ⓒ205.]

6. STREET RAILROADS Ⓒ52—RELATION OF PURCHASER TO MORTGAGED PROPERTY—RIGHTS OF MORTGAGEE.

A street railway company, which through stock purchases secured control of a competing company and caused its property to be conveyed to itself, subject to underlying mortgages which covered also the income and good will of the mortgagor, thereby assumed a fiduciary relation to the mortgaged property, and became liable to the secured bondholders for any improper diversion of the same, including its income and the business and good will of the mortgagor.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 130, 131; Dec. Dig. Ⓒ52.]

7. STREET RAILROADS Ⓒ52—RIGHTS OF MORTGAGEE—PROPERTY DIVERTED TO BENEFIT OF SECOND MORTGAGEE.

Mortgagees of the succeeding company, who obtained the benefit of any property so diverted as an increment to their security, on enforcing their mortgages, would also be accountable for its value to the mortgagees of the former owner.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 130, 131; Dec. Dig. Ⓒ52.]

8. STREET RAILROADS Ⓒ52—RIGHTS OF MORTGAGEE—SUIT FOR DIVERSION OF PROPERTY.

That the property at the sale did not bring enough to pay a prior mortgage did not affect the right of petitioner, a bondholder of the prior owner, to maintain the proceeding, since he is not concluded by such price, and is, furthermore, in case of recovery, entitled to the entire amount, if necessary to pay his bonds, to the exclusion of all other bondholders, who could have joined with him, but did not.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 130, 131; Dec. Dig. Ⓒ52.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Suit in equity by the Bowling Green Trust Company, trustee, against the Virginia Passenger & Power Company and others. Charles Hall Davis, intervener, appeals from a decree dismissing his petition against the Virginia Railway & Power Company and others. Reversed.

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

James Mann, of Norfolk, Va., and William Hodges Mann, of Richmond, Va. (Mann & Son, of Richmond, Va., and Mann & Tyler, of Norfolk, Va., on the brief), for appellant.

Henry W. Anderson, of Richmond, Va. (Munford, Hunton, Williams & Anderson, of Richmond, Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In the early development of electric lighting and transportation in and near the cities of Richmond and Petersburg, Va., the business was divided among a number of companies. There were numerous issues of stock, and many mortgages were executed by the several corporations. About the year 1900 the process of consolidation of these companies began. After some years they were all placed in the hands of receivers under proceedings to foreclose their mortgages. All of the foreclosure suits were consolidated into one, under the title of "Bowling Green Trust Company, Trustee, v. Virginia Passenger & Power Company and Others," and a decree of foreclosure was entered October 24, 1908, directing a sale of all property of all the companies. The sale was accordingly made on May 5, 1909, for \$8,100,000, to a committee representing a large majority of bondholders, who had come together and agreed upon a plan of reorganization of the property. The bid was confirmed, and title made to the Virginia Railway & Power Company, a new corporation organized to carry out the reorganization. The contest now before us, between Charles Hall Davis and the Virginia Railway & Power Company, the purchaser of the property, depends upon the transactions of the Richmond Passenger & Power Company and the Virginia Passenger & Power Company, two of the mortgagor corporations, with each other, and all of the complex matters not bearing on the contest will be omitted in stating the issues. The Richmond Passenger & Power Company will be hereinafter spoken of as the Richmond Company, and the Virginia Passenger & Power Company as the Virginia Company.

The Richmond Company executed a mortgage on January 1, 1900, to the Merchants' Trust Company, securing a bond issue of \$2,877,000, and on July 1, 1900, another mortgage to the Metropolitan Trust Company, securing a bond issue, known as debenture bonds, of \$1,000,000. In addition to these, there was a senior mortgage on property acquired by the Richmond Company from the Richmond Railway & Electric Company, securing bonds to the amount of \$123,000, and a senior mortgage on property acquired from the Richmond & Manchester Railway Company securing bonds to the amount of \$400,000. The total of these bonds outstanding against the Richmond Company was \$4,400,000.

In December, 1901, the Virginia Passenger & Power Company was formed by the consolidation of the Virginia Internal Improvement Company with the Southside Railway & Development Company. In this transaction, the Virginia Company acquired a large majority of the stock of the Richmond Company, and thus controlled its operations. By virtue of this control, the Virginia Company elected the directors of the Richmond Company, who elected the managing officers of the

Virginia Company to be managing officers of the Richmond Company. The purpose was to consolidate the companies which were competitors of each other, and the effect was to operate them together under the control of the Virginia Company. By deed dated January 23, 1902, the Richmond Company conveyed to the Virginia Company some of its lines of railway, subject to its mortgages of \$3,400,000, above recited; the Virginia Company assuming and agreeing to pay the Richmond Company's debenture bonds of \$1,000,000. By another deed, dated June 3, 1902, the Richmond Company conveyed to the Virginia Company other lines in consideration of \$500,000 to be paid by the Virginia Company. It is alleged that neither the debenture bonds nor the \$500,000 purchase money was ever paid. In June, 1902, the Virginia Company acquired control of other companies with a view of consolidation of the entire electric street car and power business of the vicinity. As a means of accomplishing this purpose the Virginia Company, on June 18, 1902, executed a mortgage to the Merchants' Trust Company to secure bonds to the amount of \$15,000,000, which was by proper instruments made a lien on all the property thus brought into the consolidation, subject to existing mortgages. Afterwards the Bowling Green Trust Company was substituted as trustee under this mortgage. From the proceeds of this bond issue the existing mortgages and bonds, including the debenture bonds of \$1,000,000 of the Richmond Company, were to be paid. Of the consolidated bonds there were issued and sold by the Virginia Company \$6,508,000, and pledged \$1,303,000, making a total of \$7,811,000. The remaining bonds of the proposed issue of \$15,000,000 were reserved for the retirement of the underlying bonds of the several corporations. This plan of consolidation failed, and the old bond issues were not paid nor retired by the new bonds.

Afterwards foreclosure proceedings were instituted by the trustee under the mortgage of the several corporations, receivers were appointed, and the sale was made as above recited. In the progress of litigation the Metropolitan Trust Company, trustee under the mortgage securing \$1,000,000 of the debenture bonds of the Richmond Company, charged in the bill for foreclosure that, after the Virginia Company secured control of its competitor, the Richmond Company, it was guilty of these wrongs against the Richmond Company and against the Metropolitan Trust Company as trustee of the mortgage securing the debenture bonds of that company: First, that it so managed generally the property and business of the Richmond Company as to divert to its own use earnings, income, business, and good will of that company, and so mingled its property with its own that full identification became impossible without an accounting under the order of the court; second, that the Virginia Company converted to its own use the lines of railway conveyed to it on January, 1902, and June, 1902, and received all the income and profits therefrom, paying no consideration for either the property or its use.

The issues made on these charges were referred to Hon. A. L. Holliday, as special master. After taking much testimony the master filed his report on July 25, 1908, making as we understand the following

findings: First, if the Virginia Company sustained no fiduciary relation to the Richmond Company or its bondholders, and if the matter was to be considered as depending on a charge of fraudulent conversion by one party of the property of the other, then the burden of clearly proving the fraud devolved upon the Metropolitan Trust Company as a condition of obtaining relief, and that under this test it had failed to make good its allegations; second, if the Virginia Company was the trustee of the property and business of the Richmond Company, then the master should be instructed to ascertain and report the value of the income, business, and property diverted from the Richmond Company to the Virginia Company, and that relief should be granted in consequence of the diversion; third, that it would be useless for the master to go into this inquiry unless the court found that the Virginia Company sustained the relation of trustee to the Richmond Company. The master asked instructions from the court, so that the matter might proceed before him to ascertainment of the value of the property diverted, or be dropped, according to the view of the law taken by the court.

The Metropolitan Trust Company objected to the foreclosure sale until the issues made by its petition as to the diversion of the property of the Richmond Company should be passed upon. The objection was held insufficient in a decree of the District Court, affirmed on appeal by this court. 168 Fed. 1021, 93 C. C. A. 671. There were exceptions to the master's report by the parties interested. Before the exceptions to the report were passed upon by the court the decree of foreclosure was made, containing this reservation:

"The court reserves the right to hereafter determine all questions in connection with the diversion of earnings, business, property, and income to the Virginia Passenger & Power Company from the Richmond Passenger & Power Company, as set forth in the pleadings herein and the reports of the special master, and to enforce against the property purchased and the earnings and income thereof in favor of the said Metropolitan Trust Company of the City of New York, as trustee, and the petitioners Howe and others, and the debenture bondholders, any lien or claim to which the said trustee or bondholders shall be entitled, and to afford such trustee or bondholders and petitioners such other and further relief as to such alleged diversion with respect to such purchaser, his successors and assigns, and the property purchased, as the court shall determine to be just and equitable; the intent being that the rights of the Metropolitan Trust Company of the City of New York, as trustee, and the debenture bondholders, and of the petitioners Howe and others, to establish any claim they may have for diversion of earnings, property, business, and income of the Richmond Passenger & Power Company by the Virginia Passenger & Power Company, or the receivers herein, and to enforce against the property purchased any claim or lien, legal or equitable, to which they may be entitled, and to apply any money or property recovered to the benefit of the debenture bondholders, in all respects as if this decree had not been made."

After the sale the Metropolitan Trust Company refused to press the matter further, giving as a reason lack of support and indemnity from the bondholders of the Richmond Company. On March 12, 1910, Charles Hall Davis, as the owner of 71 of the debenture bonds, refusing to accept as equitable the provision made for the debenture bonds of the Richmond Company in the reorganization, filed his petition, making the same allegations as to the diversion of the property

of the Richmond Company to the Virginia Company. The appeal is from the decree of the District Court refusing to allow the petitioner, Davis, to amend his petition, and from the final decree dismissing the petition.

We consider first the motion to dismiss the appeal, made on the grounds: (a) Because the appeal was not allowed within six months after the final judgment; (b) because it does not appear in the record that the appellant is the owner of the 71 debenture bonds; (c) because it appears on the face of the record that, even if the Virginia Company did convert and bring under its mortgages a part of the property subject to the mortgages under which petitioner claims, the property brought in the foreclosure sale so much less than the amount of the senior mortgages that it would be impossible for the petitioner to have any substantial interest in the property converted.

[1] The District Judge filed a written opinion to the effect that the petition should be denied, on December 13, 1911; but the decree was not entered until January 14, 1914, and on June 20, 1914, less than six months thereafter, the appeal was allowed. But it is argued that the case was finally disposed of by being automatically dropped from the calendar on October 4, 1913, the last day of the April term, under the requirement of equity rule 57 (198 Fed. xxxiv, 115 C. C. A. xxxiv), and that the failure to appeal within six months from that date was fatal. The point is not well taken. The rule forbidding continuances was meant to prevent delay in the hearing of causes, and perhaps it was intended also as a stimulating admonition to judges to decide cases as promptly as possible; but it does not mean that after a case has been heard it shall be dropped from the calendar at the end of the term and thus disposed of before the court has made a final decree. Besides, the court on October 13, 1913, made an order reciting that a number of important matters, including the claim of petitioner, had been left open, and directing that the cause be continued from the April, 1913, term, and that the order be entered nunc pro tunc as of October 4, 1913, the last day of that term. Even if this order was erroneous, it now stands in force. There was no appeal from it, and under rule 57 the court does not finally lose jurisdiction of a cause when it is dropped from the calendar for lack of proper continuance. But even if the order had no effect as an order of continuance, it should be regarded in substance an order to reinstate the cause for a hearing, since it was manifestly the intention of the court to bring the cause before it to dispose of the matters undecided. Any other construction would involve an oppressive yielding to mere form. In addition to this, the order of continuance as to other matters was made at the instance of counsel for respondent. A party cannot avail himself of the provision of an order in his favor and allege against a like provision as to another party.

[2] The appeal cannot be dismissed on the ground that there is no affirmative proof that the petitioner is the owner of the bonds. A review of the record leads to the conclusion that this point was not made before the District Court. The point is, therefore, not available as a ground of motion to dismiss. *Pine River Logging Co. v. United*

States, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164; Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 575, 16 Sup. Ct. 389, 40 L. Ed. 536. As the evidence taken is not in the record, the court cannot say there was no proof of ownership of the bonds.

The third ground of the motion is too much involved in the merits to be considered on a motion to dismiss, for the question whether the petitioner has any practical interest in the assets which he seeks to follow can only be decided on careful consideration of the relations of the parties to the property. The motion to dismiss is refused.

[3] There is no ground on which the court can reverse the order denying the motion to amend. The original petition is sufficiently broad to make relevant all competent testimony on the subject of diversion of the assets of the Richmond Company by the Virginia Company, or the receivers, and the amendment on that subject seems unnecessary. Although the sale was made on May 5, 1909, and the petition was filed on March 12, 1910, the motion to amend was not made until January 17, 1914. In the meantime the purchaser had gone forward for nearly four years with the management of the property without notice of any claims of the petitioner beyond those set up in the original petition; and securities issued under the reorganization no doubt had been bought and sold. No sufficient excuse is given for the long delay. The proposed amendments would bring in serious charges involving the whole plan of reorganization and other important matters. Under the circumstances the long delay was sufficient ground for the refusal to allow the amendment.

[4, 5] Coming to the vital matter of the alleged diversion of assets of the Richmond Company to the Virginia Company, in view of the report of the master on the subject, the first inquiry is: What relation did the Virginia Company assume to the holders of the mortgage bonds of the Richmond Company when it took control of that company? On reason and authority the general rule is obvious that the mortgagor, or his agents, operating the property in due course of business, is not technically a trustee for the mortgagee, and is under no obligation to pay over the income or profits to the mortgagee, even when the mortgage covers income, until demand is made for the income or for surrender of the possession of the property. *Galveston R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199; *Gilman v. Ill. Tel. Co.*, 91 U. S. 603, 23 L. Ed. 405; *Dow v. Memphis R. Co.*, 124 U. S. 652, 8 Sup. Ct. 673, 31 L. Ed. 565; *Sage v. Memphis & L. R. Co.*, 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694. Therefore, as to the income received in the due course of business, the mortgagor corporation sustains no fiduciary relations to the mortgagee. But it seems equally obvious that the mortgagor holds the stable mortgaged property under the implied confidence reposed and obligation assumed to preserve it intact as security for the mortgage debt. 39 Cyc. 558. If he wastes it or converts it to his own use, he is liable. 27 Cyc. 1269. And it may be followed in the hands of third persons, except purchasers without notice. *Chicago R. Co. v. Third Nat. Bk.*, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. Ed. 900. To recover property so converted, or its value, it is not necessary, as the master seems to

have thought, for the mortgagee to prove fraud. The right of action arises on the violation of confidence reposed and the obligation assumed, even if the violation be due to negligence.

[6] The stable property covered by the mortgage of the Richmond Company consisted of its railways, machinery, lands, and other property, not as inactive or dead assets, but as instrumentalities of an active business, upon the proper conduct of which the value of the property depended. This is made more clear by the inclusion in the mortgage of the good will of the company. The obligation of the mortgagor to the mortgagee was to keep up the value of the security by using all reasonable means to conserve the business. Therefore, while the mortgagee had no right to demand payment of income, it did have the right to require the mortgagor to account for the depreciation in the value of the mortgaged property due to improper diversion of the business and income of the corporation appropriated by the mortgagor; and the good will attached to the property was a part of it. *Metropolitan Nat. Bk. v. St. Louis Dispatch Co.*, 149 U. S. 436, 13 Sup. Ct. 944, 37 L. Ed. 799; *Linder v. Hartwell R. Co.* (C. C.) 73 Fed. 320. When the Virginia Company acquired stock control of the Richmond Company, and undertook its management in conjunction with the management of its own affairs under the same executive officers, it became responsible by reason of its control for any diversion of the mortgaged property. As a majority stockholder in control it became a trustee for the minority stockholders. *Jones v. Mo. E. E. Co.*, 144 Fed. 765, 75 C. C. A. 631; *Central Improvement Co. v. Cambria Steel Company*, 210 Fed. 696, 127 C. C. A. 184. By the same principle as the majority stockholder in control, the Virginia Company became a fiduciary holding the mortgaged property to answer to the mortgage debt. *Farmers' L. & T. Co. v. N. Y., etc., R. Co.*, 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689.

There is no intrinsic wrong in these trust relations; and there is no presumption of a breach of trust. A charge by the beneficiary of diversion or conversion of trust property by mingling it with the property of the trustee, or otherwise, must be proved. But, on the other hand, the rule is applicable that when a beneficiary of a trust proves against the trustee that there has been a conversion of the trust property by adding it to the like estate of the trustee, the law then places on the trustee the duty of accounting by separating the trust property from his own or proving and paying its value. *National Bk. v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693. This rule has special force and significance when one corporation acquires control of another competing with it in business.

[7] Further, if the executive officers of the two companies so managed that a part of the Richmond Company's street railway, or any other tangible property, or the good will attached to it, was turned over to the Virginia Company, and fell under the mortgages of that company, thus increasing its security, the mortgagees of the Virginia Company, upon enforcing their security, would be liable to account to the mortgagees of the Richmond Company for the amount they real-

ized, or should have realized, from the converted property as an increment to their security taken from the security of the mortgages of the Richmond Company. *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 389; *Sou. Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458.

The petitioner has the right also to show that the management of the receivers resulted in the diversion of property subject to the debenture mortgage so that it fell under the mortgages of the Virginia Company. It is true, their reports Nos. 20 and 27, as to the management of the property and the application of income were confirmed, but the order of confirmation contained this provision:

"Leave is reserved to any party in interest, for cause shown, to have said accounts recast from the date of the appointment of the receivers, or from any subsequent date."

It is true, also, that the order dismissing the petition must be held to adjudge that good cause has not been shown for having the receivers' accounts recast. But the method of keeping the accounts adopted by the receivers is so closely related to the method adopted while the Virginia Company was in control that it seems reasonable to infer that the ground for refusing to open the accounting was the same in each case. Of course, the opportunity to have the accounts recast, so as to ascertain whether any errors added to the value of the property of the Virginia Company at the expense of the Richmond Company, in no wise affects the discharge of the receivers.

There is no substantial question of notice to the mortgagees of the Virginia Company of the alleged diversion of property of the Richmond Company and increment to the property covered by their mortgages resulting therefrom, for the diversion is alleged to have taken place after the execution of the last mortgage on June 18, 1902.

[8] The position is taken by the respondent that, if all that is charged as to the diversion of the Richmond Company's property be assumed as true, it cannot avail the petitioner under the facts of the case. The argument is this: The property covered by the mortgage securing petitioner's bonds brought at judicial sale \$900,000 less than the senior mortgages; the recovery, if any, in this proceeding, would be applied to that balance, and would be insufficient to pay it, and therefore the petitioner could not possibly be benefited by any recovery. We think the argument fallacious. The reservation in the order of sale provided that no rights of the debenture bondholders should be affected by it—that they should stand "in all respects as if the decree had not been made." This means that the petitioner is not bound by the bids at the sale as an ascertainment of the value of the property, or in any other respect. *Sou. Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458. In other words, he is no more bound by the result of the sale than he would have been as a creditor not a party to the cause, and hence he was entitled to the same protection given to such a creditor in *N. P. Ry. Co. v. Boyd*, 228 U. S. 504, 33 Sup. Ct. 554, 57 L. Ed. 931. Therefore, he may show that the property as sold was of sufficient value to satisfy the senior mortgages.

The argument fails for another reason. The holders of the bonds secured by the senior mortgages and the other debenture bondholders of the Richmond Company had the opportunity to join the petitioner in his effort to recover property which he alleged had been taken from that on which they all relied for security. They refused to enter the contest, and accepted as full payment and satisfaction of their bonds the settlement offered in the reorganization. Thus the petitioner was left as the only bondholder who chose to avail himself of the reservation and make the contest, and it follows that he alone is entitled to receive the fruit of his effort. Had there been no sale, the result of the refusal of the other bondholders would have been the same. All other creditors waived their rights, and were in the position of saying, either that there was no merit in petitioner's contention, or that they were unwilling to make any effort to bring under the security the property alleged to have been diverted. Evidently, under such conditions, the property which may be recovered or brought back as a part of the assets of the Richmond Company by petitioner's efforts and expense would be applicable to his bonds. The principle is well settled by authority. *Freedman S. & T. Co. v. Earle*, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. Ed. 301; *Edmeston v. Lyde*, 1 Paige (N. Y.) 637, 19 Am. Dec. 454; 8 R. C. L. 38.

Thus we have endeavored to state the legal principles applicable to the alleged relations of the parties. After the petition was filed it seems clear that under the reservation in the order of sale the petitioner as a debenture bondholder of the Richmond Company was entitled to the benefit of any exceptions by the Metropolitan Trust Company to the master's report germane to the petition, and it was his right to have these exceptions passed upon by the court. The dismissal of the petition was in effect overruling the exceptions of the Metropolitan Trust Company and sustaining the exceptions of the Virginia Company. As we have seen, the court was in error in holding that there was no fiduciary relation of the Virginia Company to the Richmond Company, as to all of its property, including income, and to the bondholders of the Richmond Company as to the stable property and good will attached to it, subject to the mortgage securing the debenture bonds. If it be true, as contended by respondent, that the court held in dismissing the petition that diversion of the property of the Richmond Company could not avail the petitioner, this was error, because the petitioner as the active creditor would be entitled to the entire fund recovered in preference to other creditors who refused to participate in the proceedings.

The evidence is not before us, and we are therefore unable to say that it conclusively shows there was no diversion of property of the Richmond Company and that these errors were harmless.

For these errors the decree must be reversed, so that the court or the master may ascertain what was the value of all the property, if any, including the attached good will diverted from the Richmond Company by the Virginia Company, or the receivers, which was subject to the mortgage securing the debenture bonds.

The petitioner will be entitled to have his claim paid out of any

property which may have been taken from the security of his mortgage and added to the security of the mortgages of the Virginia Company, or in any wise disposed of by the Virginia Company so that it was embraced in the foreclosure sale as a part of that company's property. Under the reservation in the order of sale the purchaser will be liable to the petitioner for the value of any property so converted and sold.

Much was said in the argument as to the plan of reorganization, the petitioner contending that he was entitled to a decree against the new corporation for the amount of his debt, under the principles announced in *N. P. Ry. Co. v. Boyd*, 228 U. S. 504, 33 Sup. Ct. 554, 57 L. Ed. 931. The point is not available to the petitioner, for the reason that it is not alleged as a ground of relief in his petition.

The decree is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

On Rehearing.

This court, at its November term, 1915, rendered its decision reversing the decree of the said District Court appealed from in this cause, and the appellees, by their counsel, on December 3, 1915, presented to the court a petition for a rehearing of the cause, and the same has been carefully considered.

Only one remark need be made as to a view of the plea of purchaser for valuable consideration without notice, alleged to have been overlooked by this court. It is insisted that, since the consolidated mortgage of the Virginia Company of June 18, 1902, covers after-acquired property, the mortgagee is entitled to take as purchaser for value without notice any accretions to the property covered by the mortgage, even though due to the diversion of the property of the Richmond Company to the Virginia Company. Since any diverted or converted property of the Richmond Company rested under the lien of the prior and duly recorded mortgage given by the Richmond Company, under which the petitioner claims, it seems reasonably plain that such property could not be freed from the lien of that mortgage and brought under the lien of the Virginia Company's mortgage as after-acquired property by the mere act of diverting and converting it to the use of the Virginia Company.

The refusal of this court to dismiss the appeal on the ground that the appellant had not shown ownership of the bonds is not to be taken as an adjudication of that issue.

It is now here ordered by this court that the rehearing asked for be, and the same is hereby, denied at the cost of the appellees.

NISBET, Commissioner of Safety, et al. v. FEDERAL TITLE & TRUST CO.
(Circuit Court of Appeals, Eighth Circuit. November 16, 1915. Rehearing
Denied February 24, 1916.)

No. 4304.

1. BANKRUPTCY ⚡293(1)—DISTRIBUTION OF PROPERTY—POWERS OF COURT—
CONFLICTING LIENS.

The administration and distribution of the property of bankrupts is a proceeding in equity, and property in the lawful custody of the court is held by it in trust for those to whom it rightfully belongs; if there are conflicting liens upon the property, the court has jurisdiction to determine their priorities, although the trustee has no interest in the question.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⚡293(1).]

2. BANKRUPTCY ⚡293—POWERS OF COURT—CONFLICTING CLAIMS TO PROP-
ERTY.

Where an adverse claimant filed a petition in a bankruptcy court, asserting his ownership of property in possession of the court as that of the bankrupt, which petition was answered by other claimants, the court had jurisdiction, and was required to determine the ownership and to dispose of the property accordingly.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. ⚡293.]

3. ATTACHMENT ⚡302—INDEMNITY ⚡14—CLAIMS OF THIRD PERSONS—AC-
TIONS BY CLAIMANT.

One whose property has been seized under an attachment against another may either intervene and assert his claim, or he may bring an action of replevin or trover against the officer who made the levy, and the judgment therein will be binding against the attachment plaintiff, where he has given bond to indemnify the officer, and especially where the latter has acted throughout under his directions.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1073-1082; Dec. Dig. ⚡302; Indemnity, Cent. Dig. § 41; Dec. Dig. ⚡14.]

4. ATTACHMENT ⚡294—CLAIMS OF THIRD PERSONS—ACTIONS BY CLAIMANT.

Mills' Ann. St. Colo. 1912, § 3067, which provides that sales of personal property shall be presumed to be fraudulent and void as against creditors of the vendor, unless accompanied by immediate delivery and continued change of possession, does not preclude an owner of property from asserting his title against attachment creditors of one having the custody and manual possession of the property, in the absence of conduct amounting to fraud or deceit.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 999-1017; Dec. Dig. ⚡294.]

5. ATTACHMENT ⚡175—PROPERTY SUBJECT TO ATTACHMENT—INTEREST OF
DEBTOR—"BONA FIDE PURCHASER."

Under the law of Colorado an attaching creditor does not occupy the status of a bona fide purchaser for value, and an attachment can only operate upon the right and title of the debtor at the time of the levy.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 518-523; Dec. Dig. ⚡175.]

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

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

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

Action at law by the Federal Title & Trust Company against Alexander Nisbet, as Commissioner of Safety, etc., and others. Judgment for plaintiff, and defendants bring error. Affirmed.

July 21, 1913, Buffalo Bill's Wild West and Pawnee Bill's Great Far East, Combined, a corporation organized under the laws of the state of New Jersey, and hereinafter referred to as the circus corporation, was exhibiting in Denver. The property employed in its business was of two classes: That used strictly in the giving of its exhibitions, generally referred to as the show property; and also certain horses, wagons, railroad cars, circus paraphernalia, and equipment, commonly known as the "plant" or "plant equipment." The former class was the property of the circus corporation. The latter class was leased to that corporation by one Thomas A. Smith and one G. W. Lillie, under a written agreement dated June 6, 1912, and subsequently renewed for the season of 1913. Colonel W. F. Cody (Buffalo Bill) was vice president of the circus corporation, and Major G. W. Lillie (Pawnee Bill) was its president.

On the date first above mentioned the United States Printing & Lithograph Company of Cincinnati, Ohio, brought suit in the state district court at Denver to recover an alleged indebtedness of \$66,000 against the said circus corporation, W. F. Cody, and G. W. Lillie as defendants, and caused the defendant Nisbet, as ex officio sheriff, to levy an attachment upon all the property, show, and plant hereinabove referred to. The next day, the defendants in error, Bonfils and Tammen, under the Colorado statute permitting other creditors to become parties in such attachment proceeding and have like remedies against the defendant to secure their claims or demands as the law gives to the original plaintiff, caused a subsequent attachment to be issued out of the same court and a levy to be made upon the same property by the said acting sheriff. It is provided by the statutes of Colorado that before issuing a writ of attachment the clerk of the court shall require a written undertaking on the part of the plaintiff or plaintiffs, in not less than double the amount claimed, to indemnify the defendant in the attachment suit against all damages that may be sustained by reason of the wrongful suing out of the attachment. It is conceded that all parties plaintiff, in the attachment proceeding referred to, complied in all things with the laws of the state of Colorado relating thereto, including the giving of the bonds in question.

On July 22d, G. W. Lillie executed a bill of sale to Thomas A. Smith for his interest in the plant property; but this action was subsequent to the attachment levies. Shortly thereafter, in the District Court of the United States for the District of New Jersey, a petition in bankruptcy was filed against the circus corporation, and, upon application to the District Court of the United States for the District of Colorado, Dewey C. Bailey, United States marshal for the District of Colorado, was appointed ancillary receiver. Upon his demand, pursuant to order of the district court, the sheriff turned over to him all of the aforesaid property attached as the property of said bankrupt circus corporation and its codefendants in the state court. Subsequently, the ancillary receiver, in due course, advertised the sale of said property; and thereupon Smith filed in the bankruptcy court a petition claiming the ownership of all of said property, and praying that it be restored to his possession. To this petition the plaintiffs in error, Bonfils and Tammen, filed answer denying the claim of Smith, asserting their own, and that of the sheriff, under the writs of attachment, and praying that all of the property be redelivered to the latter officer, or, in case a sale had been made, then that the proceeds of such sale be delivered to said sheriff, to be by him dealt with as the state court should order, and also for other proper relief. No formal appearance otherwise was entered by the sheriff, nor by the United States Printing & Lithograph Company, the original plaintiff in the attachment suit.

The issues thus joined were heard before the District Judge, and August 18, 1913, an order was entered adjudging the title to the show property, in the possession of the ancillary receiver, to be in the bankrupt corporation, awarding an undivided, one-half interest in the plant property to the intervener, Smith, and declining to determine whether the claim of said Smith was prior or superior to the claim of the sheriff under the writs of attachment to the

remaining undivided one-half thereof. The receiver was further directed to tender the possession of all said property to the sheriff, and if the sheriff refused or failed forthwith to accept or receive the same, that the receiver should then deliver all of the plant property to Smith. The sheriff accepted this tender impressed with this judgment of the district court as to the ownership of the property involved. August 19, 1913, Smith executed to the Federal Title & Trust Company, defendant in error, a chattel mortgage upon all the plant property, and on August 22d that company made demand upon the sheriff therefor. Thereafter the sheriff, under order of the state court, offered for sale, and did sell for the sum of \$34,185.50, an undivided one-half interest in the plant property as the interest of W. F. Cody and G. W. Lillie, as distinguished from the undivided one-half interest claimed by Smith as owner with said G. W. Lillie. The state court refused to confirm this sale, and, thereafter, upon application of all the plaintiffs in the attachment suit, said court ordered all of said property sold before the final determination of that action. This order was executed by the sheriff, and all of the property was sold by him for the aggregate sum of \$49,257.25. Thereupon the defendant in error brought this suit against the sheriff and against Harry H. Tammen, Frederick G. Bonfils, and the United States Printing & Lithograph Company, plaintiffs in the attachment suit, for conversion of the personal property alleged to have been wrongfully attached, taken and sold. The jury returned a verdict in favor of plaintiff against defendants Nisbet, Bonfils, and Tammen, awarding damages in the sum of \$43,390.55; of this plaintiff remitted \$7,643.85, and judgment was entered in the sum of \$35,741.70. In the course of the trial the following admission was made: "All the acts done by the sheriff, in levying upon this property, were done in the first instance pursuant to instructions received from the attorneys of the United States Printing & Lithograph Company, viz. Mr. Bottom, Mr. Redmond, and Mr. Marks. And two days thereafter, when Bonfils and Tammen joined in the attachment suit, every act done by the sheriff, pursuant to this matter, from that time on, was done under directions and instructions from both Bonfils and Tammen and the Lithograph Company, and their attorneys, Bottom, Redmond and Marks."

It is conceded that the same attorneys have at all times represented the sheriff and all attaching creditors both in the state court and in this court.

Adolph Marks, of Chicago, Ill., and John T. Bottom, of Denver, Colo. (Charles H. Redmond and Frederick P. Smith, both of Denver, Colo., on the brief), for plaintiffs in error.

Ernest Morris, of Denver, Colo. (William W. Grant, Jr., of Denver, Colo., on the brief), for defendant in error.

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

VAN VALKENBURGH, District Judge (after stating the facts as above). Thirty-five errors were assigned to the action of the court below, and 14 were specified in the brief as relied upon by plaintiffs in error. Stripped of repetition and alternative statement, the following considerations are presented:

(1) That the court of bankruptcy was without jurisdiction to hear and adjudicate the claim of Thomas A. Smith as against third parties, to wit, the sheriff and attaching creditors; and, as an incident thereto, that the court erred in holding that the judgment of the bankruptcy court, in making the award to Smith, was binding upon plaintiffs in error; further, that Smith and his mortgagee should have been required to litigate the question of ownership in the state court.

(2) That the court erred in refusing to hold as matter of law that Thomas A. Smith and the plaintiff were estopped from asserting title to or interest in the property in question, and, in this connection, that certain evidence tendered by plaintiffs in error, was improperly excluded.

(3) That the court erred in directing a verdict for plaintiff and refusing to direct a verdict for the defendants.

(4) That the court erred in its charge respecting the measure of damages, that the verdict was excessive, and that a new trial should have been granted.

[1] It is well settled that, where the bankruptcy court has acquired lawful custody of property to which conflicting liens attach, it has jurisdiction to determine the priorities of such liens, though the trustee has no interest in such question; that the administration and distribution of the property of bankrupts is a proceeding in equity, and, when authorized by act of Congress, it becomes a branch of equity jurisprudence; that property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who the lawful owners are, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or interest in the property in its custody, or in its proceeds, is a power inherent in every court of equity, incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds. These principles are announced and confirmed in many decisions of this court and of the Supreme Court. *Chauncey et al. v. Dyke Bros. et al.*, 119 Fed. 1, 55 C. C. A. 579; *In re Rochford*, 124 Fed. 182, 59 C. C. A. 388; *In re Schermerhorn*, 145 Fed. 341, 76 C. C. A. 215; *In re Eppstein*, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465; *Mound Mines Co. v. Hawthorne et al.*, 173 Fed. 882, 97 C. C. A. 394; *Clay v. Waters*, 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897; *Le Master v. Spencer*, 203 Fed. 210, 121 C. C. A. 416; *Wells & Co. v. Sharp*, 208 Fed. 393, 125 C. C. A. 609; *Galbraith v. Grocery Co.*, 216 Fed. 842, 133 C. C. A. 46; *Abendroth v. Van Dolsen*, 131 U. S. 66, 9 Sup. Ct. 619, 33 L. Ed. 57; *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; *Murphy v. John Hoffman Co.*, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327.

In the foregoing cases nearly every phase of the question presented is discussed and adjudicated. In *Chauncey et al. v. Dyke Bros.*, supra, Judge Thayer made a comprehensive statement of the principle involved, which this court has often cited with approval:

"It will be conceded that the authority to try the issue which arose between the lien claimants, and to determine their respective priorities, could only be exercised by the bankrupt court in virtue of the fact that by the proceeding in bankruptcy it had acquired the custody of the res to which the controversy related. The bankrupt court had no right to assume jurisdiction of a controversy between third parties, in which the trustee was not concerned, and decide whose claim was paramount in equity, merely because the claimants happened to be creditors of the bankrupt estate, or merely because the liens affected a part of the bankrupt's property. The Bankruptcy Act confers no such authority. But if, in the exercise of its customary jurisdiction, the bankrupt court obtained the lawful custody of the res to which the liens related, or of a fund realized from its sale, then the duty, which was thereby devolved upon it, of distributing the fund among those to whom it rightfully belonged, did empower it to determine the relative priorities of the conflicting claims to the fund. A court which has lawfully acquired the custody of property or money must of necessity dispose of the same according to law; and, when conflicting claims are preferred, it is not bound to require the claimants

to litigate their claims in some other forum, and to adopt the judgment of that tribunal, although it may do so, but it is at liberty to dispose of such controversies according to its own ideas of right and justice. This is one of those incidental powers which may be exercised by any court of record, in the absence of an express prohibition."

[2] In the instant case both the show and plant property had long been in the possession of the bankrupt corporation, which had exercised dominion over it. It was attached by the Printing & Lithograph Company and by Bonfils and Tammen as the property of that corporation. Nisbet, the sheriff, levied upon it as such. When the petition in bankruptcy was filed, the liens created by these writs became subordinate to the provisions of the federal act (Act July 1, 1898, c. 541, 30 Stat. 544). In the exercise of its customary jurisdiction the court of bankruptcy ordered its receiver to take over all property held as that of the bankrupt. The usual demand was made upon the sheriff, who yielded a becoming obedience to the lawful mandate. The property was reduced to possession by the officers of the court, which thereby obtained the lawful custody of the res to which the claims in controversy related. Upon that court therefore devolved, not only the power, but the duty, to determine, by appropriate proceedings, to whom this property or any part of it rightfully belonged, and to make distribution and disposition accordingly. It decreed, and of this action there is no complaint, that the "plant" was not the property of the corporation. Thomas A. Smith intervened, and claimed that as his own. Bonfils and Tammen made voluntary answer to this intervening petition, denied its claim, and asserted a superior lien in the sheriff through attachment. To the extent of their own claim they represented the sheriff as fully as though that officer had been present in court.

It is true that a court of bankruptcy cannot make final disposition of property or funds in its possession as against third parties without affording to such, by proper notice or its equivalent, an opportunity to appear and assert their claims. Here, however, Smith, Bonfils and Tammen voluntarily appeared and submitted themselves to the jurisdiction of the court. They asked its judgment upon the issues joined. The challenge of the latter was directed at the claim of Smith, rather than at the jurisdiction of the court to decide between them. In any event, all these parties were before the court asserting a claim to property in its possession, and therefore, as to them, and as to the sheriff as representing Bonfils and Tammen, the requirements of due process were fully satisfied. Furthermore, if either party deemed himself aggrieved by the decree entered by the District Court, that decree was reviewable by appeal. *Mound Mines Co. v. Hawthorne*, 173 Fed. 882, 97 C. C. A. 394. None was taken. The property was turned back to the sheriff to be dealt with in accordance with the terms of that decree and otherwise in accordance with law; that officer accepted it and proceeded, originally, to sell subject to the adjudication of the court of bankruptcy. The state court, acting upon the representations of the attaching creditors, refused to confirm the sale thus made, and ordered all the property to be sold prior to final determination as that of the defendants in the attachment proceedings. This order was duly executed by the sheriff. Thereupon the defendant in

error, as mortgagee of the claimant Smith, brought this suit for conversion upon the ground that the property was that of Smith, and not of the defendants in the attachment suits.

[3] It will be remembered that it was admitted, in the course of the trial below, that every act done by the sheriff pursuant to this matter was done under directions and instructions from both Bonfils and Tammen and the Lithograph Company, the original attaching creditor. It was also admitted in the answer of plaintiffs in error that the sheriff was indemnified, before making the levy in the first instance, by statutory undertakings or bonds of indemnity, and that the defendants Bonfils and Tammen promised and agreed to save harmless that officer in any action he might take at their direction under and by virtue of the writs of attachment by them sued out. Under such circumstances, the right of the plaintiff below, the defendant in error here, to maintain this action is sustained by abundant authority, state and federal, and particularly in the jurisdiction in which this cause of action arose. When the property of a party is seized under a writ of attachment against another party, the owner is not confined in his remedy to intervention in the attachment suit. He may intervene, or he may bring suit in replevin or trover for conversion in any court of competent jurisdiction. *Schluter v. Jacobs*, 10 Colo. 449, 15 Pac. 813; *Wilde v. Rawles*, 13 Colo. 583, 22 Pac. 897; *Carpenter v. Innes*, 16 Colo. 165, 26 Pac. 140, 25 Am. St. Rep. 255; *Hannan v. Connett*, 10 Colo. App. 171, 50 Pac. 214. The attaching creditor, by giving a bond of indemnity to the sheriff, and still more where the sheriff acts under his directions and instructions, becomes liable as joint trespasser with that officer under the attachment. *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129; *Woodworth v. Gorsline*, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417. In the latter case it is further held that the judgment in a replevin suit determines as against all parties and privies the right to the possession of the property, and that such judgment for the return of property levied on by execution is conclusive against the plaintiffs in the execution who gave the sheriff an indemnity bond to make the levy. The same rule is, of course, applicable to a case of sale under a wrongful attachment.

The distinction between the case at bar and that of a suit on the attachment bond as in *Emerson & Co. v. Converse*, 106 Iowa, 330, 76 N. W. 705, is apparent. This action was brought originally, not only against the sheriff and Bonfils and Tammen, but against the United States Printing & Lithograph Company as well. The latter company demurred to the complaint, challenging the jurisdiction of the court upon the ground that the plaintiff was a citizen and resident of Pennsylvania and the defendant Printing & Lithograph Company was a citizen and resident of the state of Ohio. The demurrer was sustained, and that defendant is not before this court. The other defendants, however, appeared and answered. They had every opportunity to defend in their own right and in that of any interest represented by them. Whether or not the original order of the court of bankruptcy, awarding an undivided one-half interest in the property to Smith, was binding upon the sheriff, need not, therefore, be considered. The

court below had jurisdiction of the present controversy, and the judgment was binding on the plaintiffs in error, unless invalidated by some other of the errors assigned.

But complaint is made that the trial court treated said order as binding upon all the defendants before it, and predicated thereon its direction to the jury to find for the plaintiff in some amount. Neither the charge itself nor an examination of the record sustains this contention. The court did say that the one-half interest involved was decreed to Smith as against the defendants Bonfils and Tammen, but it went farther than that. It said:

"When we come to look at the testimony, we have upon this question the testimony of two witnesses. Colonel Cody testified that this property was owned by Major Lillie and Mr. Smith, but in just what proportion he did not know. Smith testified that he owned a half interest in the property, and went into detail concerning his interest. Now there is not a scintilla of evidence in this case to dispute that testimony, as I view the case. Therefore the court instructs you, as I stated a moment ago, the plaintiff is entitled to recover one-half the property upon which this mortgage was given."

The record supports the trial court in this respect. The evidence upon this point is so clearly preponderant, and of such a conclusive character, that a directed verdict, in the exercise of sound judicial discretion, was justified. *Railway Co. v. Oleson*, 213 Fed. 329, 130 C. C. A. 31.

[4] It is further contended by plaintiffs in error that the plaintiff below, as mortgagee of Thomas A. Smith, is estopped from claiming title to the property in question as against the attaching creditors because of the acts of the mortgagor in permitting the property to be held out to the world, and particularly to said creditors, as the property of the owner or owners of the exhibition. The court below declined to take this view, and its action is assigned as error. Reliance is placed upon section 3067 of the Colorado Statutes, which provides:

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive."

It should be noted at the outset that the ruling of the court, as to the ownership of an undivided one-half interest by Smith, was not based upon the bill of sale from Lillie to Smith of July 22, 1913. On the contrary, the court expressly held that that transfer was subordinate to the lien of the attachment writs. It is further to be noted that the chattel mortgage of defendant in error is relied upon only as conveying an interest of Smith which was superior to and unaffected by any rights flowing from these attachments. The evidence is that Smith was the original owner of this one-half interest in the plant property; that he, in company with Lillie, leased the plant property to the circus corporation. It is true that that corporation exercised dominion over the property, and the same was appropriately labeled to indicate its connection with the circus exhibition. The

uncontroverted proofs are that this was entirely in accord with the custom of the business in which the property was used. In such cases, the sale statute quoted above has no application. In the absence of conduct amounting to fraud or deceit, the owner of the property will not be precluded from asserting his title against the creditors of one having the custody and manual possession thereof. Such is the uniform holding of the Colorado courts. *Singer Mfg. Co. v. Converse*, 23 Colo. 247, 47 Pac. 264; *Same v. Bohon*, 31 Colo. 444, 72 Pac. 1097; *Morsch v. Lessig*, 45 Colo. 168, 100 Pac. 431.

[5] Furthermore, in Colorado an attaching creditor does not occupy the status of a bona fide purchaser for value, and an attachment can only operate upon the right and title of a debtor existing at the time of the levy. *Banks & Bros. v. Rice et al.*, 8 Colo. App. 217, 45 Pac. 515; *McMillen v. Gerstle*, 19 Colo. 98, 34 Pac. 681; *Gates Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667; *Mining & Milling Co. v. Lambert et al.*, 15 Colo. App. 445, 62 Pac. 966; *In re Appel Suit & Cloak Co. (D. C.)* 198 Fed. 322-325. So that, if the leased property in controversy actually belonged to Smith, it was unaffected by the levies under which plaintiffs in error claim.

These considerations dispose, in large measure, of the assignments of error predicated upon the exclusion of evidence. Furthermore, these alleged errors were not properly preserved as required by the rules of this court which provide that:

"When the error alleged is to the admission or to the rejection of evidence, the assignments of error shall quote the full substance of the evidence admitted or rejected."

However, an examination of the excluded evidence discloses that it is largely hearsay in its nature and otherwise negative and immaterial in character. We perceive no substantial error in its rejection.

It is urged that the court erred in its charge respecting the measure of damages. It said:

"I think in no possible view of the case, under the evidence, the amount that you find should be less than one-half of the amount the property was actually sold for. It was certainly worth that, because it brought that; and if you believe that on the date of the levy of the writ of attachment it was worth more than that, you are entitled to so find, if you can base your finding upon the evidence given upon the trial of the cause."

It is objected that the price at which the property was actually sold by the sheriff furnished no criterion of its actual value at the date of the levy. Whatever merit there may be in this contention is rendered immaterial by other language of the court, and by the subsequent action of the jury. Later in its charge the court said:

"The mortgagee is entitled to recover its value at the time of the levy of the attachment. Whatever that value may be you are to determine from the evidence in the case. Counsel discussed the testimony of several witnesses bearing upon that question. I leave that question to you, to exercise your good judgment, and return such amount as you can say the half interest in this property was fairly worth at the time of the levy."

The entire property was sold for \$49,257.25; one-half that amount is \$24,628.63. The jury returned a verdict for \$43,390.55, far in ex-

cess of the minimum suggested by the court. There was testimony fixing the value of the entire property as high as \$91,000. It was so inventoried by plaintiffs in error only a short time prior to the attachment. The plaintiff having remitted \$7,648.85, judgment was entered in the sum of \$35,741.70, and of this plaintiffs in error cannot reasonably complain. It is well settled that this court will not review the action of a trial court in overruling a motion for new trial. *Victor-American Fuel Co. v. Peccarich*, 209 Fed. 568, 126 C. C. A. 390.

No prejudicial error is disclosed in the record, and the judgment is accordingly affirmed.

CROWN ORCHARD CO., Inc., v. DENNIS et al.

(Circuit Court of Appeals, Fourth Circuit. December 17, 1915.)

No. 1371.

1. COURTS ⇨312—JURISDICTION OF FEDERAL COURT—SUIT BY ASSIGNEE—“ASSIGNEE OF CHOSE IN ACTION.”

A suit by the grantee of the standing timber on a tract of land from a prior grantee to enjoin the cutting and conversion of the timber by another is not one brought as “assignee of a chose in action,” within the meaning of Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. 1913, § 991), but one to prevent waste, and is within the jurisdiction of a federal court, where the requisite diversity of citizenship exists between the parties, without reference to the citizenship of complainant’s grantor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865–875; Dec. Dig. ⇨312.]

2. LOGS AND LOGGING ⇨3—CONVEYANCE OF STANDING TIMBER—CONSTRUCTION—TIME FOR REMOVAL.

A conveyance of the timber on a tract of land gave the purchaser eight years from its date in which to cut and remove the same, and further provided that in case it was not cut and removed within that time he should “have such additional time as may be desired * * * but * * * shall during the extended period pay interest on the original purchase price * * * year by year in advance. * * *” *Held*, that such provision was plain and unambiguous and could not be varied by parol evidence, that it entitled the purchaser to an extension on the terms stated as a matter of right for such time as might be reasonably desired, and that such right was not conditioned on his having commenced to cut the timber during the eight years.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6–12; Dec. Dig. ⇨3.]

3. LOGS AND LOGGING ⇨3—CONVEYANCE OF STANDING TIMBER—CONTRACT—TENDER OF PERFORMANCE—SUFFICIENCY.

A tender by the purchaser of the first year’s interest at the expiration of the eight years, and its unqualified refusal, was sufficient to preserve his right to the extension, without the necessity of its renewal in subsequent years.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6–12; Dec. Dig. ⇨3.]

4. INJUNCTION ⇨114—PARTIES—SUIT TO RESTRAIN WASTE.

A grantee of the purchaser after the expiration of the eight years succeeded to all his rights, including the right to maintain a suit in equity to prevent by injunction the cutting of timber by another; and

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

It is not a defense to such suit, which is one to prevent waste, that the exercise of the right of extension and the period of such extension were left by the contract optional with the purchaser.

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

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry G. Connor, Judge.

Suit in equity by the Crown Orchard Company, Incorporated, against William H. Dennis and others. Decree for defendants (220 Fed. 516), and complainant appeals. Reversed.

R. L. Montague, of Richmond, Va., Ernest L. Visanska, of Charleston, S. C., and L. D. Lide, of Marion, S. C. (Smythe & Visanska and Octavus Cohen, all of Charleston, S. C., on the brief), for appellant.

B. A. Hagood, of Charleston, S. C., and W. P. Pollock, of Cheraw, S. C., for appellees.

Before PRITCHARD and KNAPP, Circuit Judges, and WADDILL, District Judge.

KNAPP, Circuit Judge. The material facts appear to be these: E. J. Dennis, Sr., and A. H. Dennis, his wife, were the owners as tenants in common of a tract of land in Berkeley county, S. C., containing about 660 acres. By a "deed and contract" executed May 5, 1903, they conveyed, with certain reservations, all the timber on this tract of a specified size to Freeman S. Farr, trustee. September 24, 1904, Farr conveyed the timber rights thus acquired, together with the timber rights on a number of other tracts, to the Oneida Timber Company, a South Carolina corporation; and this company, on June 30, 1910, conveyed the same, with the standing timber on several other tracts, to the Midland Timber Company, also a South Carolina corporation. Later, on June 28, 1913, the timber rights in controversy were conveyed by the Midland Timber Company to the Crown Orchard Company, Incorporated, a Virginia corporation, which brings this suit. The case mainly turns upon the construction of the following paragraph in the original conveyance:

"That the said second party, his heirs, executors, administrators, and assigns, shall have, and the same is hereby granted to him or them, the period of eight (8) years, beginning from the date hereof, in which to cut and remove the said timber from the said land, and that in case the said timber is not cut and removed before the expiration of said period, then that the said second party, his heirs, executors, administrators, or assigns, shall have such additional time as may be desired for cutting and removing said timber; but, in the last-mentioned event, the said second party, his heirs, executors, administrators, or assigns, shall, during the extended period, pay interest on the original purchase price above mentioned, year by year, in advance, at the rate of six (6) per cent. per annum."

The Midland Timber Company was the owner of the timber rights in question when the 8 years expired, and no timber had been cut during that period. In the meantime E. J. Dennis had died intestate, and title to the land had vested in his widow and children. It also appears that one of the sons, the defendant William H. Dennis, had

conveyed his interest to his brother, E. J. Dennis. On the 29th of April, 1911, the Midland Timber Company, claiming the right under the above provision in the conveyance to "such additional time as may be desired," served upon the several owners of the land a notice to the effect that it desired 25 years' additional time in which to cut and remove the timber conveyed, and to use and enjoy the other privileges and easements granted, and offered to pay to the owners the sum of \$90, being 6 per cent. for one year upon the consideration of \$1,500 paid in 1903. Subsequently, and on or about the 5th of May, 1911, there was a tender of the money, which was refused. The record does not indicate that any particular reason was assigned for refusing to grant an extension and accept the money offered, though the owners apparently took the position that the right to an extension had been lost because the cutting and removal of the timber had not been commenced within the 8 years. Under date of December 2, 1913, the owners of the land executed to William H. Dennis, for the stated consideration of \$2,000, a conveyance of the timber on this tract, and he about that time began cutting the same. In January, 1914, this suit was commenced and a temporary injunction obtained. The trial resulted in a dismissal of the complaint, on grounds which will be referred to later, but the injunction was continued pending appeal to this court.

[1] At the threshold of the case is the contention, made for the first time in this court, that the suit is brought by the assignee of a chose in action whose assignor could not sue in a federal court, because it is a citizen of the same state as defendants, and therefore, under section 24 of the Judicial Code, the court below was wholly without jurisdiction. Whether this contention is well founded depends in our judgment upon the nature of the suit and the relief sought by complainant. We deem it unnecessary to determine the precise title or estate which was granted by the Dennises, and it may be assumed, as the defendants contend, that the provision for additional time was a mere option contract. And it may also be assumed that an action to enforce an executory contract relating to real estate, or for the specific performance of such a contract, comes within the statutory prohibition.

But we are of opinion that the case at bar is not of that character, and this seems to be made clear by examination of the pleadings. As appears from the bill of complaint, the sole purpose of this suit is to prevent by injunction trespass upon the timber in question by William H. Dennis, one of the defendants. He had no title to the land, or any part of it, when the other defendants, in December, 1913, executed a timber deed to him under which he seeks to justify the cutting operations which were stopped by the temporary injunction. The owners of the land were made defendants, apparently because the Supreme Court of South Carolina had held on the first appeal in the Prettyman Case, 93 S. C. 13, 75 S. E. 1012, that the landowner is a necessary party in all suits where standing timber is involved, and the only allegation against them is that they claim some interest in the matter in controversy. Nothing is set out in the bill which looks to

specific performance, or the enforcement of a contract obligation, and the answer is equally wanting in allegations appropriate to a suit for that purpose. In short, we are of opinion that the case made by the pleadings, and by the proof as well, comes within the rule laid down in *Ambler v. Eppinger*, 137 U. S. 480, 11 Sup. Ct. 173, 34 L. Ed. 765, which is cited with approval in the later case of *Brown v. Fletcher*, 235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374.

It is true that the *Ambler Case* was an action at law to recover damages for trespass and conversion by the cutting of timber, while this is a suit in equity to prevent such trespass and conversion on the ground that it would result in irreparable injury for which there is not adequate remedy at law. But we are unable to see any substantial difference between the two cases so far as the question of jurisdiction is concerned. The essential basis is the same in both of them, and it cannot be said that the latter any more than the former is brought upon a chose in action. However, we think all doubt is put at rest by the recent decision of the Supreme Court in *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856, which deals with a case of striking similarity to the one before us, and holds that it is not a suit for specific performance, but simply one to protect the property which complainant claims to own. The court says:

"Rightly understood, this is not a suit for specific performance. Its purpose is not to enforce an executory contract to give a lease, or even to enforce an executory promise in a lease already given, but to protect a present vested leasehold, amounting to a freehold interest, from continuing an irreparable injury calculated to accomplish its practical destruction. The complaint is not that performance of some promised act is being withheld or refused, but that complainants' vested freehold right is being wrongfully violated and impaired in a way which calls for preventive relief. In this respect the case is not materially different from what it would be if the complainants were claiming under an absolute conveyance rather than a lease. In a practical sense the suit is one to prevent waste, and it comes with ill grace for the defendants to say that they ought not to be restrained because perchance the complainants may some time exercise their option to surrender the lease."

In the light of these authorities we think it clear that the case at bar is within the jurisdiction of a federal court, because it does not belong to the class of cases referred to in section 24 of the Judicial Code.

[2] Coming to the merits of the controversy, we meet at once the question whether the right to an extension was forfeited by failure to commence cutting the timber within 8 years from the date of the grant. If this question be answered in the affirmative, the case is of course at an end, and the decree of the trial court should be affirmed. But we are of opinion that the question should not be so answered. The terms of the conveyance plainly contemplate an extension of the 8-year period named, not upon condition that cutting be commenced within that period, but as a matter of right which the grantee or his assigns might exercise in their discretion by paying the stipulated sum "year by year in advance." There is no ambiguity in the language providing for additional time, and we therefore perceive no ground upon which parol evidence was admissible to show the understanding of the parties as to when cutting should be commenced. Indeed, such

evidence tended to vary, if not to contradict, the written instrument, and for that reason was improperly received. The grantor was a lawyer of large experience in the preparation of timber contracts, and it must be assumed that he understood the nature and extent of the rights he was granting, and meant precisely what the written words imply. If it was intended that there should be no extension unless cutting were commenced within the 8 years, it is extremely difficult to believe that such a condition would not have been plainly expressed; and it is equally difficult to believe that he would not have fixed some shorter time within which cutting was to be commenced, if he did not intend that it should be optional with the purchaser.

Upon the point now considered we find no difference between this case and the Prettyman Case, so much discussed by counsel. 97 S. C. 247, 81 S. E. 484. The corresponding provision of the deed in that case is almost identical with the paragraph above quoted, except that the time period named was 10 years from date. And the precise claim was made that the grantee and its assigns were not entitled to an extension beyond the first period, because they did not commence to cut and remove the timber within that period. The trial court in a careful opinion rejected the contention, and this opinion was approved and adopted by the Supreme Court of the state on appeal.

We think the case at bar, like the Prettyman Case, is clearly distinguishable from other South Carolina timber cases in which parol testimony has been received. When the contract or conveyance fixes a definite period *after the grantee has commenced cutting*, the courts properly allow parol proof of the intention and understanding of the parties as to when cutting was to begin, or else hold that a reasonable time was necessarily implied, since otherwise the grantee could delay cutting indefinitely and thus defeat the purpose of the grantor. In other words, parol proof is admissible in such a case for the purpose of determining when the period for removal commences. Such proof does not vary or contradict the written instrument, but merely supplies an omitted provision. In this case the period of 8 years is specified to begin "from the date hereof." Both the beginning and the end of the named period are thus made certain by the grant itself, and so there is no ground or reason for the parol proof which was admitted in the Flagler Case, 89 S. C. 328, 71 S. E. 849, for example, and other cases where the contract was silent or indefinite as to the time of beginning.

It is not necessary for us to affirm that the Prettyman Case established a rule of property in South Carolina which we are bound to apply. We follow it upon the question in dispute, not merely out of deference to the court which decided it, but because the decision commends itself to our judgment as just and correct.

[3] It must therefore be held that the Midland Timber Company, under the plain terms of the deed, had the right to additional time for cutting and removing the timber by complying with the condition on which that right could be exercised, namely, the payment of 6 per cent. per annum upon the original consideration. This sum was duly tendered to the owners of the land and by them refused. They

did not put their refusal upon the ground that the company had asked for a longer extension than it was entitled to, or upon any other ground of objection which the company had in its power to remove. Their contention evidently was, as already stated, that the right to any extension had been lost by failure to commence cutting within the 8 years, and their refusal was made in such manner and under such circumstances as relieved the company from renewing the tender yearly thereafter. The law does not require a vain thing, and it was not necessary, after the first year, to go through the form of making an offer which the owners had in effect declared they would not accept. In short, the Midland Timber Company did all that was needful to comply with the condition of the deed and thus preserve its right to have additional time for cutting and removing the timber. And this right continued without impairment until it was transferred to complainant in June, 1913. For we think it clear under the conceded facts of this case that the failure to begin cutting in the meantime—that is, within the next 2 years or thereabouts after the 8-year period expired—did not exhaust the additional time to which the Midland Timber Company was entitled; and this was equally the case as to the period between the transfer to complainant and the bringing of this suit. In other words, if the right to an extension survived the failure to commence cutting during the 8 years, as we hold it did, that right was not subsequently lost by failure to begin cutting in the interval before the commencement of this suit. Stated in another way, if the Midland Timber Company had continued its ownership of the timber in question, without transfer to complainant, its right to cut and remove would not have been forfeited by lapse of time after the expiration of the 8-year period.

[4] But the transfer actually made in June, 1913, put complainant in the place of the Midland Timber Company and had the effect of giving to it all the rights which its assignor possessed, including the right to maintain a suit to prevent by injunction the taking of its property. On the face of it complainant was entitled to the relief sought, for the situation then existing was one which ordinarily would be recognized as justifying the interference of a court of equity. Complainant had acquired all the rights, privileges, and interests which the Dennises conveyed to Farr, the very essence of which was the right to cut and remove the timber originally paid for; and this right had been preserved by the action of its predecessor in complying, so far as it could, with the condition upon which was granted such additional time as might be desired. It found, a few months after its ownership was acquired, that the defendant William H. Dennis had put up a small sawmill on the tract and was commencing to cut the timber which complainant claimed as belonging to itself, and it thereupon filed an appropriate bill and obtained an injunction to prevent further trespass upon and waste of its property. In our judgment it is entitled to a permanent injunction, unless the grounds upon which injunction has been denied are sufficient in the exercise of judicial discretion for refusing relief, and those grounds will now be briefly examined.

In the first place, some doubt is suggested as to the charter power of complainant to acquire the rights conveyed by the Midland Timber Company; but we deem it sufficient to say, without discussing the point, that examination of the charter satisfies us that the legal capacity of complainant is ample, even if it be conceded that defendants can raise the question of *ultra vires*.

It is also suggested, as bearing upon the asserted lack of equity, that complainant is a corporation of small capital, that it is not in the business of cutting timber, and that it has no other timber property in South Carolina. But we fail to see how facts of this sort afford a reason for denying to it the protection of its property. What difference does it make whether complainant's capital is large or small, or whether it is equipped for lumbering operations? Granting that it is not, it appears nevertheless to be no worse off in that regard than any of its predecessors. The original grantee was evidently known by the grantors to be buying up timber lands as trustee for the purpose of transferring the rights acquired to other parties. The Oneida Timber Company and the Midland Timber Company are both holding companies, and neither of them has carried on the business of cutting timber for market. Moreover, the argument here referred to seems to prove too much, since it implies that, if the suit were brought by a company strong financially and suitably equipped for cutting the timber from this tract, it would presumably be entitled to a permanent injunction. We are convinced that want of equity, as that phrase is commonly understood, cannot be predicated upon the facts here considered. If the right to cut and remove the timber from this tract was preserved for an additional time beyond the 8 years by the tender and offer of the Midland Company in accordance with the terms of the deed, and if that right was transferred to complainant and continued in force up to the time when this suit was brought, it should now be protected from invasion by the effective interposition of a court of equity, although complainant may not itself be able to cut and remove the timber or have the intention to do so.

As to other reasons assigned for dismissing the complaint we refer again to the decision of the Supreme Court, rendered since this case was heard below, in *Guffey v. Smith*, *supra*. Except that it did not involve the right of extension, which we hold in this case survived the failure to begin operations within the 8-year period, it appears to us to sustain fully the plaintiff's contention. In that case the want of mutuality was asserted because the lessee had the reserved option to surrender the lease at any time, just as in this case it is said there is want of mutuality because the grantee has the option of an extension and may exercise it for one or more years and then discontinue at pleasure; that is, since the Dennises cannot enforce an extension or control the period of extension, therefore it is claimed to be inequitable to enforce an extension against them at the will and in the interest of the grantees. With reference to this question the Supreme Court says:

"It next is insisted that according to the general principles and rules of equity administered in the federal courts the surrender clause constitutes an

insuperable obstacle to granting the relief sought; the argument being that, as the complainants have a reserved option to surrender the lease at any time, it cannot be specifically enforced against them and therefore cannot be similarly enforced in their favor. The rule intended to be invoked has to do with the specific performance of executory contracts, is restrained by many exceptions, and has been the subject of divergent opinions on the part of jurists and text-writers. * * * We think this option, which has not been exercised, and may never be, is not an obstacle to the relief sought."

Without quoting more at length from this recent decision of the Supreme Court, it is sufficient to say that the principles therein announced appear to warrant us in holding that the instant case is not one for specific performance, but for injunctive relief; that it is a proper case for injunction, because complainant has no adequate remedy at law; that the extension period provided for in the deed does not create a tenancy at will; that there is no want of mutuality; that subsequent grantees succeed to all the rights of the original grantee; that enforcement of the rights conveyed would not be harsh or unconscionable; that the value of the timber at the date of the sale must be taken into account in determining whether the consideration is adequate; and that the South Carolina decisions, so far as they establish a rule of property, are binding upon this court.

As to the alleged inadequacy of consideration, which is urged as one of the reasons for refusing an injunction, it may be noted that 10 years later the owners of the land granted to William H. Dennis substantially the same right to cut and remove the timber from this tract for \$2,000, which he had not paid when the case was tried, and that in the answer of the Dennises it is denied that the matter in controversy herein exceeds the sum and value of \$3,000. In view of these facts, and bearing in mind that the owners have had the use of \$1,500 since 1903, we are unable to see that it is unconscionable or in any sense inequitable to enforce against them the rights originally conveyed to which the complainant has succeeded.

The opinion of the court below holds "that in no aspect of the case is the complainant entitled to a decree extending the period for 25 years," and we are not prepared to say that this is an erroneous conclusion. The right granted in this regard is measured by the terms of the deed, which are that the grantee and his assigns "shall have such additional time as may be desired for cutting and removing said timber," by paying in advance the yearly sum of \$90. But this language should be so construed as to give effect to the intention of the parties. Neither the Midland Timber Company, nor the complainant as its successor, could exercise the right to an extension for a period fixed by an arbitrary or capricious desire. It must be an honest and justifiable desire, not a pretended or fantastic desire. In short, we take the phrase to mean such additional time as may be *reasonably* desired by the party having the right to an extension. That a considerable period was in contemplation, and that the extension should have reference to substantial needs and business requirements, is inferable from the use of the phrase "as may be desired," and from the provision for paying the 6 per cent. "year by year." But the language is not to be stretched beyond its fair import, and this excludes an insincere or un-

real desire. Manifestly, in this view the additional time which may be allowed becomes a question of fact, to be determined by consideration of all the circumstances and the application of the rule of reason.

Without prolonging the discussion, we sum up our conclusion as follows:

First. The right to an extension was not lost by failure to commence cutting within the 8 years named in the conveyance.

Second. The complainant has succeeded to all the rights of the original grantee, including the right to additional time for cutting and removing the timber, and the latter right has not been lost through lapse of time or otherwise.

Third. The complainant is entitled to a permanent injunction to prevent an invasion of its property rights because it has no adequate remedy at law.

Fourth. It will be for the court below, to which the case will be remanded, to determine by such means as may be deemed most appropriate the maximum period of extension to which complainant is entitled and to take further proceedings in accordance with this opinion.

Reversed.

LEARY et al. v. UNITED STATES et al.

KELLOGG v. SAME.

(Circuit Court of Appeals, Fourth Circuit. November 12, 1915.)

Nos. 1277, 1278.

CORPORATIONS ⇨123—PLEDGE OF STOCK—PLEDGEE AS BONA FIDE PURCHASER.

A federal prisoner, to indemnify the surety on his bail bond pending proceedings in New York for his removal to Georgia for trial, deposited certain stocks with a trustee. The bond was subsequently renewed, and at the conclusion of the proceedings another bond given to secure the appearance of the defendant in Georgia. All were signed by the same surety, and the stocks or others substituted for them remained in the hands of the trustee. The last bond was forfeited, and the judgment recovered thereon was paid by the estate of the surety. In a suit by the United States to recover the stocks, there was evidence tending to show that they had been bought with funds of which the defendant had defrauded the government. *Held*, on the evidence, that, conceding such fact, neither the trustee nor the beneficiary of the trust had any knowledge that the stocks were not honestly obtained, also that the evidence established an agreement that they should remain for the protection of the surety as to all, and not merely the first bond, and that the right of his estate to the same was superior to that of the United States.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. ⇨123.]

Appeals from the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Suits in equity by the United States against Luther Lafin Kellogg and Daniel J. Leary and George Leary, administrators of the estate

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

of James D. Leary, deceased. Decree for complainant, from which defendants separately appeal. Reversed.

Aubrey E. Strode, of Amherst, Va., and J. T. Coleman, of Lynchburg, Va. (Coleman, Easley & Coleman, of Lynchburg, Va., on the brief), for appellant administrators.

Abram J. Rose, of New York City, for appellant Kellogg.
Marion Erwin, Sp. Asst. Atty. Gen., for the United States.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

KNAPP, Circuit Judge. For a preliminary statement of facts reference is made to the opinion of this court on the former appeal (184 Fed. 433, 107 C. C. A. 27), and the opinion of the Supreme Court, to which the case was afterwards taken (224 U. S. 567, 32 Sup. Ct. 599, 56 L. Ed. 889, Ann. Cas. 1913D, 1029).

The Supreme Court held that the petition filed by Mrs. Leary "showed a sufficient right to intervene," and that she ought to be allowed to try to prove her case, notwithstanding the objections which the courts below had sustained. Following this decision an amended petition was filed in May, 1913, which is substantially the same as the original, with the addition of a paragraph from the first answer of Kellogg, and an averment that she has paid the judgment of the United States against the Leary estate. The claims set up in this petition are controverted in the government's answer thereto, but the pleadings raise no issue between Mrs. Leary and Kellogg. There was a full hearing of the case in the court below, and a final decree entered in December, 1913, to the effect that the 400 shares of Norfolk & Western stock, which are the subject of controversy, belong to complainant, the United States of America, "free from the claims of all other parties hereto." No findings were made or opinion filed by the learned District Judge, and we are therefore not advised of the grounds upon which he based his decision. Separate appeals were taken by Mrs. Leary and Kellogg, but they are consolidated in a single record and may be disposed of in one opinion.

For the purposes of this appeal we shall assume, without discussing the evidence, that the Norfolk & Western shares, or securities for which they were substituted, were purchased by Greene with funds of which he had defrauded the government. It follows from this that the intervention cannot be sustained on the theory that the United States has failed to prove with requisite certainty that moneys stolen from it are represented by the stock in question; and nothing further need be said upon that branch of the case.

The first bond signed by Leary was on the 14th of December, 1899, and we think it must be held that neither Leary nor Kellogg then knew or had reason to believe that the securities which Greene placed in Kellogg's hands about that time were not honestly acquired. It is not claimed that Leary had any knowledge or even suspicion of Greene's misconduct, and the only ground upon which knowledge is sought to be imputed to Kellogg is the fact that he was Greene's at-

torney. But this of itself is not enough to justify the inference that he either knew or ought to have known that the securities which Greene turned over to him were the fruits of criminal wrongdoing. The presumption is to the contrary. *Evans v. Mansur & Tebbetts Implement Co.*, 87 Fed. 275, 30 C. C. A. 640. Especially is this so since it appears that Kellogg had no personal connection with the defense of Greene in the criminal proceedings instituted against him until long after the transfer of the securities in question. Moreover, Kellogg meets the implication that he was cognizant of Greene's fraudulent conduct with explicit and positive denial. In an affidavit of October 27, 1913, received under stipulation as testimony, he says:

"That at the time of the institution of the proceedings by the United States against said Greene, based on the alleged fraudulent transactions referred to in the bill herein, viz. in December, 1899, and on December 14, 1899, when there was deposited with him certain securities, deponent had no knowledge of the sources from which said securities were acquired, other than the fact that they were turned over to deponent by said Greene as the owner thereof. That said securities were received by deponent in absolute good faith, and without suspicion or notice of any flaw or taint in their title, or of any fraud in their acquisition, or of any adverse claim whatsoever. * * * That at the time of the receipt of said securities, and during the pendency of the proceedings instituted by the United States, said Greene denied he had been in any way guilty of any fraud in connection with the matters referred to in the complaint, and deponent so believed and now believes."

In this affidavit he further states with some detail the circumstances of his acquaintance and professional employment by Greene, the enterprises and litigation in which Greene was engaged, with other facts tending to show that Greene was a man of standing and importance in the business world and possessed of considerable means. These statements are in no wise contradicted, and they indicate that Kellogg was warranted in assuming without question that the securities turned over to him had been honestly acquired by Greene in business transactions with which the government was not concerned, and that his ownership of the same was free from suspicion. In short, the evidence fails to sustain the government's contention respecting Kellogg's knowledge, and it must therefore be held that he came into possession of the securities in question without reason to suspect that they had been purchased with stolen money.

Accepting the fact that Kellogg acted in good faith in receiving the stock transferred to him, and that his title thereto was untainted by knowledge or suspicion of the frauds committed by Greene, the case here presented, so far as the merits are concerned, comes directly to the question whether the bond of January 20, 1902, which Greene forfeited by failure to appear, and which Leary's estate afterwards had to pay, was signed by Leary "upon the condition and understanding," as alleged in the petition, that the securities held by Kellogg should remain and continue in his hands as indemnity to Leary for signing the last-mentioned bond. The answer to this question depends upon the probative force of the evidence offered in support of the allegation, and that evidence will now be considered. It consists in part of the following letters:

"New York, December 14, 1899.

"James D. Leary, Esq.

"My dear Sir: Captain Benjamin D. Greene has placed in my hands, as indemnity to you for becoming his bondsman in the matter of the United States against Greene, Gaynor, and others now pending in the District Court, three hundred shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company. It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be established, that it is to be applied in payment of your obligation. I am,

"Yours truly,

L. Laffin Kellogg."

"New York, May 21st, 1901.

"James D. Leary, Esq.

"My dear Mr. Leary: It will be necessary to renew the bail given by you for Capt. Greene, and for which I hold the security for your protection, on Thursday morning next at 10:30. Will you kindly come to this office for that purpose about 10:15. I am very sorry to trouble you but it cannot be helped. This new bond is to take the place of the old one without additional liability.

"Yours truly,

L. Laffin Kellogg."

"New York, June 6th, 1901.

"James D. Leary, Esq.

"My dear Mr. Leary: I am obliged to trouble you again to renew the bond in the Greene and Gaynor matter. I will have to trouble you to be in court between ten and half past ten Saturday morning. The reason for the matter is not that you have to incur any additional liability, but simply to enable them to carry their case to the United States Supreme Court. All the parties and all the other bondsmen will be on hand before Judge Lacombe by a special arrangement (as the judge is going away) on Saturday morning at half past ten. Please let me hear from you to-day as the matter is most important. With kindest regards, and hoping that you did not suffer from your misstep in the office, I am,

"Yours very truly,

L. Laffin Kellogg."

In the original answer of Kellogg, verified March 1, 1904, which was also to be treated as an affidavit, the following allegations appear:

"That at the time of the arrest of said Benjamin D. Greene in December, 1899, he was held to bail in the sum of \$25,000. That a friend and client of defendant, one Leary, became surety on the bond for his appearance before the commissioner in the sum of \$25,000, on defendant's giving to said Leary a written guaranty to hold him (Leary) harmless from loss or damage by reason of his becoming surety for said Greene. That at about that time said Greene deposited with defendant some securities for the purpose of indemnifying defendant against loss by reason of having indemnified said Leary, with the understanding that at any time he desired he might withdraw the securities so deposited and dispose of them, substituting others in their place. That the securities so deposited were also to be held by the respondent to secure him for the fees and disbursements that might be incurred by him, or his firm, in defending said Greene, or in caring for his interests in any proceedings brought by the United States against him, or in any other matters; there being several matters of litigation, in which said Greene was interested, pending in the respondent's office. That from time to time the securities so deposited were withdrawn by Greene, and others substituted in their place, and that the Norfolk & Western stock, now in defendant's hands, are securities that the defendant deposited or substituted in place of those originally deposited, and the respondent now avers that he holds said Norfolk & Western stock as a bona fide holder, as security for the obligation that he is under to the said Leary by reason of his having become surety on said bond, or by reason of the said Leary having gone upon another bond for the sum of \$40,000 for Greene's appearance in the state of Georgia after the conclusion of the said removal proceedings; the agreement to indemnify Leary having been extended to cover said last-mentioned bonds, and also to secure

the payment to the respondent, and to his firm, of the various sums of money that he has advanced and for services rendered for said Greene in various matters since that time."

If the amended answer of Kellogg, verified October 3, 1913, by omission or statement, appears to be at variance in any respect with the allegations above quoted, it is sufficient to say that this answer was allowed to be filed only against the United States, and not as against Mrs. Leary. It may be observed, however, that the amended answer sets up no claim of existing indebtedness against Greene for the payment of which the Norfolk & Western stock is held. Indeed, it is inferable from the record, as we understand it, that Kellogg does not now assert any personal claim to the fund in litigation, except perhaps for such sum as he may ask to have allowed for counsel fees and expenses in protecting the trust.

The foregoing is in substance the proof which Mrs. Leary makes of her right to the stock in question as against the United States. Does it show with sufficient certainty an agreement to protect Leary from liability on the forfeited bail bond, and is the Norfolk & Western stock the indemnity fund contemplated by the parties? We are of opinion that these questions should be answered in the affirmative. That some contract was made for the protection of Leary can hardly be denied. The Kellogg letter of December 14, 1899, admits of no other explanation. It shows that a specified security was placed by Greene in the hands of Kellogg for the express purpose of indemnifying Leary against liability as Greene's bondsman in the matter therein mentioned, namely, "the matter of the United States against Greene." True, it says that the stock described is to be held "until you are released from the *said* bond," which was the bond that day executed. But, in view of what followed, is it not quite unreasonable to suppose that these words expressed the full intent and purpose for which the stock was placed in Kellogg's hands? Plainly the "matter" referred to was the removal of Greene from New York, where he was arrested, to the Southern district of Georgia, to answer an indictment there found against him; and it is undeniable that all the bonds signed by Leary, including the one forfeited, were given at various stages of the removal proceedings, and that all of them had reference to his appearance for trial in the district where he was indicted. They were different parts, so to speak, of a single transaction. It is therefore difficult to believe that the indemnity promise was intended to be limited to the first obligation. Kellogg evidently had no such understanding when he wrote Leary on the 21st of May, 1901, more than five months later, that it would be necessary for him "to *renew* the bail given by you for Captain Greene, and for which I hold the security for your protection," and closed his letter by saying, "This new bond is to take the place of the old one without additional liability." This is a clear declaration that the security he held would cover the renewed obligation, and we do not see that anything else can be made of it.

In the letter of June 6, 1901, when occasion arose for another bond, Kellogg writes, "I am obliged to trouble you again to *renew* the bond

in the Greene and Gaynor matter," and goes on to assure Leary that he will not thereby incur any increase of liability. But this assurance necessarily involved the assertion that the stock in his hands would be held for Leary's security. It is true that no letter is produced which refers specifically to the defaulted bond of January 20, 1902; but Kellogg's answer, barely two years later, quoted from above, avers in substance that the "agreement" to indemnify Leary was extended to cover the \$40,000 bond given for Greene's appearance in Georgia after the conclusion of the removal proceedings, and this averment finds strong support in the situation then existing and the previous relations of the parties. Indeed, it is not to be supposed that Leary, who required security before signing the initial bond, would have been willing to incur increased liability on the final bond without provision for his protection. The probabilities all point in the opposite direction.

That the promise to indemnify Leary covered his last obligation is further indicated by the fact, not otherwise explained, that the Norfolk & Western stock has continued to remain in Kellogg's hands, although it appears that other securities were long ago returned to Greene and all transactions between them concluded. And in this connection it may be noted that Kellogg on this appeal assigns error in the decision of the court below, awarding the stock to the United States, "because the said securities had been deposited under an agreement that they should be held by the defendant Kellogg as indemnity for loss by reason of James D. Leary becoming bail for said Benjamin D. Greene, and thereby an equitable lien was created thereon in favor of the defendant Kellogg as trustee for the benefit of the Leary estate."

It seems evident that Greene could not be heard to say, after the continuing force of the indemnity promise had been twice recognized, that it was not intended to cover the last obligation assumed, merely because Leary did not get another written assurance that the stock in Kellogg's hands was held for his protection. And we are of opinion that the United States has no better standing than Greene to deny the continuing force of an agreement to which it was not a party, and as to which Leary had no reason to suppose when it was made that the United States had or could have the slightest interest.

Nor does it appear to us doubtful that the Norfolk & Western stock, which stands in the name of Kellogg, constitutes the trust fund from which Leary's estate may claim reimbursement. Kellogg says that Greene reserved the right to exchange the securities he transferred, and that the Norfolk & Western stock was in fact substituted for the Delaware, Lackawanna & Western stock originally deposited. If the stock first placed in Kellogg's hands was impressed with a trust in favor of Leary, the stock that replaced it became impressed with the same trust when the substitution took place, because it was then set apart and pledged for the protection of Leary.

Of the contention that Mrs. Leary's claim rests wholly upon an implied promise the Supreme Court said:

"We lay on one side the suggestion that the intervention goes only upon an implied contract in its proper sense of an obligation raised by the law irrespective of any real promise. That would seem to us a perverted interpretation of the words 'upon the understanding and condition,' even if the contract were only a general one to indemnify; but a contract that certain specific stock in the hands of a trustee should be held as security for a specific contingent claim could not exist unless it was express. It would be none the less express if it was conveyed by acts importing it than if it was stated in words."

The case presented by the record is surely not wanting in proof of a "real promise." Kellogg's letter of December 14, 1899, says in so many words that Greene had placed 300 shares of Delaware, Lackawanna & Western stock in his hands to indemnify Leary as bondsman for Greene, and this of itself is ample evidence of an express contract. The only subject of question is the scope and extent of the contract actually made. That it covered the bond of January 20, 1902, and was so intended, seems established with reasonable certainty by the written declarations of Kellogg, by the nature of the situation in which the parties were placed, and by the unmistakable import of their acts.

We are therefore constrained to hold, taking all the facts and circumstances into account, that the stock which Greene turned over to Kellogg was intended to be a continuing security for the protection of Leary as the bondsman of Greene in the removal proceedings, and that it constituted an indemnity fund, not only for the prior bonds which were exonerated, but for the final obligation under which his estate has been compelled to pay the judgment in favor of the United States.

The objection that Greene was not made a party to the intervention needs but a word of comment. The record shows that Greene had actual notice of the proceeding by the personal service upon him of a copy of the petition and proposed bill of intervention, with a copy of the order of the court citing him to show cause "against the granting of leave to file said petition and the granting of the prayers of said petition"; and this order stated that "such service of copies shall be sufficient service to entitle the court to proceed herein and to adjudicate upon the filing of said petition and the prayers thereof." The amended petition differs from the original in no material respect so far as Greene is concerned, and he cannot be heard to complain because he was not notified of the amended intervention. Moreover, Greene had long before suffered default, and the government had taken a pro confesso decree against him. This operated to divest him of any interest in the stock, certainly as against the United States, and it is only in a technical sense that he can be said to be a necessary party to the intervention. The contest here is between Leary's estate and the government, and the government is protected from Greene by the pro confesso decree, whether the estate wins or loses. We are not disposed to sustain an objection which apparently was not made on the former appeal, either in this court or the Supreme Court, and which in no aspect of the case is of any practical importance.

For the reasons above stated, we are of opinion that the estate of

Leary has established a claim to the stock in question which is superior to the claim of the United States, and it follows that the decree appealed from must be reversed.

ALASKA NORTHERN RY. CO. v. MUNICIPALITY OF SEWARD.

(Circuit Court of Appeals, Ninth Circuit. February 21, 1916.)

No. 2581.

1. TAXATION ⇨203—EXEMPTIONS—CONSTRUING AGAINST EXEMPTIONS.

Exemptions from taxation are not favored, and will not be allowed, unless it is made clearly to appear that such was the statutory intent; every reasonable doubt being resolved in favor of the taxing power.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 343; Dec. Dig. ⇨203.]

2. MUNICIPAL CORPORATIONS ⇨966—POWERS OF MUNICIPAL CORPORATIONS—STATUTORY PROVISIONS.

Act Aug. 24, 1912, c. 387, 37 Stat. 512, after granting to the Legislature of Alaska, thereby created, various powers and imposing various limitations, restrictions, and conditions, not only upon the Legislature, but upon municipal corporations, provides in section 9 (Comp. St. 1913, § 3536) that no tax shall be levied for territorial purposes in excess of 1 per cent. upon the assessed valuation of property therein, nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of 2 per cent. of the assessed valuation of property within the town, provided that Congress reserves the exclusive power for five years to fix and impose any tax or taxes upon railways or railway property in Alaska. *Held*, that this prohibits municipal corporations, as well as the territorial Legislature, from imposing any tax on railways or railway property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2045-2061; Dec. Dig. ⇨966.]

Gilbert, Circuit Judge, dissenting.

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

Proceeding by the Municipality of Seward to sell property of the Alaska Northern Railway Company for delinquent taxes. Judgment for the petitioner, and the defendant brings error. Reversed and remanded, with directions.

S. O. Morford, of Seward, Alaska, for plaintiff in error.

J. Lindley Green, of Seward, Alaska, for defendant in error.

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

ROSS, Circuit Judge. [1] The question in this case is whether that portion of the property of the plaintiff in error railway company that is situated within the limits of the municipality of Seward, territory of Alaska, and which is used and necessary for the purposes of the railway, is by statute of the United States exempted from taxation by the defendant in error. That such exemptions are not favored, and will not be allowed unless it is made clearly to appear that such was the

statutory intent, is well settled; every reasonable doubt being resolved in favor of the taxing power.

It must be admitted that the property upon which the taxes in question were levied was exempt from taxation while in the hands of the predecessor in interest of the plaintiff in error, viz. the Alaska Central Railway Company, since the fifth section of the act of Congress entitled "An act to extend the time for the completion of the Alaska Central Railway Company, and for other purposes" (Act June 30, 1906, c. 3921, 34 Stat. 798) expressly declares:

"Said company shall be exempt from license tax and tax on its railway and railway property during the period of construction and for five years thereafter: Provided, that the total period of exemption shall not exceed ten years from the time of the passage of this act."

Did that immunity or privilege follow the property into the hands of the Alaska Northern Railway Company? In the case of *Norfolk & Western Railway v. Pendleton*, 156 U. S. 667, 673, 15 Sup. Ct. 413, 415 (39 L. Ed. 574) the Supreme Court held that, in the absence of express statutory directions or of an equivalent implication by necessary construction, provisions in restriction of the right of the state to tax the property or to regulate the affairs of its corporations did not pass to new corporations succeeding by consolidation or by purchase under foreclosure to the property and ordinary franchises of the first grantee, saying:

"We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction, of the right of the state to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee; that a mortgage of the franchises and property of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but to reorganize as a new corporation subject to the laws existing at the time of the reorganization. This we have stated to be a salutary rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed strictissimi juris. *Morgan v. Louisiana*, 93 U. S. 217 [23 L. Ed. 860]; *Wilson v. Gaines*, 103 U. S. 417 [26 L. Ed. 401]; *Chesapeake & Ohio Railway v. Miller*, 114 U. S. 176 [5 Sup. Ct. 813, 29 L. Ed. 121]."

It is urged on behalf of the plaintiff in error that the equivalent implication of the intent of Congress that the exemption from taxation of the railway property here in question should pass to the successors in interest of the Alaska Central Railway Company, necessarily results from the true construction of the act of June 30, 1906, which, in extending the time for the completion of its railway also in terms declared that "the powers of said company are enlarged" in certain particulars—that is to say, by the first section of the act the time for the filing by the company of a map of the definite location of its road and the time for the completion of its construction was extended; by the second section there was granted to the company certain described lands for terminal purposes upon certain prescribed terms and conditions; by the third section there was granted to the company the

right to purchase at \$1.25 an acre a certain reserved tract of land; by the fourth section the company was granted the right to locate its right of way along the navigable waters of Alaska under certain prescribed conditions; the fifth section is the exemption clause above quoted; and by the sixth section Congress reserved the right to alter, amend, or repeal the act.

[2] Whether or not the foregoing *enlargement* of the powers that had theretofore been conferred on the Central Railway Company, taken in connection with the provision exempting that company from "tax on its railway and railway property during the period of construction and for five years thereafter," provided that the total period of such exemption should not exceed ten years from the time of the passage of the act, and in connection with the well-known fact that the legislation was designed to aid the building of a railroad in a new, distant, and sparsely settled region, manifests a clear intent on the part of Congress that the exemption from taxation should follow the property during the period specified into whosoever hands it should pass, and thus take the case out of the principle announced by the Supreme Court in the cases above referred to, we find unnecessary to decide, for the reason that we are of the opinion that by its subsequent act of August 24, 1912 (37 Stat. 512), Congress reserved to itself the exclusive power for five years from the date of that act to fix and impose any and all taxes upon railways and railway property in Alaska, thereby necessarily repealing or suspending, as the case may be, by implication, any inconsistent provision of any character.

It must be remembered that in all of its legislation with respect to Alaska Congress was dealing with a section of the country the development of which is necessarily attended with hard conditions. Its long winter climate, and the smallness of its population, necessarily make the building of railroads a costly and difficult matter, which fact no doubt entered into the consideration of the lawmakers in enacting the exemption clause found in section 9 of the last-mentioned act, which is entitled "An act to create a legislative assembly in the territory of Alaska, to confer legislative power thereon, and for other purposes."

It is urged on behalf of the defendant in error that the sole purpose of the exemption clause contained in section 9 of that act was aimed at the Legislature thereby provided for, and was solely intended to prohibit that legislative body from imposing any tax on railways or railway property in the territory, and the court below so held. We are unable to so construe the language of the statute, which, after granting to the Legislature thereby provided for various powers and imposing various limitations, restrictions, and conditions, not only upon the Legislature, but also upon the municipal corporations of the Territory, expressly declared, among other things, as follows:

"All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed

valuation of property within the town in any one year: Provided, that the Congress reserves the exclusive power for five years from the date of the approval of this act to fix and impose any tax or taxes upon railways or railway property in Alaska."

Authorizing, as Congress did, the Legislature to levy taxes for territorial purposes up to 1 per centum upon the assessed valuation of property situated within the territory in any one year, and authorizing any incorporated town or municipality thereof to levy any tax for any purpose up to 2 per centum of the assessed valuation of property within the town in any one year, Congress expressly declared that it reserved to itself "the exclusive power for five years from the date of the approval of this act to fix and impose any tax or taxes upon railways or railway property in Alaska." That the necessary effect of that clear and unambiguous language is to prohibit the levy of any tax upon such property during the specified period by any other power does not, we think, admit of doubt.

The judgment of the court below is reversed, and the cause remanded, with directions to dismiss the petition, at the petitioner's cost.

GILBERT, Circuit Judge (dissenting). In order to determine what is meant by the last proviso of section 9 of the act of August 24, 1912, it is essentially important to consider, not only the general purpose of that act, but the situation as it then existed as to the taxation of railroads in Alaska. At that time and for many years prior thereto railroad property had been regularly and annually taxed by Congress and by municipal corporations. Under Act June 6, 1900, c. 786, § 29, 31 Stat. 331, Congress had imposed on railroads an annual license tax of \$100 per mile upon each mile operated. Under Act April 28, 1904, c. 1778, § 4, 33 Stat. 531, which gave municipal corporations power to tax for school and municipal purposes, not to exceed 2 per centum of assessed valuation upon all real and personal property, with certain exceptions not pertinent here, municipal corporations, including the defendant in error in this action, had regularly taxed railroad property within their corporate limits. Such was the situation when the act of 1912 was passed. At that time, as it appears from the history of the passage of the bill, there were 500 miles of railroads in Alaska. The act of 1912 was entitled:

"An act to create a legislative assembly in the territory of Alaska, to confer legislative power thereon, and for other purposes."

The only "other purposes" mentioned in the act are the creation of a railroad commission and the codification and compilation of the laws applicable to the territory of Alaska. All the remainder of the act is devoted to the creation of a legislative assembly and the definition of its powers. In section 9, which contains limitations of the legislative power, is found the provision on which depends the decision of the case at bar. It is as follows:

"No tax shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town, in

any one year: Provided, that the Congress reserves the exclusive power for five years from the date of the approval of this act to fix and impose any tax or taxes upon railways or railway property in Alaska."

There is nowhere in the act any provision which concerns municipal corporations, or which affects their rights, other than that which is found in the language just quoted. The provision therein prohibiting the levying of a municipal tax in excess of two per centum of the assessed valuation of property is clearly a limitation solely upon the powers of the Legislature which is created by the act. By that act power had been given to the Legislature sufficiently broad to include the power to change or repeal the provisions contained in the act of Congress of 1904 in regard to municipal corporations, so that, unless restrained, the Legislature might authorize the levying of a municipal tax to exceed 2 per centum of the assessed valuation of property. It was to prevent such possible legislation that the limitation was inserted in section 9, and both the limitations as to taxes for territorial purposes and taxes for municipal purposes were limitations imposed upon the power of the Legislature only. That being the obvious purpose of the act, it becomes clear also that the proviso is a restriction only upon the power of the Legislature of Alaska. In other words, Congress thereby denied to the Legislature and reserved to itself for the period of five years the right, which it then had and was exercising, to impose a tax upon railroads operated in the territory, but left undisturbed the power of municipalities to tax railroad property within their limits.

It is a cardinal rule of construction that a proviso in a statute affects and relates only to the paragraph in which it is found, or to which it is annexed, unless a different intention on the part of the legislative body is clearly disclosed by the words used. In *Minis v. United States*, 15 Pet. 423, 445, 10 L. Ed. 791, Mr. Justice Story said:

"The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview."

In *White v. United States*, 191 U. S. 545, 24 Sup. Ct. 171, 48 L. Ed. 295, the court said:

"It is undoubtedly true that in congressional legislation provisos have been included in statutes which are really independent pieces of legislation, but this is a misuse of the usual purpose and effect of a proviso, which is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation."

In *Lewis' Sutherland*, *Statutory Construction*, § 352, it is said:

"The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter."

Not only is the use of the word "provided" an expression of the intention of Congress to withhold something out of that which in general terms had just been granted, but the further words, "the Con-

gress reserves," furnish additional evidence of that intention. To reserve is to withhold something from the whole matter covered by the general terms of a grant, and thereby to make the concurrent grant less than it otherwise would be.

It is also the rule that exemptions from taxation are not favored by law. This was held in *Yazoo & Mississippi R. R. Co. v. Adams*, 180 U. S. 1, 22, 21 Sup. Ct. 256, 45 L. Ed. 415. In *Wright v. Central of Georgia Ry.*, 236 U. S. 674, 682, 35 Sup. Ct. 471, 473 (59 L. Ed. 781), Mr. Justice Hughes, after reviewing the decisions of the Supreme Court on the subject, summed up their purport by saying:

"In view of the supreme importance of the taxing power of the state, every doubt must be resolved in favor of its continuance."

In *Memphis, etc., R. R. v. Railroad Commissioners*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837, the court said:

"This salutary rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, construed strictissimi juris."

The construction which the majority of this court give to the proviso results in the repeal by implication of the provision of the act of 1904 which gave municipalities the power to tax railroad property. All presumptions are against the legislative intention to repeal an older statute by a later one by a mere implication. This court in *Mills v. Smith*, 177 Fed. 652, 101 C. C. A. 278, held that, where two acts of different dates cover the same subject-matter, the later will operate as a repeal of the earlier only where that intention is plainly manifest and unmistakable, and that it is the duty of a court to adopt any reasonable construction which will give effect to both. And it is evident that Congress itself did not understand that the effect of the act of 1912 was to deprive municipalities of any of the powers that had been conferred upon them by the act of 1904. This is made evident by the fact that, under the authority given by section 19 of the act of 1912 to codify, compile, publish, and annotate all of the laws of the United States applicable to Alaska, the compilation made and thereafter accepted by the concurrent resolution of both houses of Congress contains, in the form in which it was as originally enacted, the provision which gave to municipalities power to levy taxes for school and municipal purposes upon "all real and personal property."

**MONTGOMERY TRACTION CO. v. MONTGOMERY LIGHT & WATER
POWER CO. ***

(Circuit Court of Appeals, Fifth Circuit. February 7, 1916.)

No. 2797.

1. CORPORATIONS ⇨657—FOREIGN CORPORATIONS—CONTRACTS—RATIFICATION.

On January 30, 1909, at the time of the execution of an instrument evidencing in part a contract by a New Jersey corporation to furnish electrical current to a corporation doing business in Alabama, the New Jersey

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

*Rehearing denied April 20, 1916.

corporation had not complied with the Alabama constitutional and statutory requirements (Const. 1901, § 232; Code 1907, § 3642), made prerequisites to the existence of any power in it to transact business in Alabama. On June 11, 1909, it complied with such requirements. Both parties recognized the existence of the contract, evidenced in part by such instrument, and evinced a mutual understanding or agreement to conform their dealings to the terms of the contract expressed in such instrument. *Held*, that they thereby adopted the contract expressed in such instrument, since, while parties cannot by ratification validate a void contract from the time it was undertaken to be made, they can, when duly qualified to contract, elect to adopt as the whole or a part of the contract by which their dealings are to be governed what is expressed in an instrument which was ineffectual at the time it was signed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536-2541, 2550, 2552-2554; Dec. Dig. Ⓒ657.]

2. SPECIFIC PERFORMANCE Ⓒ6—CONTRACTS ENFORCEABLE—MUTUALITY OF OBLIGATION.

A power company contracted to furnish a traction company electrical current for the operation of its railway for 15 years. It had complied with its obligations thereunder, and was ready, able, and willing to carry out and perform the contract, and was desirous of so doing; but the traction company was about to discontinue the use of electrical current supplied by the power company and obtain from another source the power required for the operation of its railway. The power company sued for specific performance, and the traction company contended that, as the power company's obligations called for the continued operation of its plant through a term of years, involving the rendition of skilled personal services and the outlay of considerable sums of money, the contract could not be specifically enforced against the power company, and hence lacked the mutuality of remedies necessary to its specific enforcement. *Held*, that a decree enjoining the traction company from taking electrical current from any person, firm, or corporation other than the power company during the term of the contract, so long as the power company performed the obligations imposed upon it by the contract, did not involve the inequitable result, the avoidance of which is the prime object of the rule as to mutuality of remedies, since, in so far as the power company had performed, the traction company was safe from any possible injury due to its lack of an efficient remedy to compel performance by the power company, while any material injury which it might sustain from the lack of such remedy was effectually avoided by making its obligation to continue performance dependent upon a continuance of performance by the power company.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 9-11; Dec. Dig. Ⓒ6.]

3. SPECIFIC PERFORMANCE Ⓒ127(1)—RELIEF AWARDED—FORM OF DECREE.

Where a traction company contracted to take its supply of electrical current from a power company for 15 years, the District Court did not exceed the broad powers permissible to be used in affording specific performance, or prejudicially abuse or mistakenly exercise its discretion as to the use of such powers by enjoining the traction company from taking electrical current from any party other than the power company during the period covered by the contract, so long as the power company performed the obligations imposed upon it by the contract; the result of this being to require the traction company specifically to perform its obligations.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 406, 407, 409, 410; Dec. Dig. Ⓒ127(1).]

Appeal from the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

Suit by the Montgomery Light & Water Power Company against the Montgomery Traction Company. Decree in favor of plaintiff (219 Fed. 963), and defendant appeals. Affirmed.

See, also, 191 Fed. 657.

Ray Rushton, of Montgomery, Ala., and Gregory L. Smith, of Mobile, Ala. (Rushton, Williams & Crenshaw, of Montgomery, Ala., on the brief), for appellant.

B. P. Crum and John R. Tyson, both of Montgomery, Ala. (Steiner, Crum & Weil, of Montgomery, Ala., and Frueauff & Robinson, of New York City, on the brief), for appellee.

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

WALKER, Circuit Judge. The averments of the bill in this case show that at the time it was filed, in September, 1911, the defendant (the appellant here), was receiving from the plaintiff and using electrical current for the operation of its railway under a contract then existing between them, providing for the supply by the plaintiff and the use by the defendant of such current for a period of 15 years from February 1, 1903; that the plaintiff had complied with its obligations under said contract, and was ready, able, and willing to carry out and perform every term or stipulation thereof required of it, and was desirous of so doing; and that the defendant, in utter disregard of its contractual obligations to the plaintiff, was about to violate the terms of said contract on its part by discontinuing the use of the electrical current supplied by the plaintiff, and obtaining from another source the power required for the operation of its railway. The bill contained a prayer for the specific relief of an injunction restraining the defendant from disconnecting its wires or lines from the plaintiff's power plant and from receiving or using electrical current from any person or party whomsoever other than the plaintiff under and in accordance with the alleged existing contract.

The right of the plaintiff to have the relief sought was contested upon a number of grounds, some presented by demurrers to the bill, and others presented by issues of fact tendered by the answer, which was filed after the demurrers to the bill were overruled. By the final decree now presented for review the appellant was "perpetually enjoined and restrained from taking direct electrical current from any person, firm, or corporation other than the complainant, during the period covered by the contract involved here, as prayed for, so long as complainant performs the obligations imposed upon it by the terms of said contract." Opinions accompanied the overruling of the demurrers to the bill and the rendition of the final decree. *Montgomery Light & Water Power Company v. Montgomery Traction Company*, 191 Fed. 657; *Id.*, 219 Fed. 963.

[1] According to the averments of the bill, the alleged existing contract between the parties was in part evidenced by a written instrument, signed by each of them and dated January 30, 1909. It is in-

sisted that that instrument was without legal validity because, at the time of its purported execution, the plaintiff, a New Jersey corporation, had not complied with the Alabama constitutional and statutory requirements which are made prerequisites to the existence of any power in such a corporation to transact any business in Alabama. Constitution of Alabama, § 232; Code of Alabama 1907, § 3642. It was disclosed by the evidence that, because of these provisions, the plaintiff, on January 30, 1909, was not qualified to transact business or to make a valid contract in Alabama, but that on June 11, 1909, this disqualification was removed by a compliance with the prescribed requirements. The averments of the bill show that, up to the time it was filed in September, 1911, there was a continuing recognition by each of the parties of the existence of the alleged contract, evidenced in part by the instrument of January 30, 1909, and the evidence adduced as to the dealings between the parties subsequent to June 11, 1909, after which date there was no disability to contract, evinces a mutual understanding or agreement between the parties to conform their dealings to the terms of the contract expressed in the instrument dated January 30, 1909. The conduct of the parties after the removal of the only legal obstacle standing in the way of the making of a valid contract between them had the effect of an adoption by them of the contract expressed in the instrument dated January 30, 1909. While the parties could not by any act of ratification make a void contract a valid one from the time it was undertaken to be made, they could, when each of them was duly qualified to contract, elect to adopt as the whole or a part of the contract by which their dealings were to be governed what was expressed in an instrument which was ineffectual at the time it was signed. *Turner Construction Company v. Union Terminal Company*, 229 Fed. 702, — C. C. A. — (January 18, 1916, U. S. C. C. A., 5th Circuit). This is what the evidence shows was done.

[2] It is insisted that the lack of mutuality in the remedies available to the respective parties to the contract relied on required a denial of the relief which was granted by the decree appealed from. The injunction decreed had the effect of requiring specific performance by the defendant. It is pointed out that the obligations of the plaintiff under the contract in question call for the continued operation through a term of years of an electrical power plant, involving the rendition of skilled personal services and the outlay of considerable sums of money, acts the future performance of which is incapable of being efficiently compelled by any decree that may be rendered. We understand that the prime motive underlying the requirement of mutuality in specific performance cases is the avoidance of the inequity of compelling such performance by one party to a contract at the instance of the other party when the latter may escape performance of the obligations which the contract imposes upon him. The rule is a recognition of the reciprocal feature of the duty of specific performance and that equity requires that an enforced continued performance by one party should be conditioned upon antecedent or concurrent performance by the other party as contemplated by the contract. The ques-

tion then is: Did the decree have the effect of depriving the defendant of the protection which is afforded by the application of the rule mentioned?

At the time the suit was brought, the dealings between the parties had been carried on for many years under the contract relied on. The bill averred that the plaintiff had complied with its obligations under the contract; that it was ready, able, and willing to carry out and perform every term or stipulation thereof, and was desirous of so doing. The master found that the evidence supported the substantial truth of those averments, and that since the filing of the bill the plaintiff had continued to perform its obligations under the contract. The court by its decree, rendered more than 4 years after the bill was filed and when the contract had only a little over 3 of the 15 years of its term to run, sustained these findings, and required specific performance by the defendant only "so long as complainant performs the obligations imposed upon it by the terms of said contract." However unenforceable the plaintiff's obligations under the contract may have been, in so far as it has already performed those obligations, the defendant is safe from any possible injury due to the lack of an efficient judicial remedy to compel specific performance by the plaintiff. One to whom performance is voluntarily rendered does not suffer from the lack of a remedy to which he has no occasion to resort. *Mississippi Glass Company v. Franzen*, 143 Fed. 501, 74 C. C. A. 135, 6 Ann. Cas. 707; 36 Cyc. 631.

The plaintiff's conduct in the past, both before and after the bill was filed, and its manifest interest in securing performance by the defendant, a result to be attained only by its compliance with the terms imposed upon it by the decree, persuasively indicate the improbability of the defendant having any occasion to seek the enforcement of a specific performance by the plaintiff, even if an efficient remedy for the accomplishment of that end was available. However that may be, by the terms of the decree appealed from the defendant is left at liberty to cease performance whenever a default by the plaintiff occurs. Specific performance by it is required only so long as there shall be like performance by the plaintiff. It seems that where, as in the instant case, the reciprocal obligations of the parties to the contract in question are concurrent, the continuance of the obligation of each to perform his part being dependent upon continued performance by the other, any material injury which otherwise might be sustained by the defendant, of whom performance is required, in consequence of his not having an efficient remedy for coercing future performance by the plaintiff, is effectually avoided by making the defendant's obligation to continue performance dependent upon a continuance of performance by the plaintiff. The conclusion is that the circumstances of the instant case fairly negative the conclusion that the decree appealed from involved the inequitable result, the avoidance of which is the prime object of the rule as to mutuality of remedies.

[3] We do not assent to the contention of the counsel for the appellant that there is such a dissimilarity between the facts of the instant case and those dealt with in the controlling decisions shown by

the opinions rendered in the District Court to have been relied upon to support the action evidenced by the interlocutory and final decrees as to render those authorities inapplicable. We are not of opinion that, in ordering the injunctions issued under those decrees, which had the practical effect of coercing the specific performance of the contract by the defendant, the court exceeded the broad powers permissible to be used in affording relief of that nature, the use or nonuse of which powers is left to the sound judicial discretion of the court, to be exercised with reference to the particular facts of the case dealt with. A conclusion that that discretion has been prejudicially abused or mistakenly exercised in this case hardly would be reconcilable with the fact, which we think the record as a whole discloses, that the net result of what has been done by the court is that the defendant, since the filing of the bill in 1911, has been required specifically to perform its obligations under the contract, in the meantime receiving, or being afforded the opportunity to receive, the benefits to which it was entitled from a like concurrent performance by the plaintiff of its obligations under the contract, and is required to continue performance only so long as the plaintiff shall persevere in performing its part. That such a result does not involve injury or damage to the defendant of which it justly may complain seems apparent.

We have given careful consideration to the several assignments of error which have been insisted on. The result is that we conclude that it has not been made to appear that any reversible error has been committed. In view of what has been said in the opinions rendered in the District Court, it is not believed that any useful purpose would be served by a further discussion by us of the questions involved in the case.

The decree appealed from is affirmed.

ABBOTT v. WAUCHULA MFG. & TIMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 14, 1916.)

No. 2755.

1. BANKRUPTCY \Leftrightarrow 100—ADJUDICATION—VACATING AND SETTING ASIDE—CONDITIONS.

Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 551 (Comp. St. 1913, § 9605), provides that a court of bankruptcy may require any designated person to appear for examination as to the conduct or property of a bankrupt. Section 3d provides that, whenever the alleged bankrupt denies the allegation of insolvency, he shall appear with his books, papers, and accounts and submit to an examination, and that on his failure to do so the burden of proving solvency shall rest upon him. Section 7 provides that the bankrupt shall not be required to attend a meeting of his creditors or for an examination at a place more than 150 miles from his home or principal place of business, and that he shall be paid his actual expenses when examined or required to attend at any place other than his place of residence. Section 59f provides that creditors other than the original petitioners may join in the petition or file an answer in opposition to the prayer of the petition. Within four months before proceedings against a

corporation land owned by it was sold on execution to O., a judgment creditor, and resold by him to W., a resident of Chicago. The corporation at first denied its insolvency, but subsequently withdrew its denial, and was adjudged a bankrupt. Thereafter A. petitioned to have the adjudication set aside and for leave to file an answer denying the corporation's insolvency. The corporation and the petitioning creditors gave notice to A. that they would refuse to enter into a hearing upon such motion, unless he presented himself in court with all correspondence as to such land, and the court ordered that no action be taken until A. presented himself to be questioned concerning the transfer of such land. *Held* that, as it did not appear that A.'s personal presence was necessary and as it had not been determined that there was to be any trial of the issue sought to be revived, the burdensome condition imposed on A. was prematurely imposed.

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

2. BANKRUPTCY ☞100—INVOLUNTARY PROCEEDINGS—REQUIRING PERSONS TO APPEAR FOR EXAMINATION.

It would be a perversion of the purpose of Bankr. Act, § 21a, relative to requiring persons to appear for examination concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration, to exercise the power conferred to obtain evidence for use on the trial of the issue of solvency or insolvency of an alleged bankrupt.

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

3. BANKRUPTCY ☞100—INVOLUNTARY PROCEEDINGS—PERMITTING PARTIES TO INTERVENE AND DEFEND—DISCRETION.

Where one having an interest in preventing or vacating an adjudication in bankruptcy, which would annul his purchase of land of the alleged bankrupt sold under execution, seeks leave to appear and plead to the petition because of the alleged unwarranted substitution by the bankrupt of an admission of the allegation of insolvency in place of its previous denial of such allegation, the application calls for the exercise by the court of a sound discretion in determining whether the leave sought should be granted or refused.

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

4. BANKRUPTCY ☞100—INVOLUNTARY PROCEEDINGS—PERMITTING PARTIES TO INTERVENE AND DEFEND—CONDITIONS.

Where an alleged bankrupt originally and at a proper time denied its insolvency, but subsequently abandoned its defense and admitted its insolvency, and one having the status of a creditor sought leave to assume the burden of this defense, there should not have been imposed upon him conditions substantially more onerous than could have been imposed upon the debtor under Bankr. Act, §§ 3d, 7, under which a failure to attend and submit to examination would merely cast the burden of proving solvency upon the debtor, and he could not be required to attend for examination at a place more than 100 miles from his home or principal place of business, and would be entitled to actual expenses.

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

Petition to Superintend and Revise Order of the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Proceeding to have the Wauchula Manufacturing & Timber Company adjudged a bankrupt. On application by William T. Abbott for leave to file an answer and defend the proceeding, the court ordered

that no action be taken until certain conditions were complied with, and the petitioner files a petition to superintend and revise. Order reversed.

Howard P. Macfarlane, of Tampa, Fla., for petitioner.

H. S. Phillips and J. W. Frazier, both of Tampa, Fla., for respondent.

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

WALKER, Circuit Judge. [1] At a sheriff's sale under an execution on a judgment recovered against the Wauchula Manufacturing & Timber Company on a debt owing by it for goods sold and delivered, Arthur F. Odlin, who had bought that judgment, paying therefor the amount due thereon, purchased land belonging to the defendant in the judgment, and subsequently conveyed that land to William T. Abbott. Within four months after the attaching of the lien of the execution mentioned involuntary proceedings in bankruptcy were instituted against the defendant in the judgment. On the 13th of November, 1914, the alleged bankrupt, by its duly authorized attorneys, filed in the bankruptcy proceeding a denial of insolvency and of the acts of bankruptcy alleged in the petition. On the 18th of January, 1915, the alleged bankrupt, by leave of the court, withdrew its denial of insolvency and of the acts of bankruptcy alleged in the petition, filed an admission of insolvency, and was then and there adjudged bankrupt. On January 21, 1915, said Abbott filed in the court a petition which set out the above-stated facts, averred that "he is interested in the proceedings in bankruptcy pending against said corporation," and that it was not insolvent on the date of the filing of the involuntary petition in bankruptcy, but was then possessed of specified assets more than sufficient to pay all valid debts existing against it, and prayed that the adjudication of bankruptcy be set aside and vacated, and that petitioner have leave to file an answer to the petition in bankruptcy, denying the insolvency of said corporation and each and every act of bankruptcy alleged. Prior to a hearing by the court on this petition of Abbott, his attorney received a written notice of the import stated in the following order, which was made by the court when the petition came on to be heard on February 26, 1915:

"This cause coming on this day to be further heard upon the motion of William T. Abbott to set aside and vacate the order adjudicating said Wauchula Manufacturing & Timber Company, a corporation, bankrupt, and for leave to defend said cause and to file an answer denying the insolvency of said respondent corporation, and each and every act of bankruptcy in the amended involuntary petition in bankruptcy alleged and set forth, and upon the notice of the said respondent corporation and the petitioning creditors to the said Abbott that they would refuse to enter into a hearing upon said motion unless the said William T. Abbott should present himself in court having with him all correspondence and telegrams that had passed between him and Arthur F. Odlin, of the county of De Soto, state of Florida, in reference to the transfer of certain lands mentioned in said motion from the said Odlin to the said Abbott; and thereupon Howard P. Macfarlane, attorney for William T. Abbott, did represent unto the court that the said William T. Abbott was a resident of Chicago, Ill., that he was not present in court, and

that he could not so present himself without suffering great inconvenience, but that he was ready and willing to answer any and all proper questions that might be put to him by interrogatories, that the said Arthur F. Odlin was there present in court, ready and willing to answer any and all questions held proper by said court with reference to said transfer by the said Odlin to the said Abbott, stating to the court that the said Odlin was in a position to be and was in fact better informed concerning the subject-matter of said motion and the transactions leading up to said transfer than the said William T. Abbott, and thereupon tendered the said Odlin for examination. Whereupon it is ordered, adjudged, and decreed that no action be taken in the matter of said motion, and that said motion be not entertained, until the said William T. Abbott shall present himself before this court to be questioned concerning the facts and circumstances leading up to the said transfer of said real estate."

The action of the court evidenced by the order just quoted is presented for review by Abbott's petition to superintend and revise.

It is apparent that Abbott had a substantial interest in securing the action by the court which his petition prayed for, in that an effect of the bankruptcy adjudication remaining in force would be a destruction of his title to land based upon a sale under an execution issued within four months prior to the filing of the petition in bankruptcy. He had an interest in the adjudication, whether it stood or fell. If it stood, his status was that of a creditor, as in that event he was the legal or equitable owner of the whole or a part of the demand represented by the judgment sought to be enforced by the vacated execution sale. If it fell, his title to land was restored to life. In *re McMurtrey & Smith* (D. C.) 142 Fed. 853; In *re Jacobson* (D. C.) 181 Fed. 870. It is to be observed that the above-quoted order neither granted nor denied the leave sought to resist the bankruptcy petition. It simply postponed any action on the application until the applicant "shall present himself before this court to be questioned concerning the facts and circumstances leading up to the said transfer of said real estate."

[2] The terms of the demand, to which the court by its order acceded, for the personal attendance of the applicant, and the circumstances of the making of that demand by the attorneys for the bankrupt and petitioning creditors, negative the conclusion that the court's order is to be regarded as a proper exercise of the power conferred by the provision of section 21a of the Bankruptcy Act that:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court * * * to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act."

It was not suggested that an examination of Abbott was desired for the purpose intended to be accomplished by that provision, viz. the recovery of assets of the estate for distribution. It was made plain that the demand for Abbott's attendance was conditioned upon the court's granting him a hearing on his application to be permitted to put in issue the allegation of insolvency, which had been denied by the debtor and subsequently was admitted by it, and that no testimony from him was sought, except in the event of a hearing on that application and with reference to the issue of solvency or insolvency

which the applicant was seeking leave to revive. It would be a perversion of the purpose of section 21a to exercise the power it confers to obtain evidence for use on the trial of the issue of solvency or insolvency. Section 3b contains the provision applicable to the examination of the alleged bankrupt with reference to that issue. *Rawlins v. Hall-Epps Clothing Co.*, 217 Fed. 884, 133 C. C. A. 594; *Cameron v. United States*, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448. By the terms of the last-mentioned provision the only effect given to the alleged bankrupt's failure to attend and submit to the examination provided for is that "the burden of proving his solvency shall rest upon him."

[3] When one having an interest in preventing or vacating an adjudication of bankruptcy on an involuntary petition seeks leave to appear and plead to the petition, and discloses as the occasion of his proposed participation in the proceedings an alleged unwarranted substitution by the debtor of an admission of the petition's allegation of insolvency in the place of his previously made denial of that allegation, the first question to be determined is whether the proposed defense was duly presented prior to the adjudication so made. The substance of what was sought by Abbott's application was leave to him to assume the burden of the defense which was shown to have been seasonably presented by the debtor and afterwards unwarrantably withdrawn by it. The application called for the exercise by the court of a sound discretion in determining, in the first place, whether the leave sought should be granted or refused. *In re Simonson* (D. C.) 92 Fed. 904; *Altonwood Park Co. v. Gwynne*, 160 Fed. 448, 87 C. C. A. 409. In the exercise of this discretion regard is to be had to the policy which is evidenced by the provision that creditors other than original petitioners may at any time enter their appearance and file an answer and be heard in opposition to the prayer of the petition. Bankr. Act, § 59f. Nothing in the court's order indicates that the opinion was entertained that the application should be denied because it was not made with due promptness after the occasion for making it arose.

[4] In determining what properly may be required of one occupying the status of a creditor who seeks leave to assume the burden of a defense on the issue of solvency or insolvency which was originally and at a proper time made by the debtor, but has been abandoned by him, it seems appropriate to consider the provisions of the Bankruptcy Act which show what may be required of the debtor himself in analogous circumstances, and to avoid imposing upon the proposed substituted defendant conditions substantially more onerous than could have been imposed upon the debtor. If the alleged bankrupt had been a natural person, and had persisted in the denial of the involuntary petition's allegation of insolvency, the penalty for his failure to attend and submit to examination on the trial of the issue so raised would have been the casting upon him of the burden of proving his solvency, and he could not, except for cause shown, have been required to attend for an examination at a place more than 150 miles from his home or principal place of business, and would have been

entitled to his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence. Bankr. Act, §§ 3d, 7.

The result of the order under review was to require Abbott, as a condition to his obtaining any hearing at all on his application, to incur the inconvenience and expense of a trip from Chicago, his place of residence, to Florida. The order left it altogether uncertain whether the making of that trip would have resulted in the opportunity being afforded of examining the applicant with reference to the question of solvency or insolvency, as there was no determination by the court to permit that issue to be revived. It is apparent that the burden which the order put upon Abbott as a condition of granting him a hearing on his application was decidedly more onerous than any that could have been imposed upon the debtor with reference to a trial of an issue raised by it on the involuntary petition's allegation of insolvency. Abbott was not given the opportunity of assuming the burden of proving the debtor's solvency by failing to attend. Nothing alleged in the demand made that he be required to attend, or otherwise shown by the record, indicates that his personal presence was necessary to enable the court advisedly to determine the preliminary question of allowing or disallowing the sought for revival of the defense which the debtor had abandoned. To say the least, the burdensome condition stated in the order was prematurely imposed; it not having been determined that there was to be a trial of the issue sought to be revived and with reference to which alone it can be supposed that Abbott's testimony was desired.

The conclusion is that the circumstances did not warrant the order presented for review. A reversal of it is ordered.

THE STEAM DREDGE A.

(Circuit Court of Appeals, Fourth Circuit. December 21, 1915.)

No. 1350.

ADMIRALTY ⇌ 119—APPEAL—REVERSAL AND DIRECTION OF DECREE—AUTHORITY OF LOWER COURT.

On distribution of the proceeds of a vessel sold in proceedings in admiralty for the enforcement of liens, the court entered a consent decree finding "that all the material allegations of the libels are true," dividing the lien claimants into classes, and awarding those in the first class priority over those in the second. Certain of the latter appealed, and the decree was reversed, on the ground that no reason appeared from the record for the preference given, and the cause was remanded "for a decree in accordance with the conclusions of this opinion." *Held*, that all that was necessary to comply with such decision was the entry of another decree placing the appellants on an equality with the claimants in the first class and allowing them to share pro rata in the distribution of the fund, that the consent finding that the allegations of the libels were true concluded all questions of fact, and the decree was a final decree, leaving nothing further upon which to exercise judicial authority, and that the lower court

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

was without authority to retry the question of priority on evidence taken before a special master.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 776-790; Dec. Dig. ¶119.]

Appeal from the District Court of the United States for the Eastern District of North Carolina, at New Bern; Henry G. Connor, Judge.

Suit in admiralty by Howard S. Roberts and others against the steam dredge A (Edmund H. Mitchell, trading as Mitchell & Co., claimant) and others. From the decree, certain of the libelants appeal. Reversed.

For prior opinion, see 204 Fed. 262, 122 C. C. A. 527.

Harry McMullan, of Washington, N. C., for appellants.

Julius F. Duncan, of Beaufort, N. C., and H. H. Little, of Norfolk, Va. (Guion & Guion, of New Bern, N. C., and C. R. Wheatley, of Beaufort, N. C., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. In this proceeding in admiralty the vessel libeled, known as steam dredge A, was ordered sold, and dispute has arisen as to the distribution of the proceeds. The history of the litigation and the questions heretofore decided will appear from the opinion of this court on a former appeal. 204 Fed. 262, 122 C. C. A. 527. The trial court had divided the various claimants into six classes, and awarded priority of payment to those placed in the first class, who are described as the New Bern-Beaufort claimants, and whose liens were for repairs and supplies furnished to the dredge in the port of Beaufort. In the second class were placed the creditors whose liens were for repairs and supplies furnished in the port of Philadelphia. As the fund available for distribution was sufficient to pay only a small portion of the Philadelphia claims, after paying the New Bern-Beaufort creditors in full, certain of the Philadelphia claimants, four in number, the same who are now appellants, took an appeal to this court, which held, on the record then presented, that no reason appeared for giving preference to claims for repairs and supplies furnished in the port of Beaufort over the claims of appellants for repairs and supplies furnished in the port of Philadelphia. Accordingly the decree of the court below was reversed, "and the case remanded to that court for a decree in accordance with the conclusions of this opinion."

Apparently, all that was necessary to comply with this decision was to enter another decree, which would in effect put the four appellants in the first class and divide the fund pro rata between them and those originally included in that class, if the amount were insufficient to pay them all in full. It seems plain to us that this would have been a decree "in accordance with the conclusions of this opinion," and that no other or further action was required. Manifestly the other Philadelphia creditors would be excluded, because they had not appealed, and were therefore left in the position assigned to all Philadelphia creditors by the decree that was reversed. In other words, the conclu-

sions of this court were that the appellants had equal standing with the New Bern-Beaufort claimants and were entitled to a decree which recognized that equality. To our minds this was the plain contemplation of the opinion, and all that remained to be done was to enter a new decree in conformity therewith.

But the trial court, misconceiving the import of the decision, or misled by certain statements in the opinion, and against the objection of appellants, ordered a reference of the entire case to a special master to ascertain the facts respecting "the amount, nature, and extent" of all the libels which had been filed in the proceeding. Under this order there was virtually a trial *de novo*, in which voluminous testimony was taken and an elaborate report made by the special master. Upon this report the court below again held that the New Bern-Beaufort claimants were entitled to priority, mainly upon the ground, as we gather from the opinion, that the facts disclosed in the testimony taken by the special master showed that the Philadelphia claims were not maritime liens, because the materials and supplies therein mentioned were furnished for the construction or reconstruction of the dredge, and were therefore not the subject of admiralty jurisdiction.

It is unnecessary to decide whether the learned judge was correct in thus applying the law to the facts developed before the special master, since we are of opinion that the case was improperly referred for the taking of testimony, and should have been disposed of on the record already made, by entering a new decree in accordance with the conclusions of this court. Indeed, it may be conceded for present purposes that if the facts respecting the Philadelphia claims had been shown originally, or were now open to inquiry, there were "special circumstances and equities" which justified giving the New Bern-Beaufort creditors priority over the Philadelphia creditors, even if the latter brought their claims within the statute relating to maritime liens. But the difficulty is that the opposing creditors foreclosed investigation of the facts now relied upon by failing to controvert in any way the matters set forth in the libels of the Philadelphia claimants, and by their formal consent in open court to a decree in which "the court finds that all of the material allegations of the libels are true, and that the libelants hereinafter named are entitled to recover herein the sums respectively hereinafter set out." It seems clear to us that this finding established the facts alleged in the various libels, including those filed by the Philadelphia claimants, as fully and conclusively as if proven in every detail by undisputed evidence. And when examination is made of the allegations in the libels of appellants we regard it as not open to doubt that they set forth facts which constitute maritime liens, within the meaning of the federal statute, and that nothing else can be made of them.

Taking these allegations at their face value, as they were formally admitted by the other parties in interest and expressly found to be true in the court's decree, we discover nothing of record, or in the opinion of this court on the former appeal, which required or permitted further inquiry concerning the facts which had thus been solemnly adjudicated. It was too late thereafter for the appellees to

dispute their accuracy, and the trial court was without authority in our judgment to make them the subject of further investigation. They were adequate in every respect for a final disposition of the case, and there was no occasion for taking testimony or referring the matter to a special master in order to give full and complete effect to the decision of this court. It was only necessary, as above stated, to enter another decree upon the facts already of record, which would include these appellants among the claimants entitled to preference over other creditors. *Ex parte Dubuque & Pacific Railroad*, 68 U. S. (1 Wall.) 69, 17 L. Ed. 514; *In re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994.

It is argued that the decree reversed by this court was merely interlocutory, and not a final decree, and therefore the trial court was free to modify, or even disregard, the findings based upon the admissions and consent of the parties, and could make further inquiry as to the truth of the facts alleged in the libels in question. But we fail to see upon what theory this contention can be supported. The decree appealed from, not only purported to be a final decree, and was so entitled, but it was in fact and effect a full and complete determination of the controversy. If no appeal had been taken, the litigation would have been ended, for nothing remained upon which to exercise judicial authority. Indeed, if it had not been a final decree, this court would have had no jurisdiction to review it. *Mordecai v. Lindsay*, 60 U. S. (19 How.) 199, 15 L. Ed. 624. Moreover, the appellees sought to sustain it as a final decree, and such beyond doubt is its actual character. *Farmers' Loan & Trust Co., Petitioner*, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. 736, 34 L. Ed. 97.

The further contention is made that this decree was reversed because the record failed to disclose the facts upon which it was based, and this is claimed to be supported by the following quotation from the opinion:

"The decree * * * contains no finding of facts and conclusions of law, as required by Act Feb. 16, 1875, c. 77, 18 Stat. 315 (Comp. St. 1913, §§ 1585, 1586), and does not state the ground upon which this distinction in rank between claims of the same character is awarded."

Whatever inference might be drawn from this statement taken by itself, it seems plainly erroneous, when the whole opinion is examined, to conclude that this court reversed the decree for the reason that it contained no specific finding of the facts from which the conclusions were drawn. It is true that attention is called to the fact that the form of the decree was not in compliance with the statute in question. But clearly this was not the ground of decision; it merely supported the conclusion that nothing appeared to justify "this distinction in rank between claims of the same character." If the decree had been reversed because there was no finding of facts upon which a final decree could be entered, the case would have been sent back with instructions to ascertain the facts and thus disclose the ground for awarding priority to the New Bern-Beaufort claimants. This would have been equivalent to ordering a new trial, or at least permitting the

court to make further investigation of the facts. But the appellants did not ask for a new trial, and this court did not direct a new trial. All the proceedings in the case, including the various orders and decrees of the trial court, were set forth in the record on appeal to this court. The appellants contended that upon the facts thus shown they were entitled to be classed with the preferred creditors, and that it was therefore error of law to give priority to the New Bern-Beaufort claimants. That contention was sustained by this court, and accordingly the case was remanded, not for a new trial, but "for a decree in accordance with the conclusions of this opinion." It is only repeating to say that, as we see the matter, the trial court should have simply entered another decree, which included the appellants among those whose claims had been held entitled to priority of payment.

After the reference to a special master, as above recited, the appellants applied to this court for a mandamus requiring the District Judge to enter such a decree as they claimed had been directed; and the denial of that application is urged as an adjudication that the reference was properly ordered. But such a deduction from the negative action of this court would be quite unwarranted. The only reasonable inference from the refusal of the writ is that this court in the exercise of its discretion declined to interfere at that stage of the case; the merits of the question were not considered.

A motion to dismiss the appeal is made upon the ground that it was allowed on October 28, 1914, while the petition for appeal and assignment of errors were not filed in the clerk's office until November 18, 1914. Examination of the record discloses that the petition for appeal and the assignment of errors were presented to the District Judge at the time he allowed the appeal, but through some inadvertence the same were not filed in the clerk's office until the date named. Under these circumstances we are of opinion that the requirements of the rule have been fully complied with. The other grounds set forth in the motion to dismiss are without merit, and the motion will therefore be denied.

For the reasons indicated, the decree must be reversed, and the case remanded for a decree which will include appellants among those whose claims to priority were established by the original decree.

Reversed.

HEALY v. WEHRUNG.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916.)

No. 2575.

1. BANKRUPTCY Ⓒ303—PREFERENCES—SUFFICIENCY OF EVIDENCE.

In an action to recover back money paid by a bankrupt to a creditor within 30 days before the adjudication, evidence *held* to show that the bankrupt was then wholly insolvent.

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

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

2. BANKRUPTCY ⇨166—PREFERENCES—KNOWLEDGE AND INTENT OF TRANSFEREE.

Within 30 days before an adjudication in bankruptcy against M. he paid defendant the amount of debts due him, defendant's wife, and the bank of which defendant was president, from the proceeds of a sale of land to a purchaser procured by defendant. Defendant and the bankrupt's attorney, who was an indorser on the note to the bank, attended to the sale; the bankrupt shortly afterwards not even remembering the purchaser's name. The selling price was within a few cents of the amount of such debts. Defendant had his own lawyer examine the title for the purchaser, paying the lawyer himself, and it was claimed that he did this to save time. Defendant had for years been trying, without success, to collect the debts. He claimed that shortly before he was furnished by the bankrupt a statement of his financial condition, and that from this and from his own mercantile experience he thought the bankrupt solvent. In the statement a stock of merchandise which afterwards sold for less than \$12,000 was valued at over \$40,000, accounts receivable, which were apparently worthless, aggregating nearly \$10,000, were included, and debts aggregating \$50,000 were shown. *Held*, that the facts showed that defendant not only had reasonable cause to believe that he would be given a preference, but that he initiated and caused the transaction to be consummated for the very purpose of procuring a preference.

[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 District of Oregon; Robert S. Bean, Judge.

Action by George M. Healy, as trustee in bankruptcy of H. J. Martin, against W. H. Wehrung. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Beach, Simon & Nelson, of Portland, Or., for appellant.

J. F. Shelton, of Portland, Or., and H. T. Bagley, of Hillsboro, Or., for appellee.

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

ROSS, Circuit Judge. This suit was brought by the trustee of the estate of one H. J. Martin, a bankrupt, to recover certain money alleged to have been received by the appellee (who was defendant in the court below) from his debtor, Martin, while insolvent, on the 4th day of March, 1913, contrary to the provisions of section 60b of the Bankruptcy Act, which provides:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." Act July 1, 1898, c. 541, 30 Stat. 562 (Comp. St. 1913, § 9644).

Martin filed his voluntary petition in bankruptcy on the 25th day of March, 1913, and was on the same day adjudged a bankrupt. The present suit was brought by direction of the bankruptcy court, and resulted after trial in a judgment dismissing the suit, with costs to the defendant, from which judgment this appeal comes; the sole con-

tion of the appellant being that upon the evidence judgment should have been awarded the plaintiff.

The respective parties are agreed that four elements are necessary to constitute a voidable preference: First, the debtor must have been insolvent at the time of the making of the transfer of his property; second, the transaction must have taken place within four months prior to the commencement of the bankruptcy proceeding; third, the effect of the transfer must have been to give the preferred creditor a greater percentage on his claim than that accruing to other creditors; fourth, there must have existed at the time of the transfer reasonable cause for the creditor to believe that it would result in a preference to him.

[1] That Martin transferred \$1,473.20 of his money to Wehrung on the 4th of March, 1913, which was less than 30 days preceding his adjudication in bankruptcy, is conceded, and while it is contended on the part of the appellee that Martin was not insolvent at the time of such transfer, we are unable, after a careful examination of the evidence, to come to any other conclusion than that he was wholly insolvent at that time. The record shows that for years he and his former partner, to whose interest he seems to have succeeded, had been carrying a very heavy indebtedness considering the amount of his assets, which consisted of an old stock of drugs and an old stock of postal cards, together with a homestead in Portland, and 67½ acres of land in Washington county, Or., and a small amount of apparently worthless outstanding accounts. The defendant himself admits that the amount owed him by Martin, as well as the money due his mother and the Hillsboro Bank, of which he was president, and hereinafter referred to, had been owing for years and had been renewed from time to time—on one occasion being extended for a period of one year to enable the debtor to pay off, if he could, some of his other creditors.

The testimony of the trustee, Healy, which is without contradiction, and who during the times in question was credit and office manager of Clarke-Woodworth Drug Company of Portland, is to the effect that Martin owed that firm about \$7,000, which was for purchases made from a year to a year and a half before, which the Clarke-Woodworth Company had repeatedly tried to collect without success and had for that reason stopped making sales to him on credit, but requiring cash for his purchases, and that during the month of February or March, 1913, Martin made to his creditors two offers of settlement, the first at 25 cents on the dollar, and the other at 20 per cent. Healy further testified that a short time prior to the filing by Martin of his petition in bankruptcy, which, as has been said, was March 25, 1913, there was a meeting of his creditors, about 50 in number, in the office of Martin's attorney, Mr. Sweek, which meeting, in the nature of things, could only have been in consequence of his serious financial condition, the critical nature of which, even prior to the 1st of March, 1913, is further shown by Martin's own testimony, in which he stated in effect that at the time of his transfer to the defendant Wehrung, hereinafter to be referred to, several suits had already been brought against him, that practically all of his indebtedness was past due, that he had no cash on hand, not even sufficient to pay his clerks

as their wages became due. And when it is considered, as the evidence shows, that the trustee only received upon the sale of the stock of drugs and postal cards the aggregate sum of \$11,779, which was sufficient to pay the creditors of the bankrupt 10 cents only on the dollar, we have no difficulty in holding that he was manifestly insolvent on the 4th day of March, 1913, the time he is charged with having given to Wehrung an unlawful preference.

[2] There remains, therefore, only for consideration the question as to whether Wehrung, when he received the money in question from Martin, had reasonable cause to believe that such receipt would result in a preference to him over other creditors—he thereby receiving payment in full of the indebtedness due him, as well as full payment of the indebtedness of the bankrupt to his mother and to the bank of which he was president. Wehrung testified that on February 1, 1913, Martin presented him a statement of his business, showing accounts receivable \$9,971.32, merchandise \$40,281.80, fixtures \$7,101.10; accounts payable \$17,516.96, bills payable to banks and others \$33,667.43—leaving, according to the statement, a surplus of \$6,169.83. Wehrung further testified that from his mercantile experience he regarded the fixtures, the value of which, as has been seen, was given in the statement at \$7,101.10, worth their cost, and that the accounts receivable given in the statement as \$9,971.32 were, in his judgment, worth 90 cents on the dollar. Deducting, therefore, from the stated surplus of \$6,169.83, 10 per cent. from the accounts receivable, leaves a surplus of \$5,172.70. Wehrung testified that upon that statement he would have loaned Martin additional money, if he had asked for it.

That testimony we can but regard, not only as highly improbable, in view of the statement rendered by the debtor, but as utterly inconsistent with Wehrung's further testimony to the effect that for years he had been trying, without success, to collect from Martin the indebtedness due him, his mother, and the bank of which he was president, as well as highly inconsistent with his *acts* now to be shown. In his testimony Wehrung admits that about a month after he received Martin's financial statement he sought to sell the latter's 67½ acres of land in Washington county to a man named Douty, telling the latter, according to Douty's testimony (which was practically admitted to be true in the testimony of Wehrung himself), that Martin was in bad shape, needed money, and that a then pending damage suit would surely go against him. He told Douty, according to the evidence, that the land could be bought for \$150 an acre, which it was well worth, and Douty, after examination, said that he would take it at that price. Wehrung, according to the evidence, told Douty that he would have his (Wehrung's) lawyer examine the title for him, which he did, paying him himself therefor, a deed from Martin to Douty for the land was prepared, the consideration for which, arranged by Wehrung with Douty, was within about 35 cents of the exact amount of the aggregate indebtedness of Martin to Wehrung, his mother, and the bank of which he was president, to wit, \$5,875, and then Martin was notified to meet Wehrung and Douty in the office of Martin's attorney, Sweek, who was an indorser on Martin's note

to the bank of which Wehrung was president. We extract from the testimony of Martin:

"Q. What dealings did you have with the purchaser? A. Why, I don't know as I had any more than to make out the deed. Q. Did you make out the deed? A. I think Mr. Sweek made it out for me. Q. And Mr. Sweek or Mr. Wehrung attended to the sale entirely, did they not? A. Yes, sir. Q. At the hearing before the referee in bankruptcy, you didn't even know the name of the purchaser of the property? A. No, sir, no; that is, to my best recollection, I didn't."

Martin also, according to the record, was questioned and answered as follows:

"Q. Who handled that transaction for you? A. Mr. Sweek. Q. Was anything said at the time about the legality of the transaction, whether you had a right to do that? A. Mr. Sweek said I had a right to ask—to sell the land to pay off what I wanted."

The case as made by the record is, we think, but little, if at all, overdrawn in this excerpt from the brief of the appellant:

"A debtor is grossly insolvent, offering a settlement of 20 cents on the dollar to his creditors. The debtor's lawyer is responsible on some of his paper held by a creditor representing \$5,875. On the advice of that lawyer, the debtor, on the eve of bankruptcy, transfers his principal asset, his unexempt real estate, to a hurry-up purchaser, produced by that creditor; the creditor furnishing and paying his own lawyer for services in connection with the title in order to save the time of examining the abstract. The transaction is consummated in the suite occupied by the debtor's lawyer. The selling price by a remarkable coincidence exactly equals the indebtedness to the creditor—\$5,875. The debtor a few weeks later does not even know who purchased the property. The creditor thus secures 100 cents on the dollar, and all the other creditors 10 cents—except the mother of this particular creditor and the bank of which he was president, both of which creditors also received payment in full through the same act of preference."

In so far as creditors are concerned, the purpose and policy of the Bankruptcy Act is the equal and equitable distribution of the bankrupt's estate among them, subject only to the preferences or priorities therein expressly allowed. From all the facts and circumstances shown by the record here, we regard it as clear that not only did the appellee, Wehrung, have reasonable cause to believe that by the payment to him he was thereby given a preference, but that the sale of the bankrupt's land which he initiated and caused to be consummated was all done for the very purpose of securing to himself, his mother, and the bank of which he was president such preference. See *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Coder v. McPherson*, 152 Fed. 951, 82 C. C. A. 99; *In re McDonald & Sons* (D. C.) 178 Fed. 487; *Ogden v. Reddish* (D. C.) 200 Fed. 977; *Heyman v. Bank* (D. C.) 216 Fed. 685.

The judgment is reversed, and the cause remanded to the court below, with directions to enter judgment for the plaintiff.

HOWARD D. THOMAS CO. v. BEHARRELL et al.

In re I. GEVURTZ & SONS.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1915.)

No. 2569.

BANKRUPTCY ⚡440—REVIEW OF PROCEEDINGS—APPEAL OR PETITION TO REVISE.

Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608), provides that the Circuit Courts of Appeal shall have jurisdiction to revise in matter of law the proceedings of the courts of bankruptcy. Section 25a authorizes appeals as in equity cases, in bankruptcy proceedings, from a judgment adjudging or refusing to adjudge the defendant a bankrupt, granting or denying a discharge, or allowing or rejecting a debt of \$500 or over. The claimant sold rugs to the bankrupt on credit, and before bankruptcy received back such of the rugs as had not been resold by the bankrupt. It filed its claim for a balance due, which was resisted on the ground that it had received a preference, and subsequently withdrew its claim and filed a petition for a rescission of the sale and to reclaim the rugs, with damages for such as could not be returned. *Held*, that this claim, being for the recovery of the unreturned rugs or their value, constituted a controversy arising in the bankruptcy proceedings, and as such was appealable, and not reviewable by petition to revise.

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

Petition for Revision of Proceeding of the District Court of the United States for the District of Oregon, in Bankruptcy.

In the matter of I. Gevurtz & Sons, bankrupts. Petition by the Howard D. Thomas Company to reclaim certain property, with damages for such as could not be returned, opposed by William H. Beharrell and others, trustees in bankruptcy, was denied, and the claimant files a petition to revise, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608). Petition denied.

Beach, Simon & Nelson, of Portland, Or., for petitioner.

Reed & Bell, of Portland, Or., for respondents.

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

ROSS, Circuit Judge. The respondents are trustees of the estate of I. Gevurtz, a bankrupt corporation, to which corporation the petitioner, shortly before the proceedings in bankruptcy, had sold rugs of the aggregate value of \$3,907.36. At the time of such sale the petitioner knew that Gevurtz & Sons were in financial difficulties, but upon the assurance of Gevurtz that his company was negotiating with a bank in Portland for a large sum of money with which to meet its pressing necessities and for an extension of credit on the part of its larger creditors, made the sale of the rugs and delivered them from time to time. Gevurtz, finding his company unable to consummate the negotiations, notified the petitioner of that fact, and within a few days of the filing of the petition in bankruptcy by his company returned

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

to the petitioner all the rugs so purchased remaining in the hands of the purchaser, aggregating in value \$2,911.60, all of which the petitioner accepted, leaving a balance due the petitioner from Gevurtz & Sons of \$996.26. For that balance the petitioner filed a claim against the bankrupt, to which claim the trustees of the bankrupt's estate filed objections, on the ground that the petitioner had received a preference in the returned rugs and had not surrendered them. Those objections coming on for hearing before the referee in bankruptcy, the petitioner, after the taking of testimony bearing upon the question, asked permission to withdraw its claim for the \$996.26, which permission was granted. Subsequently the petitioner applied to the District Court for leave to file a petition for the rescission of the sale of the rugs, upon the ground of fraud alleged to have been practiced by the bankrupt, and to "reclaim its rugs, with damages for such as cannot be returned," to which petition the trustees of the bankrupt estate filed an answer, raising issues which were referred by the court to a special master, upon which testimony was taken and certain findings and conclusions made by the master, all of which were approved by the court.

In substance the findings were that at the time of the sale of the rugs the Gevurtz & Sons corporation was in difficulties with its creditors, being heavily indebted and far in arrears with current merchandise bills; that it then had pending with a certain named bank negotiations for money sufficient to pay all of its outstanding small merchandise bills and to continue its business without further difficulty, and that the officers of the bankrupt corporation honestly believed that such loan would be made, and in that belief Gevurtz, president of the corporation, called Thomas, the president of the petitioner, over the telephone and placed the order for the rugs; that in that conversation "Thomas at first declined to honor his order, telling Gevurtz that his firm was slow in paying bills, that they had failed to pay bills long past due, and that he would not ship the goods unless absolutely certain that Thomas & Co. would receive its money. To this Gevurtz replied, in substance, that they were absolutely certain of paying the bill, because they had made arrangements with the First National Bank to advance them \$100,000 for the purpose of paying their pressing obligations, which would supply them with sufficient capital to run the institution along. He understood [undertook] to absolutely guarantee that Thomas & Co. would be paid, and with this assurance Thomas agreed to ship the goods." The master further found from the evidence before him that upon that occasion Gevurtz "was acting in entire good faith, and believed, with good reason, that negotiations with the bank were practically certain to result as contemplated, and that at this date the Gevurtz corporation fully expected the bank to step in and advance sufficient funds to put them upon their feet," and the master added: "I find no evidence of fraud or bad faith in his conduct." The master further found as facts the following:

"Within about 30 days from the date of the shipment negotiations with the bank for some reason fell through and bankruptcy was precipitated. Within 4 or 5 days before the petition was filed, Philip Gevurtz called Thomas & Co. up on the phone and explained to them that they were in trouble and wished

to return the rugs. Mr. Thomas, who is the manager and sole owner of the company, was absent in the East at the time, and those in charge in his absence told Gevurtz they had no authority to receive the rugs back, and that if they were shipped it must be upon the responsibility of Gevurtz & Co. However, their traveling salesman came down to confer with the bankrupt, and, while here, this party was informed by Philip Gevurtz of the reason for wishing to return the rugs, which was that they were in serious financial straits, threatened with bankruptcy, and he felt in honor bound, in view of his statements to Thomas, to protect them. This party declined to receive the rugs upon the ground that he had no authority to do so, but anyway the rugs undisposed of were at once crated and shipped back to Thomas & Co., and credit was given by them to the bankrupt for the invoice thereof upon the account."

And as conclusions of law the master found that the application of the petitioner for the filing of its petition for recovery of or for the rugs not returned should be denied, first, because the "proof of fraud upon the part of the bankrupt's officers is insufficient"; and, secondly, because "Thomas & Co., at the time they filed their claim for the balance due on the purchase price of the rugs, placed themselves in the position of a creditor, and thus lost the right to rescind, if it ever existed." The master therefore recommended that the petition to liquidate the claim be denied.

To both the findings of fact and the conclusions of the master the petitioner filed exceptions, all of which were by the District Court overruled, and the report confirmed. The exceptions were as follows:

"Exceptions to Findings of Fact.

"Petitioner excepts to the failure of said report to find as a fact that, at the time the rugs were ordered of petitioner by the above-named bankrupt, negotiations for settlement with its creditors were pending, and bankrupt's affairs were under the supervision of a creditor's committee; that the rugs were necessary for the bankrupt's continuance as a going concern, and were ordered with the said committee's consent, under a distinct provision that they be paid for or returned to petitioner.

"Petitioner also excepts to the failure of said report to find as a fact that at the time petitioner filed its claim, and up until the hearing of objections thereto, it had no knowledge or reason to believe that the statement of bankrupt that it had effected arrangements with the First National Bank of Portland, Or., was false; that petitioner made no conscious election with full knowledge of the facts until shortly before it filed its petition to withdraw its claim as a general creditor; that neither any delay of petitioner nor any other action of petitioner resulted in an injury to any third party, or altered the position of any one affected thereby.

"Exceptions to Conclusions of Law.

"Petitioner excepts to the statement by the special master of the law with regard to right of rescission for fraud, and contends that the report should have found that where a contract is induced by a statement of material fact, made as of his own knowledge by one in a position to know its truth or falsity, and the statement is believed and relied on by the other party to his damage, and is not true, that the transaction is fraudulent as a matter of law and the innocent party may rescind. Petitioner contends that this general statement is applicable to the facts found by the master and to the additional facts hereinbefore set forth, and renders it proper to permit petitioner herein to liquidate its claim.

"Petitioner excepts to the conclusion with reference to an alleged election of remedies, and contends that the equitable doctrine is that an election is binding only where made with full knowledge of all the facts, or where on

the basis of estoppel it would be inequitable to permit a change of position because of the interests of third parties, and that the conclusion here should have been that petitioner made no conscious election with full knowledge, and it would be inequitable and harsh and productive of injustice to hold that petitioner is barred by a technical election."

The claim of the petitioner, being for the recovery of the unreturned rugs or their value, clearly constituted, in our opinion, a controversy arising in the bankruptcy proceedings, and as such was appealable under section 25a of the Bankruptcy Act, and therefore is not reviewable under section 24b of that act. It is, we think, unnecessary to do more than refer to the decisions of the Supreme Court in the case of *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, and in the *Matter of Loving*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, in the latter of which the court said that under section 24b:

"Authority, either interlocutory or final, is given to the Circuit Court of Appeals to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and, in certain cases, in this court. The proceeding under section 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under section 25. *Coder v. Arts*, supra, 213 U. S. 233 [29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008]. Under section 24b a question of law only is taken to the Circuit Court of Appeals; under the appeal section controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under section 25 a review by petition under section 24b. The object of section 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate. In our judgment the rule was well stated in *Re Mueller*, 135 Fed. 711, 715 [68 C. C. A. 349, 353] by Mr. Justice Lurton, then Circuit Judge: 'The "proceedings" reviewable [under section 24b] are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under section 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under section 24a (b).'"

The petition herein is denied, with costs against the petitioner.

In re LEFLYS.

STRAUSS BROS. CO. v. WISCONSIN TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916.)

No. 2254.

BANKRUPTCY Ⓒ350—PREFERRED CLAIMS—SALE OR CONSIGNMENT—"CONDITIONAL SALE."

A contract between the claimant and the bankrupt provided that the claimant would stock the bankrupt's liquor department with liquors; that liquors were shipped on consignment, to be sold at retail for the claimant at invoice prices; that the bankrupt would save the claimant harmless from all damage to the goods, except that the claimant agreed to insure them against fire; that the bankrupt would pay all the expenses; and that all proceeds of sales were to be the property of the claimant; that title to all unsold goods was to remain in it, and they were on demand to be returned free of charge; that, if sales were made upon credit, the bankrupt would guarantee collection; that as compensation the bankrupt was to receive the excess of the selling price above the invoice price; that unsalable merchandise might be returned; that the bankrupt would purchase what remained after two years at invoice prices, title not to vest in it until payment; that future shipments of liquors would be received on the same terms, except that goods remaining unsold on the 10th day of the month following the shipment would be purchased by the bankrupt. There was no provision for segregation of the proceeds of sales from the bankrupt's general funds. *Held*, that the transaction was not a consignment, but a conditional sale, within St. Wis. 1913, § 2317, providing that such contracts shall not be valid as against third parties unless filed in the proper office as therein provided, and where this statute was not complied with a claim for proceeds of sales not accounted for by the bankrupt was not entitled to priority.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. Ⓒ350.]

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

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

In the matter of one Leflys, bankrupt. From an order disallowing as a preferred claim the claim of the Strauss Bros. Company, opposed by the Wisconsin Trust Company, trustee, the claimant appeals. Affirmed.

Bankrupt conducted a general department store at Milwaukee, Wis. Appellant is engaged in the wholesale liquor business at Chicago, and agreed to stock bankrupt's liquor department with wines, beverages, etc., under the conditions set out in a contract entered into between the parties on March 19, 1913. According to the terms of said contract, on the date of its execution appellant shipped to bankrupt a supply of liquors; the contract reciting that the same were shipped on consignment only, to be sold on behalf of appellant at retail at prices not less than the invoices thereof furnished bankrupt. After delivery on the dock at Milwaukee, bankrupt was to save appellant harmless from all loss, damage, etc., to said merchandise, excepting damage by fire—appellant agreeing to insure the same against loss by fire—and was also to pay all expenses whatsoever incident to the handling and sale of said goods, place the same in its store for sale for the account of appellant, and use its best efforts to sell the same. All money derived from sales was to be the property of appellant, title to all said goods remaining unsold was to re-

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

main in appellant, and such unsold goods were, upon demand by appellant, to be returned to it free of any charge or expense. Sales were to be at retail and for cash only; it being provided, however, that, in case any sales were made upon open accounts for credit, bankrupt would guarantee the collection of such accounts and be answerable to appellant for the amounts due. As full compensation for its part in the transaction, bankrupt was to have such sum as it might receive for the merchandise in excess of the invoice prices thereof. Any of said merchandise found to be unsalable, through no fault of bankrupt, might within one year be returned to appellant, bankrupt to pay freight, etc., and thereafter be released from obligation to sell such returned goods. Bankrupt agreed to sell one-third of said liquors within one year, one-third within two years, and one-third within three years from the date of the contract, and, failing so to do, to purchase what remained at the expiration of such periods from appellant for cash at said invoice prices, title not to vest in bankrupt until the purchase price be actually paid to appellant; on the same terms and conditions, in the event bankrupt discontinued its liquor department within three years, it was to purchase all unsold liquors in its possession at the time of such discontinuance. Future shipments of liquors to bankrupt were to be received and handled by it on the same terms and conditions governing the original transaction, except as to the time within which said goods were to be sold; bankrupt agreeing to purchase all goods remaining in its possession unsold on the 10th day of the month following the date of shipment thereof by appellant. The contract further recited that nothing therein contained was to be construed as vesting title to any of said merchandise, covered either by the original or subsequent shipments, in bankrupt until cash therefor had been received by appellant, unless otherwise agreed in writing, and that no bill or invoice sent bankrupt, nor failure on the part of appellant to note on any such bill or invoice that the merchandise covered thereby was shipped on consignment, nor the absence in any such bill or invoice of reference to the contract, should be held to waive any of the provisions thereof. It was further provided that, in the event appellant should desire to cancel said contract, all merchandise then in bankrupt's possession which had not been sold, nor purchased and paid for in cash by bankrupt, should be returned to appellant upon demand by it, who thereupon might, at its election, terminate the contract, and, upon the refusal or neglect of bankrupt to so return said property, take possession of said property with or without process of law, and pursue and take the same from any place to which it might be removed and from any person into whose hands or possession it might be.

Leflys sold said property so alleged to be consigned and failed to account to claimant for \$1,250.58 of the proceeds thereof. The record makes no further showing as to what became of said sum and no attempt was made to trace said proceeds into the trustee's hands. Leflys was thereafter declared a bankrupt, and claimant presented to the trustee its claim for said balance as for "money converted by said Leflys belonging to claimant under the terms of the agreement" aforesaid, making a copy thereof Exhibit A thereto, and claiming its allowance as a preferred claim. No contest was made as to the amount thereof, but objection to its allowance as a preferred claim was duly urged. The referee allowed the claim for \$1,250.58 as a preferred claim. On review the District Judge reversed the order of the referee, from which judgment the matter is before us on appeal. The failure of the District Court to allow the same as a preferred claim is assigned for error. Other facts appear in the opinion.

Leon B. Lamfrom, of Milwaukee, Wis., for appellant.

Albert K. Stebbins and Jackson B. Kemper, both of Milwaukee, Wis., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The contract under consideration is one not easy to classify. It indicates

an intention to secure the advantages and avoid the disadvantages of a conditional sale. In arriving at a proper construction of it, little weight can be given to the frequent allusions therein to the claim that the relation of the parties is that of principal and agent, as against the effect of its terms. The bankrupt was bound to purchase all of the merchandise not returned as unsalable within one year. While it was provided that the goods and proceeds belonged to appellant, no provision for segregation of the proceeds was required, so that such moneys were permitted to go into the general funds of the bankrupt. There was no obligation upon the bankrupt to return any of the merchandise in kind provided the bankrupt paid the cash therefor. All expenses arising after loading were assumed by bankrupt, except the insurance. It might sell on credit, but must guarantee the amount of sales to appellant. Bankrupt's compensation and expenses must be covered by the excess of sales price over purchase price. No salary or commission was provided for it. There was no price of sale by it agreed on, save that the contract price must be realized.

In *Re Galt*, 120 Fed. 64, 67, 56 C. C. A. 470, 473, this court said:

"The distinction between bailment and sale is not difficult of ascertainment, if due regard be had to the elements peculiar to each. In bailment the identical thing delivered is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered, and there is no obligation to return."

And again, on page 68 of 120 Fed., on page 474 of 56 C. C. A.:

"The test would seem to be: Has the sender the right to compel a return of the thing sent, or has the receiver the option to pay for the thing in money?"

In that case the petitioner had reserved the right, upon failure to sell the wagons within a year, to require the bankrupt either to pay cash therefor, give his note, or store the wagons subject to petitioner's order, at the petitioner's option. The bankrupt had no choice. The transaction was held to be a bailment.

In *Lenz v. Harrison*, 148 Ill. 598, 36 N. E. 567, it was provided that, if wagons were not sold within a year, Harrison might give his note for the balance unpaid, if so required. This provision was held to indicate that the transaction was a sale.

The Eighth Circuit Court of Appeals, in *Deere Plow Co. v. McDavid*, 137 Fed. 802, 70 C. C. A. 422, in dealing with a somewhat different contract, wherein the implement company was required to segregate the cash and note proceeds from the general fund of the business, held the transaction to be one in which the goods actually remaining in the dealer's possession belonged to the original seller, while the latter was not entitled to the proceeds of those sold which had gone into the general fund.

In *Newmark on Sales*, § 23, this provision as to compensation is said to be inconsistent with the claim that the parties occupied the relation of principal and agent in the transaction. The same position was taken by Judge Philips, of the Eighth Circuit, in *Re Rabenau* (D. C.) 118 Fed. 471, citing *Kellam v. Brown*, 112 N. C. 451, 17 S. E. 416, *Ex parte White*, 6 Ch. App. 397, and *Chickering v. Bastress*,

130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309. In the last-named case the court says:

"The provisions [of the contract] authorizing Pelton & Co. to determine solely for themselves at what prices they would sell the pianos from their store is almost conclusive that in reality they were not acting as the agents or factors of the Chickerings; but that, with the further provision that they were to bear as their proper burden all the expenses of shipment, etc., the same, precisely, as purchasers, would leave no doubt that the contract was not one of bailment, or of principal and factor."

To the same effect is *Thompson v. Paret*, 94 Pa. 275.

Taking into consideration, further, the so-called insecurity clause of the contract, commonly used in chattel mortgages and conditional sale agreements, together with the general effect of all the other provisions of the contract, not specially dwelt on herein, we are of the opinion that the transaction effected was that of a conditional sale, and not a consignment, and within the terms of section 2317 of the Revised Statutes of Wisconsin, which provides that:

"No contract for the sale of personal property, by the terms of which the title is to remain in the vendor and the possession thereof in the vendee until the purchase price is paid or other conditions of sale are complied with, shall be valid as against any other person than the parties thereto and those having notice thereof unless such contract shall be in writing, subscribed by the parties, and the same or a copy thereof shall be filed in the office of the clerk of the town, city or village where the vendee resides."

With this statute appellant failed to comply. That being so, the claim for priority as against the trustee was properly denied.

The judgment of the District Court is affirmed.

In re FOOTVILLE CONDENSED MILK CO.

ROY'S v. CAREY et al.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916.)

No. 2316.

CORPORATIONS ⚡473—BONDS—DEFENSES AVAILABLE AGAINST BONA FIDE HOLDERS.

St. Wis. 1913, § 1753, adopted in 1874, provides that no corporation shall issue any bonds, except for money or property, estimated at its true money value, actually received by it, equal to 75 per cent. of the par value thereof, and that all bonds issued contrary thereto shall be void. Section 1676-27, adopted in 1899, provides that a holder in due course of a negotiable instrument holds it free from any defect of title of prior parties and may enforce payment for the full amount, except in certain cases, having no reference to corporate bonds. Section 1684-7, a part of the same statute, repealed certain sections of the statutes, provided that certain other sections should not be affected, and repealed all other provisions inconsistent therewith. *Held*, that it is not a defense available against a bona fide holder of negotiable bonds of a corporation that they were issued for less than 75 per cent. of their par value, since, if section 1753 applies to corporate bonds in the hands of innocent holders, it is in irreconcilable conflict with section 1676-27, and the legislation last enacted must prevail.

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

Petition to Review and Revise an Order of the District Court of the United States for the Western District of Wisconsin; Ferdinand A. Geiger, Judge.

In the matter of the Footville Condensed Milk Company, bankrupt. A claim of lien by Emerson Carey and another was sustained by the District Court, and William B. Roys, trustee, brings a petition to review and revise. Order affirmed.

John B. Sanborn and Chauncey E. Blake, both of Madison, for petitioner.

Sam T. Swansen and R. W. Jackman, both of Madison, for respondents.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge. The Footville Condensed Milk Company, a corporation, is bankrupt. Respondents, Carey and Guymon, are holders of \$16,500 of its unregistered, negotiable bonds, payable to bearer, secured by trust deed of the bankrupt on certain of its property. Respondents acquired the bonds before their maturity in due course of business, from the Valencia Condensed Milk Company, advancing to the Valencia Company therefor the sum of \$15,000 in cash, and receiving the bonds in good faith, without any knowledge of any infirmity in or defense to them. How or where the Valencia Company got the bonds the transcript does not disclose. A sale of the bankrupt's property, free of liens, was ordered by the referee, with direction that all persons claiming liens shall present their claims, which, if found valid, shall attach to the proceeds of the sale.

To the petition of respondents, setting forth the facts, and claiming a lien by virtue of the bonds, the trustee of the bankrupt estate answered that for the bonds so issued by the bankrupt corporation it, the bankrupt, did not receive in money, or labor, or property, or any of them, a sum equal to 75 per cent. of the par value of the bonds, and that the bonds were issued contrary to the provisions of section 1753 of the Statutes of Wisconsin, and are void. Respondents' demurrer to the answer was overruled by the referee. On review the District Court reversed the ruling of the referee and sustained the demurrer, and, the trustee electing to make no further answer, the District Court directed the referee to enter an order sustaining the lien as claimed.

It is the action of the District Court, in overruling the demurrer and sustaining respondents' claim for lien, against which the petition herein is directed. The question of law presented is whether corporate bonds issued in contravention of the provisions of section 1753 of the Wisconsin Statutes are valid in the hands of innocent holders. The section is as follows:

"No corporation shall issue any stock or certificate of stock except in consideration of money or of labor or property estimated at its true money value, actually received by it, equal to the par value thereof, nor any bonds or other evidences of indebtedness except for money or for labor or property estimated at its true money value, actually received by it, equal to seventy-five per cent.

of the par value thereof, and all stocks and bonds issued contrary to the provisions of law and all fictitious increase of the capital stock of any corporation shall be void."

Although adopted in 1874, and a number of times under consideration by the Supreme Court of Wisconsin, it does not appear to have been adjudicated by that court whether, as against innocent holders of such bonds, the corporate maker can sustain the defense of want of the consideration prescribed by this section. In the view we take it will not be necessary to consider whether or not under section 1753 alone, unaffected by subsequent legislation, such bonds in the hands of innocent holders are enforceable.

In 1899 Wisconsin adopted what is known as the Uniform Negotiable Instruments Law. Some of the sections thereof are as follows:

"1676-22. A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it;

"(5) That he took it in the usual course of business."

"1676-25. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtains the instrument, or any signature thereto, by fraud, duress, or force or fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud and the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care.

"1676-26. 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.

"1676-27. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon except as provided in sections 1944 and 1945 of these statutes, relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provision of section 1676-25 of this act."

"1684-7. Sections 176, 1675, 1676, 1677, 1678, 1679, 1680, 1681, 1682, 1683 and 1684, of the statutes are hereby repealed. Sections 1944, 1945, 4193, 4194, 4425 and 4458 of said statutes are not affected by this chapter, and nothing herein shall be deemed to repeal any part of such sections. All other provisions inconsistent with this chapter are repealed."

The exceptions stated in 1676-27 have no reference to corporate bonds, but the inclusion of the particular exceptions to the otherwise general rule would indicate that no other exception was intended. The peculiar repealing clause (section 1684-7) likewise strongly indicates legislative intent that corporate bonds should not be excepted from the application of the general rule declared in favor of bona fide holders in due course, of negotiable instruments.

It will be observed that 11 enumerated sections of the prior statutes are by section 1684-7 specifically repealed, and 6 are declared to re-

main unaffected, and "nothing herein shall be deemed to repeal any part of such [six] sections," but that "all other provisions inconsistent with this act are repealed." If, apart from the Negotiable Instruments Law, section 1753 be construed as applying to corporate bonds in the hands of innocent holders, it is in direct conflict with the Negotiable Instruments Law, particularly with section 1676-27, which distinctly provides that the holder in due course holds the instrument free from defects of title of prior parties, and from defenses available between prior parties. The inconsistency is irreconcilable, and in such case the legislation last enacted must prevail; and this conclusion is in harmony with the holdings of the Supreme Court of Wisconsin as to the effect of the Negotiable Instruments Law in this respect.

In *Quiggle v. Herman*, 131 Wis. 379, 111 N. W. 479, it was held that under section 1675-1a, Stats. Wis., providing that, where notes are given for stallions, lightning rods, and some other purposes, the consideration must be stated on the note in red ink, a note given for a stallion without the indorsement on the note as so required, was void in the hands of one taking it with knowledge of the consideration. But the court said:

"Whether the maker of such a note which has passed into the hands of an innocent purchaser before due would be estopped from setting up the illegality of the transaction, as was held with regard to a note executed on Sunday but dated on a secular day (*Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28), is not necessary to be considered, as the answer alleges that the plaintiff knew when he received the note that it was given in part payment for a stallion."

At the same term that court decided the case of *Arnd v. Sjoblom*, 131 Wis. 642, 111 N. W. 666, 10 L. R. A. (N. S.) 842, 11 Ann. Cas. 1179, which involved a note given for a lightning rod, the statutory red-ink indorsement of the consideration not appearing on the note, and the action being by an innocent holder in due course. While the court reached the conclusion that as against a bona fide transferee of the note the maker would in any event be estopped from making this defense, what was said in the opinion as to the effect of the Negotiable Instruments Act on such a note in innocent hands is quite in point here. We quote the following therefrom:

"Further than this, our negotiable instruments statute (section 1676-27) provides: [Section is quoted.] * * * Section 1676-25 applies only to the case where the signer did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care. Sections 1944, 1945, refer to a note given for an insurance premium, which by said sections is required to bear upon its face a declaration of its consideration, and omission thereof is penalized. But for these express exceptions the provision is general that the innocent holder may enforce payment for the full amount free from defenses available between the original parties. Such specific exceptions strongly indicate that no others were intended. We cannot escape the conclusion that this statute supports plaintiff's right of recovery."

In *Samson v. Ward*, 147 Wis. 48, 132 N. W. 629, the court held another stallion note without red-ink indorsement good in the hands of an innocent holder in due course, saying:

"It was decided in *Arnd v. Sjoblom*, 131 Wis. 642, 111 N. W. 666, 10 L. R. A. (N. S.) 842, 11 Ann. Cas. 1179, construing chapter 438, Laws of 1903, relating to such notes, that this statute did not make the note void in the hands

of an innocent purchaser for value in due course under sections 1676-25 and 1676-27 of the Negotiable Instruments Law."

We are of opinion that under the negotiable instruments statute of Wisconsin, the asserted defense that the bonds did not realize to this corporate maker 75 per cent. of their par is not available against these respondents, and that the District Court was right in sustaining the demurrer, and in directing an order to be entered finding the bonds a valid lien on the proceeds of the property covered by the trust deed securing them.

The order of the District Court is affirmed.

TURNER CONST. CO. v. UNION TERMINAL CO. et al.
(Circuit Court of Appeals, Fifth Circuit. January 18, 1916.)

No. 2759.

CORPORATIONS ⚡659 — FOREIGN CORPORATIONS — CONTRACTS — NONCOMPLIANCE WITH STATUTE.

Act Fla. June 1, 1907 (Laws 1907, c. 5717), provides that every contract made by or on behalf of any foreign corporation, affecting its liability, or relating to property within the state before it shall have complied with the provisions thereof, shall be void on its behalf and on behalf of its assigns, but shall be enforceable against it or them. A foreign corporation entered into a building contract before it had complied with the statute by filing a copy of its charter or articles of incorporation, and obtaining a permit to do business, but pending the performance of the contract the statute was complied with, and thereafter, as the dealings between the parties progressed, each party invoked the written contract as the basis of the rights and obligations asserted and recognized by them. *Held*, that this amounted to an adoption of such instrument as the evidence of the contract under which the dealings were carried on, and estopped the other party to the contract to set up a lack of right in the foreign corporation to claim under it, since, though the contract was unenforceable when made, the foreign corporation, after complying with the statute, could acquire rights theretofore ineffectually contracted for by the operation in its favor of an estoppel, or by joining with the other party in adopting, as the evidence of a subsisting contract between them, the written instrument previously signed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2561, 2562; Dec. Dig. ⚡659.]

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Bill by the Turner Construction Company against the Union Terminal Company and others. From a decree dismissing the bill, plaintiff appeals. Reversed.

Sam R. Marks and Richard P. Marks, both of Jacksonville, Fla., for appellant.

P. H. Odom and J. T. G. Crawford, both of Jacksonville, Fla., for appellees.

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

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

WALKER, Circuit Judge. The bill in this case, filed September 19, 1913, and which sought the enforcement of a builder's or mechanic's statutory lien, alleged the execution by the plaintiff, a New York corporation, and the defendant Union Terminal Company (hereinafter referred to as the owner), of a written contract for the construction by the former for the latter of a building, a copy of which contract, dated November 21, 1912, was made an exhibit to the bill; that shortly after the date of that instrument, to wit, on the 10th day of December, 1912, and in compliance with the terms of that instrument, the plaintiff commenced the work of construction, and proceeded with it, furnishing all necessary material and labor, until the building was completed in July, 1913; that from time to time during the course of the work and in accordance with the contract provisions the plaintiff submitted to the owner statements and estimates of the amounts due and to become due for labor and materials under the contract, and from time to time during the course of the work the owner paid to the plaintiff various sums, aggregating \$140,695.89, but that there is still due and owing to the plaintiff a large balance, to wit, \$81,046.40. The owner's amended answer to the bill averred, in addition to other matters of defense and of set-off, that the plaintiff—

“is a corporation for profit, organized and existing under the laws of the state of New York; that the contract upon which recovery is sought in this suit affects the liability of said complainant; that said complainant was not transacting business in the state of Florida on or before the 1st day of June, 1907; that said complainant has not filed in the office of the Secretary of State of the state of Florida a duly authenticated copy of its charter or articles of incorporation; that said complainant has not received from the Secretary of State a permit to transact business in the state of Florida.”

The evidence in the case was taken while the pleadings were in the condition above indicated. It was disclosed by that evidence that on the 11th day of January, 1913, the Secretary of State of Florida issued a permit to plaintiff showing a compliance by it with the provisions of the act of the Legislature of Florida, approved June 1, 1907 (Acts of 1907, c. 5717), entitled “An act to prescribe the terms and conditions upon which foreign corporations for profit may transact business, or acquire, hold or dispose of property in this state”; and it was also disclosed by the evidence that the conduct of both the plaintiff and the owner while the work on the building was progressing after January 11, 1913, unequivocally showed that each of them was relying on the written instrument which they had signed as embodying the contract by which their dealings were governed. After the evidence was closed, the owner was permitted, over objections made by the plaintiff, so to amend its answer as to set up the plaintiff's noncompliance with the requirements of the statute above mentioned until after the date of the contract and the commencement of the work thereunder. With the objections to this amendment the plaintiff submitted also a motion to strike it, if allowed; one of the grounds stated in that motion being the following:

“Defendant, having allowed complainant to proceed, and having accepted the benefit of the contract, with full knowledge of all material facts, is now estopped to present the defense sought to be interposed.”

Following the expressed conclusion of the court that the contract relied on by the plaintiff was void under the statute, a decree dismissing the bill was entered.

The statute above mentioned provides that:

"Every contract made by or on behalf of any foreign corporation affecting its liability or relating to property within the State before it shall have complied with the provisions of this Act shall be void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

It may be conceded that an effect of this provision was to prevent the acquisition by the plaintiff of any enforceable right as a result of the signing of the instrument on November 21, 1912, and that no right thereunder could have accrued to it prior to its compliance with the statute. But its compliance with those requirements and the issue of the permit to it on January 11, 1913, effectually removed its disability to acquire contractual rights in Florida. Thereafter its capacity to contract in that state was not subject to the restriction imposed by the statute referred to. Its power in this regard could be exercised in any way by which a valid contract may be made. It could acquire rights theretofore ineffectually undertaken to be contracted for by the operation in its favor of an estoppel upon the party dealt with to deny the existence of such rights, or by joining with that party in adopting as the evidence of a subsisting contract between them the instrument which, when it was signed, did not, because of a statutory prohibition, confer any enforceable right on the plaintiff. The contract, so far as the statute made it void, could not be ratified with the result of giving it validity from the time it was undertaken to be made; but after both the parties were free of any disability they could make a new contract and recognize the instrument already signed as embodying the terms of it. *Williams v. Morris*, 95 U. S. 444, 457, 24 L. Ed. 360; *Wald's Pollock on Contracts* (3d Ed.) 621, 791.

The evidence adduced clearly showed that, as the dealings between the plaintiff and the owner progressed after the date of the permit issued to the former, each of them invoked the written instrument they had signed as the basis of the rights and obligations that were asserted and recognized. The owner's conduct during that period was equivalent to a continuing assertion by it that the contract which the instrument expressed was in existence and that the reciprocal rights and obligations of the parties were governed by it. The conduct of the parties to the dealings subsequent to the issue of the permit had the effect of an adoption by them of the instrument they had signed as the evidence of the contract under which the dealings were carried on and of estopping the owner to set up a lack of right in the plaintiff to claim under it.

Before the allowance of the last-mentioned amendment, the only allegation of the owner's answer as to a noncompliance by the plaintiff with the Florida foreign corporation statute was one which was not supported by the evidence adduced. Without further pleading by the plaintiff, that allegation was to be deemed to be denied by it. *Equity Rule 31* (198 Fed. xxvii, 115 C. C. A. xxvii). The averments of the bill were such as to show that the demands asserted by it were

based, not alone upon the execution of the written instrument which was made an exhibit to the bill, but also on what was averred to have occurred between the plaintiff and the owner throughout the period when the work mentioned was in progress—from its commencement in December, 1912, until it was completed in July, 1913. And the evidence adduced so far supported those averments as to show that the plaintiff acquired enforceable rights as a result of what happened after the permit was issued to it. The averments of the last-mentioned amendment to the answer failed to show that the plaintiff was under a disability to acquire contractual rights throughout the period in which the averments of the bill and the evidence supporting them showed that such rights were accruing to it. In other words, the averments of that amendment did not show the existence of a state of facts constituting a defense to the bill as a whole. The sufficiency of the defense set up by that pleading was properly tested by a motion to strike out. Equity Rule 33 (198 Fed. xxvii, 115 C. C. A. xxvii). The conclusion is that the court was in error in its rulings to the effect that the state of facts set up by that amendment constituted a defense to all the demands asserted by the bill and supported by evidence.

It follows that the decree appealed from should be reversed; and it is so ordered.

POLSON LOGGING CO. v. NEUMEYER et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916.)

No. 2584.

1. SALES ◊164—PERFORMANCE OF CONTRACT BY SELLER—EXCESS OF QUANTITY.

Under an order for a quantity of steel bars of various sizes, the bars to be 20 feet long and cut in two, some of the steel was shipped in bars exceeding 10 feet in length, the aggregate length of three bars being over 77 feet, and the aggregate excess of length over the order 523 feet, making a total excess in weight of 2,709 pounds, amounting at the contract price to considerably over \$300 on an order aggregating between \$3,000 and \$4,000. *Held*, that the buyer would have been justified in refusing to accept the shipment because of this excess, either under the strict rules of the common law or under the rule of substantial compliance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 386-390; Dec. Dig. ◊164.]

2. SALES ◊176—REFUSAL TO ACCEPT—WAIVER OF OBJECTIONS NOT SPECIFIED.

A seller of steel bars shipped bars exceeding the length specified in the order, making an aggregate excess of length over the order of 523 feet and an additional cost at the contract price of over \$300. The purchaser, however, refused to receive the steel on the ground that the sellers' agent was guilty of fraud in procuring the order and that the purchaser's employé was without authority to give the order, and the objection to the excess in quantity was not made until about a week before trial, more than a year after the shipment of the steel, during which time the parties had been disputing by letter and telegraph over the fact of the alleged sale, the alleged fraud, and the lack of authority on the part of their respective employés. *Held*, that the objection based on the excess in quantity was made too late, since a buyer of merchandise must either accept or

reject it when tendered, and is bound to do one or the other within a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. 176.]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Gustave H. Neumeyer and another, copartners doing business as Neumeyer & Dimond, against the Polson Logging Company. Judgment for plaintiffs for \$3,895.39, the amount sued for, and defendant brings error. Affirmed.

This action was brought to recover the alleged agreed value of certain bars of steel alleged to have been ordered in writing by the defendant to the action (plaintiff in error here), from the plaintiffs (defendants in error), the delivery to be made f. o. b. Hoquiam, state of Washington, which the plaintiffs in their complaint alleged were so delivered, and for which the complaint alleged the defendant company promised, but afterwards refused, to pay. Those allegations of the complaint were put in issue by the answer of the defendant, which also set up as an affirmative defense certain alleged frauds upon the part of the plaintiffs' salesman who procured the order (to be set out in full), and lack of authority on the part of the defendant's representative who signed the order. The order is as follows:

"No. 2012.

Sept. 11, 1912.

"Neumeyer & Dimond, New York.

"Enter our order for the following:

"When ship—Soon as possible.

"Ship to—Polson Logging Company, Hoquiam, Washington.

"Send bill to—Same.

3 bars 1½" x 2½" Swivel Steel
 2 bars each 2" Rd. 1-⅜" Rd. Clevis Steel
 1 " " 2¼" Round Swivel Eye Steel
 7 " " 1¼" x 4½" Chaker Hook
 2 bars each 1¼" Rd. -2½" Rd. Block Hook Steel
 2 " " 2¼" Round Line " "
 2 " " 5/16" x 14" Block Side Steel
 2 " " 2-¾" □ Sledge Steel
 2 " " 2" Rd-2½" Rd-1-13/16" Rd. Piston Rod Steel
 1 " " 1¼" Round Valve Rod
 1 " " 7/16" x 3½" Locomotive Spring Steel
 25 " " 1" x 2" Dog Hook Steel
 1 " " 5/8" Oct. 2 bars ¾" Oct. Cold Chisel
 2 " " 2" □ 1½" □ 1-⅜" □ 1¼" □ Track & Bull Chisel
 1 " " 3" □ Splitting Wedge Steel
 12 " " 1" x 3" Falling & Bucking Wedge
 12 " " 7/8 Rd. -1" Rd-1-⅛" Rd-1-1¼" Rd Cold Shut
 50 " " ¾" Round
 2 " " 1" " Roller Bearing Steel
 250 ft. 1¼" x 6" Draw Head Steel
 bars 20 ft. long cut in two at 12½¢ lb.
 8 ft. each 3" □ 4" □ Die Steel (Ann.) 17¢ lb.

"F. O. B. Hoquiam, Wash.

"Polson Lg. Co. Order #653 as per copy left with us of this order.

"Terms 2% 10 days, 30 days net.

[Signed] Polson Logging Co.

"J. C. Shaw."

On one side of sheet:

"This order is taken subject to delay in delivery caused by strikes, differences with workmen, serious fires, accidents to machinery, or other causes unavoidable or beyond our control.

"(4158)"

The issues made by the plaintiffs' reply to the alleged fraud on the part of the plaintiffs' representative, and the alleged lack of authority of the defendant's representative, were resolved by the jury against the defendant, and, as the case is brought here, are not for consideration by this court.

The contention on the part of the plaintiff in error grows out of the fact that it appeared in evidence without conflict that some of the steel was shipped in bars exceeding 10 feet in length—the aggregate length of the three bars of $1\frac{1}{2}$ " x $2\frac{1}{2}$ " of swivel steel being 77 feet $2\frac{1}{2}$ inches, and the aggregate excess of length over the order being 523 feet, making a total excess in weight of 2,709 pounds, amounting at the contract price to considerably over \$300.

Bridges & Bruener, of Aberdeen, Wash., for plaintiff in error.
John W. Roberts and Nelson R. Anderson, both of Seattle, Wash., for defendants in error.

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

ROSS, Circuit Judge (after stating the facts as above). [1, 2] Whether tested by the strict rules of the common law, or the rule contended for by the defendants in error, requiring only a substantial compliance with the terms of the contract by the seller, we should have no difficulty in holding that such a departure in the matter of the length of the bars and such excess in weight of the steel, resulting in an additional cost over the contract price to the purchaser of more than \$300, is not sanctioned by either of the rules referred to, and would have justified the latter in refusing to accept the shipment in question, had such refusal been seasonably made on those grounds. But the case shows that the purchaser refused to receive the steel so shipped solely upon the grounds that the sellers' solicitor was guilty of fraud in procuring the order, and that the defendant's employé was without authority to give it, and therefore that there was no sale or purchase.

The objections now relied upon to defeat the action were confessedly not made until about a week before the actual trial of the case—long after the suit had been brought, and more than a year after the steel had been shipped to the purchaser, during which time the respective parties were disputing by telegraph and letter over the fact of the alleged sale and the alleged fraud and lack of authority on the part of their respective employés.

We think the objections now relied upon were made altogether too late. It is quite true that mere silence at a time when there is no occasion to speak is neither a waiver nor evidence from which a waiver may be inferred—especially when unaccompanied by any act calculated to mislead the other party. But surely a buyer of merchandise must either accept or reject it when tendered by the seller, and is bound to do one thing or the other within a reasonable time. In the present instance the buyer made no objection within any reasonable time to the overweight of the steel nor to the length of the bars, but based its refusal to accept the shipment exclusively upon the grounds above stated, which grounds the jury found were without any foundation.

In *Railway Company v. McCarthy*, 96 U. S. 258, 267 (24 L. Ed. 693), the Supreme Court said:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. *Gould v. Banks*, 8 Wend. (N. Y.) 562 [24 Am. Dec. 90]; *Holbrook v. White*, 24 Wend. (N. Y.) 169 [35 Am. Dec. 607]; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Wright v. Reed*, 3 Durnf. & E. 554; *Duffy v. O'Donovan*, 46 N. Y. 223; *Winter v. Coit*, 7 N. Y. 288 [57 Am. Dec. 522]."

To the same effect, see *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. 239, 55 C. C. A. 93; *Davis & Rankin Bldg. & Mfg. Co. v. Dix* (C. C.) 64 Fed. 406, 410, 411; *Lorraine Mfg. Co. v. Oshinsky et al.* (C. C.) 182 Fed. 407; *Meincke v. Falk*, 61 Wis. 623, 21 N. W. 785, 50 Am. Rep. 157; *Zeimantaz v. Blake*, 39 Wash. 6, 80 Pac. 822; *Peterson Bros. v. Mineral King Fruit Co.*, 140 Cal. 624, 74 Pac. 162; *Ginn et al. v. Clark Coal Co.*, 143 Mich. 84, 106 N. W. 867, 107 N. W. 904; *Linger v. Wilson*, 73 W. Va. 669, 80 S. E. 1108; *Sutton v. Risser*, 104 Iowa, 631, 74 N. W. 23; *Ricketts v. Buckstaff*, 64 Neb. 851, 90 N. W. 915; *Bundy v. Wells et al.*, 88 Neb. 554, 130 N. W. 273, Ann. Cas. 1912B, 900; 28 Am. & Eng. Encyc. of Law, 18, and cases there cited.

The judgment is affirmed.

BROOKS et al. v. HILTON-DODGE LUMBER CO. et al.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 93.

1. SHIPPING ⇐174—DEMURRAGE—LIABILITY OF PURCHASER OF CARGO.

The purchaser of a cargo of lumber from the charterer to be delivered at its wharf, which agreed to supply "suitable berth on arrival for receipt of the lumber in accordance with rules of port," was bound, not only to furnish suitable berth for receipt of the lumber, but also to do nothing to prevent its receipt from the vessel in accordance with the rules of the Maritime Exchange, and is liable to the charterer for demurrage it was required to pay because of delay caused by the purchaser.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 571; Dec. Dig. ⇐174.]

2. SHIPPING ⇐180—CHARTERS—LIABILITY FOR DEMURRAGE.

In the absence of an agreement to the contrary, it is the duty of the vessel to load and discharge cargo, and such duty should not be transferred to the charterer, unless the intention of the parties to do so is clear. The vessel is not relieved from such duty by a provision of the charter party that the stevedore for discharging shall be subject to approval of the charterer, and a stevedore employed with such approval is still the agent of the vessel, for whose delay in discharging the charterer is not liable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 587, 588; Dec. Dig. ⇐180.]

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

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

Suit in admiralty by Joseph W. Brooks and others, owners of the schooner *Grace Seymour*, against the Hilton-Dodge Lumber Company and the Yellow Pine Company, impleaded. From the decree, the Yellow Pine Company appeals. Modified and affirmed.

For opinion below, see 221 Fed. 265.

Hyland & Zabriskie, of New York City (N. Zabriskie, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (T. C. Jones, of New York City, of counsel), for appellee Hilton-Dodge Lumber Co. Alexander & Ash, of New York City, for appellees Brooks and others.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a libel by the owners of the schooner *Grace Seymour* against the Hilton-Dodge Lumber Company, the charterer, to recover demurrage for 10½ days at \$49 a day. The charterer, which had sold the cargo to the Yellow Pine Company f. o. b. its wharf, brought it in under the fifty-ninth rule in admiralty (29 Sup. Ct. xli).

The charter party provided that the cargo should be discharged as per rules of the Maritime Exchange, rule V of which fixes the lay days for discharging such a cargo as this at the rate of 35,000 feet per day, Sundays and legal holidays excepted. The total cargo divided by this amount gave the charterers 13½ lay days. The charter party also provided that for every day's detention thereafter by the default of the charterer or agent it was to pay \$49.

[1] The Yellow Pine Company purchased the cargo of the Hilton-Dodge Company delivered on its wharf, and had nothing to do with either the charter party or the bill of lading. In the contract of sale, however, with the Hilton-Dodge Company, it agreed to supply "suitable berth on arrival for receipt of the lumber in accordance with maritime rules of port." We think it thereby undertook, not merely to furnish a suitable berth for receipt of the lumber, but also to do nothing to prevent its receipt from the vessel in accordance with the rules of the Maritime Exchange. The demurrage rate by rule VII was 15 cents per 1,000 feet of entire cargo delivered, or something over \$70 a day. For any detention in receiving cargo caused by the Yellow Pine Company, the Hilton-Dodge Company would be liable as charterers to the vessel owners. Therefore the Yellow Pine Company must indemnify the Hilton-Dodge Company for whatever it is liable to pay the vessel for demurrage.

The common expression that so many days are allowed for loading and discharging a vessel is misleading. There is no obligation on the vessel to load or discharge within any fixed time. The duty is that of the charterers to furnish and to receive the cargo, if the vessel be able to load and discharge it within a fixed period, viz., the lay days. For any delay caused by the vessel the lay days would be pro tanto extended, and any delays due to the charterer would of course be included in the lay days.

The arrival of the vessel off Stapleton, Staten Island, was reported on Friday, November 29th, and the charterer had under rule IV of the Exchange from midnight of that day to midnight of the 30th to furnish a berth in which the vessel could discharge (*Leary v. Talbot*, 160 Fed. 914, 88 C. C. A. 96), and December 1st being a Sunday, the lay days began December 2d and if not interrupted by the vessel would end on December 17th at noon. The account is as follows:

	Detention.		Detention.
December 2		No men f. 513	1
		No room f. 170	
		Rigging	$\frac{1}{4}$
3			
4			
5			
6	$\frac{1}{2}$		
7	1		
9	1		
10	$\frac{1}{2}$		
11			
12			
13	1		
14	1		
16		Rigging	$\frac{1}{2}$
17			
18		Rain	$\frac{3}{4}$
19			
20	Demurrage begins		

The charterer contends that the delays mentioned in the first column were due to the refusal of the master to shift his vessel astern, so as to bring her after hatch opposite the clear space on the wharf, and its refusal to open the bow ports. It is enough to say that the District Judge found on both these points in favor of the vessel, and we adopt his findings of fact; therefore this detention must be included in the lay days.

Rule V of the Maritime Exchange provides:

"If vessel is ready to discharge cargo in questionable weather consignee must receive the same."

The charterer was not at fault for the delay of three-quarters of a day on the 18th, no cargo being discharged because of rain. The failure to discharge on the 2d was said by the master to have been due to lack of room on the wharf, but by the president of the stevedoring company to lack of stevedores. The detention because of the rigging was of course part of the stevedore's duty.

[2] The charter party provided:

"Stevedore at port of discharge to be subject to approval of charterers."

In the absence of an agreement to the contrary, it is the duty of the vessel to load and discharge the cargo, and clauses regulating the subject are frequently introduced into charter parties. The normal duty of the vessel should not be transferred to the charterer, unless the intention of the parties to do so is clear. Under the language of this charter we have no doubt that the stevedore was the agent of the owners who appointed and paid it. The charterer named the Franklin

Garage Company, which did all the work of the Yellow Pine Company, and the master agreed to employ it. It is quite natural that the charterer shipper or consignee should want the privilege of approving the stevedore to be employed, so as to insure proper loading and discharging; but this privilege should not be taken to carry with it responsibility for loading and discharging the cargo. In this case the master was not obliged to employ any stevedore the charterer might name, but only one approved by it. Such a person would still be the servant of the shipowners, performing their duty of discharging the cargo. The *T. A. Goddard* (D. C.) 12 Fed. 174, 184; *Harris v. Post*, 7 Asp. Mar. Cas. N. S. 272; *Harrington v. American Tie & Lumber Co.*, 185 Fed. 475, 107 C. C. A. 575; *Carver on Carriage by Sea* (4th Ed.) 274. Accordingly we think these delays in the second column, amounting to 2½ days, are to be attributed to the vessel, and the lay days, being pro tanto extended, terminated December 19th, inclusive; demurrage beginning December 20th and continuing thereafter every running day until the discharge was completed, December 27th—i. e., 8 days, at \$49 per day, with interest due de die in diem.

The court below relied on the case of *Irzo v. Perkins* (D. C.) 10 Fed. 779, but it in no way qualified the vessel's duty to discharge the cargo, and only imputed delay to the charterers for their failure to carry out the special agreement as to the manner in which the cargo should be discharged. The court below is directed to award the libelants demurrage at the rate of \$49 per day for 8 days, beginning December 20th, with interest de die in diem, with costs of the District Court to be paid primarily by the Yellow Pine Company, and secondarily by the Hilton-Dodge Company; the libelants to pay costs of this court to the Yellow Pine Company. The decree, so modified, is affirmed.

In re KRECUN.

KRECUN v. MEYER et al.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916.)

No. 2279.

BANKRUPTCY ⇔400—EXEMPTIONS—OBJECTIONS—TIME FOR FILING.

Bankr. Act July 1, 1898, c. 541, § 47, 30 Stat. 557 (Comp. St. 1913, § 9631), requires the trustee to set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after his appointment. General Orders in Bankruptcy No. XVII (89 Fed. viii, 32 C. C. A. xix) provides that the trustee shall make a report to the court within 20 days of the articles set off to the bankrupt and that any creditor may take exceptions to the determination of the trustee within 20 days after the filing of the report. *Held*, that the rule is mandatory, and the District Court had no discretion and could not permit the filing of objections 21 days after the filing of the report.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. ⇔400.]

Petition to Review and Revise an Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

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

In the matter of Abe Krecun, bankrupt. The District Court overruled an order of the referee refusing to permit the filing of objections by Louis Meyer and another, copartners doing business as Louis Meyer & Son, to the trustee's report on the claim for exemptions, and the bankrupt files a petition to review and revise. Reversed and remanded, with directions.

B. M. Shaffner and Harry H. Krinsky, both of Chicago, Ill., for petitioner.

Harry J. Myers, of Chicago, Ill., for respondents.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge. From the petition herein and the answer thereto it appears that the petitioner, a bankrupt, duly made claim for his exemptions allowed by the statutes of Illinois; that the trustee's report on the bankrupt's claim for exemptions was filed with the referee on December 22, 1914; and that 21 days thereafter, on January 12, 1915, respondents (who are creditors of the bankrupt) presented to the referee for filing, their exceptions to the report. The referee held that the exceptions were presented too late, and denied leave to file them. On petition to the District Court this finding of the referee was overruled, and this proceeding challenges the correctness of the ruling of the District Court.

Respondents' answer states that on the twentieth day after the trustee's report was filed the matter was turned over for attention to a law clerk of respondents' attorney, who only that day began service in the law office, and who, the answer states, did not understand the importance of filing the exceptions on that day; and that this clerk, when he learned late in the afternoon of the twentieth day that it was the last day for filing the exceptions, went with them to the office of the referee after half past 5—how long after is not stated—but found that office locked; that the next morning the exceptions were brought to the referee, who afterwards denied leave to file them. In the affidavit of the same law clerk, which appears in the transcript of the record which was without objection filed herein, no mention whatever is made of any attempt by him to present the exceptions on the twentieth day, but only on the following morning.

If the District Court had discretion to permit the presenting of such exceptions after 20 days from the filing of the trustee's report, it might be important to review the circumstances under which the court permitted the exceptions to be thereafter filed, as bearing on the question of the reasonableness of the exercise of such discretion. But was there, under the law, such discretion in the Court? The forty-seventh section of the Bankruptcy Law provides that trustees shall "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment." Paragraph XVII of the General Orders in Bankruptcy (89 Fed. viii, 32 C. C. A. xix) is as follows:

" * * * The trustee shall make report to the court within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of

the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. * * *

If the time within which such exceptions may be filed rests within the discretion of the court, the question of exemptions might be extended indefinitely, with resultant embarrassment in the settlement of the estate, and withholding from the debtor of the immediate benefit of the exempted property, which, out of a humane policy, is generally accorded to him by statute in order that he may not wholly be deprived of means of present sustenance for himself and family.

The Bankruptcy Law saves to the debtor such exemptions as the law of the state gives him, and General Order XVII points out the manner in which, in case of bankruptcy, the exemptions to the bankrupt shall be set apart. In prescribing a method by which exception may be taken to the exemptions as set apart, it fixes a period of 20 days after the trustee makes report of the exemptions within which to take exception thereto.

When the 20 days have thus passed, and exceptions have not been taken, the trustee is warranted in presuming that none will be taken, and may then with safety pay over or turn over to the debtor the money or property thus reported as exempted to him. In Remington on Bankruptcy, vol. 1, § 1082, in commenting on Order XVII as it bears on the time of filing the exceptions, it is stated:

"The creditors in doing so must file their exceptions within 20 days, so that the trustee may have it set at rest whether the beneficiaries of his trust—the creditors—will find fault with him in that particular."

In the General Orders in Bankruptcy are found some instances where a time definitely fixed may be extended by an order of the referee or court. In Order XXI, par. 3, on the subject of notice of assignment of claims, it is provided:

"If no objection be entered within ten days, or within further time allowed by the referee," etc.

In Order XXXII (89 Fed. xiii, 32 C. C. A. xxxi) on the subject of discharge or composition, it is provided:

The creditor "shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge."

Thus making provision in some instances for extension of time beyond that specifically fixed in the order, but leaving unqualified in rule XVII the time fixed within which creditors may take exception to the trustee's report, would tend strongly to indicate an intention on the part of the court which promulgated the General Orders that, under rule XVII, if the creditor desires to except to the report, he must do so within the 20 days so fixed.

In commenting upon that part of General Order XXXVI (89 Fed. xiv, 32 C. C. A. xxxvi), which fixes thirty days as the time within which appeals to the Supreme Court may be taken, that court said:

"The limitation has the same effect as if written in the statute, and the allowance of an appeal on certificate cannot operate as an adjudication that it is taken in time. The present appeal was allowed four months 'after the judgment or decree' appealed from and three months after the time to appeal had expired."

The appeal was dismissed. *Conboy v. First National Bank of Jersey City*, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128.

We perceive no reason why this language is not likewise applicable to the time limit as fixed in Order XVII. We are of opinion that Order XVII is mandatory in this respect, and that the District Court had no discretion to extend the time for presenting exceptions to the trustee's report.

The order of the District Court is therefore reversed, and the cause is remanded, with direction to the District Court to enter an order denying appellee's motion for leave to file exceptions to the trustee's report of exemptions to the bankrupt.

GOOD PINE LUMBER CO. v. DUKE.

(Circuit Court of Appeals, Fifth Circuit. February 15, 1916. Rehearing
Denied March 21, 1916.)

No. 2787.

1. APPEAL AND ERROR ⚡671—REVIEW—STATUTORY PROVISIONS.

Rev. St. § 649 (Comp. St. 1913, § 1587), provides that issues of fact in civil cases in any Circuit Court may be tried without a jury whenever the parties file a stipulation in writing waiving a jury, and that the finding of the court upon the facts, shall have the same effect as a verdict. Section 700 (Comp. St. 1913, § 1668) provides that when an issue of fact is tried without a jury the rulings of the court in the progress of the trial, if excepted to and duly presented by a bill of exceptions, may be reviewed upon writ of error or appeal, and that when the finding is special the review may extend to a determination of the sufficiency of the facts found. *Held*, that where, in an action tried without a jury, there was no agreed statement of facts, or special finding of facts, in the record, but only a general finding embodied in the judgment, assigning no other reason than that the law and the evidence was in favor of plaintiff, only the rulings during the trial presented by a bill of exceptions could be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. ⚡671.]

2. APPEAL AND ERROR ⚡1051—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a possessory action tried without a jury, the admission of an exhibit over the objection that it was an *ex parte* statement, not made in defendant's presence, and an attempt to prove a parol sale of real estate, never reduced to writing, nor recorded, and was not an authenticated act purporting to be a sale, was not reversible error, where alunde the exhibit a witness testified substantially to the same facts contained therein, and no exception was reserved to his testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. ⚡1051.]

In Error to the District Court of the United States for the Western District of Louisiana; Aleck Boardman, Judge.

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

Action by John K. Duke against the Good Pine Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. H. White, of Alexandria, La., for plaintiff in error.
George Wear, Jr., of Jena, La., for defendant in error.

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

PARDEE, Circuit Judge. [1] This is a possessory action, brought in accordance with the laws and practice of the state of Louisiana. It was tried before the judge without a jury, the same having been waived in writing. The record shows no agreed statement of facts, no special finding of facts by the judge, but a general finding, embodied in the judgment rendered therein, assigning no other reason than that the law and the evidence was in favor of the plaintiff and against the defendant. In this state of the record, only the rulings of the court during the progress of the case, duly presented by a bill of exceptions, can be here reviewed. R. S. U. S. §§ 649, 700 (Comp. St. 1913, §§ 1587, 1668).

[2] While a mass of evidence, oral and documentary, is set forth in the transcript, only one bill of exceptions was taken, and that was to the admission of a certain exhibit, "Plaintiff A," on the ground that it was an ex parte statement purporting to be made up by one A. M. Duke out of the presence of the defendant, and because it was an attempt to prove a parol sale of real estate, never reduced to writing nor recorded, and for the further reason that the act was not an authentic act purporting to be a sale. Whereupon the judge overruled the objection, and limited the evidence to the effect, and not the admissibility, of the same. To this bill, by agreement of counsel and judge, the whole testimony of the plaintiff, John K. Duke, was to be attached and made part thereof, and in that testimony the witness, aliunde the exhibit, over the objection of defendant, testified substantially to the main facts contained therein, to wit, the purchase of plaintiff from Elisha Beck in 1876 of the land in controversy, but no exception was reserved.

As the trial was before the judge without a jury, we cannot hold that the ruling of the court complained of was reversible error. None of the assignments of error are well taken.

Judgment affirmed.

THE GRANVILLE R. BACON.

(Circuit Court of Appeals, Fifth Circuit. January 31, 1916.)

No. 2793.

SHIPPING ⚡84(5)—PERSONAL INJURIES—COMPARATIVE NEGLIGENCE—AMOUNT OF RECOVERY.

The libellant, a young man 21 years old, was injured in unloading a cargo from a schooner, and was in bed 50 days, suffered pain, and was still suffering pain at the time of the trial. His physician's minimum fee was \$350. His leg was fractured at the hip, and had been so shortened that

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

he would be a cripple for life, and unable to do the work to which he was accustomed, though able to do light work. He had been a steady working man, hardly ever unemployed, and generally earning \$1.75 a day. *Held*, that the facts showed that the District Court's allowance of \$1,500 as damages was based on a finding that the libelant was guilty of contributory negligence, and that he followed the admiralty rule to divide the damages.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 342; Dec. Dig. 84(5).]

Appeal from the District Court of the United States for the Southern District of Florida; Wm. B. Sheppard, Judge.

Libel in admiralty by Ronald Forsyth against George Bennett, master of the schooner Granville R. Bacon. Decree for libelant, and defendant appeals. Affirmed.

Frank B. Shutts, Wm. P. Smith, and Crate D. Bowen, all of Miami, Fla., for appellant.

Eugene O. Locke, of Jacksonville, Fla., for appellee.

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

PER CURIAM. This is a libel in admiralty to recover damages from the schooner Granville R. Bacon for injuries in unloading cargo. The decree of the District Court, without assigning specific reasons therefor, awarded \$1,500 for damages.

On the evidence in the transcript, we conclude that the schooner was guilty of negligence as charged, and that the libelant was guilty of contributory negligence. The evidence shows without dispute that the libelant was a young man 21 years of age at the time of his injury; that he was 50 days in bed and suffered pain, and was still suffering pain at the time of testifying; that the minimum fee of the attending physician was \$350; that his leg was fractured at the hip, and has been shortened, so that he will be a cripple for life, and that, while he may be able to do light work, he can never do the work to which he was accustomed; and that he had been a steady working man, hardly ever unemployed, generally earning \$1.75 per day.

From this we infer that the sum of \$1,500, allowed by the District Judge, was based on the finding that, while the schooner was guilty of negligence, the libelant was guilty of contributory negligence, and that he followed the admiralty rule in such cases, dividing the damages. See *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586.

The decree appealed from is affirmed.

FULLINWIDER v. SOUTHERN PAC. R. CO. OF CALIFORNIA et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916.)

No. 2638.

PUBLIC LANDS ⇐70—RAILROAD LAND GRANTS—CONSTRUCTION—CONDITIONS.

Act March 3, 1871, c. 122, 16 Stat. 573, granted lands to the Texas Pacific Railroad Company, and provided in section 9 that all such lands not disposed of within three years after the completion of the road should be subject to settlement and pre-emption like other lands, at a price to be paid to the company, not exceeding an average of \$2.50 per acre. Section 23 authorized the Southern Pacific Railroad Company to construct a railroad connecting that of the Texas Pacific Railroad, "with the same rights, grants, and privileges and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California" by Act July 27, 1866, c. 278, 14 Stat. 292. *Held*, that this did not indicate an intent that the rights, grants, and privileges given the Southern Pacific Company were to be the same as those given the Texas Pacific Company, and did not attach to the grant to the Southern Pacific Company the condition of section 9, nor can such a condition be read into section 23 because a similar provision was uniformly inserted in railroad land grants during the two or three years preceding the grant in question.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 231, 236; Dec. Dig. ⇐70.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Action by George S. Fullinwider against the Southern Pacific Railroad Company of California and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

J. Mack Love, of Los Angeles, Cal., for appellant.

Charles R. Lewers, of San Francisco, Cal., and W. I. Gilbert and Luther G. Brown, both of Los Angeles, Cal. (Guy V. Shoup, of San Francisco, Cal., of counsel), for appellees.

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

GILBERT, Circuit Judge. The appellant brought a suit to compel the appellees to convey to him a certain half section of land situated within the limits of the congressional grant made to the Southern Pacific Railroad Company of California by the act of March 3, 1871 (16 Stat. 573). The complaint alleged that the appellant tendered the railroad company \$2.50 an acre for the land and demanded a conveyance of the same, but the conveyance was refused. From the final decree of the court below, dismissing the bill for want of equity, the present appeal is taken.

The act of March 3, 1871, contained a grant of lands to two railroad companies: First, to the Texas Pacific Railroad Company, which was incorporated by the act; and, second, to the Southern Pacific Railroad Company of California, a corporation which had received

a prior land grant in 1866. The main purpose of the act was to aid the Texas Pacific Company in the construction of a railroad from the eastern line of Texas, through El Paso and Yuma, to ship's channel in the Bay of San Diego. At the end of the act, and in section 23 thereof, is found the grant to the Southern Pacific Railroad Company of California, in words as follows:

"That, for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seventh, eighteen hundred sixty-six: Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company."

The appellant predicates his cause of action upon the provisions of section 9 of the act, whereby there was imposed upon the grant to the Texas Pacific Railroad Company the following condition:

"And provided further, that all such lands, so granted by this section to said company, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of \$2.50 per acre for all the lands herein granted."

There is no similar provision in the grant to the Southern Pacific Railroad Company of California, but the appellant contends that in section 23, which authorizes the construction of a railroad by the Southern Pacific Railroad Company of California, the intention of Congress is expressed to impose upon that company the same limitations and conditions that were imposed by section 9 upon the Texas Pacific Railroad Company, and that that intention is evidenced by the use of the words "with the same rights, grants and privileges," and that Congress thereby intended that the rights, grants, and privileges given to the Southern Pacific Company were to be the same as those given to the Texas Pacific Company, and thus attached to the grant the conditions contained in section 9; and the appellant contends that the words which immediately follow that clause, "and subject to the same limitations, restrictions, and conditions," are to be severed therefrom and associated with a wholly different subject-matter, to wit, the grant to the Southern Pacific Company by the act of Congress of July 27, 1866 (14 Stat. 292, c. 278). We are unable to understand the ratiocination by which such a conclusion is reached. Section 23 is plain, clear, and unambiguous, and leaves no room for construction, and there is no room to doubt that Congress thereby granted lands to the appellee with the same rights, grants, and privileges, subject to the same limitations, restrictions, and conditions, as were the lands granted by it to the same company by the act of July 27, 1866.

We find no merit in the contention that the conditions specified in section 9 should be read into section 23, for the reason that such

provisions were uniformly inserted in the grants which Congress had made in aid of the construction of railroads, in the two or three years which preceded the date of the grant in question, and that those grants and this should be construed *pari materia*. Statutes are in *pari materia* which relate to the same persons or things, or to the same class of persons or things. Those various railroad grants were not in *pari materia*. They did not relate to the same persons or things, or to the same class of persons or things. Each grant was distinct in itself, and each grantee was distinct from the others. The grantee of one of those grants, in order to ascertain the nature of the rights and privileges conferred upon it, was not bound to refer to any other grant or act of Congress. Again, the rule of *pari materia* is a rule of construction only, and is resorted to for its assistance in determining the meaning of a doubtful statute. It has no application where the language of the statute is, as in the present instance, clear and unambiguous.

The decree is affirmed.

DAYTON ENGINEERING LABORATORIES CO. et al. v. SIDNEY B.
BOWMAN AUTOMOBILE CO.

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

No. 74.

PATENTS \Leftrightarrow 328—VALIDITY AND INFRINGEMENT—MEANS FOR OPERATING MOTOR VEHICLES.

The Coleman patents, No. 745,157, claims 3, 7, 9, 12, 17, 18, and 20, and No. 842,827, claims 2, 3, 7, and 9, all relating to means for operating motor vehicles, *held* not anticipated, valid, and infringed.

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

Suit in equity by the Dayton Engineering Laboratories Company and another against the Sidney B. Bowman Automobile Company. From the decree, both parties appeal. Modified and affirmed.

This cause comes here upon cross-appeals from a decree entered in a patent infringement suit. Two patents are involved. The first is No. 745,157, issued November 24, 1903, on application filed February 11, 1901, to Clyde J. Coleman for "means for operating motor vehicles." The second is No. 842,827, issued January 29, 1907, on application filed February 11, 1901, to the same patentee for "means for operating motor vehicles."

The District Court, in disposing of the first patent, held that claims 3, 7, 12, 17, and 20 were valid and infringed. Complainants appeal because a like finding was not made as to claims 9, 18, and 24. Defendant appeals, assigning error in finding that any of the claims are valid; also in finding that the five first enumerated above were infringed.

In disposing of the second patent the District Court held that claims 2, 3, 7, and 9 were valid, but not infringed. Complainants appeal because the court did not find infringement of these four claims, and also because the court did not find that claims 19 and 26 were valid and infringed. Defendant appeals because the decree did not affirmatively declare that claims 19 and 26 were invalid.

The opinion of Judge Sanborn will be found in 220 Fed. 927.

Livingston Gifford, Drury W. Cooper, and J. B. Hayward, all of New York City, for complainants.

C. Schuyler Davis and Farnum F. Dorsey, both of Rochester, N. Y. (Edmund Wetmore, of New York City, of counsel), for defendants.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). As is apparent from the circumstance that both applications were filed on the same day, these inventions deal with a single subject-matter; the earlier patent being concerned more particularly with its mechanical side, and the later patent with its electrical side. A summary of what the patentee sets forth as his invention is found in a statement at the beginning of the specification of the first patent—in part repeated and continued in the specification of the second patent. After stating that his invention relates to motor vehicles with internal combustion engines, which are nonstarting, the patentee says:

"According to my invention means are provided for starting the engine upon the application of power thereto and for utilizing the power of the engine when the engine is self-actuated for the purpose of storing energy, these means and the engine being connected by differential connecting devices and according to my invention these means comprise a motor dyamo so connected. * * * My invention also includes provision for the discontinuance of the starting motor after the engine has been started, so that such starting motor has only to perform the work of starting the engine. * * * An electric motor is the auxiliary starting means, receiving its current from a storage battery, or other suitable electric storage means * * * and the motor, when self-actuated, starts the engine and is an auxiliary motor, and when actuated by the engine at a predetermined speed will act as a dynamo and store up electric energy in the storage means. Means are also provided whereby the speed of the motor controls connections which adapt it to the change from a motor into a dynamo, so that upon the attainment of the predetermined speed this change will be effected automatically. My invention further consists in the provision of means whereby a starting tonque of maximum force may be employed; and my invention further consists in the provision of means for controlling the speed of the engine, so that it will drive the motor at a constant speed."

In motor vehicles of this type a storage battery is commonly found which subserves several purposes, such as ignition, lighting, etc. An electrical machine is also found which, when the car is running, generates energy for the same purposes; also for keeping the storage battery charged. Sometimes there are found two of these machines, one for starting the engine, the other for the other purposes above stated. Occasionally the electric machine is utilized to supplement the internal combustion engine as a driving power to propel the car.

Since internal combustion engines cannot start themselves, various means have been employed to set them in motion—a hand-operated crank, a compressed-air motor, a gas motor, a powerful spring, an electric motor, or what not. These Coleman patents are concerned with a single electric motor, which, through electric power supplied by the storage battery, acts to start the engine, and which, after the

engine starts, ceases to act as a motor, but becomes a dynamo generating electricity to recharge the battery or to be otherwise used.

The necessities of car construction require the use of a small electric motor, of limited power. The engine to be started requires the exertion of a force greater than such motor would give out, unless its strength were in some way multiplied. This multiplication is secured by Coleman in two ways: A gear wheel of small diameter attached to the motor shaft meshes with a gear wheel of large diameter attached to the engine shaft. The small motor dynamo is thus given a high leverage. At the same time through certain field connections, automatically controlled, there is a field of high intensity created while the engine is being started. In that way the power of the small motor dynamo is able to overcome the resistance opposed to it and set the engine in operation. When the engine "fires"—i. e., starts in operation—it does so suddenly, increasing at once from the few revolutions per minute at which it ran under the applied power of the motor dynamo to many times that number of revolutions resulting from the abrupt application of its own power.

To meet this changed condition, which would produce disastrous results that need not be recited, the parts are so arranged that, as soon as the engine's own speed overruns that of the motor shaft, certain automatic clutches put the differential gearings out of business and bring into play other gearings, which will cause the engine to drive the dynamo at a rate of speed not high enough to cause evil results. Similarly, when this sudden jump in speed of the engine occurs, an automatic switch shifts the field connections, so as to produce a field of less intensity for the dynamo for charging operation. When the engine is running at comparatively high speed, driving the motor dynamo accordingly (it should be noted that the latter rotates always in the same direction), the electric current therefrom is strong enough to overcome the opposed voltage of the battery, and current flows into the battery. Should the speed of the engine be reduced sufficiently, it might happen that the voltage of the battery would overcome the voltage of the dynamo, in which event the storage would lose current, instead of storing it. This is provided for in Coleman's device by a further arrangement of switches and connections, whereby, when the engine is running so fast that it could force current back into the battery, it closes a switch, thus making a circuit through which to force the current into the battery; but, when it is running slow, connection with the battery is broken, so that none of the already stored current flows back.

As this brief synopsis indicates, we are dealing here with a complicated structure, involving not only the application of mechanical devices, but also the regulation and control of electric currents to accomplish varying results. The patents in suit are lengthy documents. Although the cause was tried in open court, the record of the testimony fills more than 700 printed pages. There are many patents introduced from the prior art. To present the whole matter, even in a compact form, would expand this opinion to an inordinate

length; but even then the discussion would be concerned almost entirely with facts, interesting possibly to the parties, but of no use in facilitating the determination of some other patent controversy. Moreover, the District Judge has written a very full and careful opinion, and the points on which we agree with him are more numerous than those on which we disagree. It seems, then, sufficient to indicate those on which we concur, briefly stating why the argument to reverse his findings is not found persuasive, and also to indicate those touching which we differ from him, briefly stating in what respect we think the record does not sustain his conclusions.

Upon the testimony Judge Sanborn held that Coleman had proved the date of his invention back to September, 1899. This finding is attacked by defendant, but we think it unnecessary to discuss it. The finding affects only the first patent, shutting out from the prior art two English patents to Lanchester—one for an air starter, No. 12,245 (July 25, 1900); the other for an ignition patent, No. 20,570 (November 28, 1900). In our opinion neither of these patents negative invention in Coleman. The air starter operates on a different principle, the driving direction is reversed, and the automatic devices of Coleman are lacking. The other Lanchester patent is for an improvement in electric ignition arrangements for gas motors, viz. to secure a constant potential in the magneto which produces ignition and to drive the magneto at sufficient speed when cranking. It does not deal at all with the problem of starting a powerful engine with a small electric motor and thereafter regulating matters so that evil results will not ensue. All that Lanchester says about starting is contained in the statement, at the end of the specification, that his device might be used to operate the starting handle shaft through independent train of gearing with a clutch properly of the positive type. There is nothing to indicate that Lanchester ever did this; certainly the device he shows would need to be radically changed to effect such result. He gives not the slightest indication as to what changes he would make. His patent is another instance of the "prophetic suggestions" found in many English patents, which have been held not to bar the field to inventors who by time, thought, and experiment devise means to fulfill the prophecy. *Westinghouse Company v. Great Northern*, 88 Fed. 258, 31 C. C. A. 525.

Another patent in the prior art is *Gibbons & Wilcox*, U. S. 581,816 (May 4, 1897). It deals with spring starters, an art which presents different problems from those confronting Coleman, and solves its own problems in a way different from that in which Coleman solved his.

Another patent set up as anticipating Coleman's first patent is *Melvin*, U. S. 688,262. In this there is a large electric motor, which propels the vehicle and, in addition, a gas engine which can be used to contribute to the driving power and also to run the electric motor to charge the batteries, "when the carriage is moving at a comparatively slow speed or * * * when the carriage is stationary." The circumstance that the electric motor in *Melvin* was itself so powerful,

being the main driving device, eliminated one element of Coleman's problem. We find nothing in Melvin which anticipates Coleman.

Of course as frequently happens with combination patents, various elements of the combination are found separately in various prior art devices combined with other elements to solve other problems; but in the citations against this first patent, and we have referred to the principal ones, we do not find the combination by which Coleman solved the various problems (dilemmas, as complainant's counsel calls them) that presented themselves when he undertook to use a single electric motor dynamo to start his gas engine, when energized by a storage battery, and afterwards, while running in the same direction, to charge the battery, under conditions which would make the charging continuous (i. e. without set-back when the main engine slowed), and to do this automatically except for the driver's single push on a button or pull on a lever.

Infringement of the first patent seems quite clear to us; indeed, defendant concedes that claims 3, 17, and 18 are infringed, if valid. Except perhaps for claim 24, which is somewhat obscure, we think defendant's device is covered by them, unless other patents (to be referred to later) require them to be very narrowly construed, a conclusion which we do not reach. The decision of the District Court holding claims 3, 7, 12, 17, and 20 valid and infringed is affirmed. That court did not discuss claims 9, 18, and 24. If 12 be valid and infringed, so is 9; if 17 be valid and infringed, so is 18. The differences between these two sets of claims is merely verbal. The decree is therefore modified, so as to find claims 9 and 18 valid and infringed.

As was said above, the first patent, although it brings in some of the electric elements, is more particularly concerned with the mechanical side of the invention; the second patent is more particularly concerned with the electrical side. In former opinions of this court the difference between these two branches of the inventive art has been pointed out. When electric forces are a prominent feature of any patent, the gentlemen retained by the opposing parties, who have made a life study of those forces, present elaborate theories, which a person, untrained as they have been, finds it very difficult to follow, and usually impossible to reconcile. All that can be done is to weigh one expert argument against the other and hold as close as may be to what was actually published to the world in the particular statements of the patents and publications which make up the prior art.

There is much of such testimony in this record, and the District Judge apparently was particularly impressed by the argument of defendant's expert to the effect that Coleman unfortunately discarded all prior art as to variable speed lighting; that in consequence the real problem was not what he conceived it to be; that such problem was to utilize the variable dynamo speed train-lighting system to the variable speed engine and dynamo; that Coleman either dodged this problem, or thought he could get something better in his own way; and that the Coleman patents would subtract from rather than add knowledge to the art. In consequence the claims of the second patent

were so construed below that defendant's device was held not to be covered by them, although they were held to be valid and to read upon that device.

This theory is very skillfully presented in defendant's expert testimony and in its brief; with equal skill it is controverted in the testimony of complainant's expert and in its brief. The impression produced upon our minds from a study of this controversial literature is that the proposition that the problem before Coleman was not what he thought it was is not sustained. Summarizing from complainant's brief, the problems which Coleman thought he had to deal with were these: To start a powerful internal combustion engine by a small electric motor, which would not be able to start the engine unless its applied power was increased; this increase he secured by a differential gear and a magnetic field of high intensity. When the engine was started so that it "fired," running up quickly to many revolutions, to provide against these revolutions being multiplied in the electric motor now running as a dynamo; this protection he secured by his overrunning clutches and consequent shift of gears, and the change of connections which threw out the field of high intensity. To prevent the storage battery from losing power while the motor dynamo was running at a rate of speed not sufficient to overcome the voltage from the battery; this he did by an automatic switch which cut the battery out of circuit, as soon as the lever or push button which applied electric force to start the engine was released. To restore the battery to circuit as soon as the dynamo motor was running fast enough to force voltage into the battery; this he accomplished by another automatic switch. To prevent possible injury to the battery by too high or excessive speed in running of the engine and dynamo; this he accomplished by limiting the speed of his engine through a governor which prevented it from rising above a predetermined amount. To prevent the battery voltage from discharging when a slowing down in speed (e. g., under traffic conditions) made the dynamo voltage too feeble to resist such discharge; this he accomplished by automatically breaking connections.

Whatever other problems there were to be solved—for instance, dealing with an engine which is tied down to no predetermined running speed, an unlimited "variable speed engine"—seems to us unimportant. Equally unimportant is it whether Coleman did not know of their existence, or did know of them and "dodged" them. The thing to be considered is: Did these problems confront him? Did he show how to solve them? And is his solution a useful one? If these three questions are answered in the affirmative, the circumstance that his invention is susceptible of improvement will not defeat it; and if his invention is utilized in dealing with some other problem, accomplishing its purpose in substantially the same way, infringement will not be avoided by the slight changes necessary to adapt it to solve such other problem, although the changes may be themselves patentable.

We feel no hesitancy in answering these three questions in the affirmative. It is next in order to examine the patents of the prior art to

see if they require such a disallowance or curtailment of the claims by which Coleman has sought to protect his invention that infringement of them cannot be found in defendant's device, upon which certainly they read. Two only need be referred to: Washburn and Munson. This does not mean that the others (Patton, Greengrass, etc.) have been overlooked; no motion for reargument need be made on the theory that they were not read and considered.

Washburn—U. S. 550,002, November 19, 1895—is for a self-propelling vehicle, boat, etc. His invention is to provide a system of propulsion in which may be employed a prime mover, which will serve to rotate or assist in rotating the driving shaft or axle and also and at the same time serve to operate a dynamo electric machine and generate electrical energy, which is stored in an accumulator (battery); the parts to be so combined that the stored energy will be utilized in rotating the shaft by the automatic transformation of the dynamo into a motor whenever the electro-motive force of the accumulator exceeds the opposing force of the dynamo. Both motors are used to propel the vehicle, but Washburn also states that he may start his gas engine (in the event a gas engine is employed) by connecting his electric motor to the battery. He says nothing about increasing the field intensity to make it operative; the relative size of the two motors was such that Coleman's first problem was not presented. Elsewhere he states that:

"If for any reason the combined power of the prime mover and electric motor is insufficient to move the car, a rheostat in the field circuit of the dynamo motor is adjusted so as to strengthen the field."

Apparently this is a hand-operated rheostat. Such a use of rheostats to effect intensities was well known in the art. We fail to find in Washburn any suggestion of the problems with which Coleman dealt, and certainly no proposed solution of them. We cannot concur in the conclusion of Judge Sanborn that this patent "shows Coleman's fundamental idea."

Munson—U. S. patent No. 653,199, July 3, 1900—points out the inconveniences which result in the case of an electrically propelled vehicle when its storage batteries run out and it is necessary to go to a power station to have them recharged. His object was:

"To provide a combined electric and vapor vehicle, the electric motor thereof being employed to propel the vehicle, and the engine to be employed to drive said motor as a dynamo, for the purpose of replenishing the batteries at times when the vehicle is still, as when in the barn or waiting in the road."

Another object is to provide means—

"whereby, after the engine is started to charge the batteries, it may be left unattended and the engine will be automatically stopped when the battery is fully charged."

This "means" consists of two different field windings, controlled by two switches *I*, and *J*, both hand switches. Without going into the details of the patent it is sufficient to say that it does not deal with the problems Coleman had to dispose of, and, of course, does not solve

them. We cannot agree with the District Judge that it discloses the fundamental idea of Coleman's combination.

So much of the decree as holds claims 2, 3, 7, and 9 to be valid is affirmed. The District Judge found that claim 7 reads on defendant's apparatus—the other three claims above enumerated do so equally—but he imposed limitations upon those four claims because he was satisfied that Washburn and Munson disclosed the fundamental conception of Coleman's invention. Since we do not so construe these two prior patents, the limitations are not to be imposed. It would needlessly expand this opinion to take up, piece by piece, the elements of defendant's machine and point out the particular language of each claim which covers it; we do not understand that defendant contends that, construing the claims as we do, they are not infringed. But, if he does, it will be sufficient to say that we do not agree with him.

We do not think it necessary to discuss claims 19 and 26, about which the District Judge made no finding. The disposition made of the other claims sufficiently disposes of the concrete controversy presented by the device now before us, and therefore the application to declare those two claims invalid is denied, without expressing about them specifically any opinion which will interfere with their interpretation when some other device which requires such interpretation may be the subject of controversy.

The decree of the District Court is modified as above indicated, and, as modified, is affirmed, with costs to complainant.

GAMMONS et al. v. CAPLAIN et al.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 150.

PATENTS ⇨328—VALIDITY AND INFRINGEMENT—MACHINE FOR SEWING SWEATBANDS INTO HATS.

The Gammons patent, No. 747,963, for a machine for sewing sweatbands into hats, claim 4, was not anticipated and discloses patentable invention; also *held* infringed.

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

Suit in equity by W. P. Gammons, Jr., and F. W. Cole, Incorporated, against Samuel W. Caplain and Hyman Goldman, copartners as Caplain & Goldman. Decree for complainants, and defendants appeal. Affirmed.

The following is the opinion of Hough, District Judge:

Final hearing in equity. Action on patent 747,963, granted December 29, 1903, to Gammons et al., for a machine for sewing sweatbands into hats. Defendants are alleged to infringe claims 4 and 7, by using a machine made under patent to Knight & Bauer, 1,138,669, dated May 11, 1915.

The art of sewing sweatbands in hats by machinery is confessedly not new; in it there seems to be no room for a pioneer invention. Accordingly plain-

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

tiffs do not profess to have wrought a mechanical revolution, nor to be entitled to the widest range of equivalents. A machine for this purpose is wanted only by large manufacturers, and it must be as simple as is consistent with accuracy and speed, for the machine is ordinarily operated by workers with no mechanical education. It would be a waste of effort to describe in detail the organization either of the type of machine under consideration or of the special combinations used by the parties hereto. The arrangement and correlation of parts is complex, and yet so easily seen in mechanical drawings, that no words of mine can make them clearer, while the questions upon which decision herein depends, are easily stated without any preface of technical description.

There is no mechanical subdivision of plaintiffs' machine which cannot be found in a device of the prior art, doing the same thing that it does for plaintiffs, and contributing to the same result as they seek for. But it does not follow that the elements of claim ¹ are therefore old,—in any true sense of that word.

Feed and presser wheels, hat supports and presser arms, needles and needle ways, and also adjustments for all these machine parts, were known; but a *vertically adjustable* feed wheel, in combination with an adjustable hat support, and a presser arm (bearing its appropriate wheel) movable both vertically and horizontally, is not only new in combination, but in some of its elements. As this has been substantially admitted by defendants' expert (Flint, cross-question 230) I need dwell upon it no further.

The merit of the plaintiffs' organization is its quickness in operation—obtained principally by the double movement of the presser arm—without loss in accuracy; the adjustability of both hat support and feed wheel being obtained by visible and easily handled parts. The necessity or reason for adjustability has, I think, an important bearing on this case. In all the sewing machines brought to my attention herein, the needle is (so to speak) a fixed point; the rest of the apparatus moves or may move in order to get work to the needle, which is the ultimate worker.

Presser and feed wheels, hat support and needle way, must be so correlated or arranged with reference to each other that the needle will pass at just the proper depth through the edge of felt projecting from the narrow passage between the two wheels, and after piercing the felt will truly enter the needle way, which in the organization of both plaintiffs and defendants is on the doubly movable presser arm. Not all hats are of the same thickness or quality of felt, and therefore do not under identical conditions present the same kind of edge; nor will any frequently moved and intentionally movable apparatus of bolts, shafts, nuts, etc., always remain true under the strain of operation. It follows that any serviceable machine of this kind must have means provided for readjusting the parts in relation to the needle, as change in material sewed or wear and tear requires.

Since the needle way is upon the presser arm, it is evident that the relation of that element to the needle can be meddled with only by skilled men; therefore the natural adjustments for operator or ordinary mechanics are by and through hat support and feed wheel, which must always coact with reference to the needle, in order to produce at the right place (a very small place) the felt edge for the needle.

¹ Claims in suit are as follows:

4. In a hat-sewing machine, a casing, a feeding wheel, means for vertically adjusting said feeding wheel, an adjustable hat support, a horizontally and vertically movable presser arm provided with a wheel engaging the face of the feeding wheel, a horizontal reciprocating needle, and a needle way above the presser wheel to receive the needle, substantially as set forth.

7. In a hat-sewing machine, a casing, a feeding wheel, a semicircular hat support, a presser arm provided with a presser wheel, the presser wheel acting against the serrated face of the feeding wheel, a horizontally reciprocating needle, a loop taker traveling obliquely across the path of the needle and adapted to carry the loop, a block on the presser arm provided with a needle way and a guide for the sweat band, and a nose on one side of the block guiding the fold and having a cord and leather guide, substantially as set forth.

Plaintiffs effect this result by adjustable feed wheel and hat supports, and *both* must be adjustable, unless the machine is to lose efficiency; and the same comment is obvious as soon as defendants' organization is understood. But it is not necessary that both feed wheel and hat support shall be alike easily and quickly adjusted, and in plaintiffs' machine it is the feed wheel whose position can be changed by the operator, and the hat support that requires the presence of a workman with a screwdriver; but no such detail is introduced into the claims. The fourth claim reads with ease upon defendants' apparatus, if (as is vigorously denied) it contains a vertically adjustable feed wheel. If this wheel is not vertically adjusted, it has no adjustment² at all, and is (as above shown) an inferior device, in theory at least.

Counsel assert that defendants' feed wheel and needle are by intention in "permanent fixed relation." This would be true if machines never got out of order, and needed no adjustment or readjustment; but, when the Exhibit Defendants' Machine is examined, the feed wheel is found in the position determined by the assembling mechanic, and fixed by a sleeve with a hexagon top threaded upon a bracket and provided with a set screw. This construction fairly justifies the comment made that the plea of so expensive a device "being merely a convenience in assembling is not worthy of serious consideration." In short, defendants' feed wheel ought to be adjustable, perhaps not often, nor easily, but still capable of adjustment, for the benefit of the machine; it is as matter of fact so capable, therefore I believe it was intended to be adjustable. The truth is defendant has simply transferred the easy, usual, operator's adjustment from feed wheel to hat support, and the slower mechanic's adjustment from hat support to feed wheel; as the claims are drawn this obviously is insufficient to avoid infringement.

As is usual in litigation over patents of a crowded art, defendants have laid before me a portentous list of old inventions, for purposes to be inferred from experience, rather than understood from pleadings and evidence. After Mr. Flint's admission above referred to, one might be justified in relying upon the presumption of invention attaching to the grant, and passing them by altogether. One reference, honestly relied on, is better than a hundred from which may be culled here one idea and there another, in the hope that invention may be denied to any compound or combination of the same. The only legitimate use of such a multitude of old patents is to impress upon the technical ignorance of the court the small remaining field of invention. This last impression I acknowledge, and have, it is thought, not gone beyond the narrow limits of mechanical equivalence.

As to anticipation one statement of brief needs comment. Richard, 252,799, is for a hat sweat sewing machine, and it is said that Richard's organization is that of the fourth claim in suit, "except only this hat guide"—i. e., hat support. It is possible (after a fashion), to sew on Gammons' machine without a guide; therefore it is argued that the addition of a guide is aggregation not invention. The premises of this conclusion are false. Richard's organization is not Gammons', unless a man with a wooden peg for a leg is physically organized as is the same man after substituting for his peg a modern artificial limb. But, further, I cannot agree that adding to Richard's machine a hat support which performs a function in co-ordination with the old elements is aggregation.

There is one further style of argument here advanced, and expected, viz. that plaintiff's patent must be restricted to the exact form shown, wherefore defendants rotatable hat support, and transference of place of ordinary adjustment from feed wheel to hat support, plus the change of place of impact of feed on hat, prevent infringement. These arguments seem to me to mistake accidents for substance; the patent contains claims (not in suit) that could be escaped in the way suggested, but in claim 4 plaintiffs patented a combination of parts which function in a certain definite manner, and do so by co-ordination. That combination is new—a fact which disposes of the argument.

Finally, defendants appeal to the file wrapper, and there discover what is

² This word is used as meaning the intended relative positioning of the parts of a finished product; not an original and unchangeable arrangement made in manufacture.

called in argument a "disclaimer" of any structure wherein the "folding and feeding" of the hat are not done by "one element" alone, viz. the feed wheel. It is I think true that the examiner pressed the patentee pretty hard on this point, and was wrong in so doing in my opinion. Yet he passed claims (in suit) containing no such limitation, and in so doing he was (perhaps inadvertently) in my opinion right. Plaintiffs may take a decree on the fourth claim.

The seventh claim is one of those above referred to, which are so drawn as to greatly restrict the scope of the combination shown. Even if the words "semicircular hat support" do not let defendants escape, it is a fair inquiry whether the state of the art did or did not permit as a patentable combination the union of *any style* of needle way, cord guide, and nose with the presser arm. There have been needle ways on the arm since (at any rate) Boland (reissue 9,586, February 22, 1878), and I cannot think it invention to place the other adjuncts of sweat band sewing at the only place they would be of service, viz. near the needle way. If I am wrong in thinking that, so far as claim 7 adds to the combination of claim 4, it is invalid, it seems to me clear that the art was in such shape that any combination would have to be restricted to the exact form shown in the application.

Defendants do not use that form, but a separate piece of thin resilient metal, not integral with the block, and thereupon place their guides for band and cord. It is true that merely making in two parts what was designed in one will not avoid the claim under consideration, but, when it is seen that plaintiffs also have commercially used and are using this same plan of construction, I am persuaded that the thin metal, nonintegral construction is a different *thing* from that shown in the patent. It being impossible, as I think, for plaintiffs to lawfully claim monopoly on *all* guides on blocks placed upon presser arms, it is my opinion that defendants do not infringe the seventh claim, even if it is valid at all.

In considering this case, I have felt justified in applying to Knight & Bauer (and defendants stand in their shoes) the same treatment as was awarded to defendant in the recent decision in *Brunswick & Co. v. Wolf*, 222 Fed. 916, 138 C. C. A. 396. The real defendants here learned what they knew about hat sweat machines from the Gammons, whose name appears frequently in the long list of patents above referred to. Having left the Gammons connection, they have tried to beat a successful Gammons patent. As to claim 4, I do not think they have succeeded, and decree will be entered accordingly, with costs.

Herbert H. Dyke, of Newark, N. J., and John D. Morgan, of New York City, for appellants.

William A. Redding and William B. Greeley, both of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The plaintiff appellee is a corporation engaged in the manufacture of machines under the Gammons patent granted December 29, 1903, for a machine for sewing sweatbands into hats. The defendants are charged with infringing claim 4 of this patent, which is as follows:

"In a hat-sewing machine, a casing, a feeding wheel, means for vertically adjusting said feeding wheel, an adjustable hat support, a horizontally and vertically movable presser arm provided with a wheel engaging the face of the feeding wheel, a horizontal reciprocating needle, and a needle way above the presser wheel to receive the needle, substantially as set forth."

Judge Hough, while conceding that it was old in the art to sew sweatbands into hats by mechanical means, was of the opinion that

claim 4 disclosed a new combination which contains a vertically adjustable feeding wheel, an adjustable hat support and a vertically and horizontally moving presser arm, together with the other elements as stated in the claim. The machine is so complicated and deals with so many minute parts each performing an important function in the completion of the hat that anything like a minute description of the machine and its operation would accomplish no good result even if it could be done with accuracy. Suffice it to say that the result accomplished by the machine can be seen by the examination of almost any so-called "soft hat," the object being to attach the sweat leather to the hat so that the stitches cannot be observed on the outside of the hat above the brim. The great saving of time over the handmade method will be appreciated when it appears that a dozen hats may be stitched by a skilled operator in six minutes, which includes the placing of the hats in the machine and the removal therefrom; so that a single hat may be stitched in about thirty seconds. A skilled operator can turn out 35 dozen hats per day.

Efforts had previously been made to construct machines to do this work but they were all crude and unsatisfactory attempts which never went into extensive use. Some of the alleged anticipations do not belong to the hat making art at all; others omit important elements, but we are of the opinion that the skilled mechanic with all the defendant's references before him, assuming them to be relevant, could not construct the machine of the Gammon patent. It required the skill of the inventor to do this.

It is unnecessary to add further to what is said in the opinion of the District Judge with whom we agree upon the questions of patentability and infringement.

The decree is affirmed.

MINER v. T. H. SYMINGTON CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1915. Rehearing
Denied January 14, 1916.)

No. 2169.

1. PATENTS Ⓒ328—VALIDITY AND INVENTION—DRAFT RIGGING FOR RAILROAD CARS.

The Emerick patent, No. 693,643, for a draft rigging for railroad cars, was not anticipated, and although of narrow scope discloses patentable invention, in that the device affords more simple, easy, and efficient means for removal of the parts for the making of repairs than those of the prior art; also *held* infringed.

2. PATENTS Ⓒ73—ANTICIPATION—PRIOR PATENT.

Whether an alleged anticipating patent was a part of the prior art depends, not on priority of invention, but on whether the invention of the later patent was made prior to the issue of the first patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 64; Dec. Dig. Ⓒ73.]

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

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit in equity by the T. H. Symington Company against William H. Miner. Decree for complainant, and defendant appeals. Affirmed. For opinion below, see 216 Fed. 198.

Appellee brought suit to restrain infringement of the four claims of the Emerick patent, No. 693,643, for draft rigging for cars, granted February 18, 1902, on application filed May 24, 1901. The object of the invention, as claimed by the inventor, was to provide a draft rigging device wherein the coupling bar could be easily replaced. The art is one in which convenience and speed of repair are of consequence. The earlier art abounded in devices which required the removal of the draft rigging from its supports. Emerick claims to have invented a draft rigging from which the coupler bar may be removed and replaced, without disturbing the other parts, by merely removing the lynchpin and its keeper—a process requiring negligible time and labor. In doing this, he claims to have attained other desirable results. The buffer springs and followers can also be replaced by merely removing the bottom plate, without displacing the drawbar and yoke. Should the yoke require removal or adjustment, it can be slid out after the key or lynchpin is withdrawn. These advantages the patentee claims he was the first to provide.

Claims 1 and 3 sufficiently set out the invention. They read as follows, viz.:

"1. A draft rigging for cars comprising side sills, independent counterpart castings mounted upon the opposed sides or faces of said sills, said casting provided with shoulders and having co-operating longitudinally extending seats or ways in the opposed faces thereof, follower plates arranged to be received between said castings and operating between said shoulders, the ends of said plates extending into and working in said seats or ways, springs interposed between said plates, a draft yoke loosely seated between said castings and arranged to straddle said plates, a coupler arm and a removable key for connecting said coupler arm to said draft yoke and sills, as and for the purpose set forth."

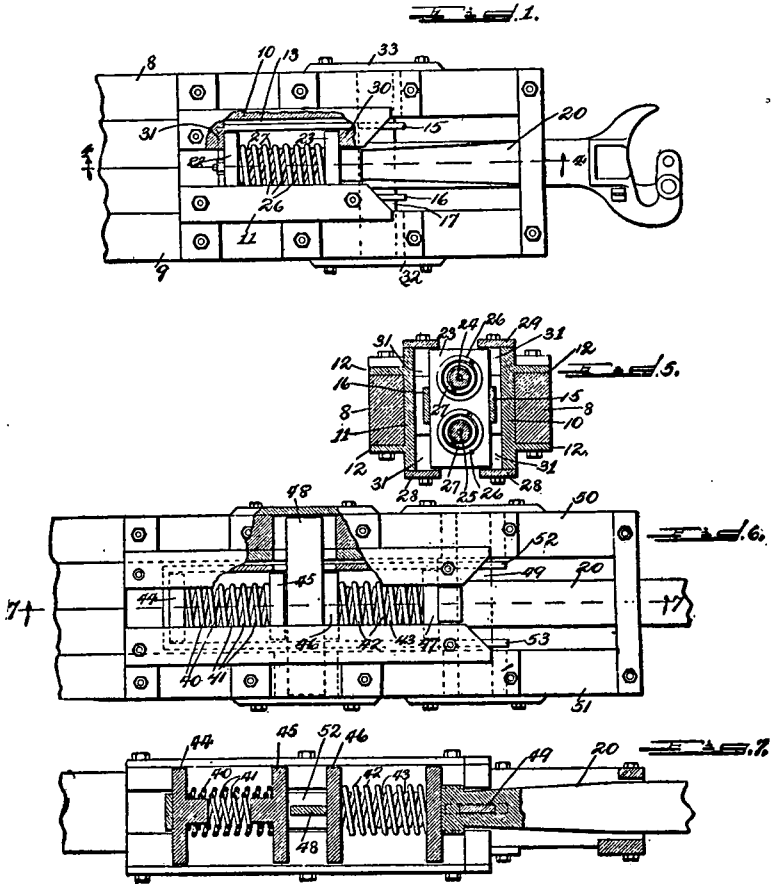
"3. A draft rigging for cars comprising side sills having elongated longitudinally extending slots or openings, counterpart castings mounted on the opposed faces of said sills, a coupler arm having an opening therethrough, a draft yoke loosely mounted between said castings and having the sides thereof received in longitudinal seats formed in the opposed faces of said counterpart castings, a locking key or pin passing through said coupling arm and draft yoke and having its ends received in the elongated slots in said sills, and yielding means interposed between said draft yoke and casting, as and for the purpose set forth."

The patent is of the type in which the yoke is arranged horizontally and not vertically. Claim 1, it will be seen, calls for (a) side sills; (b) independent counterpart castings mounted upon the opposed sides or faces of said sills; (c) said castings provided with shoulders, (d) and having co-operating longitudinally extending seats or ways in the opposed faces thereof; (e) follower plates arranged to be received between said castings and operating between said shoulders; (f) the ends of said plates extending into and working in said seats or ways; (g) springs interposed between said plates; (h) a draft yoke loosely seated between said castings and arranged to straddle said plates; (i) a coupler arm; (j) a removable key for connecting said coupler arm to said draft yoke and sills, as and for the purpose set forth.

Claim 3 contains the following elements, viz.: (a) Side sills having elongated longitudinally extending slots or openings; (b) counterpart castings mounted on the opposed faces of said sills; (c) a coupler arm having an opening therethrough; (d) a draft yoke loosely mounted between said castings and having the sides thereof received in longitudinal seats formed in the opposed faces of said counterpart castings; (e) a locking key or pin passing

through said coupling arm and draft yoke, and having its ends received in the elongated slots in said sills; and (f) yielding means interposed between said draft yoke and casting, as and for the purpose set forth.

Figs. 1, 5, 6, and 7 of the drawings are here reproduced:



Reference signs 8 and 9 show the car sills upon which the draft-rigging is supported; 10 and 11 are counterpart castings attached to the inner faces of the sills, opposite each other. On the inner opposed faces of 10 and 11 are formed co-operating guide ways 13 and 14, each adapted to receive a leg 15, 16 of the U-shaped draft yoke, the outer ends of which legs are slotted to receive the key 17 which passes through a slot in the coupling bar and into ample rest slots in the car sills. Necessarily the several slots must be in alignment with each other. The keepers 32 and 33 prevent displacement of the key. It will be seen that the coupler arm 20 is detachably connected with the draft yoke. Interposed between the end of the coupler arm and the web 21 of the yoke is placed a buffer spring of the usual kind. At either end of this spring are blocks or plates 22 and 23, termed "followers" in the patent, bearing against shoulders formed in the casting, which plates are connected by rods upon which they loosely slide and upon which the coiled spring is mounted. The rods are not shown in Figs. 6 and 7, and are, so appellee

claims, not essential parts of the draft rigging. These parts constitute a connected frame adapted to be received between the castings 10 and 11 and held in place by flanges 28 which may be made removable to afford access to the springs 26, 27. The plate 22 takes bearing against web 21 of the draft yoke, and plate 23 bears against the inner end of the coupler bar. "From the foregoing description it will be seen that when a pull is exerted upon the coupler arm the buffer plate 23 will take bearing against the shoulders 30 of the castings 10, 11, which thereby constitute a stop for said buffer plate, and the pull exerted upon the coupler arm 20 is transmitted through the draft yoke and is imposed upon the buffer plate 22, which being movable and loosely mounted upon the bolts 24 is drawn yieldingly toward the plate 23, thereby imposing a compression upon the springs 26, 27. Similarly in case of an endwise impact upon the coupler arm—as when two cars come together, for instance—the buffer plate 22 strikes against the shoulder 31 (see Fig. 1) of the castings 10, 11, and the endwise projection of coupler arm 20 forces the buffer plate 23 toward plate 22 and imposes a compressive tension upon the springs. In this manner the parts are relieved of shock or jar. If desired, the ends of the key or pin 17 may be retained in place and said pin or key prevented from working out of place by means of keepers 32, 33."

Appellant in his answer alleges invalidity of the patent in suit, denies infringement, and sets up various alleged anticipating patents, and particularly that of patent No. 673,419 issued May 7, 1901, to John J. Byers on his application filed April 21, 1900, for a draft rigging, under which patent appellant claims to be manufacturing. Reference to such of these prior art patents as may be deemed necessary will be made in the opinion.

The District Court sustained the patent, narrowly construed, found infringement, and decreed an accounting. From that decree appellant brings this appeal.

George I. Haight and Charles C. Linthicum, both of Chicago, Ill., for appellant.

Melville Church, of Washington, D. C., and Edwin F. Samuels, of Baltimore, Md. (Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., and W. Stuart Symington, Jr., of Baltimore, Md., of counsel), for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] There are no new elements in appellee's device. It must depend entirely on the arrangement of its parts. What it particularly claims to accomplish is convenience in getting at the coupler bar and spring parts in case of breakage or other causes for access to them. Manifestly such a patent must be narrow. In the draft rigging art slight advances, especially such as are time-saving or convenient, may in the multiplicity of the applications be of considerable moment. Thus, if it be true that the device of the patent in suit provides a simple, easy, and efficient means of making repairs to the coupler-bar and other accessories of the draft rigging, it may well be deemed invention so far as utility is concerned. Appellee's description and claims seem to be somewhat obscurely worded. The claims all mention longitudinal seats or ways between the faces of the castings on the inner sides of the sills. The drawings show these face castings to be provided with top and bottom flanges which, as shown in Fig. 5, form top and bottom supports to the so-called followers 15 and 16. Yet the patentee says these form no part of the device, but serve to hold it in place. Manifestly, without these

the followers, springs, and other parts of the draft rigging would not remain in position. The lower flanges, at least, must be removed before the plates and springs can be taken out. Appellant contends his device lacks these flanges. They are not included in the claims of the patent in suit. Any other supporting means, it is claimed, answers the purpose. If the flanges, especially the lower one, were not removable, the object asserted by the patentee would not be attained. It is the inner faces of the castings which appellee claims constitute the guideways. Each face has four shoulders, one in each corner of the casting constituting one of the faces. The length of the guideway must be limited to the longitudinal spaces between these. Thus the springs and followers and draft strap which straddles them must move between the shoulders. In a sense this is a way through which the draft strap moves and a way through which the followers move. This latter seems to be framed by the draft strap. Both this latter strap and the follower plates extend into the longitudinal space between the shoulders, and this is probably meant by the statement of the claims: "The ends of said plates extending into and working in said seats or ways." Appellant's expert Harris says the seats or ways are formed by upper and lower flanges of the castings and the vertical webs thereof. In view of the statement, in the specification of the patent in suit, that the flanges are no part of the device, but only supports, and the absence of anything in the claims covering them, they need not be deemed essential features.

Considering the plethoric condition of this art, the advance made in convenience and simplicity, the easy way in which the draft strap may be removed by withdrawal of the key, together with the presumptions attaching to the grant, we hold that, in the absence of anticipating patents in the prior art, the patent would be sustainable for its specific arrangement and clear equivalents thereof. There are a number of patents in the prior art, cited by the appellant. Of these we may consider briefly the following, viz.: Timms patent, No. 532,115, granted January 8, 1895, for draft attachment; Mitchell patent, No. 517,146, granted March 27, 1894, for draft rigging; Poor patent, No. 341,601, granted May 11, 1886, for a drawbar; Crook patent, No. 436,753, granted September 16, 1890, for a drawbar; Clark patent, No. 497,264, granted May 9, 1893, for draft attachment; Brown patent, No. 515,044, granted February 20, 1894, for drawbar mechanism; Tomlinson patent, No. 545,555, granted September 3, 1895, for draft rigging; Pilcher patent, No. 616,965, granted January 3, 1899, for draft rigging (this patent was not set out in the answer); Byers patent, No. 673,419, granted May 7, 1901, for draft rigging.

Timms uses links and keys, instead of a yoke and key, located outside the sills. It has followers and ways therefor. It has integral flanges extending from its cheek plates, which inclose the followers. It is not adapted to receive a horizontal yoke, and provides no means for removing the draft gear in parts, but only as a whole. It fails to accomplish what Emerick was seeking to and did provide as an aid to repairs.

Mitchell's horizontal yoke is bolted to the drawbar. It uses bolts, instead of a key. These it becomes necessary to remove, and, since they are apt to be bent by rough usage, this is often difficult. Even then the coupler cannot be withdrawn horizontally, but must drop unless held. No counterpart castings are used, but bridge castings in form, whereby the sills are tied together. The members of the rigging cannot be removed separately, and the device likewise lacks Emerick's idea.

Poor's patent shows a vertical yoke. Because of this fact the springs cannot be removed independently of the yoke and drawbar. It lacks the cheek plates, ways for the yoke, and the horizontal yoke. Its drawbar and yoke are connected by flanges and rivets on the yoke. Its parts are not removable, without knocking down the whole draft gear structure, and therefore it does not anticipate the Emerick invention.

Crook shows a draft gear of the tail pin type. It has no convenient means of removing the coupler bar, the springs, the followers, or the horizontal yoke. It lacks Emerick's conception of a convenient, simple arrangement of parts which makes possible ready access to the device.

Clark's patent is for a draft gear of the vertical yoke type. It has independent cheek castings, but has no longitudinal seats or ways in its castings for the yoke, which has to be supported on followers and drawbars. The bolt connecting the coupler and yoke is located under the floor and removed with difficulty. Emerick's key and its application to its various slots and rests seems to require that the yoke be horizontal. The difference between Emerick and Clark is greater than the mere difference between a pin and a bolt.

Brown's device is entirely different in principle from Emerick. It has no horizontal yoke, or cheek plates, or ways for the yoke and followers, and therefore need not be further discussed.

Tomlinson uses links which act as tension members, instead of a yoke, which are supported on the ends of the keys. He has no cheek plates, nor ways for the yoke. Two followers of different designs are used. The method of operation is different from Emerick, and the device lacks the arrangement and idea of the patent in suit.

The Pilcher patent was introduced in evidence somewhat irregularly. Its yoke is riveted to its drawbar and received in threaded apertures formed in the followers, through which its arms pass. Thus the yoke cannot be separated from the followers and drawbar without the use of special tools. Its cheek plates are not provided with longitudinal or horizontal ways for the yoke. Stops in the cheek plates engage the followers, and otherwise the arrangement is such as to miss Emerick's conception.

The nearest approach to Emerick is that of Byers. As above noted, appellant claims to be operating under this patent. It discloses in a unit structure much of what Emerick contends for. It was issued 17 days before Emerick filed his application. Appellant, however, does not use the Byers structure, but does use the two counterpart castings

of Emerick. There is evidence to show that Byers' draft rigging has practically never been used.

It is contended that there is no invention in making in two parts that which was before made in one. Byers never contemplated the counterpart casting, either in his present patent or in his two subsequent patents. His present device could not be cut in two and produce Emerick's counterpart cheeks and other features of the patent in suit. It would require readjustment. The difficulty of alignments would make it practically impossible. There are many other distinctions. We need not, however, pursue these further. The District Court found that Emerick's invention antedated the Byers issue. This finding was based upon the evidence of Emerick, Wright, and Darrach. Emerick testified he made the models of his invention as far back as March, 1901. Both Wright and Darrach testify that Emerick disclosed his invention to them in 1899, and that it was that of the patent in suit. The District Court was convinced by this evidence, which was heard in open court. We do not feel at liberty to doubt that finding. It would have been more satisfactory, could Emerick have produced his models or drawings made in 1899; but he did not preserve the drawings and has lost the model. This we find no reason to question. The evidence is sufficient under the authorities to support the claim of the patentee. *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68; *Eck v. Kutz* (C. C.) 132 Fed. 758.

[2] The question is not one of a priority of invention but of invention made prior to the issue of the patent to Byers. *Union Typewriter Co. v. Smith et al.* (C. C.) 173 Fed. 291; *Bates v. Coe*, supra, and cases cited in *Turner Brass Works v. Appliance Co.* (C. C.) 203 Fed. 1001. We are satisfied from the evidence that appellee has made an invention—very narrow, more than usually the case—but nevertheless entitled to protection as an addition to the draft rigging art, especially in the matter of its adaptability to convenient access for repairs.

We find no difficulty in discovering infringement on the part of appellant. It has employed the essential features of Emerick. There are several other matters urged which we do not deem it necessary to consider.

The decree of the District Court is affirmed.

THURSTON et al. v. REED et al.

(District Court, D. Massachusetts. December 31, 1915.)

No. 615.

1. PATENTS ⇨200—ASSIGNMENTS—CANCELLATION—SUFFICIENCY OF EVIDENCE.

In a suit to cancel the assignment of a patent having about 5½ years to run, evidence as to whether the assignee's agent represented to the patentee that it had only a short time to run *held* insufficient to show that the patentee was actually deceived regarding the unexpired term of his own patent, to the extent of believing that only a year or two of such term remained.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⇨200.]

2. PATENTS ⇨200—ASSIGNMENTS—CANCELLATION—MATERIALITY OF MISREPRESENTATIONS.

A statement by defendant's agent, in negotiating for the assignment of a patent having 5½ years to run, that it had only a short time to run, was not a material representation, authorizing a cancellation of the assignment for fraud.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⇨200.]

3. PATENTS ⇨200—ASSIGNMENTS—CANCELLATION—SUFFICIENCY OF EVIDENCE.

In a suit to cancel the assignment of a patent, which the patentee had previously agreed to assign to a corporation of which F. was treasurer, and which was being wound up by its directors, as trustees for creditors and stockholders, evidence *held* to show that, while defendant's agent, in negotiating for the assignment, used the name of F., or referred to him in some way, such as conveyed to the patentee the impression that he came from F., he did not represent that he was sent by F. to see the patentee respecting the patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⇨200.]

4. PATENTS ⇨200—ASSIGNMENTS—CANCELLATION—MISREPRESENTATIONS.

Plaintiff assigned certain patents covering processes for coating one metal with another to a corporation, agreeing to also assign patents subsequently obtained. He afterwards obtained a patent covering such processes, but for more than 11 years it had been left in disuse, and the corporation had requested no assignment. The corporation had discontinued business and was being wound up by its directors. The agreement to assign had not been recorded in the Patent Office. Defendant's agent, in negotiating with the patentee for an assignment of the patent, stated to the patentee, according to the patentee's claim, that the corporation had no claim on such patent; that he had been at Washington and examined the record, and there was no assignment on record; that the patent would revert to the patentee if the company had lapsed; and that the patentee had authority to assign it, and nothing could be done about it, if he did assign it. *Held*, that there was in this no false representation of a material fact, authorizing a cancellation of the assignment, since the statement that no assignment appeared of record was true, as was also the statement that the patent was the patentee's property, and he was free to sell and assign it, so far as the record showed, while the statement as to the patentee's rights, if the company had lapsed, was no more than a statement of opinion as to a matter of law.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⇨200.]

5. PATENTS ⇨200—RESCISSION FOR FRAUD—DEGREE OF PROOF REQUIRED.

To establish actual fraud, warranting the cancellation of a contract, clear, unequivocal, and convincing proof, going beyond a mere preponderance in plaintiff's favor, is necessary.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⇨200.]

6. PATENTS ⇨200—ASSIGNMENTS—CANCELLATION—GROUNDS.

Plaintiff owned a patent, which he had agreed to assign to a corporation, and, at the time an assignment was made to defendant, who had no notice of the agreement to assign, plaintiff was 79 years old and had a poor memory, but was not incapable of managing his own affairs. Defendant's agent exercised no undue persuasion or influence, did not refuse to allow further time for deliberation, or state that the amount offered for the assignment must be accepted then or never, and took no advantage of the patentee, except by concluding the bargain at the first interview, lasting about an hour, though the patentee's infirmities were manifest. *Held* that, as he had no notice of the importance that the patentee should have in mind his relations to the corporation, the facts did not show that he took any fraudulent advantage of the patentee's failing memory.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⇨200.]

7. PATENTS ⇨200—ASSIGNMENTS—CANCELLATION—SUFFICIENCY OF EVIDENCE.

In a suit to cancel a patent covering processes for coating one metal with another, evidence as to the value of the patent, which had been left in disuse for more than 11 years, *held* insufficient to show that the consideration paid for the assignment, \$200, was so grossly inadequate as to raise a presumption of fraud, though the allegation that the amount in controversy exceeded the jurisdictional amount, \$3,000, was not denied.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⇨200.]

In Equity. Suit by Samuel H. Thurston and others against Philip L. Reed and others. On hearing on pleadings and proofs. Bill dismissed.

Francis J. V. Dakin and Rufus B. Sprague, both of Boston, Mass., and Thorndike Saunders, of New York City, for plaintiffs.

Philip C. Peck, of New York City, and J. Sidney Stone, of Boston, Mass., for defendants.

DODGE, Circuit Judge. The relief sought in this suit is the cancellation of an assignment by the plaintiff Thurston, executed by him February 25, 1914, of United States patent No. 706,701, which was issued to him August 12, 1902. The assignment purports to convey the patent to the defendant Reed for the sum of \$200, the receipt whereof is acknowledged. The bill alleges that the assignment was procured by fraud practiced upon Thurston by the defendant Calder. It seeks also a reconveyance of the patent by the defendant United Metals Coating Company of America, to whom Reed has since assigned the patent, on August 4, 1914. A preliminary injunction, issued June 3, 1915, has forbidden its further transfer pending this suit.

As originally filed, the bill alleged nothing regarding the amount in controversy. An amendment allowed at the hearing, on July 15, 1915, sets forth that:

"The subject-matter of the controversy exceeds the sum of \$3,000 value, exclusive of costs and interest."

The defendant has not disputed the jurisdiction of the court. So far as diverse citizenship of the parties is concerned, jurisdiction appears from the allegations of the amended bill.

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

In a further amendment, also allowed July 15, 1915, the plaintiffs tender the defendant corporation the \$200 paid for Thurston's assignment of the patent to Reed. No such tender had previously been made.

When the plaintiff Thurston assigned the patent in question to Reed on February 25, 1914, as above, he was sole owner of it so far as the Patent Office records showed. By an assignment in due form, executed by him under date of April 16, 1901, he had conveyed two others patents, issued to him before the latter date, to Thurston Metal Company, a New Jersey corporation; and by the terms of that instrument he had also assigned to the same company and its legal representatives, for the same consideration:

"All improvements in the [processes described in said earlier patents] which I may hereafter invent, or improved processes for obtaining the same or similar products which I may invent or discover, and all patents which I may obtain under my own name or otherwise in the United States of America."

And by the same instrument he had also agreed:

"In case said patents were not taken out in the name of the company * * * to make or procure the assignments thereof to said company, in due form of law."

The patent now in controversy was issued to him after the date of the above agreements—on August 12, 1902, as above stated. It had been applied for before that date, on March 23, 1900. The two earlier patents, assigned as above, and also the patent in controversy, covered processes for coating one metal with another.

The Thurston Metal Company had therefore been entitled to a transfer from Thurston of the patent in controversy ever since its issue on August 12, 1902. But he had never so assigned it, nor, so far as appears, had he ever been asked so to assign it, doubtless because the Thurston Metal Company, organized in 1900 to operate under his patents, had not been successful. It had been "proclaimed" in 1911 for nonpayment of taxes by the Governor of New Jersey, had discontinued business, and has been since 1911 in the hands of its directors as trustees for creditors and stockholders for winding up purposes, according to New Jersey laws. Rev. 1896, §§ 53-55. Thurston is one of the directors; all are named as plaintiffs in the bill. As directors they were equitable owners of this patent on February 24, 1914, when Thurston undertook to assign it to the defendant Reed, and were, as between them and Thurston, entitled to an assignment of it from him for the creditors' and stockholders' benefit. The same is apparently also true as regards three other patents issued to Thurston since his above agreements, of April 16, 1901, with the Thurston Metal Company, with which, however, this case is not concerned. Besides the Thurston patents, owned or claimed by it, the company has no assets of any consequence.

Not only had the Thurston Metal Company omitted to procure from Thurston assignments of any of his patents issued subsequently to April 16, 1901, but it had also omitted to record his assignment of that date, wherein his agreements to assign said subsequent patents were contained; and this was never put on record at the Patent Office

until March 20, 1914, after the transfer to Reed now attacked (recorded March 5, 1914), and after the present controversy had arisen. Before that date the records referred to afforded no notice of its existence.

Thurston's patent No. 706,701, now in controversy, does not appear to have been utilized or considered with any view to its actual use from its issue in 1902 up to the year 1914. Investigations into a German electro-plating process having by that time led two independent groups of investors to seek control of this patent, both were trying in February, 1914, to find Thurston, its sole owner according to the records, in order to negotiate with him for its purchase.

The specification of this patent, signed by Thurston March 17, 1900, gave his residence as Long Branch, in the county of Monmouth, N. J., and his residence was so given in all the patents issued to him, except one; in No. 822,873, issued June 5, 1906, on his application filed April 1, 1905, his residence is given as Newark, N. J., but he appears to have gone in 1911, broken in health, to live with his brother in Hamburg, N. Y., a village not far from Buffalo, and to have remained there during the four years preceding February, 1914. In that month he was nearly 79 years old, somewhat impaired in health and in mental vigor, but still undertaking to manage his own affairs, with some assistance in details from his niece, Rose M. Thurston, about 20 years of age, who resided in the same house.

A representative of one of the groups above referred to called upon Thurston at Hamburg, on February 21, 1914, asked his price for the patent No. 706,701, and was told by him that it belonged to the Thurston Metal Company, as did all his patents. He was also informed by Thurston that negotiations regarding the patent must be made with Charles D. Fuller, the treasurer of the Thurston Metal Company, residing and doing business in New York City, and was given Fuller's address. Fuller was a steel merchant, a partner in the firm of Fuller Bros. & Co., which had carried on business for many years at 139 Greenwich street, the address given as above. He was an old friend of Thurston, had been treasurer and director of the Thurston Metal Company since its organization, and appears to have had the chief control of its financial affairs.

Four days later, on February 25, 1914, the defendant Calder arrived in Hamburg. His errand there was to see Thurston, find out whether he was the patentee named in the above patent, and, if he was, to buy it from him, if terms of sale could be agreed on. Calder was acting for the other of the two above groups. He knew nothing, so far as appears, of the application made to Thurston on February 21st as stated.

Calder had an interview with Thurston at his brother's house on February 25th. It lasted an hour or more. Its result was that, being satisfied as to Thurston's identity with the patentee named, Calder offered him \$200 for an assignment of that patent to Reed, one of the persons composing the group represented by him. Thurston accepted the offer, took Calder's check for \$200 on a Boston bank, executed an assignment to Reed, and delivered it to Calder, all before

Calder left the house. Calder had brought an assignment with him, previously drawn up by counsel, and requiring, to make it ready for execution, only insertion of the date, the consideration, and a correction in the statement of Reed's place of residence. The insertions and corrections were made by Calder in Thurston's presence. Calder signed as witness to Thurston's signature. A copy of the assignment as executed is annexed to the bill. Thurston having deposited the check, it was paid in due course March 2, 1915.

Exactly what took place between Thurston and Calder at this interview is in controversy. Except that Rose M. Thurston was there during part of the time, they two were the only persons in the room. Her testimony and that of Thurston himself contradict that of Calder. All three testified in person at the hearing. If fraud was ever practiced by Calder upon Thurston in regard to the assignment, it consisted in representations made during this interview. Calder denied making the representations testified to by the Thurstons, upon which the plaintiffs rely.

As set forth in the bill (paragraph 8), the representations were in substance as follows:

(1) That Calder had been sent to Thurston by Charles D. Fuller, above mentioned.

(2) That the patent had never been assigned to the Thurston Metal Company; that the company had no claim to it, it was independent of patents previously assigned, it was Thurston's property, and he was free to sell and assign it.

(3) That it had "only a year or two to run."

There are further allegations in the same paragraph that Calder also told Thurston he "could rely upon the facts being as stated by him," "that he was in great haste to return to Massachusetts and desired to have the transaction closed that day," and that "Reed did not desire to invest in said patent, but had agreed to take title * * * to accommodate him (Calder)." But these last statements, though included among those alleged to have been believed and acted upon as true by Thurston in executing the assignment, seem to add nothing material upon the question of fraud. Calder, as is not disputed, left Hamburg the same day for the East, and, if Thurston assigned the patent, it does not appear to have been a matter of any consequence to him whether he assigned to Reed or Calder. Whether or not the other alleged representations were fraudulently made is the question upon which the case turns.

[1, 2] As to those alleged representations, the evidence regarding that above numbered (3) may be first considered. According to Thurston's testimony, Calder said the patent had "only a short time"—"a few months"—to run. According to Rose M. Thurston, he said it "only had a short time to run"—"about a year or a year and a half, something of that sort." He stated, according to his own testimony, that the patent had "several years," or "a few years," to run. According to his testimony, also, he had a copy of the patent with him, he handed it to Thurston, Thurston examined it during the interview, and it was at hand, so that it could have been examined

throughout. Thurston's testimony was at first that he did not think Calder had a copy of the patent with him, and that "he didn't show it to me"; but on cross-examination he "could not swear to anything in regard to that, because I don't remember," or "I can't remember about it." Rose M. Thurston said she saw no paper produced by Calder, except the assignment.

The fact was, as reference to the patent would at once have shown, that it had about 5½ years to run. It seems to me improbable that Calder would in any event have intentionally misrepresented upon this point. More than two-thirds of the life of the patent having undoubtedly expired, statements by him, if made, that it had "only a short time to run," but going no further, could hardly amount to material misrepresentation. On the evidence I accept Calder's testimony that he had with him and produced a copy of the patent at the interview. He would not have been likely to go there without a copy. With a copy at hand, stronger evidence than is here afforded seems to me necessary for the conclusion that the patentee was actually deceived regarding the unexpired term of his own patent, to the extent of believing that only a year or two of it remained.

[3] The allegation referred to under (1) above, that Calder represented himself as sent to Thurston by Fuller, is the one mainly relied on by the plaintiffs, and the one regarding which the most serious conflict of testimony occurs.

Thurston himself, and Rose M. Thurston, who met Calder at the door and was thereafter present during the first part of the interview, agreed in stating that Calder, in introducing himself, said that he "came from" Charles D. Fuller, and that further talk followed about Fuller and his New York firm before the matter of the patent was taken up. Calder denied, on direct examination, that he ever told Thurston he had been "sent to him by" Charles D. Fuller, and said, further, that he never knew of Fuller, never heard of the Thurston Metal Company, and first heard of Fuller after he had given Thurston the check for \$200; that Thurston then said, while waiting for pen and ink wherewith to execute the assignment, that "Mr. Fuller will be very glad to hear of this," thereafter explaining, in answer to an inquiry who Fuller was, that he was a very dear friend, who had been helpful to him, and would be glad to hear he had made something out of some of his patents. Until Thurston thus mentioned it, Calder "never heard the name before," according to his direct testimony.

It is claimed that reason to doubt the truth of these statements was afforded by Calder's cross-examination, in connection with testimony on the plaintiffs' behalf, as follows: On cross-examination Calder said that, while trying to discover Thurston's then residence, he had called, on February 21, 1914, upon Mrs. Mary K. Thurston, at 45 West Ninety-First street, New York, who proved to be the widow of Thurston's son, and that the information that Thurston was then living at Hamburg came from her. Calder at first denied that he showed her the patent, or that he got from her any further information, except that Thurston was an inventor, had been unfortunate, that Mrs. Thurston's daughter had been living with him at Hamburg until recently,

and that she herself had had no communication with him for some time. But during his further cross-examination, on the day following the above statements, Calder said he began the interview with her by asking if she knew the Thurston whose initials were similar to those on patent No. 706,701; that "she looked at it, and said they were the initials of her deceased husband"; and still later, though denying that she gave him Fuller's address, or mentioned Fuller's interest in Thurston's patents, or referred to the Thurston Metal Company as having conducted experiments relating to the patented inventions, he somewhat qualified these denials by saying that he was positive regarding them "so far as his recollection went."

Mrs. Thurston herself testified for the plaintiffs, in rebuttal, that she told Calder at the above interview that it would be better for him to see Charles D. Fuller, Thurston's partner, instead of hunting up Thurston himself, and that she got Fuller's address at the time from her telephone book to give to him. She added, it is true, that Thurston's address was all he seemed to care to know.

Calder had previously stated, on direct examination, that after his interview with Mrs. Thurston on February 21st he asked his counsel to ascertain from the records at Washington who was the registered owner of the patent No. 706,701, and that he got word in reply, on February 24th, that Thurston was the sole owner of record. He started for Hamburg the same day, broke the journey at Utica, and arrived at Thurston's house between 3 and 4 p. m. on February 25th.

A fact also disclosed by Calder for the first time during cross-examination was that he had himself visited Fuller's New York place of business, at 139 Greenwich street, in his search for Thurston's address. This he did on February 19th, two days before his interview with Mrs. Thurston. From lawyers in New York, whose names appeared in connection with one of the Thurston patents, he had learned that according to their records they had addressed letters to Thurston at 139 Greenwich street. During his visit there to follow up this clew, he learned from a clerk that one of the gentlemen there, at the time absent for his health, used to see Thurston there some years before. Calder's testimony was, however, that he made no further inquiry there, and, while there, neither heard Mr. Fuller's name mentioned, nor learned it in any way. Fuller, testifying for the plaintiffs in rebuttal, stated that the entire building at 139 Greenwich street was occupied by his firm, that the offices were two floors above the sidewalk, that on the side of the building, over the door through which access was had to them, "Dudley B. Fuller & Co." appeared in letters 10 to 12 inches high, and that "Fuller Bros. & Co.," with the street and number, appeared on the side of the doorway in white letters 3 to 4 inches high, on a black framework, in plain sight. This evidence was uncontradicted.

I find it difficult to believe that Calder could have gone away from 139 Greenwich street, considering the nature of his errand there, entirely ignorant of the name of the concern there located, or that, if Mrs. Thurston gave him the same address two days later from the telephone book, it made no impression on his mind. I am not pre-

pared to find that Mrs. Thurston's statement that she did so give Calder this address is false. If Calder's visit to Fuller's place of business and his subsequent interview with Mrs. Thurston had led him to apprehend that Thurston, though the sole patentee named in No. 706,701, might not have retained sole ownership during the 11 or more years which had passed since it issued, such an apprehension may well have suggested the search at Washington set on foot by him on February 21st.

Nearly at the end of his cross-examination Calder stated, for the first time, that during their interview at Hamburg he told Thurston that 139 Greenwich street had been visited during the search for his address, but that the people there had said "they had heard nothing of Mr. Thurston for eight years; * * * that one of their gentlemen had been friendly with him, and was now away in the West." Thurston well knew that 139 Greenwich street was Fuller's place of business, and such a reference to it could hardly have failed to bring from him some mention of Fuller's name, if there had in fact been no previous mention of it, and, to the inquiry by cross-examining counsel whether Thurston did not thereupon remark that it was Charles D. Fuller's address, Calder replied that "he may have said it, but I don't remember it." Neither Thurston nor his niece include any mention by Calder of a visit to 139 Greenwich street in their accounts of what was said during the interview.

In view of all the evidence bearing upon the question, I am unable to believe that, when Thurston and his niece testified that Calder said he "came from" Fuller, they were inventing something for which there was no foundation whatever in fact. But, on the other hand, besides Calder's denial, there are many circumstances tending to forbid the conclusion that he ever told them, in so many words, that he "came from Charles D. Fuller." As will be noticed, neither Thurston's testimony nor that of his niece quite supports the allegation of the bill that Calder said he had been "sent to" Thurston by Charles D. Fuller; and, according to both, if he said he came from Fuller, he said nothing beyond those words to convey the impression that Fuller had sent him there about the patent, as might be expected, if he was really attempting to deceive. There is nothing to show knowledge on Calder's part at the time that Thurston had ever agreed to assign the patent, or that he had referred a former applicant for it to Fuller, or that he was unwilling to negotiate about it without Fuller's sanction. Calder could not have seen the unrecorded assignment upon which the Thurston Metal Company relies; so far as appears, he had talked with no one who could have told him anything about it, nor would any search of records have indicated its existence. He had no other reason, so far as appears, to think the mention of Fuller's name would help him with Thurston, than the information said to have been given him by Mrs. Thurston. I think the conclusion warranted, in view of all the above, that Calder used the name of Fuller, or referred to Fuller's place of business in some way such as conveyed to Thurston and his niece the impression that he did come from Fuller; but only

to that extent can I regard this allegation of the bill as supported by the evidence.

Fuller was, in fact, absent from New York between January 19 and March 3, 1914; and the fact was that on February 25th Calder did not know him and had never seen him.

[4] As to the allegations referred to under (2) above, there is no testimony, either from Thurston himself or from Rose M. Thurston, to any statements by Calder that the patent "had never been assigned to said Thurston Metal Company and was independent of patents previously assigned"—which is the language of the bill. Calder went no further, according to their testimony, than to say (after Thurston's statement that he had assigned some of his patents to that company) that the company had no claim whatever on the patent which Calder wanted to get; that he had been at Washington and examined it, and there was no assignment on record; and that the patent would revert to Thurston if the company had lapsed altogether, as Thurston thought might have been the case; or to assure Thurston that he had authority to assign it, and nothing could be done about it if he did assign it, there being no transfer on record. In all this I can find nothing amounting to false representation of a material fact. That no assignment appeared of record was true, and it was therefore true, also, that the patent was Thurston's property, and he was free to sell and assign it, so far as the records showed. If he undertook to tell Thurston what his rights would be if the company had lapsed, Calder cannot be regarded as having misrepresented facts. Thurston would have had no right to understand this as anything more than a statement of Calder's opinion, and as a matter of law.

[5] Unless, therefore, fraud is to be presumed from the respective circumstances of the parties, or is apparent from the bargain itself, I do not think the evidence sufficient to justify cancellation of the assignment. The clear, unequivocal, and convincing proof, going beyond a mere preponderance in the plaintiff's favor, necessary to establish actual fraud in such cases is wanting. See *Atlantic, etc., Co. v. James*, 94 U. S. 207, 24 L. Ed. 112; *The Maxwell Land Grant Case*, 121 U. S. 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; *Southern, etc., Co. v. Silva*, 125 U. S. 249, 8 Sup. Ct. 881, 31 L. Ed. 678; also, in this circuit, *Marsh v. Cortis*, 150 Fed. 121, 80 C. C. A. 75.

[6] It is said on the plaintiff's behalf that Thurston was not physically well or mentally alert, and it was therefore comparatively easy to influence him. The bill alleges only that he was at the time "very infirm and in poor health," an allegation denied by the answer. Except by the misrepresentations which it charges Calder with making, the bill does not allege that Calder unduly influenced Thurston.

Thurston's uncontradicted testimony was that he had a serious attack of neurasthenia about 1909; that for a time thereafter his son (since deceased) conducted experiments in his place for the Thurston Company, because he was too ill; that his condition had been such since he went to live in Hamburg in 1911 that no work on his inventions had been expected from him, and that he had been a great invalid; also at the time of his interview with Calder he was "not a

well man," or "a pretty sick man." At the trial of this case in July, 1915, it was apparent that his memory, as he testified, was "a little bad," and apparent, also, in my opinion, that impairment of his mental powers, through age or ill health, had proceeded far enough to render much patience and consideration necessary on the part of those with whom he might deal, in order to insure fully intelligent action in business matters on his part. He could by no means, however, be called incapable at the time of managing his own affairs, and only to the extent above indicated can it be said that he was not dealing on equal terms with Calder.

Except by saying, what was no doubt true, that he desired to close the transaction that day, and was in a hurry to get back to Massachusetts, there is nothing to show that Calder brought to bear anything like undue persuasion or influence upon Thurston's mind. No statement by him appears to the effect that the \$200 must be accepted then or never, nor any refusal to allow further time for deliberation. No request for further time by Thurston appears to have been made. The utmost that can be claimed on the evidence, it seems to me, is that Calder concluded the bargain on the spot, notwithstanding that Thurston's infirmities were manifest during their interview, so as to show that he could not at the time remember the actual state of his relations with the Thurston Metal Company, as regarded his patents—a subject mentioned between them during the interview, as both agree. I do not think it can be said, however, that the evidence charges Calder with any notice of the importance to Thurston, or to the Thurston Metal Company, that the existing state of those relations should be present to Thurston's mind in making such a bargain. The absence of such notice to him was due to the failure of the Thurston Company to put its assignment seasonably on record; and it is only the interest of the Thurston Metal Company in the patent that the bill is framed to protect. I do not find sufficient proof that Calder took any fraudulent advantage of Thurston's failing memory, still less that he brought to bear influence or constraint such as Thurston was too weak to resist. See *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; *Ralston v. Turpin*, 129 U. S. 663, 670, 9 Sup. Ct. 420, 32 L. Ed. 747.

[7] It remains to consider whether there was gross inadequacy of price, such as to raise a presumption of fraud in the bargain. Except for the fact that in February, 1914, ownership of the patent was being sought by two independent interests, so that its owners, had they been aware of the facts, might presumably have had competing offers from both; there is little reason to believe that it had substantial value at the time. Its owners had left it in disuse for more than 11 years, during which period no offer for it appears to have been made. The bill alleges (paragraph 11) that it is "of great value in the metal art, in the electrotyping art, and in other arts," and that the plaintiffs will suffer "a great and irreparable loss," unless reconveyance is ordered. Calder's answer admits that the patent is "of value in the metal arts." The evidence relied on to show its value at the time of the assignment is in substance as follows:

On July 16, 1914, Calder organized the defendant Metals Coating Company of America, whereof he became president; the other incorporators, besides Reed, being the other persons under whose instructions Calder acted in procuring the assignment to Reed. Its capital stock was \$100,000, and to it Reed assigned this patent on August 4, 1914. Although the bill alleges that a large proportion of this stock was issued in payment for the Thurston patent, the allegation is denied, and the plaintiffs have offered no proof of it. The defendants' evidence is that the company acquired certain other patents, for which \$55,000 has been paid, and more is to be paid, if experiments with them result favorably; also that the Thurston patent was acquired only for purposes of protection. This evidence does not seem to afford a satisfactory basis for any safe estimate of its value.

From the plaintiff's evidence it further appears that on March 13, 1914, Fuller, acting in New York on behalf of the owners of 53 per cent. of the stock of the Thurston Metals Company, and not having then learned that this patent had been assigned to Reed, entered into an agreement with Morton D. Connolly, representing the investors on whose behalf Thurston had been approached on February 21, 1914, whereby Connolly undertook to pay \$25,000 for all that company's stock. Connolly testified that he was familiar with the electroplating art, that the process described in Thurston's patent 706,701 could be used, instead of electroplating, so as to save 50 per cent. in time and cost, and that he made the above agreement for the purpose of getting that particular patent. He further stated that the patent would be "worth \$100,000 to him, provided he secured a purchaser for it"; but a statement of this kind is obviously of little weight upon such a question, nor can I regard Connolly's opinion as to what could be accomplished by use of the patented process as of much consequence. It is not shown to have been an opinion based on any actual experience or experiment, or to be anything more than a speculative opinion. It is supported by no other evidence.

The patent was without demonstrated value at the time, nor could it be proved valuable without the expenditure of time and money, and only 5½ years remained within which profitable use could have been made of it in any event. As the defendants urge, "the uncertainty and highly speculative nature of patent values are notorious," and estimates of such values based on opinion only can hardly be accepted for the purposes of a question like the present. See *American, etc., Co. v. Merchants', etc., Co.* (D. C.) 216 Fed. 904, 910. Although, as has been stated, the defendants have not denied the allegation that the jurisdictional amount is involved, I am not satisfied that gross inadequacy of price is shown with sufficient certainty to justify cancellation of the assignment on that ground alone.

The above conclusions require dismissal of the bill, and there may be a decree accordingly.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. CARPER AUTOMATIC BOTTLING MACH. CO. OF BALTIMORE CITY et al.

(District Court, D. Maryland. December 29, 1915.)

1. PATENTS ⇨129—SUIT FOR INFRINGEMENT AGAINST ASSIGNOR—ESTOPPEL.

A corporation formed for the purpose of manufacturing a device alleged to infringe patents granted to one of the incorporators, who was to own one-half the stock, and assigned by him to complainant, is bound by any estoppel which binds such patentee.

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

2. PATENTS ⇨328—VALIDITY AND INFRINGEMENT—BOTTLING MACHINES.

The Carper patents, No. 1,012,984 and No. 1,120,596, each for a bottling machine, as to claims 28, 29, 37, 38, 39, 42, and 57 of the former, and claims 6, 9, 10, and 24 of the latter, are not for combinations of definite mechanical elements, but combinations to attain a definite end of mechanical means, which might vary in form and construction, and are entitled to a fairly liberal construction. As so construed, *held* valid and infringed. Claim 1 of the second patent *held* not infringed.

In Equity. Suit by the Crown Cork & Seal Company of Baltimore City against the Carper Automatic Bottling Machine Company of Baltimore City and Albert A. Carper. On final hearing. Decree for complainant.

Crain & Hershey, of Baltimore, Md., and James Q. Rice, of New York City, for complainants.

William F. Hall, of Washington, D. C., for defendants.

ROSE, District Judge. The plaintiff owns United States letters patent No. 1,012,984, December 26, 1911, and No. 1,120,596, December 8, 1914, both of which were issued to it as assignee of the defendant Carper. It says the defendants have infringed the twenty-eighth, twenty-ninth, thirty-seventh, thirty-eighth, thirty-ninth, forty-second, and fifty-seventh claims of the earlier patent, and the first, sixth, ninth, tenth, and twenty-fourth of the later. In the amended bill, infringement of the twenty-second claim of No. 1,012,984 was alleged, but at the hearing the plaintiff withdrew that claim from consideration. Both the patents are for machines for bottling gaseous liquids under pressure.

For nearly ten years prior to the 31st of May, 1914, the defendant Carper was in the employ of the plaintiff, as an inventor and machine designer, at an annual salary of \$5,000. By his contract it was provided that any inventions which he should make while in plaintiff's employ should be for its exclusive use. In the course of such employment he made the inventions for which the letters patent in suit were subsequently issued; applications for them being made in 1908 in the months of June and December, respectively. While the earlier patent was granted more than two years before he left the plaintiff's employ, the second was still pending in the Patent Office at that time, and was not issued until six months later. Both applications were

prosecuted by Messrs. Spear, Middleton, Donaldson & Spear, who had for many years been solicitors of patents for the plaintiff.

The defendant Carper says that after he left the plaintiff's employ he invented a new bottling machine. On the 28th of August, 1914, through Messrs. Spear, Middleton, Donaldson & Spear, he applied for a patent therefor. It is in substance the alleged infringing device. For a period of more than three months, from the 28th of August to the 8th of December, the same solicitors prosecuted the application for the second patent in suit, and also the patent for the alleged infringing device. Mr. Hall, who is now a member of that firm, appears in this case as counsel for the defendants.

Carper's actual service with the plaintiff ended on the 30th day of April, 1914, although he was paid until the 31st of May of that year. It appears he thought that he had, in substance at least, invented the machine now said to infringe, possibly as early as the latter part of May of 1914, certainly by the early part of June of that year. He at once brought the device to the attention of the plaintiff, who, however, showed no interest in it. He took up the matter with Messrs. Spear, Middleton, Donaldson & Spear, and in August told the president of the plaintiff that he was having his patent application prepared by those gentlemen. The plaintiff at once wrote the latter telling them that Carper had called its attention to some alleged improvement on machines, the previous patents on which he had assigned to it, and had told it that they were drawing his improved plans. The letter notified them that Carper was no longer associated with the plaintiff, and that any work that they did for him should be done with knowledge of that fact. They replied that Carper had told them that he was no longer in the plaintiff's employ. They said they were impressed with the fact that it would be to the interest of the plaintiff to encourage him to deal with it. While they had told him that his new construction fell within the claims of the plaintiff's patent, there were radical changes in his device, and another concern might feel justified in patenting the invention and fighting out with the plaintiff the question of infringement. They added that a rival, with skillful attorneys having a knowledge of the prior art, when aided by Mr. Carper, would not lack grounds on which to base a defense. A reference was also made to the pending interference of one Shields, and it was suggested that Carper's invention would avoid the issue upon which such interference was declared.

[1] Plaintiff did not accept these suggestions. Carper thereupon sought other backing, and obtained it from one Henry L. Brack. On the 30th of September, 1914, an agreement was entered into by them and a certain Charles H. Brack. The last named had been an employé of the plaintiff and had left its service shortly after Carper. This agreement provided for the formation of the corporate defendant, the Carper Automatic Bottling Machine Company of Baltimore City. The latter was to have a capital of \$500, divided into 100 shares of the par value of \$5 each. Henry L. Brack agreed to loan the company the sum of \$10,000, the loan to be made in such installments as the board of directors might from time to time determine. The

company was to pay him 6 per cent. interest on such loan. Henry L. Brack agreed that, after the patents Carper was to obtain for the machine had been assigned to the company, he would make over 50 shares of its stock to Carper and 23 shares to Charles H. Brack. There were other provisions for the division of profits, when there were profits to divide. In the meanwhile, Carper was to receive a weekly salary of \$50. At the time of the hearing, Henry L. Brack had lent the company \$5,000 of the \$10,000 mentioned in the agreement. In view of all the circumstances, the corporate defendant is bound by any estoppel which binds Carper. *Automatic Switch Co. v. Monitor Manufacturing Co.* (C. C.) 180 Fed. 986, and cases there cited.

The substantial defenses divide themselves into two classes: First, that none of the claims in suit can be read upon the defendants' device; second, that, even if the first contention should not be sustained, the prior art requires the broad language of these claims to be limited by construction, and that, when so limited, defendants do not infringe. Of these defenses in their order.

One of the elements in all of the claims in suit is a filling chamber. Defendants say that their device contains none. When a bottle is being filled with gaseous liquids, which are to be sealed in it under pressure, communication between its mouth and the open air must be cut off. Some place provided with facilities for cutting off such communication must be supplied, and while the bottle is being filled its mouth must be brought into such place, or in air-tight connection with it. In machines having the purpose of those involved in this controversy, such place is usually known as a filling chamber; that is to say, the chamber in which the bottle mouth is held while being filled. In that sense of the word, the defendants' machine, as well as those of the plaintiff, necessarily has such a chamber. Defendants say, nevertheless, that they have not a filling chamber, as that term is used in the patents in suit, because in their device the liquid is carried in a tube through the chamber into the bottle, while in plaintiff's machine the liquids enter the chamber and from it flow into the bottle.

In defendants' contention the real function of the filling chamber is lost sight of. It is not primarily a chamber through or from which the liquid is to be carried into the bottle, although such carrying, in one way or another, must necessarily take place; but it is a chamber in which the bottle mouth is to be secured in some gas-tight manner while the bottle is being filled. There is nothing in any of the claims in suit to suggest that this natural and simple interpretation is not the one intended. When the tube stops an eighth or a sixteenth of an inch above the bottle head, defendants admit that there is a filling chamber. It is mere trifling to assume that the lengthening of that tube by half an inch would enable the defendants to escape infringement. The function performed by the tube does not depend on its length. It is true that there may be advantages in using a longer tube, having at its lower end means of breaking the force with which the liquid is discharged from it. Defendants contend that there are. If they are right, the discovery of this fact and the providing of apparatus necessary to make practical use of it may involve the exercise

of inventive genius. In that event, defendants may be entitled to a patent for such improvement.

Such circumstances have nothing to do with the question as to whether their device does not contain a filling chamber. The function of that chamber is precisely the same, whether the liquid is brought from the outer air to the bottle through a tube or opening which stops in the top or side of the chamber itself, or extends nearly or quite to the bottom of the air, which by the filling chamber and the bottle is cut off from communication with the atmosphere. At the time the individual defendant applied for the second patent in suit, he stated that, when the bottle head and gasket are in gas-tight contact, the situation existing was as if the interior of the bottle were a part of the filling chamber, and in his application for a patent for the device now alleged to infringe, he said that in his machine "various means may be employed for delivering the liquid into the bottle."

An element of the combination described in some of the claims in suit, in addition to the filling chamber, is a means of supplying liquids thereto. The filling chamber, at the time the bottle is being filled and sealed, must be cut off from free communication with the air, and yet in a bottling machine there must be means for conveying liquids to this filling chamber while it is so cut off. The "means for supplying liquids thereto," referred to in the patent, are the means which serve such purpose, and it is immaterial, when the liquid has been so supplied, whether it is discharged above or below the bottle mouth. It follows that the defendants' first contention cannot be sustained.

Defendants' second contention, that the broad language of the claims in suit must, in view of the prior art, be limited, and that, when so limited, their device does not infringe, must now be considered.

The patents in suit are for combinations. They are for making a new thing by putting old things together in a different way from that which has been before used. In one sense, all machine patents are for new combinations of old things. Pulleys and levers, wheels and screws, as well as the materials out of which they are made, are millenniums old. An inventor may conceivably take nothing newer than some of these fundamental mechanical devices, which were known as soon as men acquired any civilization whatever, and he may so combine them as to produce some machine, all or nearly all of the subsidiary combinations in which are new. Another man may use as the elements of his combination devices which in themselves are highly organized machines, and if he so combines them, as distinguished from merely putting them together, that they will produce a new result, or an old result in a new and better way, he too has made an invention.

Now the patents in suit and the alleged infringing device are alike, in that they are all combinations of the latter class. Carper testified that when making his first invention he had before him all the patents that had, to that time, been issued for bottling machines, as well as a number of machines themselves, some patented and one at least unpatented, which had been made for use, and some of which had been extensively used. It is clear that his purpose was to make a new machine which would be absolutely automatic in its operation, and in which the

devices for accomplishing each of the different stages of the process should be so accurately timed that the machine would work with speed and efficiency. Such a machine would be a step forward in the art. How long a step would depend upon the degree to which he obtained his end and the extent to which, in consequence, the cost of an efficient bottling operation was thereby reduced. The language of the description in the two Carper patents in suit shows that for the performance of different parts of the bottling operation there were various well-recognized methods then in existence, and that his invention, as he saw it, laid not in the selection of one or the other of these methods of doing each one of the things that was necessary or desirable to do, but in his way of combining all these operations so as to accomplish one unified result.

Now, it is true that the way these separate operations must be combined might depend to a very considerable degree upon the method actually selected for performing each of them, and, if so, one of such methods might not, for the purpose of his invention, be an equivalent of the others, but to the extent to which his combination as an operative device did not necessarily depend upon the details of the machinery employed in one or another part of the work, he could claim as his invention the bringing together, so as to produce from the various operations one unified result, whatever old or new machinery might be used in the various steps of such operations. Such was unquestionably Carper's view when he applied for the two patents in suit. More than a score of times in each of his applications did he say that the means for doing various things which had to be done might vary within wide limits. In each of these patents, he was, moreover, at pains to point out that his invention, as he understood it, consisted in making a working combination of various mechanical operations, every one or nearly every one of which had in the past been performed in various ways, and for the doing of which in his new combination an equal variety of means might be employed.

Nor when, after he had left the plaintiff's service, he applied for a patent for the device now said to infringe, did he show any different conception of the nature of the task to which he had addressed himself. Some ten times in the course of that application he declared that various means for doing some one or another of the things required to be done in his combination might be employed. It is true, as defendants aver, that the plaintiff and Carper were equally well informed as to the state of the art. It follows, defendants contend, that they are not, for the purpose of limiting the language used in the claims, estopped from showing what that state was. The specifications and claims of the patents in suit were drawn by solicitors chosen and paid by the plaintiff. He was himself in plaintiff's employ. Under such circumstances the court might hesitate long before basing an estoppel on some isolated phrase, or even upon a number of ambiguous sentences, in specifications or claims. That is not the point here in issue. A different question is presented. It is in what the invention itself consists; that is, whether it lies in the combination, for the purpose of producing a common result, of particular, definite, and, except within very narrow

limits, unchangeable mechanical constructions, as defendants contend, or whether, as plaintiff asserts, it is found in the combination of various operations to bring about the desired end, there being a considerable choice among a number of well-known ways of performing each of such operations, as the inventor himself, at the time in the most formal way told the Patent Office.

To the latter view Carper thus committed himself. His counsel, who now so earnestly and persistently argue for the latter, once gave the weight of their experience, learning and ability to the former. It may be that neither of them are now estopped to say that what he, acting under their advice, swore to be true, was in fact untrue. Nevertheless, before at their insistence, and for his profit, he can be held mistakenly to have told the Patent Office, under oath, that his invention was in substance of a different kind than it actually was, it should be clear that either the state of the art or some settled principle of law makes it impossible to accept the view of his invention so often and so solemnly expressed by him. There is nothing in the record nor in the authorities to which attention has been called to make either clear. If it were otherwise, the defendants would be no better off. When there is room for doubt as to what a patentee means, the courts strive so to construe his language as to save his claims; but in this case, if words mean anything, there can be no question that Carper said his invention consisted, not in a combination of definite mechanical structure, but in the combination to attain a definite end, of mechanical means, most of which might vary widely in form and construction. If the state of the art showed that he was not entitled to claim such an invention, his patent would be held invalid. It would not be a case in which the claims were broader than the invention, but it would be one in which the invention described and claimed was in essentials different from anything which the patentee had actually invented.

But the defendants are estopped to deny that each and every one of the claims is valid, however free they may be to limit the scope of such claims in any case in which anybody else could properly ask for such limitation. As the record is here presented, it is not necessary for the plaintiff to invoke the benefit of the doctrine of estoppel. The grant of the patent for the invention described and claimed, of course, creates the presumption of its novelty and utility. There is nothing here to overcome that presumption. It is perhaps somewhat strengthened by the fact that plaintiff has received a half a million or more for machines made in accordance with the disclosures of these patents.

Assuming, as has already been held, that defendants' machine has a filling chamber and means for supplying liquids thereto, each of the claims in suit in the first patent are readable upon defendants' device. Most of the arguments on behalf of the defendants, why such claims should be so limited by construction as to make it impossible to read them upon their machine, are based upon the contention that the invention of the patent in suit was merely a combination of definite mechanical constructions. That contention has already been rejected. In the view that has been taken, viz. that the invention claimed was

for the combination in one unified machine, all the parts of which work together to produce one definite result, of means for performing various operations, most if not all of which were well known, and most of which, to the knowledge of those skilled in the art, could, as the patentee says, be performed in more than one way, there is nothing in the prior art as disclosed in this record which requires that the claims in suit should in favor of these defendants be so narrowed that they will not cover defendants' machine.

A like conclusion can be reached as to all the claims of the second patent in suit, except the first. The machine of the second patent in suit is substantially that of the first, except as to the arrangements for allowing, during the filling of the bottle, the escape of surplus air and gas from the filling chamber. In the machine of the first patent, at the time the liquid begins to enter the bottle, the filling chamber is closed to the escape of air and gas. The volume of air within the bottle is greater than that of the air in the filling chamber above the bottle mouth, and consequently, as the liquid under gaseous pressure comes into the bottle, the air in the bottle and the filling chamber, for it is impossible for such purpose to distinguish one from the other, becomes compressed and in such condition exerts a resistance to the flow of further liquid into the filling chamber and the bottle. The effect of this resistance is first to retard the filling, and ultimately to arrest it all together. To deal with this situation bottlers have long employed what they call a "snifiting process"; that is to say, they provide means by which a valve can be opened during the filling of the bottle to allow the escape of air and gas. Usually this snifiting process takes place when the pressure in the filling chamber has become high; that is, when the bottle is nearly filled. When the valve is then opened, the filling is necessarily finally completed and the bottle sealed at a time when, in consequence of the escape of air and gas through the snifiting valve, or other outlet, the pressure upon the contents of the bottle has been reduced considerably below that in the carbonator. The result is to waste a good deal of the gas that has been, with trouble and expense, there forced into the liquid.

The invention of the second patent was intended, in combinations of the kind described and claimed in the first patent, to provide means for overcoming this difficulty. This end was attained by providing means for the partial escape of gas from the beginning of the filling process until nearly its close, and then for cutting off such escape. The effect necessarily was that, at the time the bottle was sealed, the liquids in it were under high pressure. To accomplish this purpose, Carper in his second patent arranged or invented a snifiting tube which could be let down into the bottle, and which should be open from the time at which the flow of liquid into the bottle began. This tube and the openings into it were so arranged as to keep the pressure in the bottle and filling chamber at that point most conducive both to filling the bottle with the greatest rapidity and to preventing any undesirable escape of gas. By ingenious mechanism, when the bottle was filled to a certain predetermined point, this venting tube was closed and drawn up out of the way of the filling chamber. There was then no

longer any way of escape for the gas. As a consequence, the process of filling and sealing the bottle was completed under a pressure at least equal to that prevailing in the carbonator.

Some of the claims of the patent are limited to the precise mechanism shown. Those in suit are broader and purport to cover other means for allowing the desired escape of gas during most of the filling process, and of closing the avenue for such escape shortly before the bottle is sealed. As in the first patent, the patentee left no possible doubt that the invention claimed in these broader claims was the combination, with the machines of the prior art, of any mechanical means included within the language of those claims, and adapted to attain the contemplated result. Such claims may or may not be invalid as against any one entitled to set up such invalidity, as these defendants are not; but there can be no question as to what they mean and were intended to cover.

One of the elements of the first claim of the second patent in suit is for automatic means for enabling the gas to escape continuously until the filling operation has been nearly completed. In the alleged infringing device means are provided by which the gas does escape during most of the process of filling, and the escape is cut off just before the filling is completed and the bottle sealed. The means for bringing about these results are somewhat different from those shown in the patent in suit. There is no venting tube, but there is a valve which is controlled in such manner that it opens an instant after the filling begins. It is finally closed just before or as the filling ends. If that were all, it would clearly answer the description of the like element in the first claim of the second patent in suit; but it is not quite all. The method of control used for this valve is such that, shortly after it is first opened, it is closed for a brief period of time, and then reopened. The time is very short. The only witness who attempts to testify on the question estimates that the period during which it is closed is about one-tenth of the time consumed in filling a bottle, and as the machine will fill, according to the testimony, 1,200 bottles an hour, it will be seen that this closing and opening must be of the briefest.

Plaintiff's contention is that the closing is made for the sole purpose of evading the claims in suit; that it has no other end or function, and is for so brief a period that, as a practical matter, it does not interrupt the continuity of the venting. Defendants assert that they had a distinct purpose in view in arranging for this temporary closing. In the alleged infringing device the syrup is not introduced simultaneously with the charged water, as in the machines described in the patents in suit, but is put in the bottle before the latter comes to the filling chamber. The defendants say that this temporary closing is intended, in the early stages of the filling of the bottle, to keep down the foaming of the syrup when mixed with the gas-charged water. Such foaming is one of the undesirable things with which bottlers have to contend. It is likely to result in a certain amount of the syrup being carried off through the venting valve. They claim that the brief closing of their venting valve and some other differences in the construc-

tion of their machine reduce to an appreciable extent the waste of syrup, which they charge takes place in that of the plaintiff.

With some hesitation the conclusion has been reached that, upon the record as it stands, it would not be proper to hold that defendants' device infringes the first claim of the second patent in suit. Such holding is made solely because of the use in this claim of the word "continuously." That word is not found in the other claims in suit.

The latter are accordingly, upon the evidence, held valid, and infringed by defendants' device. It follows that the plaintiff is entitled to the usual decree declaring valid all the claims in suit, and that the defendants have infringed all of them except the first claim of patent No. 1,120,596, which they have not infringed.

As, at the time the preliminary injunction was granted, an agreement as to the amount of damages suffered by plaintiff in consequence of the infringement was reached and entered of record, an accounting will not be necessary; but the decree for an injunction may also require the payment of such sum by the defendants to the plaintiff.

EPSTEIN et al. v. DRYFOOS.

(District Court, S. D. New York. December 31, 1914.)

1. PATENTS Ⓒ45—EVIDENCE OF NOVELTY—COMMERCIAL SUCCESS.

In approaching the consideration of the patentable novelty of an article of wearing apparel, it is well, in a doubtful case, to weigh cautiously the influence of commercial utility, for, in addition to the merit of the product, many causes contribute to success, notably a nation-wide market, change of fashions, clever advertising, and good business methods.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 51-53; Dec. Dig. Ⓒ45.]

2. PATENTS Ⓒ328—VALIDITY AND INFRINGEMENT—SKIRT.

The Epstein & Epstein patent, No. 887,610, for a skirt or petticoat having the entire rear portion of the waistband formed of an elastic band inclosed in the body portion, claims 3 and 4, narrowly construed, and limited, as they must be, in view of the prior art and the proceedings in the Patent Office, *held* not infringed.

In Equity. Suit by William Epstein and Samuel Epstein against Milton M. Dryfoos for infringement of letters patent No. 887,610, for a skirt or petticoat, granted May 12, 1908, to William Epstein and Samuel Epstein. On final hearing. Decree for defendant.

Alan D. Kenyon, of New York City, for complainants.

Charles McC. Chapman and Fred H. Bowersock, both of New York City, for defendant.

MAYER, District Judge. [1] In approaching the consideration of the patentable novelty of an article of wearing apparel, it is well, in a doubtful case, to weigh cautiously the influence of commercial utility, for, in addition to the merit of the product, many causes contribute to success, notably a nation-wide market, change of fashions, clever advertising, and good business methods.

[2] The "Eppo," as complainants call their petticoat, has undoubtedly proved a success. By its manufacture, complainants have developed a large business from modest beginnings, and have placed on the market a petticoat which women seem to like; but, as the testimony shows, other garments of this kind have also won the popular fancy—witness the "Klosfit."

These are the days, so the testimony amply shows, of thin outer garments. Wherefore the enterprising petticoat manufacturer must have in mind, not only a good fit, but also a smooth-appearing undergarment, not afflicted with varying colors, nor with gathers tending to crumple.

The Epsteins were not the first, however, to realize these essential requisites. Doubtless this problem antedates the file wrapper, but from the file wrapper it is apparent that the art advanced by little steps until, finally, Feuchtwanger (United States letters, No. 662,714, dated November 27, 1900) invented something really worth while.

"My invention," said Feuchtwanger, "relates to improvements in skirts; and the object of the same is to produce an underskirt which will fit neatly over the hips without wrinkling and be secured snugly about the waist. To accomplish this object, I construct my skirt of three parts, each of a different kind of material. The first part or lower skirt portion is of nonelastic material, the second or hip portion is of material with a medium modulus of elasticity, and the third portion or waistband is of material having a large modulus of elasticity."

This patent has been held valid in the Third Circuit and here. *Greenwald Bros., Inc., v. Enochs*, 183 Fed. 583, 106 C. C. A. 351; *Greenwald Bros., Inc., v. La Vogue Petticoat Co.* (S. D., per Sheppard, J.), affirmed on appeal 226 Fed. 448, — C. C. A. —.

Later (United States letters patent No. 855,885, dated June 4, 1907) Jacob Greenwald obtained a patent for a skirt with gores, stating:

"I am aware that heretofore skirts have been made, of which the upper portion was wholly composed of elastic fabric, such a garment being patented in United States letters patent No. 662,714, dated November 27, 1900, granted to Henry J. Feuchtwanger. One of the purposes of the present invention is to permit the use of relatively nonelastic material for the upper portion of a skirt, while still obtaining the advantages of smooth close fit characteristic of such patented skirts. Thus, in my improved garment, silk may be used for such upper portion; and yet the advantages of an elastic fabric at the important region may be obtained.

"I am also aware that it is not broadly new to insert elastic gores at the waist region in garments, or to employ elastic strips in such waist regions. I therefore do not claim the use of such devices individually."

It is thus apparent that the field of invention had been greatly narrowed, and that the dividing line between skilled workmanship and invention was becoming constantly thinner.

In this situation, complainants applied for their patent, and were put to the necessity of overcoming prior art references until they finally succeeded in having allowed to them (among others) the claims in suit which are as follows:

"3. A skirt or petticoat, comprising a body, and a waistband, the front portion of the waistband being inelastic and secured to the front portion of the said body, the *entire* rear portion of the waistband being elastic and

formed of an elastic band, the *entire* rear upper portion of the said body *inclosing* the said elastic band, and longitudinal rows of stitches securing the said band-*inclosing* portion to the said elastic band while the latter is in a stretched condition, the said upper front portion of the said body being plain or nongathered, and the *entire* upper rear portion of the said body adjacent to the said elastic waistband portion being gathered.

"4. A skirt or petticoat, comprising a body having a placket at one side thereof, and a waistband consisting of a front and a rear portion, the front portion being inelastic and secured to the upper front portion of the said body, beginning at the placket and reaching to the opposite side of the body, the said rear portion of the waistband being formed of an elastic band, and an integral extended portion of the rear of the said body, the said extended body portion *inclosing* the said elastic band and being secured thereto throughout the length of the elastic band and while the latter is in a stretched condition."

In claim 3 the limitation "entire" employed in each of lines 4 and 6 was deliberate, and was necessitated by the citations of prior art patents, and in the argument accompanying the amendment dated February 21, 1908 (see file wrapper), the applicants referred to the elastic extending "from the side placket clear across to the other side of the garment, so that, when the garment is placed in position, the entire rear portion of the waistband and the adjacent body portion stretches uniformly from hip to hip and thus allows the garment to hang properly, even if a very stout person uses the garment," thus emphasizing the limitation made in the third claim, as well as in the two preceding claims, not now in question. Then, in the same argument, the applicants particularly direct the examiner's attention to lines 6-16, page 4 of the specification, which correspond to lines 100 to 112, page 1 of the printed specification; the same being next to the last paragraphs above quoted from the specification of the patent in suit.

Regarding claim 4, in the same argument, it is stated that the structure of the reference (Crocker) is foreign to that of applicants, particularly as "the rear portion of applicants' waistband is formed of an elastic band and an integral extended portion of the body inclosing the elastic band and secured thereto throughout the length of the elastic band and while the latter is in a stretched condition," this quoted matter being the language of lines 59-64 inclusive, page 2 (in claim 4), of the patent.

The file wrapper history of claim 1 furnishes additional evidence of the limitations imposed by the prior art.

It must be concluded that the word "entire" meant what "entire" ordinarily means, and that "inclosing" meant to "envelop with surrounding material." (See Standard Dictionary definition of "enclose," and read also the specification with the claims.)

The result is that these claims (which are practically identical) must be strictly construed if the patent is to be sustained, and I confess I am sometimes reluctant to disturb the validity of a patent, where hard-working men have developed a business on the faith of it, if such a conclusion is unnecessary.

In assuming the patent to be good for the purposes of the case at bar, I have not considered as part of the prior art the Goggin skirt

for reasons stated at the trial (although I believe Goggin to be disinterested and truthful), nor have I considered the Wertheim, No. 857,968, and Gilson, No. 797,194, patents, which, I think, are relevant on the state of the art; but, to avoid any question, they have been eliminated and are really not necessary in this controversy.

The alleged infringing petticoats are four in number, illustrating two kinds of petticoat concededly sold by defendant. (Exhibits 3 and 4, and 5 and 6.)

In Exhibits 3 and 4, four elements of claim 3 are lacking as follows:

4. The entire rear portion of the waistband being elastic and formed of an elastic band.
5. The entire rear upper portion of the body inclosing the elastic band.
6. Longitudinal rows of stitches securing the band-inclosing portion to the elastic band while the latter is in a stretched condition.
8. The entire upper rear portion of the body adjacent to the elastic waistband portion being gathered.

And three elements of claim 4 are lacking as follows:

3. The front portion being inelastic and secured to the upper front portion of the body, beginning at the placket and reaching to the opposite side of the body.
4. The rear portion of the waistband being formed of an elastic band and an integral extended portion of the rear of the body.
5. The extended body portion inclosing the elastic band and being secured thereto throughout the length of the elastic band and while the latter is in a stretched condition.

The same is true of Exhibits 5 and 6, and, further, these two petticoats do not use a side placket (thus not infringing claim 4 in any event), and have, in addition, plaits or tucks which, it is claimed, are an advantage, because by hand adjustment the garment can be made to fit a woman whose measurement is greater than the elastic stretch of the waist band.

I could continue with the elaboration of details, for in cases of this kind the subject-matter lends itself to more or less small similarities or differences; but, after all, the controversy must be decided upon the basic proposition that, if the scope of the patent is broadened, it must fall under the prior art, and therefore, if held to its true limits, it cannot catch in its net another device which clearly avoids the terms of the claims.

As applied to Exhibits 3 and 4, it may be urged that this is a narrow view; but, desirable as is the recognition of invention, it is equally desirable that in a busy work-a-day art, the competitive field should not be limited by extending to the claims of a patent a scope which was never intended, and more especially where the contrivance, though successful, has by no means revolutionized the art.

The bill is dismissed, with costs.

GILLESPIE v. SMITH et al.

(District Court, N. D. West Virginia. February 11, 1916.)

1. ALTERATION OF INSTRUMENTS ⚡7—MATERIALITY—INSERTING DATE.

Where at the time a release was executed the closing line, "Witness my hand and seal this 29th day of September, 1909," did not contain the words "29th" and "September," the subsequent insertion of these words was not such an alteration or addition to the writing as rendered it void; that being the true date of the execution of the release.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 34-39; Dec. Dig. ⚡7.]

2. ALTERATION OF INSTRUMENTS ⚡8—MATERIALITY—SURPLUSAGE.

Where a release by plaintiff of a surety on the bond of his father's executor was signed and sealed by him with his own hand, no witness to his signature was required, and the indorsement on the release after its execution of the words, "Witness to signature, John M. Smith," was surplusage, and not an alteration of the instrument.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 40-46; Dec. Dig. ⚡8.]

3. EXECUTORS AND ADMINISTRATORS ⚡531—CONSTRUCTION—EFFECT OF SEAL.

Where plaintiff's release of a surety on the bond of his father's executor from liability was under seal, the seal was conclusive evidence of a sufficient consideration, especially where it acknowledged payment of \$1 and alleged other considerations, and there was evidence that \$1 was in fact paid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2406-2430; Dec. Dig. ⚡531.]

4. RELEASE ⚡12—CONSIDERATION—NECESSITY.

Under ordinary conditions a man may without consideration voluntarily forgive his debtor his debt, though he may have been an unjust steward.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 18-20; Dec. Dig. ⚡12.]

5. FRAUD ⚡50—PRESUMPTIONS AND BURDEN OF PROOF.

Fraud is never presumed, but must be clearly shown.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. ⚡50.]

6. CONTRACTS ⚡96—VALIDITY—UNDUE INFLUENCE.

Undue influence assumes a condition existing where such baneful influence can be exerted.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 441, 1155, 1169; Dec. Dig. ⚡96.]

7. EXECUTORS AND ADMINISTRATORS ⚡531—SURETIES ON BOND—RELEASE—VALIDITY—FRAUD OR UNDUE INFLUENCE.

Plaintiff's uncle was surety on the bond of the executor of plaintiff's father, and plaintiff lived with the executor in the largest town in the county, while the uncle, a farmer, lived some 20 or more miles away. The executor's management of the estate was such as to charge the sureties with liability, and plaintiff, who was not illiterate, but, on the contrary, college bred, was not ignorant of the executor's affairs but knew of at least one unfortunate investment by the executor. The executor and the uncle were his sole blood relatives and had reared and cared for him from his thirteenth year to his majority. The uncle stated to plaintiff that he was an old man, desirous of settling up his affairs and turning over his farm to his sons, and for these reasons asked plaintiff to relieve him from the suretyship obligation. It was claimed that the uncle repre-

sented that this would not affect the liability of the other sureties, and the release was executed under the belief on the part of both parties that such would be the legal effect of the release, but both parties were sincere in so believing. *Held*, that the facts did not show that the release was obtained by fraud, misrepresentation, or undue influence.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2406-2430; Dec. Dig. ⚡531.]

8. EXECUTORS AND ADMINISTRATORS ⚡531—SURETIES ON BOND—DISCHARGE—RELATION OF COSURETY.

While, under ordinary conditions, the rule of stricti juris, or even strictissimi juris, is properly invoked in behalf of sureties, and they should be released from their obligation by any dealings which operate to change or increase their liabilities, a release by plaintiff of one of the joint and several sureties on the bond of his father's executor from liability released the other sureties only to the extent to which the released surety would have been liable upon the ultimate ascertainment of the sum to be paid by the solvent and responsible sureties, as the sureties stood in the same fiduciary relation to plaintiff as the executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2406-2430; Dec. Dig. ⚡531.]

In Equity. Suit by John J. Gillespie against Walter R. Smith and others. Decree for complainant.

Thomas P. Jacobs, of New Martinsville, W. Va., McCoy & Swiger, of Sistersville, W. Va., and Pugh & Pugh, of Columbus, Ohio, for plaintiff.

Boreman & Carter and C. B. Riggle, all of Middlebourne, W. Va., Arthur S. Dayton, of Philippi, W. Va., and Hogg & Hogg, of Pt. Pleasant, W. Va., for defendants.

DAYTON, District Judge. Gillespie has recovered in a state court a judgment against Walter R. Smith, executor of his father's estate, for \$36,008.74 and \$1,341.45 costs. Execution on this decree having been returned "No property found," he has instituted upon the law side of this court, an action of debt in the name of the state, at his relation, against said executor and the sureties upon his official bond. The sureties in said action at law have tendered a special plea, setting forth that Gillespie has, by writing under seal, released one of their number "from all and every obligation and liability as a surety or otherwise upon the said bond," and they aver that this release operated to release them all. Upon the tender of this plea in the law action, Gillespie filed this bill, in which he seeks to have this release annulled on the grounds that it was procured from him (a) by fraud, misrepresentation, and undue influence; (b) was without consideration; and (c) was materially changed after execution.

[1-4] This last contention can be at once disposed of. The release was prepared by an attorney in advance of its execution, and in the closing line, "Witness my hand and seal this 29th day of September, 1909," the figures "29th" and the word "September" were not incorporated, but inserted, after the paper was signed by Gillespie, by John M. Smith, the surety released, who also indorsed below the writing the words, "Witness to signature, John M. Smith." There is no ques-

tion but what the 29th day of September, 1909, was the true date this release was executed, and in no way has it been made apparent that the date of its execution is in any way material to the controversy here. The insertion of this date, therefore, I do not regard as such an alteration or addition to the writing as to render it void. The indorsement of the words "Witness to signature, John M. Smith," below, must be held to be surplusage, as no witness to the signature of Gillespie, who with his own hand signed and sealed it, was by law required.

Nor do I have difficulty in disposing of the second ground alleged against the validity of the release, that of lack of consideration; and this for the reasons that: At common law the part payment of a debt is not sufficient consideration for its discharge. *Bailey v. Day*, 26 Me. 88; *Potter v. Green*, 6 Allen (88 Mass.) 442. If the discharge be by a sealed instrument, it is of no consequence what the actual consideration may be, for the seal is conclusive evidence of sufficient consideration. *Deering v. Moore*, 86 Me. 181, 20 Atl. 988, 41 Am. St. Rep. 534. But, if this were not so, the instrument itself admits payment of one dollar and alleges other considerations; and, while Gillespie now denies payment of this dollar, Smith and his son say it was paid. The Supreme Court of Appeals of this state, in *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150, has very strikingly illustrated the importance and effect of a dollar payment, set forth as paid in contracts. Finally, I have no doubt but what under ordinary conditions, a rational man may without consideration voluntarily forgive his debtor his debt, although he may have been an unjust steward.

[5-7] This brings us to the consideration of the first contention, that this release was obtained by fraud, misrepresentation, and undue influence. The direct evidence touching this is confined to the statements of the two men, Gillespie, the plaintiff, and John M. Smith, the released surety. It is not necessary to consume time in discussing it in detail. I have gone over it time and again, and the conviction has grown stronger in my mind each time that, so far as any charge of fraud or undue influence is concerned, it must be rejected. Fraud is never to be presumed, but must be clearly shown. Undue influence assumes a condition existing where such baneful influence can be exerted.

Touching the charge of fraud, the release stands admitted as having been executed, and there was nothing fraudulent on the part of John M. Smith stating to his nephew that he was an old man, desirous of settling up his affairs and of turning over his farm to his sons, and for these reasons asking him if he was willing to release him from this suretyship obligation. It is not to be assumed that this young man, Gillespie, was less able, under all the circumstances, to care for his own interests in this matter than this old farmer was of his. The farmer had lived his life some 20 or more miles away from Sistersville, the largest town in the county; the young man had lived his in this largest town, and in the home of the defaulting executor. He was not wholly ignorant of this executor's business affairs; on the contrary, he at least knew of the unfortunate Virginia real estate investment made by this executor, and himself had part in the effort to save it. He was not

illiterate; on the contrary, he was college bred. Again, there was nothing unnatural in this young man, looking on life with youth's confidence and faith in the future, and his ability to work out his own fortune without harassing his uncle, who was old and had a considerable family dependent upon him, being entirely willing to free the older man from this obligation. It is to be remembered that the Smiths were his sole blood relatives so far as the record discloses, and had reared and cared for him from his thirteenth year to his majority. His two possible interviews with this farmer uncle, or his single one according to his statement, touching the execution of this release, do not disclose such exercise of influence as seems to me to have rendered the conduct of Smith undue or unlawful.

Upon one point there can be no disagreement. Whether Smith made representation that his release would not affect the liability of the other sureties or not, it cannot be disputed that the release was executed under the clear understanding of both that it would not. If it is to be held that it in fact does operate to release such other sureties from liability, then we are confronted with the fact that it was executed under an innocent misconception of the law governing the matter. I say "innocent," because it seems to me clear that both parties were sincere in their conception of the legal effect of this paper. And that there was excuse for such conclusion by them will be clearly demonstrated by any one who undertakes to ascertain what the law is touching this question. I am persuaded from a careful examination that few legal propositions have been more confused by conflicting precedents than this one. This confusion can be very well illustrated by quoting from the legal encyclopedias and text-books. Cyc. says:

"Under the common-law rule, where cosureties were bound jointly, a release of one discharged all; but in equity the cosureties remained liable for their proportionate shares, and under the modern law, a covenant not to sue, or a release of one cosurety, does not discharge the others; but he remains liable for his proportionate share of the indebtedness, especially if the surety released has paid his own proportionate part." 32 Cyc. 156.

The American and English Encyclopædia of Law (2d Ed.) vol. 27, page 527, says:

"A surety is only partially discharged where the creditor releases a cosurety, and the result is the same whether the creditor obtains from the surety discharged by him his full proportion of the debt or merely executes the release voluntarily. As generally stated, the rule is that the remaining surety is exonerated to the extent to which he would have been entitled to contribution from the released surety. Some of the older decisions hold, or seem to hold, that the remaining surety in such case is wholly discharged at law, but the more equitable rule is now settled as stated above."

Elliott on Contracts, bk. 3, § 2064, says:

"The unconditional release of one joint or joint and several promisors is generally speaking a release of all: Provided, the release is without the consent of the cosureties or joint obligors."

Counsel for defendants, in their brief, have very rightly indicated that the proposition has been further complicated by reason of the abolition of the common-law for the Code practice by some of the

states and by special legislative enactments by others; but they insist that the common-law rule releases all the sureties, that the common law prevails in West Virginia, and that no statute has been enacted in the state modifying or repealing it in this particular, and they cite *Maslin's Ex'rs v. Hiatt*, 37 W. Va. 15, 16 S. E. 437, and *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240, and further point out that Virginia now has a statute abrogating the rule, but before its passage adhered to it, as shown by the rulings in *Blow v. Maynard*, 2 Leigh (29 Va.) 29-59, *Peasley v. Boatwright*, 2 Leigh (29 Va.) 196, and *Garnett v. Macon*, 6 Call. (10 Va.) 308, Fed. Cas. No. 5,245. It is very difficult to resist the force of this argument. The question, however, is still further complicated by reason of the very varied number of conditions in which it may arise and has arisen in business transactions involving the relations of principal, sureties, creditors, and other interested parties, and the application of a general, and I may say arbitrary, rule of this character to all of such conditions and relations.

[8] Without extending the discussion to undue length, I may say that my study of the authorities has led me to believe that the tendency in the past has been to extend its scope and operation beyond its original purpose, and that in common-law states it may well be held to be subject to certain limitations and exceptions. The reason of the law is the life of the law. Under all ordinary conditions the rule of "stricti juris," or even "strictissimi juris," is properly invoked in behalf of sureties, and this for the reason that they assume a responsibility ordinarily without any expectation of pecuniary profit or gain. It is but reasonable and right, therefore, that they should be released from their obligation by any dealings which operate to change or increase their liabilities. *Ward v. Tinkham*, 65 Mich. 695, 32 N. W. 901. An every day illustration of such change or increase of liability is found in the undue extension of time to pay, by a creditor to the principal after he has received notice from the surety to sue. It would seem, too, that in the old common-law practice of England the rule under discussion may have arisen from the fact that bonds were almost wholly joint as to their obligors, and the release of one necessarily released all, because suit could be maintained against all only. Under the modern "joint and several" surety contract the reason for the rule is greatly lessened and modified. Be this as it may, it seems to me that in cases like this of fiduciary bonds, joint and several in character, taken by the state in the course of its legal care, custody, and administration of the estates of its "wards in chancery," another rule is applicable, to wit, that:

"A release given by the beneficiaries to a surety, in order to be upheld, must be shown to be fair and reasonable, because the sureties stand in the same fiduciary relation to the beneficiaries as the principal does." 11 Am. & Eng. Enc. of Law (2d Ed.) 896, citing *Baines v. Barnes*, 64 Ala. 375.

And applying this rule to this case, it would seem perfectly clear that these cosureties of Smith, who bound themselves jointly and severally to see to it that this estate of Gillespie should be properly administered and turned over to him when he became of age or to

his guardian during his minority by the executor, can urge no reasonable change or increase of their liabilities, provided Gillespie be held to remit and credit the full part of the liability that Smith would be liable for, if he had not been released in the ultimate ascertainment of the sum such sureties, or the solvent and responsible ones, may have to pay by reason of the executor's default. This seems to me to be just, reasonable, and in accord with equity and good conscience.

Therefore I will entertain this bill and enter a decree restraining the defendant sureties from using said release for other purpose than to secure for themselves, in the trial of the law action, credit for such a sum as Smith would be liable for if he had not been released, which sum must be a full and equal share of what the solvent sureties may have to pay or be liable for. No costs in this case will be awarded either side.

CARSON v. GORE-MEENAN CO.

(District Court, D. Connecticut. February 9, 1916.)

No. 755.

1. DEATH ⚡25—ACTIONS FOR DEATH—DEFENSES—SETTLEMENT OR RELEASE.

Gen. St. Conn. 1902, § 1094, provides that the executor or administrator of any person whose death shall have been caused by negligence may recover of the party in fault just damages, not exceeding \$5,000. Section 399, prior to its amendment in 1915, provided that damages recovered under section 1904 should be distributed, after deducting costs and expenses, one-half to the husband or widow and one-half to the lineal descendants, per stirpes, and that, if there were no such descendants, the whole should go to the husband or widow, or, if there was no husband or widow, to the heirs, according to the law regulating the distribution of intestate personal estate. *Held*, that a settlement with the widow of a decedent before her appointment as administratrix and a release by her was not a defense to an action thereafter brought by her as administratrix, since the beneficiaries of the action have no vested right prior to judgment, and the amount recovered is to be distributed to those who are beneficiaries on the day the judgment is rendered; the statute not contemplating a distribution to the personal representatives of deceased beneficiaries.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 27; Dec. Dig. ⚡25.]

2. CONSTITUTIONAL LAW ⚡105—RIGHT TO DAMAGES AS PROPERTY.

There can be no vested right in a claim for damages for a tort not connected with or growing out of a contractual relation until judgment is rendered, and until that time the claim is a mere expectancy or an inchoate right, not assignable, and not liable to attachment, and not a debt.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 228-235; Dec. Dig. ⚡105.]

3. DESCENT AND DISTRIBUTION ⚡76—EXECUTORS AND ADMINISTRATORS ⚡49—RIGHT TO DAMAGES AS PROPERTY.

A claim for damages for a tort does not pass to an administrator as assets, save by virtue of a statute, nor descend to a person's heirs until judgment is rendered.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 252-262; Dec. Dig. ⚡76; Executors and Administrators, Cent. Dig. §§ 301, 303-305; Dec. Dig. ⚡49.]

4. DEATH ⚡69—ACTIONS FOR CAUSING DEATH—EVIDENCE.

In an action for death under the Connecticut statute, the trial court has nothing to do with the distribution of the recovery, and evidence of the number and condition of the beneficiaries is inadmissible on the question of damages, and can by any possibility be admissible only to show an absolute lack of beneficiaries or heirs.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 86, 87; Dec. Dig. ⚡69.]

5. STATUTES ⚡267, 276—CONSTRUCTION—STATUTORY PROVISIONS AS TO CONSTRUCTION.

Gen. St. Conn. 1902, § 1, providing that the passage or repeal of an act shall not affect any pending action, does not limit the power of the Legislature in the enactment of laws, nor affect the construction of laws when enacted when the legislative intent is clear, and must yield to later expressions of the legislative will.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 350-359, 371, 372; Dec. Dig. ⚡267, 276.]

At Law. Action by Martha J. Carson, administratrix, against the Gore-Meenan Company. On demurrer to certain defenses in the answer. Demurrer sustained.

Robert J. Woodruff, of New Haven, Conn., for plaintiff.
Seymour C. Loomis, of New Haven, Conn., for defendant.

THOMAS, District Judge. [1] After the decision sustaining the demurrer to the second defense of the defendant's answer, the defendant, with the permission of the court, amended its second and third defenses. These defenses, as amended, aver that prior to the appointment of the plaintiff as administratrix, and before the bringing of the action, the decedent's widow, who is also the administratrix, for a valuable consideration, released and settled and gave a full accord and satisfaction of all claims arising against the defendant by reason of the decedent's death, and for a valuable consideration waived and released all claims which might arise against the defendant because of any negligence of the defendant; that the decedent left no lineal descendants, and left surviving him a widow, who is the sole beneficiary of any sum which may be recovered in this action, and who, as administratrix, is prosecuting this action. A demurrer has been filed challenging the sufficiency of these defenses. Elaborate briefs have been presented and the questions involved have been exhaustively argued. In my opinion the decision sustaining the original demurrer should stand.

The vice of the defendant's argument is that it erroneously assumes that the beneficiaries' right in the judgment which may be recovered in an action upon section 1094 of the General Statutes of Connecticut, Revision 1902, vested before the judgment. This contention is not sound. The beneficiaries cannot be determined until the judgment is rendered, and the court of probate has nothing to do, except to determine who are the beneficiaries on the day the judgment is rendered, under section 399 of the General Statutes of Connecticut, Revision 1902, as it was prior to the amendment of

1915; that is to say, if the widow of a decedent, in an action brought under section 1094, who had survived him, should die before judgment, the share which she would have received, had she lived until judgment, would lapse, and would then be distributed to the other heirs entitled to share in the judgment, and so, if the lineal descendants surviving him should die before the judgment, their share would accordingly lapse and pass to the widow. Section 399 clearly does not contemplate a distribution to personal representatives, and such a construction of the statute is manifestly opposed to both its letter and spirit. The purpose of the Connecticut statute, as has been repeatedly held, is to provide for the survival of the decedent's right of action for the compensation of those dependent upon him, to be determined as of the date of the judgment, and, had it contemplated a distribution to legal representatives, it would have said so in so many words, as do sections 396 and 398 of the General Statutes of Connecticut, Revision of 1902—the general statutes of distribution of the State. "Expressio unius est exclusio alterius." Whether the amendment of 1915 has changed the law in this respect it is not now necessary to decide.

[2, 3] Moreover, there can be no vested right in a claim for damages for a tort, not connected with or growing out of a contractual relation until judgment is rendered. Such a claim does not pass to the administrator as assets, save by virtue of a statute, does not descend to the heirs, and constitutes no basis for the action of any legal principle until judgment is rendered, and up to that time the claim is a mere expectancy, or an inchoate right, not assignable, not liable to attachment, and not a debt. *Holcomb v. Winchester*, 52 Conn. 447, 52 Am. Rep. 609; *Brown & Adams v. United Button Co.*, 149 Fed. 48, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961, 9 Ann. Cas. 445; *In re New York Tunnel Co.*, 159 Fed. 688, 86 C. C. A. 556 (C. C. A. 2d Cir.); *In re Ostrom* (D. C.) 185 Fed. 988.

[4] The trial court has absolutely nothing to do with the distribution under the Connecticut statute, and evidence of the number and condition of the beneficiaries is inadmissible as bearing upon the question of damages. *McElligott v. Randolph*, 61 Conn. 159, 22 Atl. 1094, 29 Am. St. Rep. 181; *Goodsell v. Hartford & New Haven R. R. Co.*, 33 Conn. 51. And the only circumstances under which such evidence could by any possibility be admitted would be the absolute lack of any beneficiaries or heirs, in which event the action would fail.

The precedents cited by counsel for the defendant in support of its contention arise in jurisdictions where the statutes are substantially different from the Connecticut statute, and where the existence of the cause of action is not dependent upon the appointment of an administrator, but grows out of the negligent death; the action being for damages sustained by designated beneficiaries on account of such negligent death, and which comes into existence by reason of the death, and which is not cumulative, nor the survival, continuation, or enlargement of any existing right, but the substitution of a new right and remedy by way of exception. It is possible in such cases a right of action might vest in the designated beneficiaries when the action ac-

cruces, although the administrator as a trustee is a necessary party, but the Connecticut statutes clearly exclude any such construction.

As already indicated, the whole tenor of the decisions of the Connecticut Supreme Court of Errors is to make the action given by section 1094 a purely survival one for the compensation of those dependent upon the decedent, free from claims of creditors, such beneficiaries to be determined under section 399 as of the date of the judgment.

This view of the law is borne out by *Blagge v. Balch*, *Brooks v. Codman*, and *Foote v. Women's Board of Missions*, cases arising under the act of Congress relating to the French spoliation claims and reported in 162 U. S. 439, 16 S. Ct. 853, 40 L. Ed. 1032. These were writs of error to the Supreme Judicial Court of the state of Massachusetts and the superior court of the state of Connecticut for the county of New Haven, respectively, and involved the construction of the proviso in the Act of Congress of March 3, 1891, c. 540, 26 Stat. 908, which is as follows:

"That in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards."

The Supreme Court held, reversing the Supreme Judicial Court of Massachusetts, in *Codman v. Brooks*, 159 Mass. 477, 34 N. E. 689, and the Supreme Court of Errors of the State of Connecticut, in *Leffingwell's Appeal from Probate*, 62 Conn. 347, 25 Atl. 453, that the words "next of kin," as used in the proviso meant next of kin *living at the date of the act*, and not at the decease of the original sufferers. In the course of the opinion of the court, which was delivered by Chief Justice Fuller, at page 462 of 162 U. S., at page 858 of 16 Sup. Ct. (40 L. Ed. 1032), it is said:

"And this conclusion is in harmony with * * * section 1981 of the Revised Statutes in reference to recovery of damages by the legal representatives of persons killed by wrongful act in violation of the civil rights act of 1871, the Act of Congress of February 17, 1885, c. 126, 23 Stat. 307, providing for actions in the District of Columbia for the death of persons caused by wrongful acts of others and generally with the statutes of the states giving a right of action for injuries resulting in death."

[5] It is urged that the amendment of 1915 (Laws 1915, c. 44) falls within the contemplation of section 1 of the General Statutes of Connecticut, Revision of 1902, providing that the passage or repeal of an act shall not affect any pending action. This statute does not seem in any way inconsistent with the views expressed, for the reason that that provision was not intended to limit the power of the Legislature in the enactment of laws, nor to affect the construction of laws when enacted when the legislative intent is clear, and these legislative enactments must yield to the later expression of the legislative will. *Lew v. Bray*, 81 Conn. 213, 217, 70 Atl. 628.

I am also supported in my conclusion by *Yelton v. Evansville & Indianapolis R. R. Co.*, 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158; *Pittsburgh, C., C. & St. L. R. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419; *Cowen v. Ray*, 108 Fed. 320, 47 C. C. A. 352 (C. C. A. Sixth Circuit); *Dowell v. Burlington, C. R. & N. R. R. Co.*, 62 Iowa, 629, 17 N. W. 901; *Baltimore & Ohio R. R. Co. v. McCamey*, 12 Ohio Cir. Ct. R. 543; and *Maney v. Chicago, B. & Q. R. Co.*, 49 Ill. App. 105. These cases hold that because a right of action for wrongful death did not exist at common law, but is dependent entirely upon statutory authority, therefore, if the statute provides that such action shall be brought by the representative of the decedent for the benefit of certain named beneficiaries, such representative may maintain an action without reference to what the beneficiaries may have done in the matter. The reasoning in the cases last cited is well stated in *Yelton v. Evansville & Indianapolis R. R. Co.*, supra, at page 417 of 134 Ind., at page 630 of 33 N. E. (21 L. R. A. 158) as follows:

"The action is prosecuted under section 284, R. S. 1881. This section authorizes the action to be prosecuted by the administrator of the decedent. The damages recovered inure to the exclusive benefit of the widow and children of the deceased. In this case, there being no children, the damages would inure to the sole benefit of the widow, but she could not prosecute the action. It must be prosecuted by the administrator. This being true, if the widow can compromise the cause of action and release the damages, so as to terminate the suit, it places the administrator in the anomalous position of having the sole right to prosecute the action and yet gives to the widow, or widow and children, if there be children, the right to compromise the action outside of court, and cancel the claim for damages upon which the action is based. While it would give to the administrator the sole right to prosecute the action, yet he would not have the sole right to control the prosecution of the action once commenced. It would seem that the law which authorizes a person to prosecute an action would give to him, by necessary implication, the right to control such prosecution, and not permit one not a party to the action, and having no right to be a party to the action, the right to compromise the action. While actions under this section of the statute are prosecuted for the benefit of, and the damages inure to the exclusive benefit of, the widow and children of the deceased, yet it contemplates the collection of the damages by the administrator, and the turning of the same over to the widow and children on final settlement."

I have endeavored to give the question before us careful consideration, especially as the precise point involved does not seem to have been decided by the Connecticut courts; but, in view of the similarity between the Connecticut statute and those of Iowa and Indiana, I am compelled to abide their ruling, and hence the conclusion reached on the first argument.

Let the demurrer be sustained.

LANTERMAN et al. v. DELAWARE, L. & W. R. CO. et al.

(District Court, D. New Jersey. February 9, 1916.)

1. MALICIOUS PROSECUTION ⚡34—TERMINATION OF PROSECUTION—NECESSITY OF FAVORABLE TERMINATION.

Under the rule in New Jersey, it is not essential to the maintenance of an action for malicious prosecution, based on a prosecution seeking to have plaintiffs held to bail to keep the peace, that the criminal proceeding shall have terminated in plaintiffs' favor; and an action lies, even though plaintiffs have been required to give bail, as such a prosecution is *ex parte*, and the truth of the statements made by the complainant cannot be controverted, and the person against whom the complaint is made is afforded no hearing or opportunity to obtain a favorable decision, but can merely attack the sufficiency of the complaint, and not its truth.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 70; Dec. Dig. ⚡34.]

2. MALICIOUS PROSECUTION ⚡24, 51—WANT OF PROBABLE CAUSE—RESULT OF PROSECUTION.

As proceedings to have plaintiffs held to bail to keep the peace were *ex parte*, and plaintiffs were afforded no opportunity to controvert the truth of the charges made against them, the fact that they were placed under bonds to keep the peace afforded no evidence of probable cause in an action for malicious prosecution, and a complaint alleging that the order requiring them to give bonds was procured through the false testimony of one of the defendants, and that the charge was in fact false, and made without reasonable or probable cause, was sufficient, though it showed that they were required to give bail.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 49-55, 98, 99; Dec. Dig. ⚡24, 51.]

At Law. Action by U. S. Grant Lanterman and another against the Delaware, Lackawanna & Western Railroad Company and another. On motion to strike out complaint. Motion denied.

William C. Gebhardt, of Jersey City, N. J., and William H. Morrow, of Belvidere, N. J., for plaintiffs.

Frederic B. Scott, of Jersey City, N. J., for defendants.

HAIGHT, District Judge. This is an action for malicious prosecution, based upon a complaint presented to a justice of the peace by the defendant Lunger, at the alleged direction of the other defendant, the Lackawanna Railroad Company, charging the plaintiffs with threats to do Lunger bodily harm, whereby he had been put in fear of his life. It is alleged that by reason of the charge so made a warrant was issued, and by virtue thereof the plaintiffs were arrested and brought before the justice, who thereupon, by reason of false testimony given by Lunger and others, required each of the plaintiffs to enter into a recognizance to keep the peace; that they did not do so, and were thereupon committed to the Warren county jail, where they were imprisoned for three days. It is also alleged that the charge was false, and that it was made from motives of malice and without reasonable or probable cause. The objection to the complaint is that

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

it fails to set forth a cause of action: (1) Because it contains no allegation that the prosecution has terminated in the plaintiffs' favor; and (2) because it appears on the face of the complaint that the prosecution was based on reasonable and probable cause.

[1] The first alleged defect would unquestionably be fatal, were this an ordinary suit for malicious prosecution, because an essential element of such an action is that the criminal prosecution shall have terminated in favor of the plaintiff. But in this respect an action based on a prosecution which sought to have the plaintiff held to bail to keep the peace, such as that complained of in this case, is an exception to the general rule; and in such cases it is not necessary that the criminal proceeding shall have terminated in the plaintiff's favor, and an action lies, even if he has been required to give the bail. *Apgar v. Woolston*, 43 N. J. Law, 57, 65; *Steward v. Gromett*, 7 Com. Bench (N. S.) 191 (141 Eng. Rep. Full Repr't, 788); *Castrique v. Behrens*, 3 El. & El. 709, 721 (121 Eng. Rep. Full Repr't, 608, 613). The reason for this exception is that such a prosecution is *ex parte*, and the truth of the statements made by the complainant cannot be controverted, and therefore the person against whom the complaint is made is afforded no hearing or an opportunity to obtain a favorable decision. All that he can do is to attack the sufficiency of the complaint, but not its truth. As startling as this statement, regarding the rights of a person against whom proceedings to hold to bail are instituted, may seem, it is undoubtedly the rule of the common law. *Steward v. Gromett*, *supra*; *The King v. Doherty*, 13 East, 171 (104 Eng. Rep. Full Repr't, 334); *Lord Vane's Case*, H. 17 Geo. II (reported in full in note in 104 Eng. Rep. Full Repr't, 334); *The King v. Bringloe*, M. 7 Geo. II (reported in note 104 Eng. Rep. Full Repr't, 336); *The King v. Stanhope*, M. 6 Geo. IV (reported in full in note 113 Eng. Rep. Full Repr't, 949); *The Queen v. Dunn*, 12 Ad. & E. 599 (113 Eng. Rep. Full Repr't, 939). The only case apparently opposed to this rule, to which my attention has been called, is *Rex v. Parnell*, 2 Burr. 806 (97 Eng. Rep. Full Repr't, 572), decided in 1759. But, if that case is so opposed, it is clearly contrary to the great weight of authority of the English courts. Moreover it can probably be distinguished from them because of the peculiar facts there presented.

I cannot find that the above rule of the common law has been changed by statute in New Jersey. It was considered to be the rule in this state when *Apgar v. Woolston*, *supra*, was decided. It follows, therefore, that it was not necessary for the plaintiffs to have alleged in their complaint a termination, favorable to themselves, of the criminal proceedings alleged to have been instituted against them by the defendants.

[2] This, likewise, disposes of the second supposed defect of the complaint, because, as the proceedings before the justice of the peace were *ex parte*, and the plaintiffs were afforded no opportunity to controvert the truth of the charges made against them, the fact that they were placed under bonds to keep the peace affords no evidence of probable cause. The complaint alleges that the order requiring the plaintiffs to give bonds was procured through false testimony given

by the defendant Lunger, and others, and that the charge was in fact false, and was made without reasonable or probable cause.

The motion to strike out the complaint will therefore be denied, with costs.

BATES v. DRESSER et al.

(District Court, D. Massachusetts. December 17, 1915.)

No. 227.

1. COURTS ⇨294—**JURISDICTION OF FEDERAL COURTS—SUIT BY RECEIVER OF NATIONAL BANK.**

The fact that a suit is brought by the receiver of a national bank in the course of winding up its affairs gives a federal District Court jurisdiction, under Judicial Code (Act March 3, 1911, c. 231) § 24, par. 16, 36 Stat. 1092 (Comp. St. 1913, § 991), regardless of the citizenship of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 836; Dec. Dig. ⇨294.]

2. EQUITY ⇨409—**REFERENCE TO MASTER BY CONSENT—REVIEW OF FINDINGS OF MASTER.**

Under a consent order, referring a case to a master to hear, and to report to the court his findings of fact and rulings of law thereon, which further provides that any party "shall have the right to a review and a determination by the court upon the evidence reported by the master," and that the master "shall report to the court all the evidence bearing upon any question of fact which any party desires to be re-examined and found by the court," the findings of fact by the master are no more than presumptively correct, but will be sustained, except as they appear to the court to be clearly against the weight of evidence, or so inconsistent with each other that they cannot properly stand.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 904, 920-923; Dec. Dig. ⇨409.]

3. BANKS AND BANKING ⇨253—**INSOLVENCY—LIABILITY OF DIRECTORS.**

The by-laws of a national bank provided that every six months, which was supposed to be immediately preceding the declaring of the semi-annual dividend, there should be appointed by the board of directors "a committee whose duty it shall be to examine into the affairs of the bank, to count its cash and compare its assets and liabilities with the balance on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept and the condition of the bank in a sound and solvent condition." The deposits averaged between \$300,000 and \$400,000. During the three years and three months preceding its closing, the book-keeper who kept the deposit ledger was stealing from the bank in increasing amounts, which aggregated \$310,000. His method was the drawing of checks on the bank, which were cashed in a city and returned with other checks through the clearing house. He received the checks, withdrew his own, and charged the sum to other deposit accounts, until the amount grew too large to be covered in that way, and then made false entries and footings, which an examination of his ledger would have readily detected. During the time the directors made but two examinations, and on neither occasion did the committee examine the deposit ledger, nor compare the checks received through the clearing house with the lists which accompanied the same, from which the remittances were made. There were also other circumstances which should have put them on inquiry. *Held*, that the directors were negligent in failing to make examinations at proper times and in proper manner, and were liable for the

losses of the bank through the thefts after the time when a proper examination would have disclosed the same.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 944-949; Dec. Dig. ⚡253.]

4. ABATEMENT AND REVIVAL ⚡53—CAUSES OF ACTION WHICH SURVIVE—ACTION BY BANK RECEIVER AGAINST DIRECTORS.

An action by the receiver of an insolvent national bank against its directors, to recover for losses sustained through their misconduct or negligence for the benefit of creditors and stockholders, is *ex contractu*, and survives the death of a defendant.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 251, 252; Dec. Dig. ⚡53.]

In Equity. Suit by John L. Bates, receiver of the National City Bank of Cambridge, Mass., against Edwin Dresser and others. Decree for complainant.

Bates, Nay & Abbott, of Boston, Mass., for plaintiff.

Clarence A. Bunker, of Boston, Mass., specially for Geo. E. Richardson.

A. E. Pillsbury, of Boston, Mass., specially for David A. Barber.

Tyler & Young, of Boston, Mass., for defendant Geo. E. Richardson.

Robert M. Morse and Alger, Dean & Sullivan, all of Boston, Mass., for defendants, Edwin Dresser, Sumner Dresser, and Geo. W. Gale.

BINGHAM, Circuit Judge. This is a bill in equity, brought by the plaintiff, as receiver of the National City Bank of Cambridge, Mass., against the defendants, to recover the losses which the bank sustained through the defalcations of George W. Coleman, its bookkeeper, which took place during a period extending from November 24, 1906, to the close of the bank, February 21, 1910.

The plaintiff's claim of a right to recover is based upon the ground that the defendants, as president and directors of the bank, were bound to use due care and diligence in the management and supervision of its affairs, and that, through their negligence in this respect, they failed to discover Coleman's misconduct in season to prevent the whole or any part of the losses which the bank sustained during the three years and three months that Coleman's peculations were going on.

[1] As there is no diversity of citizenship, and the ground of action is for a breach of their duties as directors at common law and in equity, federal jurisdiction depends upon the fact that the proceeding is brought by a receiver of a national bank in the course of winding up its affairs and is sanctioned by section 24, paragraph 16, of the Judicial Code of 1911. *International Trust Co. v. Weeks* (C. C.) 116 Fed. 898, 899; *Weeks v. International Trust Co.*, 125 Fed. 370, 373, 60 C. C. A. 236; *International Trust Co. v. Weeks*, 203 U. S. 364, 27 Sup. Ct. 69, 51 L. Ed. 224; *Auten v. United States National Bank*, 174 U. S. 125, 141, 19 Sup. Ct. 628, 43 L. Ed. 920; *Guarantee Co. v. Hanway*, 104 Fed. 369, 44 C. C. A. 312; *McCartney v. Earle*, 115 Fed. 462, 53 C. C. A. 392. The question decided in the recent case

of *Herrmann v. Edwards*, 238 U. S. 107, 112, 35 Sup. Ct. 839, 59 L. Ed. 1224, differs from the one under consideration, as that suit was not brought by a receiver in the course of winding up the affairs of a national bank, and jurisdiction, if it existed, was held to depend upon diversity of citizenship or the presence of a federal question.

[2] On October 16, 1911, pursuant to an agreement of the parties, and under an order of the court, the case was sent to a special master, with directions "to hear the parties and report to the court his findings of fact and rulings of law thereon." The order also contained the following provision:

"Any party to the suit shall have the right to a review and a determination by the court upon the evidence reported by the master. The master shall report to the court all the evidence bearing upon any question of fact which any party desires to be re-examined and found by the court, and such other portions of the evidence as may be material to any requests for rulings or other question of law which any party may desire to present to the court."

The case has been heard by the master, and he has filed a report covering 94 typewritten pages, together with a book containing 597 pages of special findings, in addition to the general and special findings contained in his report, and he has made the figures of the expert showing the state of the depositors' ledger during the time the defalcations were taking place a part of the report. He has also reported all the evidence and exhibits in the case. He adopted this course, for the reason that there was no other practical way of complying with the court's order, in view of the great number of exceptions taken to facts which he found and refused to find, as the labor of separating out the evidence bearing on each particular question would be too great.

After finding many preliminary facts and stating much of the evidence bearing upon the conduct of the defendants, as president and directors, in the management and supervision of the bank, the master reached the conclusion that none of the defendants was negligent.

The plaintiff has excepted to the general finding and ruling of the master that the defendants were not negligent, as inconsistent with his other findings of fact, and as directly against the weight of the evidence. He has also excepted to the finding and ruling that the defendant Edwin Dresser was not guilty of actionable negligence, as inconsistent and wholly at variance with the master's special findings of fact, stating in detail wherein it is claimed to be inconsistent, and as against the weight of the evidence; and he has taken numerous other exceptions to special findings of fact and rulings of law.

At the hearing before me on the master's report, counsel for the defendants took the position (1) that the findings of fact made by the master were conclusive, or (2) that, if not conclusive, they were presumptively correct, and that the reservation of the right of review contained in the order of the court was not so broad as to render the master's findings advisory only. In support of the first proposition they rely on the case of *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289. That case does not seem to me to be in point, for the reason that there the order sending the case to the master con-

tained no reservation of a right of review. On the second proposition reliance is placed on the decision in *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. There the order sending the case to the master, as in this case, was by consent of the parties and directed the master "to hear the evidence and decide all the issues between the parties and make his report * * * separately stating his findings of law and fact, together with all the evidence introduced before him, which evidence thereby shall become a part of the report, which report shall be subject to like exceptions as other reports of masters"; and it was held that the findings of the master should be "treated as so far correct and binding as not to be disturbed unless clearly in conflict with the weight of the evidence upon which they were made." In the recent case of *Goldsmith Silver Co. v. Savage*, 229 Fed. 623, — C. C. A. —, decided by the Court of Appeals for this Circuit December 10, 1915, the decision in *Kimberly v. Arms* was followed; the reservation of the right of review in the two cases being made in substantially the same language. In the present case it would seem that the parties and the court must have understood, from the language employed in the order, that findings of fact made by the master, which the parties did not ask to have re-examined by the court, should be regarded as conclusive; but the language, reserving the right of review as to findings which they did desire the court to re-examine, is so broad it would seem that the decision in *Kimberly v. Arms* must have been in the mind of the draftsman, and that he was seeking to provide for a more extended right of review than was held to be reserved in that case. For instance, the order directs the master to report all the evidence bearing on any question of fact which either party desired to have re-examined and found by the court, and provides that any party to the suit shall have the right to a review and a determination by the court upon the evidence reported by the master of any finding of fact or conclusion of law made by the master. But, however this may be, in the consideration of the case I shall regard the findings of the master as presumptively correct and to be sustained, except in so far as I regard them as clearly against the weight of the evidence, or it appears that his findings, general or special, are so inconsistent with one another that they cannot properly stand.

[3] The National City Bank of Cambridge was organized in 1867. At the time of the defalcations Edwin Dresser was, and for many years prior thereto had been, the president and a director of the bank. He was also one of the largest stockholders and depositors. His account was an inactive one, and ran from \$35,000 to \$50,000. The defendants Gale and Sumner Dresser were directors for many years prior to Coleman's employment, and were such during the period covered by his defalcations. The defendants Barber and Richardson became directors in January, 1907, and remained in office to the close of the bank. July 30, 1903, Mr. Earl was chosen to succeed one Davis as cashier. Mr. Davis had been a director, and continued as director for a time after he ceased to be cashier. From the fall of 1903 to the spring of 1904 Albert B. Roaf acted as teller; from the spring

of 1904 to February, 1905, Charles L. Bragg was teller; and from February, 1905, until October, 1905, Lewis W. Cutting was teller; from October, 1905, to November, 1907, Coleman acted as teller and bookkeeper; and from November, 1907, to the close of the bank Edward A. Paul was teller.

Coleman first came into the bank in July, 1903. He was then 17 years of age and was employed as messenger. He continued as messenger up to January 1, 1904, when he was made bookkeeper, which position he held from that time to the close of the bank, doing also the work of teller from October, 1905, to November, 1907, as above stated. Prior to entering the bank he had taken a course in Burdett's Business College and had graduated there. He received for his services, first \$4 a week, then \$8, \$10, and later \$12, the last sum being the highest compensation he received at any time.

After January, 1904, when Coleman became bookkeeper, one Lockhart was messenger, and continued in that position until August, 1907. After that time two other men served as messengers. Lockhart was not regularly employed by the bank thereafter, but in the summers of 1908 and 1909 he kept the depositors' ledger while Coleman was away on a vacation. In May, 1909, he entered the employ of Coleman at \$15 a week and continued in his employ until the bank failed.

Edwin Dresser did not give all of his time to the affairs of the bank, as he was engaged in other business enterprises. He conducted the business known as the Standard Diary Company, of which he was president; he was a trustee of the Cambridge Savings Bank, and at one time its vice president, and frequently settled estates of deceased persons. It was his custom to be at the bank every morning at 8:30 and remain for an hour or two, to consider with the cashier questions pertaining to the discounting or purchasing of paper or other securities for investment, and to return again in the afternoon for an hour or so to ascertain how things had gone on during the day. The time he gave to the bank was devoted largely to the matter of making investments. He at times signed checks to pay the demands of the Clearing House and First National Bank, and looked after such matters as requiring tellers to make good shortages in their cash, and discharged them when he regarded them as incompetent or unduly careless in handling their cash.

In the general routine of the business, the teller received all deposits and paid all checks at the counter. It was his duty, when deposits were made, to enter the amount of them on a slip of paper and put the deposit slip of each depositor on a spindle. When he paid checks, he also made entries of the payments on the slip of paper and put the checks upon another spindle. The entries made by the teller were not intended as permanent records, but to assist him at the close of the day's business in settling his cash. During the day the bookkeeper would take the deposit slips and checks, credit the deposits and charge the checks to the accounts of the individual depositors, and two or three days a week he would extend the balance due each depositor at the end of those days to the balance column, as hereafter explained. As the bookkeeper finished his work with the checks and deposit slips,

the cashier would take them and enter the amount of each check and deposit in the check and deposit columns of the cashier's ledger, but without entering the name of the drawer of the check or of the person making the deposit. All checks and deposits received by the teller at the counter were entered in the depositor's ledger in black ink. The Cambridge banks exchanged checks each day with the National City Bank. Checks thus received were treated as counter checks and were entered in the depositors' ledger in black ink. Checks coming from Boston were charged in the depositors' accounts in red ink.

In case a check drawn on the National City Bank found its way into a Boston bank other than the National Shawmut or the First National, it was sent through the Boston Clearing House for collection. Accompanying the check or checks drawn on the National City Bank and sent to the Clearing House by such a bank would be a slip showing the amount of the checks in detail and the total. In case a number of Boston banks had deposited with them checks on the National City Bank, each would send the checks to the Clearing House accompanied by a slip made out as above stated. The Clearing House would, at the end of each day, make out what is designated as the large Clearing House slip, on which was typewritten the totals of the checks shown on each slip of the different banks, added so as to show the total of all of them, but without designating the banks from which the checks came; the small slips showing that. The Clearing House slip, with the small slips and the checks, would be placed in an envelope and mailed to the National City Bank at the close of the day's business, and would be received at Cambridge the next morning.

The envelope containing these checks was generally taken from the post office by the messenger, although Coleman sometimes, after he ceased being messenger, procured it at the post office and carried it to the bank. At the bank Coleman would open the envelope and verify the checks with the amounts on the small slips from each bank, compare their totals with the sums entered on the Clearing House slip, and then charge the checks to the individual accounts of the depositors, provided the checks were properly drawn on the National City Bank and properly indorsed. If any check coming from the Clearing House was not properly filled out, indorsed, or was otherwise imperfect, it would be charged back by deducting the amount of such check from the total shown on the large Clearing House slip and returning it, and the same would be done in case the drawer of the check had no funds to meet it. The large Clearing House slip would, during the day, be taken by the cashier, who would deduct such checks as were to be returned from the total amount shown on the Clearing House slip, and send to the Clearing House a draft for the balance due it, drawn on the National Shawmut Bank of Boston, where it had a deposit, together with the rejected checks.

The First National and the National Shawmut banks did not send checks drawn on the National City Bank through the Clearing House, but each sent them through the mail to the National City Bank with slips on which the checks from each bank were minuted. The envelopes containing these checks and slips, on being received through

the mail, would be turned over to Coleman, who would go over them and dispose of them in the same way he did the slips received from the Clearing House.

All checks received from the Clearing House and the Boston banks were charged into the depositors' accounts in red ink.

The cashier, during the day, would take the slips showing the checks sent by the First National and Shawmut banks from the table where they were left by the bookkeeper, transfer from each of these slips the totals as shown thereon to the Clearing House slip in his own handwriting, and enter the total of the three slips in one item in the check column of the cashier's ledger. At the end of the day the checks, the large Clearing House slip, and the small slips of the various Boston banks, including the Shawmut and the First National, were gathered up and put in the safe.

As the National City Bank kept a deposit with the National Shawmut Bank, the checks received from the Shawmut were credited up to the Shawmut account; but the sums due the Clearing House and the First National Bank were paid by drafts on the Shawmut. These drafts were ordinarily signed by Earl, the cashier, but were occasionally signed by Edwin Dresser, the president.

The checks were retained by the bank until the end of the month, when the depositors' passbooks were balanced by Coleman and the messenger, and the checks were then returned to the various depositors who had drawn them. The Clearing House slip and the smaller slips of the Boston banks were retained by the bank.

The depositors' ledger, kept by the bookkeeper, was made up in folios. In 1903 and 1904 each folio comprised 10 pages; in 1905, 1906, and 1907, 12 pages; and in 1908, 1909, and 1910, 14 pages. About the middle of each page was printed the names of depositors, 45 to a page, arranged in alphabetical order from the top to the foot of the page. During the time when the folio had 14 pages, page 1 of the folio began with Wednesday and ended with the following Tuesday. The balances, however, of Tuesday of the previous week would be brought forward and appear in the second column, marked "Tuesday's Balance" on each page of the folio. Under the heading "Wednesday" would appear a column headed "Checks in Detail," then to the right and next to it a column headed "Total Checks," then to the right and next to it a column headed "Deposits," and then to the right of that a column headed "Balance." The subdivisions under the heading "Thursday," "Friday," "Saturday," "Monday," and "Tuesday" were the same, except that under "Tuesday" the balance column would be found on the corresponding page of the succeeding folio. Each of the 14 pages was made up in this way. The pages were numbered consecutively from 1 to 14; each page having on it the names of different depositors against which their accounts were entered. Checks drawn against a customer's account and paid by the bank were charged to that account, on the day they were paid, in the "Checks in Detail" column; the amounts being placed one above the other. In the "Total Checks" column was placed the sum of the checks in the "Checks in Detail" column. In the "Deposits" column deposits for

the day were placed, and in the "Balance" column the sum due the depositor at the close of the day. This sum was ascertained on Wednesday by subtracting the difference between the checks paid and the deposits made on that day from, or adding it to, the previous Tuesday's balance due the particular depositor; the addition or subtraction depending upon whether the deposits made were greater or less than the checks paid for him on that day. The additions at the foot of the "Total Checks" and "Deposits" columns would show the amount of business transacted with the depositors named on a particular page for that day, and the balance due the depositors on that page for that day could be ascertained, either by adding the balance column, or by extending the footing by computation. The sum of the footings of the balance columns on all the pages for a given day would represent the total deposits in the bank at the close of business for that day. Provision was made on the fourteenth page of each folio for carrying over the footings of the "Total Checks" column, of the "Deposits" column, and of the "Balance" column on each page for every day on the page, and, if this was done at the close of each day's business, and these transferred balance footings were added, one could ascertain at a glance, by referring to the fourteenth page, what the balance of deposits in the bank was on any day during the week covered by the folio.

In the master's report it is said that, in examining an individual depositor's account on the deposit ledger, "it had to be read across the page." This would give the impression that to ascertain the state of a depositor's account on a particular day one had to read and compute the figures extending across the entire page; but the fact is that it would be necessary to look only at the "Total Checks" column and the "Deposits" column, which were right beside each other, and at the previous day's "Balance" column, to see whether the balance credited to the depositor for that day was correct; and the sums deposited and the checks withdrawn by a given depositor on any particular day were, as a rule, so few as to render the task of verifying the account for that day a very simple one.

The "Total Checks" column and the "Deposits" column should be footed each day. It was not the practice in the bank to carry forward the individual balances every day, but this was done twice or three times a week. When the balances were carried forward, the "Balance" columns should be footed, and when not carried forward the balance footing on each page for that day should be extended, and the footings to the "Total Checks," "Deposits," and "Balance" columns on the several pages for the day should be transferred to page 14, and the balance due depositors struck, so that it could be ascertained, by simply referring to that page, what the balance on a given day was.

The cashier's ledger, in addition to showing the daily deposits and daily withdrawals, as heretofore set forth, showed its accounts with the National Shawmut Bank and its New York correspondents; also the total sum due depositors on a given day. There was also a column in which the resources and liabilities of the bank were set out in

detail. This book was always kept by the cashier. If the depositors' ledger and the cashier's ledger were correctly kept, the balances due depositors, as shown on the two books, would be the same.

Mr. Earl, during the period covered by Coleman's stealings, rarely, if ever, examined the checks coming through the mail from the Boston banks and the Clearing House. He invariably saw the checks and deposit slips that came in over the counter and entered the amount of each in the ledger which he kept. The sum entered in his book in the check column and marked "C. H." was the total, as made up by him, of the demands due the Clearing House, the First National Bank, and the National Shawmut Bank.

The teller had nothing to do with the checks coming from the Clearing House, the First National, and the Shawmut banks, and at the end of each day, when he checked up with the cashier, the checking related only to such transactions as he and the cashier had had to do with on that day, and its primary purpose was to see that his cash balance was correct. It had no relation to the withdrawals by Boston banks and the Clearing House.

In May, 1906, when Coleman was paying teller and bookkeeper, he entered the bank one night and took from its vault \$2,000. After having parted with this sum, he became frightened, and procured the amount from his father, and restored it to the bank the next day. This was not known by the directors. The first stealings of his, that were found upon the books of the bank, occurred November 24, 1906. He was, at this time, acting as teller and bookkeeper. Whether the sums taken while he was both teller and bookkeeper were all cash, and were wrongly charged up on the depositors' ledger, or the defalcations were brought about by having some one draw checks on the bank in his interest, which he wrongly charged up on the depositors' ledger, the evidence does not disclose. He may have adopted both methods; but, inasmuch as at that time he was both paying teller and bookkeeper, and, as paying teller, had the handling of the cash, it is far more probable that, as a rule, he took the cash, rather than that he resorted to the check method of getting the money out of the bank.

His stealings in 1906, not including the money restored, amounted to \$1,005. About the time he commenced to steal he began to speculate in stocks through brokers in Boston and kept accounts with them. In fact, he continued to speculate in stocks down to February 7, 1910, when his last stock speculation took place.

Coleman kept a small deposit in the National City Bank, and would draw checks upon the bank payable to his broker's order for sums far in excess of his deposit, and either present them in person to his broker or send them by his messenger. These checks would be taken by the broker, who would give Coleman or his messenger his own check for an amount equal to Coleman's check or checks drawn on a bank in Boston. Then Coleman or his messenger would at once present the broker's check at the Boston bank and obtain the cash. All of his transactions were not conducted through the same broker; the evidence shows that he dealt largely with one J. Thomas Reinhardt. The same methods, however, were pursued with all the brokers. The checks

which Reinhardt gave to Coleman or his messenger in exchange for Coleman's checks on the National City Bank were always drawn on the National Union Bank of Boston; Coleman's checks were always deposited by Reinhardt in the National Union Bank, and would go from that bank to the Clearing House, and would reach the National City Bank the morning of the next day in the Clearing House envelope. Coleman, who opened the envelope, would verify the checks, and enter all of them upon the depositors' ledger except his own, which he would take out and suppress. As Earl rarely, if ever, looked over the Clearing House checks, he did not discover Coleman's method of stealing. The amount of Coleman's check, however, was stated on the National Union Bank's slip, which went with the Clearing House slip and was included in the total for which the cashier drew his check on the National Shawmut Bank to pay the Clearing House demand. The master finds that Coleman conceived and actually put in operation this method of stealing before he ceased to be teller in November, 1907. His stealings at the end of December, 1907, amounted to \$32,100.

Coleman resorted to various methods to conceal his thefts on the books. During the period when he expected a national bank examiner, it was his custom to charge the amount taken to some large account or accounts. At other times he would conceal his defalcations, or some of them, by false and excessive additions of his "Total Checks" columns, and in this way apparently increased the withdrawals. Then, again, he would conceal them by making false footings of the "Balance" columns on days when individual balances had been carried forward to those columns, and by extending false footings for those columns when the individual balances had not been carried forward; the addition or extension being less than the true balance, so that when the total of all the balance footings was made up at the end of the day's business the amount shown on the depositors' ledger was less than the sum actually due depositors. He also concealed his defalcations by dropping the balances of individual depositors without entering any checks to justify the drops. But his favorite methods seem to have been either not to extend the balances of the individual accounts to the "Balance" columns, so these columns could not be added, or, if the individual balances were extended, to make false footings to the columns, or not to extend the footings of the balance columns when individual balances were not extended, or, if he did, to extend a false footing less than the real one.

An examination of the depositors' ledger during the period covered by his stealings will disclose his defalcations concealed by any one of these methods. In the early part of 1907, when his stealings were small, his false entries were few and would not be readily discovered. At the end of February, 1907, his stealings amounted to only \$2,840, and around March 14, 1907, when the master says his false footings were always made on page 4 of the depositors' ledger, his stealings were practically the same. After March 14, 1907, his stealings increased very considerably, which of necessity increased the false entries upon

his book, at which time the master finds that "false entries were made on various, and perhaps all, of the pages."

At the end of March, 1907, his stealings amounted to \$11,865, and at the end of April were \$17,100. This sum was increased from time to time, and at the close of December, 1907, it amounted to \$32,100. During this year his defalcations were concealed by dropping the balance due Edwin Dresser anywhere from \$17,000 to \$20,000, by making false additions of the "Balance" columns, and by failing to transfer to page 14 of the folio the balance footings and add the same, which, if it had been done, would have disclosed that his balance footings for days and weeks exceeded the deposits on the cashier's ledger by many thousand dollars; and this was so, notwithstanding he had made the additions of some of the "Balance" columns less than the true additions.

The master has found that at the end of every day the cashier's figures and Coleman's agreed. What Coleman gave Earl as the balance due depositors on any given day may have compared with the sum due them as it appeared on Earl's ledger. Coleman had access to Earl's ledger, and could easily learn from it the sum necessary to make the comparison when called on by Earl. This would be much easier than totaling the footings of his "Deposits" and "Total Checks" columns for the 14 pages for the day and adding them together to get the totals of the respective columns and striking the balance, and it was sure to compare with Earl's figures, while a computation made from his books ordinarily would not. The agreement, therefore, between Earl's and Coleman's figures, must, as a rule, have been due to Coleman's knowledge of what Earl's book showed.

The Edwin Dresser account was not the first individual account that Coleman manipulated prior to May 1, 1907, for he had raised or lowered the individual accounts of others in a few instances. The reason why, in May, 1907, he charged up his defalcations to the Dresser account was to prepare his books so that the balances would be apparently correct when the national bank examiner arrived, who was expected about that time and actually came on June 6th. And, as a national bank examiner usually made another call the last of November or the first of December, he again, on November 4th, dropped Mr. Dresser's balance \$20,000; his stealings at that time being in the vicinity of \$30,100. The remainder of his defalcations at this time he concealed by dropping the balances of other depositors. In the period intervening between the visits of the bank examiners he carried his defalcations more or less of the time in false footings, but did not confine himself to any particular method. The master finds that:

"Whenever the bank examiners were due, he would mass the defalcations into a few accounts, carrying forward reduced balances, but making all other entries correctly, so that an addition of his different columns would be correct."

This is not strictly correct, for in December, 1908, and June and December, 1909, when the bank examiners came, as hereinafter pointed out, an addition of the balance columns would show the footings were wrong.

Coleman's stealings during the year 1908 amounted to \$17,571, which added to previous sums taken, made the total at the end of the year \$49,671. From the 1st of January, 1908, to the 21st of April of that year, an addition of the footings of his daily balance columns corresponds with the deposits on the cashier's ledger, but a correct addition of the balance columns on his ledger from day to day would show that throughout that entire period the amount due depositors exceeded the sum due them as it appeared on the cashier's ledger anywhere from a few dollars to \$28,000. From April 21, 1908, to June 22, 1908, the additions of his balance columns were correct, and these totals, if added, would correspond with the cashier's ledger, but, beginning with June 22d and continuing down to July 14th, while an addition of the footings of his balance columns would correspond with the cashier's ledger, a correct addition of his balance columns would not correspond with his footings or with the cashier's ledger by amounts varying from \$900 to \$25,400. From July 14, 1908, to November 10th, an addition of the footings of his balance columns would show that the sum due depositors each day exceeded the amount appearing on the cashier's ledger by sums varying from about \$21,000 to \$46,310, and during a greater portion of this time a correct addition of the balance columns would exceed his footings of those columns. On November 10, 1908, he began to prepare for the bank examiner, and after that date, down to November 30th, the footings of his balance columns were correct and an addition of them would correspond with the sum due depositors on the cashier's ledger. From November 30, 1908, to the end of the year his balance footings, if added, would correspond with the cashier's ledger substantially all of the time; but a correct addition of his balance columns would exceed the amount due depositors on the cashier's ledger by sums varying from \$2,000 to \$14,741.75. From January 5, 1909, to March 30th, an addition of his balance footings for any day would exceed the sum due on the cashier's ledger by many thousand dollars, and a correct addition of the balance columns would for each day exceed the sum due on the cashier's ledger from about \$13,000 to over \$36,000. From March 30 to July 7, 1909, an addition of the balance footings would compare with the cashier's ledger each day, with the exception of four days in the last of May and on the 10th of June; but a correct addition of his balance columns would not have corresponded with these footings, except on June 7th and 8th. On June 14th, the day before the bank examiner came, a correct addition of the balance columns for that day would have shown that the sum due depositors exceeded the sum shown on the cashier's ledger by \$1,050.04, and a correct addition of the balance columns for the 15th, the day he came to examine the bank, would have been larger by \$3,065.12.

It would seem that at the time of this examination the bank examiner could not have added the balance columns at all, for, if he had, he would not have found them correct. A correct addition of the balance columns for every day from June 14, 1909, to the close of the bank would show a sum due depositors exceeding the sum due them on the cashier's ledger anywhere from \$1,000 to \$274,777.83, and after July

8th ranging from \$77,375 to the larger sum. Moreover, it appears that from July 8th to the close of the bank there was never a time when an addition of the footings of the balance columns for any one day would have corresponded with the amount due depositors on the cashier's ledger, except November 30 and December 2, 1909, and that from Wednesday, December 8, 1909, on, the balance columns were never added, and no balance footings were extended. All that Coleman did during this period was to add up the total checks and deposits columns from day to day—never a balance column.

The bank examiner who examined the bank November 30, 1908, testified that his examination of the depositors' ledger was for November 28, 1908. The balances of the individual depositors were not extended to the balance columns for that day, but footings for the balance columns were extended, and the evidence discloses that all the examiner did was to add the extended footings. This being so, he could not have ascertained by an addition of the balance columns whether they compared with the cashier's ledger or not. All he could tell from what he did was whether the addition of the footings corresponded. To have ascertained what the balance was on that day he would have had to extend the individual balances of each depositor from the preceding Tuesday, add the balances thus extended, and add the footings thus ascertained, which, it is apparent, he did not do. On December 3, 1909, the same bank examiner examined the bank and made a comparison of the depositors' ledger with the cashier's ledger for December 2, 1909. On December 2d the balances due individual depositors had been extended to the balance column, so that they could be added. The footings for those columns, if added, would have equaled the balance due depositors on the cashier's ledger. It is evident, however, that the examiner at this time, in making his examinations of the depositors' ledger for comparison, did not go beyond adding the footings of the balance columns; that he did not add the columns, for, if he had, he would have found the footings were wrong. In the Thursday's balance column—December 2, 1909—the extended balance in the account of Edwin Dresser was \$39,068.31. Although the column contains numerous other items, the total of which would be many thousand dollars, the footing for that column is only \$27,076.28. There was no erasure and raising of the balance due Edwin Dresser in this column, although it is apparent that there had been in that of the preceding Tuesday. The examiner, not only did not add the column, but failed even to glance over it, for, had he done so, he would have seen that the footing was several thousand dollars less than the one item in the column to the account of Mr. Dresser.

The first examination made by the bank examiner in 1908 was June 16th. At that time the additions of the balance columns were correct, and the total of the balance footings corresponded with the cashier's ledger. Coleman had then transferred to page 14 of the folio the footings of the "Total Checks," "Deposits," and "Balance" columns from every page for each day, and these balance footings were added up so that one could see, without making any computation,

what was due depositors on any day during the week. This, however, seems to have been the last time he completed the entries in a folio in this way. After this, for a time, he transferred to page 14 simply the footings of the "Total Checks" and "Deposits" columns; then again he would transfer only the footings of the "Balance" column for two days of the week, and then again he would not transfer anything.

After November, 1907, when Paul became teller, Coleman had nothing to do with the actual handling of the cash or securities. The depositors' ledger, which he kept after that date, had nothing to do with the resources of the bank, but was a means of determining one of its liabilities, and because of this I do not understand what the master means where he says that:

"When the figures were made up on each day, both Coleman's figures and the cashier's were correct as to the actual cash resources."

The directors were supposed to meet as a board every Monday at 9:30 a. m. Section 16 of the by-laws provided for the keeping of a minute book, "in which shall also be recorded the proceedings of the board at all regular and special sessions." Section 19 provided:

"There shall be appointed by the board, every six months, a committee whose duty it shall be to examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept, and the condition of the bank in a sound and solvent condition, the result of which examination shall be reported to the board at their next regular meeting."

In 1907, 49 directors' meetings were held. All of the directors were fairly constant in their attendance upon the meetings this year, except Richardson, who attended only 4. Mr. Barber was in Europe for a time during the year, and, while he attended a large number of meetings, his absence prevented his attending quite as many as some of the other directors. In 1908, 48 meetings were held. The attendance of all of the directors was fairly constant this year, with the exception of Mr. Richardson, who attended but one. In 1909 there were 43 meetings in all, 41 regular and 2 special meetings, and all of the directors, except Mr. Richardson, attended 39 or more of the meetings. Mr. Richardson attended but 2, these being held February 15th and March 15th. In April, 1909, Mr. Richardson met with an accident and was unable to go to business until September. The master finds that he was physically disabled until the latter part of December; but the only evidence in the case relating to the matter is that he was physically disabled up to September, and from that time on he went to his work at the New England Trust Company, although he did not take on all his labors until the beginning of December. In 1909 the directors' meetings appear to have been regularly held from January down to the 24th of May; but from the 24th of May to the 19th of July no meetings were held. Mr. Gale was in Europe and Mr. Richardson was sick. From July 19th to September the meetings were regularly held, but in September two meetings in succession were omit-

ted. At this time Mr. Edwin Drésser was disabled and Mr. Sumner Dresser was serving on a jury.

"It was the cashier's duty to present to the board of directors at their regular meetings a statement of the condition of the bank. For that purpose he had a printed slip headed 'State of the Bank.' Then followed a list of 'Resources,' which showed the loans, specie, and all other forms of cash, the deposits in other banks, stocks, etc. Then followed a statement of 'Liabilities,' which included the capital stock, surplus, profit and loss, and amount of deposits. From the slip the directors could judge whether there was money enough to make additional loans or purchase paper or securities for investment."

The figures on the slip were taken from the cashier's ledger. From these figures the directors could ascertain the state of the deposits on the day preceding the one on which their meeting was held, and could compare it with the same period or any other period in previous years, for the purpose of determining whether they were gaining or losing business, and, by calling for the cashier's ledger, they could ascertain what the state of the deposits was at any time they wished to know about.

According to the minute book, the directors made only two examinations of the bank during the period of a little over six years which is here under investigation. These examinations were made on November 16, 1908, and March 30, 1909. The master finds that other examinations were made than those which appear in the records, but when they were made or how many he does not state. The dividends were usually declared as of the 1st of April and the 1st of October, and the examinations, when made, were intended to take place before the dividends were declared. The dividends were in fact declared in 1907 on March 25th and September 30th; in 1908, on March 23d and September 28th; and in 1909 on March 30th and September 27th. So the examination which took place in the fall of 1908—November 10, 1908—was subsequent to the declaration of the dividend, and the examination which took place in the spring of 1909—March 30, 1909—was on the same day that the dividend was declared.

The testimony discloses that no examination was made by the directors in March, 1908, or in the fall of 1909. Mr. Barber, who was a director from 1907 to the close of the bank, thought he might have attended three examinations, and that he surely did the two of which there was a record. Mr. Sumner Dresser and Mr. Gale admitted that they had no recollection of an examination in 1907, unless the books showed one, and I find that in 1907, 1908, and 1909 no examinations were made beside those which the records disclose.

In making their examinations the directors did not inspect or examine the depositors' ledger kept by Coleman or compare it with the cashier's ledger to see if the balances due depositors corresponded.

"The examinations were confined to going over the cash and securities and checking them with the cashier's reports, verifying the accounts with the depositories as stated by the cashier, passing upon the worth of the securities and loans, with a view of deciding what should be crossed off and charged to the profit and loss account, and separating the cash into different kinds, as gold, silver, legal tender, notes, etc."

They took the amount due depositors upon the cashier's ledger as correct which was, in fact, inaccurate by the amount of Coleman's stealings.

The plaintiff contends that the directors were negligent so far as the examinations of the bank were concerned (1) in not making them every six months as their by-law provided they should be made, and (2) when an examination was made, in not examining the depositors' ledger to see whether the balance due depositors compared with the balance as shown on the cashier's ledger. In support of his position the plaintiff contends that the by-law has the force of a rule of law governing the conduct of the directors and that a failure to comply with it was per se negligent. On the other hand, the defendants contend that, inasmuch as the by-law was enacted by the board of directors, they could waive it, and that their failure to comply with it was a waiver.

It seems to me, however, that the only effect that should be given to the by-law is to treat it as a piece of evidence in the nature of an admission on the part of the directors as to what they regarded they were called upon to do in the performance of their duties in examining the bank. If the directors were not chargeable with knowledge of what the by-law called for, it seems to me that the fair inference is that they knew what it called for, inasmuch as they understood they were to make examinations twice a year. Under the by-law, they were required:

"To examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept, and the condition of the bank in a sound and solvent condition."

And, irrespective of the by-law, I find that due care on their part required them, in examining the bank, to compare the liabilities, as they appeared on the depositors' ledger at the time the examinations were made, with the cashier's ledger. The master finds, and the finding is not questioned, that they never looked at the depositors' ledger, which was the book upon which the chief liability of the bank was kept, and consequently never compared the liability as there shown with the balance due depositors on the cashier's ledger for the purpose of ascertaining whether or not the books were correctly kept.

If they had examined the depositors' ledger on September 27, 1909, the day they declared their last dividend, they would have found that a correct addition of the balance columns amounted to \$388,830.04, and that, on comparing with the cashier's ledger, it exceeded the sum shown on that ledger as due depositors by \$108,818.96—the sum due depositors, as it appeared on the cashier's ledger, being \$280,011.08—and that an addition of Coleman's footings to the balance columns, as they appeared on that day, amounted to \$363,435.08, and would not correspond with the cashier's ledger within \$83,924, being that much in excess of the amount on that ledger. And, if they had looked at the footing of the balance column on page 11 for September 27th, they would have seen by a glance over the column that the footing was

altogether too small, and, if they had added the column, that the footing was \$9,500 too small; and, had they looked at the footings of any of the balance columns on page 4, to which the individual balances had been extended, they would likewise have seen at a glance that the footings were too small. An addition of the balance columns on pages 2, 4, 5, 6, 7, 8, 9, and 13 would have shown that the footings were out of the way in sums varying from \$400 to \$9,500.

If, when they in fact examined the bank on March 30, 1909, they had examined the depositors' ledger, they would have found that a correct addition of the balance columns for that day would have amounted to \$324,168.86, and that it exceeded the sum due depositors on the cashier's ledger by \$13,145; the sum due depositors on the cashier's ledger being \$311,023.86. An addition of the balance footings for this day would have corresponded with the cashier's ledger, but if they had looked at the footing of the column on page 11 for that day, they would have seen at a glance that the footing was several thousand dollars less than it should have been, and, had they added the column, that the footing was \$8,000 too small. Incorrect additions appear on pages 1, 3, 4, 11, and 12 of the folio for that day; and there were, besides, seven dropped balances, four raised balances, and three incorrect extensions.

If, on November 16, 1908, when they examined the bank, they had looked at the depositors' ledger, they would have found that the balance columns for that day were correctly added, and that an addition of the balance footings corresponded with the sum due depositors as shown on the cashier's ledger. This was due to the fact that five days before, in extending the individual accounts in the Tuesday's balance columns, Coleman had dropped 27 balances, and in extending the balance footings he had made 13 incorrect extensions, one on each page except page 2. The 27 dropped balances made at that time amounted to \$38,310. He was then preparing for the bank examiner, who came usually the last of November or the first of December.

If they had examined the depositors' ledger March 23, 1908, when they declared the dividend, they would have found that the addition of the balance columns for that day were incorrect, and would, on comparing it with the amount shown on the cashier's ledger as due depositors, have found it not to correspond within \$17.68, but that an addition of the balance footings would correspond with the cashier's ledger. His stealings at this time were almost wholly concealed in the individual accounts. He was then, and had been since March 10th, carrying a dropped balance in the account of Edwin Dresser for \$20,000, and had been carrying a dropped balance in the account of the Estate of Samuel Sanders since March 3d of \$8,000.

If they had examined the depositors' ledger on September 30, 1907, when they declared their dividend, they would have found that a correct addition of the balance columns on that day exceeded the amount shown due depositors on the cashier's ledger by \$27,000, and that a correct addition of the footings of the balance columns was \$20,000 larger than the sum due depositors on the cashier's ledger; that the balance column on page 11 for that day was incorrectly added, the

footing being out of the way \$2,000, and that the same was true of page 12, the footing being out of the way \$5,000.

If they had examined the depositors' ledger on March 25, 1907, when they declared their dividend, they would have found that a correct addition of the balance columns for that day would exceed the sum due depositors on the cashier's ledger by \$7,330, but that the addition of the balance footings would correspond with the cashier's ledger. On page 4 the balance column for March 25th, was incorrectly added, being out of the way \$6,325, and on page 11 the same column was out of the way \$1,005. The check column was out of the way \$1,000 on page 4.

If reasonable care in examining and comparing the depositors' ledger with the cashier's ledger required the directors to go no further than to add the balance footings for the day on which they made the examination, so that a comparison could be made, they could not be held responsible for losses from March 25, 1907, for on that day an addition of the balance footings would have corresponded with the sum due depositors on the cashier's ledger. But, if a reasonable performance of their duties required them to go further and make an addition of the balance columns, they might be held responsible for the losses from that time, for the addition of those columns would not correspond with the cashier's ledger. In their examination of September 30, 1907, however, they could be found to be derelict in both respects, for an addition of the balance footings would have shown a discrepancy of \$20,000, and an addition of the columns would have shown a discrepancy of \$27,000. The only time when the directors were called upon to examine the bank in these years that an addition of the balance columns and the balance footings would have been found correct was November 16, 1908.

In 1907 the deposits varied from \$296,000 to \$374,000. On January 1, 1907, they stood, at the end of the day, \$325,544.28 and on December 31st at \$314,991.16.

In 1908 the deposits ran from \$276,000 to \$357,000. On January 2, 1908, they stood at \$334,797.98, and on December 31st at \$331,201.43. While they were less at the end of the year by \$3,596.55 than they were at the beginning of the year, they were greater than they were at the end of the previous year by \$16,210.27.

In January, 1909, the deposits reached their highest point on the 18th of the month, when they were \$388,536.97, and the lowest point on the 28th, when they were \$315,965.03.

In February the highest point reached was \$346,919.53 on February 9th, and the lowest \$322,958.04 on February 25th.

In March the highest was \$352,032.46 on March 16th, and the lowest was \$311,023.86 on March 30th.

In April the highest was \$336,854.58 on April 26th, and the lowest was \$298,714.50 on April 13th.

In May the highest was \$343,676.73 on May 4th, and the lowest was \$299,393.33 on May 25th.

In June the highest was \$322,383.15 on June 10th, and the lowest was \$271,535.36 on June 29th.

In July the highest was \$342,475.14 on July 27th, and the lowest was \$274,040.75 on July 1st.

In August the highest was \$345,236.50 on August 17th, and the lowest was \$294,195.41 on August 30th.

In September the highest was \$311,439.29 on September 16th, and the lowest was \$271,349.50 on September 28th.

In October the highest was \$286,686.43 on October 14th, and the lowest was \$254,646.13 on October 26th.

In November the highest was \$257,288.18 on November 1st, and the lowest was \$173,979.13 on November 29th.

In December the highest was \$172,829.20 on December 13th, and the lowest was \$135,662.65 on December 28th.

In January, 1910, the highest was \$181,947.33 on January 18th, and the lowest was \$143,460.10 on January 31st.

In February the highest was \$145,877.90 on February 1st, and the lowest was about \$107,000 on February 21st, the day the bank closed.

In 1908 Coleman's monthly stealings ranged from \$235 to \$6,100, and during the year he stole \$17,571.

In 1909 his monthly stealings ranged from \$1,246.95 to \$51,847. In September, October, November, and December his stealings amounted to \$163,430.52, and his total stealings during the year were \$226,602.52.

In January, 1910, he stole \$27,393.53, and in February \$6,473.97, making his total stealings \$310,143.02.

The master finds that "after September 1, 1909, the amount due depositors, according to the general ledger, passed the \$300,000 mark on only three days, and gradually decreased, until November 1st it stood at \$257,288.18"; that "from September 1st to the time the bank closed the decline was so steady that it became apparent the bank was going behind and the conditions were not normal. This became apparent to the cashier and the directors, and, as appeared in evidence, caused some discussion among and by them"; and that "after November 1, 1909, the decline was rapid." He also found that "in September or the early fall of 1909 the directors considered the question of the apparent shrinkage in the deposits in an effort to find a cause for it," and that after examining the figures from various public sources as to a decrease in deposits in New York banks and the published reports of other banks in Cambridge which seemed to them to indicate an increase in deposits in those banks, they came to the conclusion "that general conditions of business and the competition of new and younger institutions, making more attractive offers to depositors, were the cause." While he finds that they reached this conclusion in this way, he says:

"I do not find, as a matter of fact, that the things that they considered were the real reason, or that they were right in their conclusions, or fully and correctly informed as to some of the things that they considered as facts, but confine myself to the finding that they did make such effort to find explanation for the condition in their own bank which they realized existed."

The tables of the expert, which the master finds to be correct, show that on August 26, 1909, the deposits in the bank were \$300,211.81,

as shown by the cashier's ledger, and that there were only four days after that when the deposits exceeded \$300,000, to wit, September 7th, 8th, 16th, and 21st, and then only by a few thousand dollars; that all the rest of the time to the close of the bank they were less than \$300,000, and after November 1st less than \$250,000. These tables also show that from the 1st of January, 1907, to the 1st of August, notwithstanding Coleman's stealings down to the 1st of August amounted to \$18,100, the average deposits were about \$350,000.

No evidence has been called to my attention, and I have been unable to find any in the case, showing that the directors made any other effort than that found by the master to ascertain the cause of this sudden shrinkage in the bank's deposits. They took no steps to examine the depositors' ledger, or to cause Mr. Earl, the cashier, to make an examination. The number of depositors was not falling off, and the daily deposits, instead of diminishing, were in fact increasing, and but for Coleman's stealings would have been over \$400,000. The directors knew that the checks paid by the bank, whether they came in over the counter or through the mail from the Clearing House and the Boston banks, were kept each month in the bank until the close of the month, when the depositors' passbooks were balanced and the checks returned to the depositors, and they knew that those checks would show exactly who was drawing the money from the bank and the amounts that were being drawn out. The slips of the Clearing House and of the banks that cleared through the Clearing House, of the National Shawmut Bank, and of the First National Bank were kept in the bank, and had they, after the decline in the deposits became apparent, directed the cashier, before the checks were returned to depositors at the end of the month, to examine the checks and compare them with the slips and the depositors' ledger, to see if they were entered upon the ledger, it could have been found that in every month after August 26, 1909, and almost every day of the month from October 1, 1909, to the close of the year, checks were missing from those on file in the bank that appeared on the slips of the National Union Bank and were charged up on the Clearing House slip, and that the missing checks had not been charged up on the depositors' ledger on the days upon which they had been paid, or any day thereafter.

If, in the month of September, when the master finds they first took notice of the shrinkage in the deposits, they had made, or caused to be made, an examination of the checks on file, they would have found that on September 1st they paid a check that was put through the Clearing House by the National Union Bank for \$600 and that it was missing; on September 8th, one for \$3,200; on September 13th, one for \$1,500; on September 22d, one for \$5,000; on September 27th, one for \$4,050; and on September 29th, one for \$3,000.

In October, 1909, they would have found checks missing from their bank that came through the same channels as follows: October 1st, a check for \$1,206; October 2d, for \$205; October 4th, for \$3,000; October 5th, \$2,000; October 7th, \$3,500; October 9th, \$1,000; October 12th, \$400; October 13th, \$3,500; October 14th, \$3,000; October 15th, \$1,000; October 18th, \$4,000; October 19th, \$500;

October 20th, \$4,000; October 22d, \$5,100; October 23d, \$2,000; October 25th, \$1,800; October 26th, \$1,971.08; October 27th, \$4,000; October 29th, \$2,500; October 30th, \$2,600.

In November, 1909, they would have found checks missing amounting in all to \$51,847, distributed through every day in the month with the exception of six, and in December, 1909, they would have found checks missing amounting to \$45,956.44, distributed through every day in the month except six.

All of these checks were drawn by Coleman on the National City Bank in favor of his broker, deposited by the broker in the National Union Bank for collection, sent by the National Union Bank to the Clearing House, and by it to the National City Bank, and there taken out by Coleman and suppressed.

It seems inconceivable that men, who were aware that funds entrusted to their care were diminishing at an unprecedented rate, could be said to be exercising reasonable care in the performance of their duties by simply looking at the state of the New York banks, as reported in the Boston Herald, or the reports of the other banks in Cambridge showing the state of their deposits, and not looking at the checks in their own bank to see who was drawing out the money and the amounts, or making any examination of the depositors' ledger.

Mr. Richardson had been trained as a bank man. His father at one time was cashier of the National City Bank, and he had himself held the position of paying teller in the New England Trust Company for a good many years. Had he performed his duty, which he assumed when he took the oath of office as a director, and exercised reasonable care in its performance, he would have known that in the semiannual examinations of the bank the depositors' ledger was not consulted for the purpose of ascertaining whether the liabilities there shown corresponded with the balance due depositors on the cashier's ledger, and would have known of the abnormal shrinkage in the bank's deposits after August 26, 1909. If his physical incapacity to attend the meetings of the directors from the 1st of April to the 1st of September, 1909, would be a sufficient justification for his failure to attend during that period, it is no justification for his failure to attend the meetings of directors after September 1st, as the evidence discloses that he went to his place of business through September, October, November, and December of that year. Moreover, the evidence discloses that when he assumed the duties of director he did not intend to attend the meetings of directors and his performance in that respect shows a substantial compliance with his intention. Under the circumstances, he stands no different with respect to his failure of duty than do the other directors.

As hereinbefore stated, Coleman from early in 1907 to the close of the bank, during which period substantially all his stealings took place, was gambling in stocks through brokerage firms in Boston, was spending money freely in hotels and restaurants in that city, and was generally leading a fast life. He bought an automobile in 1907, for which he paid \$800, and in 1909 turned in his old machine and procured a new one; he often went to the bank in the automobile and

left it standing in front of the bank; and there was a rumor current in Cambridge that he was keeping a woman. At no time while he was employed by the bank did he receive more than \$12 a week. It is true that during a portion of the time after he obtained an automobile he was an agent for the sale of automobiles and sold three on commission, and that in the summer of 1909 he became the treasurer of an automobile company, receiving for his services as treasurer \$50 a month. It also appeared that in the summer of 1909 Lockhart, who had been a messenger in the bank up to about the close of 1907, entered the employ of Coleman at \$15 a week. Just what his duties were other than driving Coleman's automobile from the automobile works to the automobile office in Boston and taking checks for Coleman, which he had drawn on the National City Bank, to his brokers in Boston, the evidence fails to disclose.

The master finds that in 1904 and 1905, during the period when Roaf, Bragg, and Cutting were tellers, there were shortages in the teller's cash, the reason for which they were not able to locate, and that, when Mr. Cutting left, he denied that those which occurred during his term of service were due to any mistakes on his part, and told Mr. Edwin Dresser in substance that "somebody in this bank had stolen the money, and if you will give me a chance I will set a trap and catch the man." Mr. Dresser said that he did not think any one stole the money, and that the shortages occurred through errors in handling the cash.

After Earl became cashier, and while Coleman was employed in the bank, and prior to February, 1908, a package of money containing \$150, which was left in the bank by a Mr. Fillmore for safe-keeping, was lost or stolen. In February, 1908, Mr. Fillmore called for the package. A search was instituted, but it could not be found, and when Mr. Fillmore, who had been in the West for a time, called again at the bank in April and July he was so informed. After this Mr. Fillmore had one or two conversations with Mr. Edwin Dresser in regard to the matter, and, nothing being done in the way of restoring the funds, on September 29, 1908, he sent a letter to Mr. Edwin Dresser, as president of the National City Bank, which letter is given in full in the master's report at pages 75 and 76, in which he set forth in detail the circumstances with regard to the package of money, how it came to be left at the bank, and how it could not be found, and requesting Mr. Dresser to bring the matter before the board of directors. About the last of October, 1908, after he had written the letter, he had a conversation with Mr. Dresser about the matter and in the course of the conversation with him said:

"I told him it was very evident there was a thief in the bank, that the money had been stolen. I said: 'I would advise you to look after Coleman, for I believe that he is living a pretty fast pace, and I have pretty good authority for believing that he is supporting a woman.'"

To which statement Mr. Dresser made no reply. Mr. Dresser did not present the letter to the directors, and never reported to any of them what Mr. Fillmore told him about Coleman.

On October 29, 1908, when Mr. Dresser received this warning from Mr. Fillmore, an examination of the depositors' ledger would have shown that a correct addition of the balance columns exceeded the sum due depositors on the cashier's ledger by \$46,310, and that an addition of Coleman's balance footings on that day would have exceeded the amount due depositors on the cashier's ledger by \$37,250, and the same is true of the days immediately preceding and following October 29th.

About the 23d of February, 1909, Mr. Dresser called at the office of a Mr. Campbell in Boston. Mr. Campbell was a lawyer and lived in Cambridge. Mr. Dresser had a note which the bank held against Campbell's father, and he called for the purpose of getting Campbell to indorse the note. Campbell declined to indorse the note, saying, in substance, that the bank did not need any money, that its young men were riding around in automobiles, to which Mr. Dresser replied that he did not ride in an automobile, and Mr. Campbell's answer was:

"Well, if I had somebody working for me, and I was walking and he was riding, I should probably find out where he got his car."

About the middle of August, 1909, Mr. Lombard, a depositor in the bank, told Earl that Coleman was running around with a woman in his automobile, and he understood he was keeping this woman. Earl told Dresser of this, adding that the woman they referred to was probably the Miss Taylor that they reported he was engaged to and was going to marry.

There was also evidence that Coleman was in the habit of ordering stocks over the telephone which was in the banking room, and that he frequently spoke to Mr. Edwin Dresser about stocks. Mr. Dresser admitted that Coleman said to him at one time that he was going to buy or sell some copper stock.

Mr. Dresser never reported any of these matters to the board of directors, or took any steps to investigate Coleman's life outside of the bank, or the manner in which he kept his ledger.

Mr. Edwin Dresser knew that Coleman took charge of the checks coming from the Clearing House. Earl testified that Dresser repeatedly saw Coleman handling the clearings, and the checks presented in evidence show that at times Coleman made out the draft on the National Shawmut Bank to pay the Clearing House demand and that Edwin Dresser signed the check, and on these very occasions the amount of the checks drawn to pay the Clearing House included checks drawn by Coleman on the National City Bank which Coleman had suppressed. For instance, on November 10, 1909, Edwin Dresser signed a check on the National Shawmut Bank to pay the Clearing House demand for \$5,260.98, the body of which was in Coleman's handwriting. This check went, in part, to pay a check of Coleman's that was sent through the Clearing House amounting to \$1,000. On November 11, 1909, a check similarly drawn and signed, the body of the check being in Coleman's handwriting, for \$13,933.32, went to pay a check of Coleman's for \$3,500 that was sent through the Clearing House. And on January 10, 1910, Mr. Edwin Dresser signed a check similarly

drawn, the body of which was in Mr. Coleman's handwriting, for \$5,457.28, that went to pay a check of Coleman's for \$3,000 that had come through the Clearing House.

These checks were a part of the 56 exhibits presented in evidence as samples of the method pursued by Coleman in getting money out of the bank and show the slip of the National Union Bank and the Clearing House slip, from which it appears that the amount of the checks sent by the National Union Bank through the Clearing House was the largest of the Boston banks that cleared checks drawn on the National City Bank through the Clearing House in every instance except three, and in two of these it was the second, and in the other the third largest.

Mr. Edwin Dresser testified that he knew the system by which the deposit ledger was kept, and it is hardly conceivable, in view of his long experience as president and director of the bank, and his daily attendance at the bank in the management and direction of its business, that he should not know the principle of the book, and be capable, if he saw fit, of finding and adding the balance columns or the balance footings for any given day. He knew that the depositors' ledger was an important book and needed to be correctly kept. That it was unsafe to let it go for a single day with errors not found was brought to his attention by a letter dated August 3, 1903, written by Mr. Wright, an auditor employed at that time by the directors to audit the accounts of the bank, when making a report of his examination. This was a matter in regard to which Mr. Gale and Mr. Sumner Dresser had like information.

In the summer of 1909, Dr. Wetherbee, who lived near the bank, told Mr. Barber that he did not think it looked very well to have the automobile in front of the bank so much.

Along in the middle of November, 1909, and about three months before the bank failed, in an interview between Mr. Barber and Mr. Bullard, president of the Harvard Trust Company, in regard to a possible sale of the National City Bank to the Trust Company, the master finds that the following conversation took place:

Mr. Bullard "told Mr. Barber that he thought the business of the City Bank was leaving it rapidly; that Mr. Barber replied that he didn't think so; that the depositors were all staying with the bank, and that, although the deposits had run down, he couldn't account for it; that he asked Mr. Barber if he had entire confidence in all the officers and clerks in the bank, and that Mr. Barber said, 'Yes; that witness (Bullard) then said it had currently been reported among his clerks that one of his officers was frequenting bucket shops in Boston and was evidently living pretty fast; that he did not mention names; that Mr. Barber replied, 'I don't think that is so; I don't think that can be so.'"

Barber did not ask Bullard who the officer or clerk was, did not report the conversation to the other directors, and took no steps to ascertain whether it was true or false.

Counsel for the defendants, in their arguments, placed much reliance upon the fact that the directors knew the national bank examiners examined the bank twice a year, and that, because of this, they, as

reasonable men, in the performance of their duties, would not be called upon to have an audit of the bank made, or to make regular semi-annual examinations themselves before declaring dividends. Their position was, in a large measure, that the irregularities and defalcations of Coleman could not have been ascertained without an audit of his ledger and the calling in of the depositors' passbooks, and that they were not required to take such action, in the absence of some special occurrence coming to their attention leading them to believe that an audit was necessary, and that, under the facts in this case, no such occurrence was brought to their attention.

The directors knew that the national bank examiners examined the bank twice a year. They knew that only one examiner at a time made the examination, and Mr. Edwin Dresser knew that the time allotted to the examination of the depositors' ledger was very brief. The other directors had no knowledge of the time allotted to the depositors' ledger, but in a general way knew that the time consumed in making the entire examination was but a portion of a day. Mr. Edwin Dresser, Sumner Dresser, and Mr. Gale must have known that the examination made by the bank examiner was not the equivalent of an audit, for they were directors in 1903 when they caused an audit to be made, and that it took from 12 to 14 days for two men to make it, and, while the directors, as a board, were not aware of the warnings regarding Mr. Coleman, which were brought to the attention of Mr. Edwin Dresser and Mr. Barber, and their knowledge that examinations were made by national bank examiners may have been a sufficient justification for their not causing an audit to be made, it was not a justification for their failure to perform their duty to examine the bank twice a year before declaring dividends. And it would seem very doubtful whether it should be regarded as a justification for their failure to cause an audit to be made in September, 1909, when they were aware the shrinkage in their deposits was abnormal; but, however this may be, it seems to me, and I find, that the defendants were negligent in not making examinations of the bank twice a year, and in not ascertaining, when such examinations were made, whether the liabilities of the bank, as they appeared on the depositors' ledger, corresponded with the balance due depositors on the cashier's ledger, and that, had they made such an examination September 30, 1907, and only added the balance footings for the purpose of making a comparison, they would have ascertained Coleman's irregularities, and, not having done so, they are responsible for his defalcations after that date.

I find, also, that if, in September, 1909, they had exercised reasonable care when they knew that the shrinkage in the deposits of the bank were abnormal, and had called for and examined the checks that were in the bank, they would have discovered that large checks appearing on the slips of the National Union Bank were missing, and would have learned of Coleman's irregularities, and are responsible for his defalcations after a reasonable time had elapsed for making such inquiry, and that a reasonable time for this purpose had elapsed at the end of September, 1909.

As to Edwin Dresser, I find that he was negligent in failing to report to the directors the Fillmore letter, and particularly so in his failure to report to them the conversation had with Mr. Fillmore in the last part of October, 1908, in which Fillmore charged that there was a thief in the bank, and told Dresser about Coleman's conduct, and that he better look after him; that he was negligent in failing to make an investigation of Coleman and his affairs as a result of this information; that, had he exercised reasonable care in this respect, Coleman's irregularities would have been discovered, and his defalcations thereafter prevented; that a reasonable time for making such investigation would have elapsed by the close of November, 1908; and that he is responsible for Coleman's defalcations after that time.

As to Mr. Barber, I find that he was negligent in giving no heed to Bullard's warning in November, 1909; that he could not, in the exercise of reasonable prudence, have regarded what Mr. Bullard told him as mere trader's talk, and that, had he taken steps to ascertain who the official or clerk in the National City Bank was with reference to whom Mr. Bullard was speaking, he would have learned that it was Coleman; that due diligence in investigating Coleman's affairs would have revealed his defalcations; that a reasonable time for making the investigation would have elapsed by December 1, 1909; and that he is responsible for his defalcations after that date.

Much time was taken up in the argument of the case in discussing the competency of Mr. Earl, as bearing upon the question whether the directors were negligent (1) in employing him in the first instance, and (2) in retaining him in their employ. The master, in his report, disposes of this question of negligence by finding that Earl was competent. I am unable to find that the directors were negligent in the original employment of Earl. He worked in the bank some six months when Mr. Davis was cashier, doing the work of teller, book-keeper, and cashier, and was recommended by Mr. Davis, who was himself a director, as a suitable and competent man for the position. After he had been cashier for about three or four years, he seems to have become very lax, and to have exercised little supervision over the work intrusted to his subordinates. Possessed of his knowledge and intelligence, it would seem that, if he had exercised the slightest care in supervising Coleman in the handling of the Clearing House checks and in the keeping of the depositors' ledger, the greater portion of the defalcation never would have taken place. But whether the directors were negligent in retaining him I regard of little importance, in view of the findings made.

[4] Since this proceeding was begun George F. Richardson and Edwin Dresser have died. The death of Mr. Richardson took place prior to the hearings before the master. The administrators of his estate have appeared and defended the suit.

The death of Edwin Dresser took place after the hearing was had before the court on the master's report. Sumner Dresser has been appointed administrator of his estate and has been cited to appear in the cause. He has appeared specially and filed a motion to dismiss the

suit as against him on the ground that it did not survive. The motion was denied, and he was ordered to appear generally.

The question of the survivorship of an action of the character of the one in question has been before the Circuit Court for this district at least twice, and it was held that the action survives. *Allen v. Luke*, 163 Fed. 1018, 1020; *Id.*, 141 Fed. 694, 697. The cases relied upon in reaching this conclusion were *Boyd v. Schneider*, 131 Fed. 224, 229, 65 C. C. A. 209; *Stephens v. Overstolz* (C. C.) 43 Fed. 465, and *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 44 N. E. 112.

The same question has recently been considered in *Curtis v. Phelps* (D. C.) 208 Fed. 577.

The ground upon which these cases seem to proceed is that the directors of a national bank, in entering upon their duties as such officers, impliedly agree to properly and faithfully perform them, and if by misconduct or negligence they fail in this respect, and damage ensues, a cause of action arises which the receiver may enforce for the benefit of the stockholders and creditors; that the cause of action is *ex contractu*, rather than *ex delicto*, and, because of this, survives.

This is apparently the ground upon which a like conclusion was reached in the following cases, although in them it was said that a "fiduciary relation" exists between the corporation and its directors, and that for a failure to perform duties arising out of such relation the remedy will survive; it being regarded as an exception to the maxim "*Actio personalis moritur cum persona.*" *Charitable Corporation v. Sutton*, 2 Atk. 400; *Concha v. Murrieta*, 40 Ch. D. 443; *Warren v. Para Shoe Co.*, 166 Mass. 97, 104, 44 N. E. 112.

The foregoing embodies my findings of fact and rulings of law in this case. So far as the findings and rulings of the master are consistent with or are embodied in my findings, they are affirmed; but, so far as they are repugnant to or inconsistent with them, I find that they are clearly against the weight of the evidence, or so inconsistent with other facts found by him and herein affirmed, that they cannot stand.

The clerk will prepare three decrees—one against George W. Gale, David A. Barber, and Sumner Dresser jointly, one against Sumner Dresser, administrator of the estate of Edwin Dresser, and one against the administrators with the will annexed of George E. Richardson; and in each decree the damages will be the amount of Coleman's defalcations after September 30, 1907, to the close of the bank, with costs. See *Von Arnim v. Am. Tube Works*, 188 Mass. 515, 14 N. E. 680; *Allen v. Luke* (C. C.) 163 Fed. 1018, 1021.

NOTE.—The amount of the decree against the several defendants, covering the thefts of Coleman after September 30, 1907, was \$282,043.02.

REAL ESTATE TITLE, INS. & TRUST CO. v. LEDERER, Collector of
Internal Revenue.

(District Court, E. D. Pennsylvania. February 23, 1916.)

No. 3646.

1. INTERNAL REVENUE Ⓒ2—EXCISE TAXES—STATUTORY PROVISIONS—"BANKER."

Act Cong. Oct. 22, 1914, c. 331, 38 Stat. 750, § 3, provides that bankers shall pay a special tax of \$1 on each \$1,000 of capital employed; that, in estimating capital, surplus, and undivided profits shall be included: that every person, firm, or company having a place of business where credits are opened by the deposit or collection of money subject to be paid or remitted, or where money is advanced or loaned on stocks, bonds, etc., or where stocks, bonds, etc., are received for discount or sale, shall be a "banker" thereunder. *Held*, that the statute is not void, as imposing a direct tax upon the property of a banker merely because of its ownership of such property, as the act does not tax property as such, but levies a special license tax upon one engaged in a particular business, because of the privilege he is exercising, and the fact, if true, that the amount paid is the same as would be paid, had all the property of the banker been taxed on an assessed value basis, is merely incidental and accidental.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 2; Dec. Dig. Ⓒ2.]

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

2. INTERNAL REVENUE Ⓒ9—EXCISE TAX—QUESTIONS OF FACT.

What, if any, of the capital of a corporation engaged in banking and other kinds of business, is employed in banking, within Act Cong. Oct. 22, 1914, is a fact to be found.

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

3. INTERNAL REVENUE Ⓒ9—EXCISE TAXES—STATUTORY PROVISIONS—"CAPITAL INVESTMENT"—"LIQUID INVESTMENT."

A corporation, engaged not only in the banking business, but also in the title insurance and other kinds of business, kept entirely separate from its other moneys a sum equal to its aggregate of deposits, and a sum equal to the aggregate of its capital and surplus invested in chosen securities, called "capital investments." Its capital investments were invested in real estate and other investments of a less mobile character than investments commonly termed "liquid," while the deposits were invested in securities which were more readily convertible into cash, and these investments were kept separate from its other investments. It from time to time put out statements of its financial condition, showing its assets to consist of cash on hand, etc., and showing the aggregate amount of its liabilities, in which were included, to balance the statement, the amount of its capital stock, surplus, and undivided profits, which was not less than the amount which measured the tax imposed on it under Act Cong. Oct. 22, 1914, and paid by it. *Held*, that the facts did not show that it did not use or employ any part of its capital in banking, and it was not entitled to recover back such tax, as the character of a banker's investments can have no bearing upon the question of the amount of capital invested in the business, and the capital, surplus, or undivided profits, either separately or in a lump, cannot be segregated from a bank's other assets and identified as such.

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

4. WORDS AND PHRASES—"EVIDENTIAL FACT"—"ULTIMATE FACT."

Facts are either "evidential facts," meaning facts which can be directly established by testimony or evidence, or "ultimate facts," which can only be deduced by inference from evidential facts.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Evidentiary Fact; Words and Phrases, First and Second Series, Ultimate Fact.]

5. TRIAL \Leftrightarrow 136—QUESTIONS OF LAW OR FACT—EVIDENTIAL AND ULTIMATE FACTS.

Evidential facts, if in controversy, must be found by a jury, if the case is a jury case; but ultimate facts need not be submitted, if only one inference can fairly and reasonably be drawn.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. \Leftrightarrow 136.]

At Law. Action by the Real Estate Title, Insurance & Trust Company against Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania. On motion to take off nonsuit. Motion denied.

M. B. Saul and J. G. Johnson, both of Philadelphia, Pa., for plaintiff. Gordon Auchincloss, Sp. U. S. Atty., of New York City, and Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. In ruling upon the present motion, all other questions than the three following may be deemed to have been eliminated by agreement.

(1) The constitutionality of the act of Congress of October 22, 1914.

(2) The amount of capital which the plaintiff "uses or employs in its banking business."

(3) The right of the plaintiff to have this second question submitted to a jury.

Of these, in their order.

[1] The constitutional question raised is one which has been so fully discussed and considered in the cases already ruled that nothing more is called for than a statement of the conclusions reached. The point made on behalf of the plaintiff is that the tax which was collected is a direct tax upon its property, imposed upon plaintiff merely because of its ownership. If the tax is such a tax, the act of Congress, which imposes it, is admittedly void. The whole argument which makes for the unconstitutionality of the act is summed up in the asseveration that the principle upon which the Pollock Case, in 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108, was ruled, condemns it. The ruling in that case was that a tax on the income derived from property merely because of its ownership is a tax on the property, and, in consequence, a direct tax, and whether an act of Congress levied such direct tax was to be determined by what the act did, not by what name the tax bore in the phraseology of the act. The application of the principle to the present act is based upon the averment that what this act does is to levy a tax upon the plaintiff in proportion to the value of its property merely because of its ownership of property to that value, and that this is a direct tax upon property.

The argument admits the power of Congress to impose a special license tax for what may be termed the privilege of engaging in any profession, calling, occupation, or business, and to determine the amount to be paid, either by the imposition of an arbitrary sum, or by the number of transactions had in a given time, or by the volume of the business or the product, or by the nominal capital employed, or in any way which is not the equivalent of a tax on the assessed value of what the taxpayer owns. The argument might further concede that a lawful tax could be imposed upon a corporation engaged in the banking business, with the license fee regulated in amount by the nominal capital of the corporation to which its nominal surplus might be added. When, however, its undivided profits are included, the tax is at once switched from an excise basis to a direct property tax basis. The thought may perhaps be most clearly presented by assuming (although this involves an almost absolute contradiction in terms) a corporation with all its assets employed in banking and having no liabilities. The tax imposed by this act would not differ in amount from a like tax imposed directly upon the property of the corporation assessed at the valuation which the corporation had itself placed upon its property.

The argument in support of the constitutionality of the act is in turn summed up in the answer to the propositions thus advanced. It is that the Pollock Case clearly distinguishes between incomes which are derived from the profession, calling, or business in which the taxpayer may be engaged, and the income which is derived from property solely by reason of his ownership of it, and gives recognition to a tax on the former as an excise tax. The same distinction holds good between a special license and a direct property tax. It is denied that what this act does is to tax property as such. On the contrary, what it does is to levy a special license tax upon one engaged in a particular business because of the privilege he is exercising. If it be true that the amount paid is the same as would have been paid, had all the property of the taxpayer been taxed on an assessed value basis, this is merely incidental and in a sense accidental, and does not indicate the identity of the two things done. The amount of the excise exacted is based upon the extent to which the taxpayer avails himself of his privilege. This is assumed (as it can fairly be assumed) to be measured by the amount of the capital which he has employed in the business. This capital is fairly defined by the amount of his own money which he employs in the business, and this, in turn, is defined by all there is in the business less what belongs to creditors. It, of course, happens that if a man employs his whole fortune as such capital the license fees he pays exactly equal what he would pay if a like direct tax were imposed upon the value of such fortune; but such likeness is no other, nor has it more significance, than the equality in volume or bulk between two entirely different things which have been subjected to the same measure. The words "capital used or employed" necessarily limit the tax to a special license or excise tax, and exclude any possible direct tax and were inserted for that purpose. The conclusion reached is that the act is constitutional.

[2] As the constitutionality of the act thus turns upon the amount of capital used or employed, strict adherence must be given to this measure. This brings us to the second question. The difficulties which may be encountered in seeking to get a clear view of this branch of the case are due to failing to distinguish between the economic and the legal features of the question. The thought voiced in the phrase that a man may be engaged in banking without employing his entire capital in that business is intelligible, and lends itself to easy grasp, notwithstanding the fact that he is responsible for all obligations incurred, and the business in consequence has the credit given by his whole fortune. The same thought may be transferred to a corporation without losing in clearness. Indeed, banks and trust companies afford us a practical illustration of the difference between capital employed and a credit thus given, which in the economic sense is doubtless additional capital. All of them may have, and we know some of them do have, behind them the added credit of the personal liability of stockholders. No one, however, would think of adding this to the capital used or employed in the legal sense of these words. It is conceivable that the banking business may be carried on without any capital, in the sense in which the words "capital, surplus, and undivided profits" are used in this act. We have many living proofs of this in the plan of organization of savings banks. Indeed, this very act gives congressional recognition of the existence of such institutions.

This phase of the question may be dismissed with the remark that whether a given banker (whether a natural person or a corporation) uses or employs any capital, or the amount of it, is a question of fact, to be found as is any other fact. Inasmuch as all practical—and, indeed, possible—profitable banking involves the thought that all moneys, not required to make settlement with its customers, be kept invested, it is very difficult to grasp the significance of the thought intended to be conveyed by a statement of the fact that the moneys of the bank are invested. And, further, inasmuch as a bank (unless restricted by law to special forms of investment) may invest its moneys as it pleases, it is more difficult to see any room for difference of liability to the payment of the excise tax between bankers, one of whom invests his moneys in municipal bonds, and another who invests in commercial paper or any other form of lawful investment. If any question were raised here of whether this plaintiff was a banker within the meaning of this act, what he did would, of course, bear upon what he was; but this act contains its own definition of a banker, and it is admitted the plaintiff is one. This admission would seem to carry with it that what plaintiff did was banking, and to have no other significance than the other fact that it did other things besides banking. What, if any, of its capital is employed in banking, again, is a fact to be found and will be considered in connection with the third question.

[3] The final stand taken by the plaintiff upon what is really its chosen ground of defense is based upon a distinction which is more difficult to keep clear than the others. This plaintiff is in the strong-

est possible position to urge this defense. It has consistently treated itself as a trustee for depositors in its banking department, and has scrupulously kept a sum equal to its aggregate of deposits as entirely separate from its other moneys as a trustee could keep the moneys of his cestui que trustent separate from his own moneys. It has likewise kept a sum equal to the aggregate of its capital and surplus invested in chosen securities, which it has called "capital investments," or by an equivalent name. Based upon these facts, it lays claim to the benefit of the principle of exemption from taxation which it asserts to have been applied in the cases of *Central Trust Co. v. Treat* (C. C.) 171 Fed. 301, and *Treat v. Farmers*, 185 Fed. 760, 108 C. C. A. 98.

If the principle there applied is as broad as it is claimed to be, and can be upheld as law and is applicable, it undoubtedly rules the present case in favor of the plaintiff. It is confidently asserted that the rule established by these cases is that, if the moneys received from depositors are kept separate from the other moneys of the bank and are invested in securities which are likewise kept separate from the other investments of the bank, and no more in amount of the moneys of the bank are invested in commercial paper by discount or purchase than is represented by the investments made of deposit moneys, the other moneys of the bank being invested in so-called permanent (whatever this may mean) forms of investment, then the legal inference is that no part of the capital of the bank is invested in banking except the sums which may have been spent for a banking house or banking fixtures and the like.

We do not understand any such principle to be deducible from the rulings in the cited case. There are, it is true, some expressions in the opinions accompanying the rulings which supply plausible support to the argument of counsel for plaintiff. As has been often remarked, however, opinions are to be read in the light of the facts of the case to which they relate. The cited case was decided as a case stated, the facts being stipulated. It, moreover, arose under a different act of Congress. The agreed fact was that the capital of the bank in that case was invested in securities which had no relation to banking, and that all the funds of the bank which were in any way used or employed in banking were moneys belonging to depositors, and that no part of the capital or surplus of the bank was so used or employed. It was no part of the duty of the court—indeed, it was powerless—to change the effect of the stipulation. The agreed fact being that the banking business was carried on without any capital being employed, the court could not do otherwise than rule that no tax was payable. This is a very different thing from ruling as a matter of law that, if some of the moneys of a bank were invested in commercial paper, and some in other forms of investment, and if the aggregate investments in commercial paper do not exceed the aggregate sum owing to depositors, no part of its capital is used or employed in banking.

There are at least two seemingly unsurmountable obstacles in the way of reaching such a conclusion. One is how the character of the investments in which the banker puts his money can make any dif-

ference. As already observed, what he did might go to the question of whether he was a banker, if that were an open question. If he were a private individual, what he did with his money might have an important bearing upon the question next discussed of the evidence of the fact of what he had put into the banking business. It must be, however, that granted one is a banker and has money in the banking business, the character of the investments he makes of these monies can have no bearing upon the question of the amount of capital he has invested in that business.

The other obstacle is the utter impossibility of its being held as a matter of law that the capital, surplus, or undivided profits of a bank, either separately or in a lump, can be segregated from its other assets and identified as such. The loose phrases in common use which might seem to imply such a possibility it is well understood do not. A bank or trust company might be said to have invested its surplus in the erection of a banking house or an office building. Every one understands that all that is meant by this is that it has so invested a sum equal to a certain part of its estimated accumulated profits. Surplus, and kindred words, are nothing more than banking expressions. It is certainly clear that in no legal sense can either capital or surplus be earmarked as a concrete thing. The answer to the retort of counsel that "this company plaintiff not only can do it, but has done it," is an obvious one.

[4, 5] This brings us to the final question: Should the case have been submitted to the jury to find the fact of how much capital the plaintiff used or employed in its banking business? We have deferred certain features of the second question to be discussed in connection with this. There are certain questions which provoke the comment that they are mixed questions of law and fact. This expression is of more seeming than real clarity. A more clarifying and helpful classification of facts is into evidential and ultimate facts—meaning facts which can be directly established by testimony or evidence, and facts which can only be deduced by inference from such evidential facts. Evidential facts, if in controversy, must be found by a jury, if the case is a jury case. Ultimate facts need not be so submitted, if only one inference can fairly and reasonably be drawn.

When this case was called for trial, it was stated by counsel that the question involved was probably a question of law, as the facts were not in dispute. This meant that the trial judge should direct a verdict for plaintiff or defendant. In the judgment of the trial judge, this would have been a proper disposition of the case. At the close of the plaintiff's case the defendant moved for a nonsuit. The logic of the argument seemed to be good that, if the plaintiff was not entitled to a verdict, it had failed to make out a case and could properly be nonsuited. A nonsuit was accordingly awarded.

Plaintiff is in consequence entitled to every inference which can fairly and reasonably be drawn from the facts in evidence. A recapitulation of them involves some repetition, but seems to be helpful to the disposition of the case:

(1) The plaintiff was not only engaged in the banking business, but in the title insurance and other kinds of business unnecessary to enumerate.

(2) It kept, as already stated, the funds it received from depositors separate from its other moneys.

(3) Some of its funds, which it called its capital investments, were invested in real estate and other investments of a less mobile character than investments which are commonly termed "liquid."

(4) The moneys which it received from depositors it invested in securities which in its judgment were more readily and easily convertible without loss into what is called cash.

(5) The investments which are classified as (4) were kept separated from its other investments.

(6) It kept its accounts in such a way as to show, and from time to time made up and put out statements of, its financial condition, by which it appeared that it possessed assets consisting of cash on hand, obligations of borrowers, shares of stock and bonds of corporations, bonds and mortgages, ground rents, real estate, and other property of a given aggregate supposed value (as well as like property held by it as collateral), and showing, also, the aggregate amount of its debts and other liabilities. This statement was balanced by including along with its liabilities the amount of its capital stock, its surplus, and undivided profits. The latter was the equivalent of the balance of its profit and loss account. The aggregate of capital, surplus, and profits was admitted to be not less than the amount which measured the tax it had paid and was seeking to recover back.

From any one of these facts, or from all combined, could it be fairly and reasonably found that the plaintiff did not use or employ any part of its capital in banking?

This opinion has already been drawn out to such length that we do not feel called upon to add any observations, except to the three features the fuller discussion of which was deferred to this place. These are the fact that the plaintiff was engaged in other business than banking, the fact that it invested its moneys in different forms of investments, and the fact that it kept its deposited moneys and investments made of them separate from its other moneys and investments. As already observed, if a man say of a fortune of \$1,000,000 were to establish himself in several different kinds of business, and were to put \$100,000 into his bakery business and \$100,000 into the banking business, it must, we think, be conceded that as a banker he would be liable to the tax measured only by \$100,000 invested capital, notwithstanding his personal liability for its debts. If, however, he appointed agents to run his banking business for him, and left with them all its assets, and put out statements showing the amount of the capital of that business to be \$100,000, he would be liable to a tax measured by that capital, notwithstanding that he had authorized his agents to also do a real estate and brokerage business, and no matter in what form of investments the moneys of the business were kept, and in spite of the fact that the moneys of the business which came

from deposits were separately entered. If the business were turned into a partnership, or were incorporated, the tax would under like conditions be the same.

The motion to take off the nonsuit is denied.

In re CAPITOL TRADING CO., Inc.

(District Court, N. D. New York. February 21, 1916.)

1. BANKRUPTCY Ⓒ123—ELECTION OF TRUSTEE—RIGHT OF ATTORNEY TO VOTE —“CREDITOR.”

Bankr. Act July 1, 1898, c. 541, § 1 (9), 30 Stat. 544 (Comp. St. 1913, § 9585), provides that “creditor” shall include any one who owns a claim provable in bankruptcy and may include his duly authorized agent, attorney, or proxy. Section 44 (section 9628) provides that the creditors shall, at their first meeting after the adjudication, appoint a trustee or trustees. Section 56 (section 9640) provides that creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as therein otherwise provided. *Held*, that the rule of practice followed generally of requiring duly admitted attorneys at law appearing for a creditor and desiring to vote for trustee to have specific written authority, is binding, as, even though the law does not expressly require the production and filing of a written power or warrant of attorney, the court itself may require the filing thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171-179; Dec. Dig. Ⓒ123.]

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

2. INTERNAL REVENUE Ⓒ19—STAMP TAXES—POWERS OF ATTORNEY.

Emergency Revenue Act Oct. 22, 1914, c. 331, § 5, 38 Stat. 753, provides that there shall be levied, collected, and paid in respect of the documents, instruments, etc., mentioned and described in schedule A, or for or in respect of the paper, etc., upon which such instruments shall be written or printed the taxes specified therein. Schedule A imposes a tax of 25 cents on powers of attorney to sell and convey real estate, etc., or to perform any and all other acts not thereinbefore specified. *Held*, that powers or letters of attorney authorizing attorneys to represent creditors in bankruptcy proceedings, vote for trustee, etc., must bear an internal revenue stamp, and, even if such powers or letters of attorney are unnecessary, when they are executed and presented, they are not exempt from the stamp tax.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 39-44; Dec. Dig. Ⓒ19.]

In Bankruptcy. In the matter of the Capitol Trading Company, Incorporated, bankrupt. On review of action and order of Referee Edwin A. King in refusing, for want of a revenue stamp, to file certain letters of attorney and allow the attorneys designated in such letters or powers of attorney, respectively, to cast the vote of Mrs. E. I. Stewart and 159 other alleged creditors of the bankrupt, respectively, for trustee in a bankruptcy proceeding then pending. Order affirmed.

Mills & Mills, of Albany, N. Y., for creditors, especially Mrs. Stewart.

RAY, District Judge. The power of attorney or letter of attorney contained in the proof of claim of Mrs. Stewart reads as follows:

"Letter of Attorney to Mills & Mills, Attorney at Law.

"You or any one of you are hereby authorized by said creditor by the person making the foregoing deposition, who is duly authorized thereto, to appear for and represent said creditor and vote for said creditor in any proceedings, or meetings, which may be had or called in the above-entitled proceeding, in court, before the referee in bankruptcy, or elsewhere, and particularly to vote for said creditor in the choice of a trustee of said bankrupt whenever such election is held, to accept, or in your discretion oppose confirmation of, any composition offered by or in behalf of said bankrupt, and to receive and receipt for any and all moneys which may be, or may become, payable to said creditor therein, or for or on account of said debt.

"In witness whereof said creditor has hereunto signed her name and affixed her seal, when signing the deposition proceeding, the 6th day of January, 1916.

"Mrs. E. I. Stewart. [L. S.]
 "[Individual executing always sign here.]
 "Creditor."

"Subscribed, sworn to, and acknowledged before me this 6th day of January, 1916.

"[Seal.]

O. G. Porter, Notary Public."

The others read the same. It will be noted these instruments give power to the attorney as follows:

- (1) To "appear for and represent said creditor," and
- (2) "Vote for said creditor in any proceedings or meetings which may be had or called in the above entitled proceedings [bankruptcy] in court, before the referee in bankruptcy, or *elsewhere*, and particularly
- (3) "To vote for said creditor in the choice of a trustee of said bankrupt whenever such selection is held;
- (4) "To accept or in your discretion oppose confirmation of any composition offered by or in behalf of said bankrupt," and
- (5) "To receive and receipt for any and all moneys which may be, or may become, payable to said creditor therein, or for or on account of said debt."

The contention of the creditors of the bankrupt is:

- (1) That no revenue stamp is required on a written power or letter of attorney running to an admitted attorney of this court, authorizing him to appear, file a claim, vote for trustee, and assent to a composition and collect the dividend on the claim.
- (2) That no power or letter of attorney to an attorney of this court is necessary to enable him to appear for a creditor and vote for a trustee, that a written retainer is all that is necessary, and that such retainer requires no stamp.

This contention involves the question: May an attorney at law, under his general retainer, not only *conduct* the proceeding in bankruptcy for a creditor, but in so doing vote for trustee? A bankruptcy proceeding is somewhat peculiar. The bankrupt himself may institute it by filing a voluntary petition, or petitioning creditors may do so by filing an involuntary petition. All creditors are or should be notified of the proceeding after adjudication, and at a meeting of creditors called for the purpose they may come in and prove their claims. If a claim is allowed, *the creditor* is entitled to vote for the appointment of a trustee to administer the estate, and ordinarily the creditors control the appointment, subject to the approval of the court. After

the appointment is made and approved, and the trustee has qualified, subject to certain provisions of law, he is largely subject to the control and direction of the creditors themselves. The selection of the trustee is a part of the proceedings in bankruptcy when there are assets. It would seem that when a creditor executes his claim and places it in the hands of an attorney of this court, with directions to appear in the proceeding, there should be an implied authority to do any act in such proceeding necessary to protect and enforce the claim, including participation in the selection of a trustee. However under the prior Bankruptcy Act it was held that a special written power of attorney was necessary, and quite generally and almost without exception it has been held under the Bankruptcy Act of 1898 that a written power of attorney to an attorney of this court is necessary to entitle him to vote for trustee. If a written power of attorney or letter of attorney is necessary, it would seem clear that a revenue stamp of 25 cents must be annexed thereto. As one was actually executed and offered for filing, it would seem it was not entitled to filing unless properly stamped, even if unnecessary.

Did the referee err in refusing to receive and file and recognize the unstamped power or letter of attorney? Did the referee err in refusing to allow the creditor to vote for the selection and appointment of a trustee?

[1] In *Re Sugenheimer* (D. C.) 1 Am. Bankr. R. 425, 91 Fed. 744, Judge Brown assumed that a written power of attorney to vote for trustee was required. There the creditor resided abroad. It would seem that Judge Brown followed the holdings under the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), where the practice was definitely settled that an admitted attorney could not vote for an assignee in bankruptcy merely by virtue of his general authority as attorney at law. It was held that he must prove his authority by letter of attorney, or by the oath of some one, showing him to be a duly constituted attorney; that is, an attorney in fact for that particular purpose. *Bump on Bankruptcy* (10th Ed.) 667, note; *In re Purvis*, 1 N. B. R. 163, Fed. Cas. No. 11,476; *In re Knoepfel*, 1 N. B. R. 23, 1 Ben. 330, Fed. Cas. No. 7,891; *Id.*, 1 N. B. R. 70, Fed. Cas. No. 7,892. This last-cited case was decided by Mr. Justice Blatchford, later of the Supreme Court of the United States.

In *Martin v. Walker*, 1 Abb. Adm. 579, 16 Fed. Cas. 911, No. 9,170, it was held that under a retainer as attorney at law the proctor could not claim to be an attorney in fact and entitled to vote for assignee in bankruptcy. The act of 1867 provided:

"Any creditor may act at all meetings by his duly constituted attorney the same as though personally present."

In the present Act (1898), sections 56 and 44 authorize creditors to appoint a trustee by vote, and section 1, subdivision 9, provides that:

"Creditor * * * may include his duly authorized agent, attorney, or proxy."

It seems clear that the words "duly authorized" apply to attorney and proxy, as well as to agent. If this be so, then the language of the

act requires the attorney, even though admitted to practice in the bankruptcy court, to produce and exhibit proof of his authority. It would seem clear that the act intends that the creditor himself may vote for trustee by agent, attorney, or proxy, when such agent, attorney, or proxy presents and files power or letter of attorney authorizing him so to do. This has been held in *In re Eagles & Crisp* (D. C.) 3 Am. Bankr. R. 733, 99 Fed. 696; *In re Lazoris* (D. C.) 10 Am. Bankr. R. 31, 120 Fed. 716; *In re Scully* (D. C.) 5 Am. Bankr. R. 716, 108 Fed. 373; *In re Henschel* (D. C.) 6 Am. Bankr. R. 305, 109 Fed. 861, and by implication 7 Am. Bankr. R. 662, 113 Fed. 443, 51 C. C. A. 277; *In re Richards*, 4 Am. Bankr. R. 631 (D. C.) 103 Fed. 849.

The contrary is held by a referee in bankruptcy, affirmed by Dodge, District Judge, without opinion, in *Re Crooker Co.*, 27 Am. Bankr. R. 241. In *Re Hawley* (D. C.) 220 Fed. 372, Judge A. N. Hand held by implication that a written power of attorney is necessary in such a case, although it does not specifically appear that the attorney in fact was an attorney and counselor admitted to practice in the bankruptcy court. He says:

"The referee in bankruptcy has refused to accept a general letter of attorney in the above estate in the usual official form, authorizing the attorney in fact to attend meetings of creditors of the bankrupt and vote thereat for trustee, or for any other proposal or resolution that may be submitted under the act, to accept any composition proposed by the bankrupt, and to receive payment of any dividends or money due under any composition, etc., unless there shall be affixed to such letter of attorney a 25-cent internal revenue stamp."

This case (*In re Hawley*) seems to be an authority only for the proposition that the letter of attorney to an attorney in fact must have the revenue stamp, saying nothing as to whether a special power of attorney or letter of attorney is necessary to enable an attorney at law duly admitted to appear and vote for trustee.

Remington on Bankruptcy (2d Ed.) vol. 1, §§ 583 and 584, state, accepting the weight of authority:

"The courts have almost uniformly held, whenever called on to pass upon the question, that even attorneys at law, admitted to practice in the United States courts, and in good standing, must have written power of attorney in order to vote [for trustee], although there would be no such requirement in order to act in other respects for clients."

Remington proceeds to say (section 584):

"However, it seems a wholly unnecessary requirement, in cases of attorneys duly admitted to practice before the court. For in fact, if there is one particular thing a creditor wants of his attorney in a bankruptcy proceeding, it is to vote for trustee. That is usually the first duty, and, being so, it would seem a strong implication would arise from the employment itself that the creditor expects his attorney to vote for him. Certainly it is precisely as appropriate as it would be for attorneys to suggest names of receivers for other courts to appoint. Because there are forms for use in appointing proxies and attorneys in fact is not conclusive that such forms are to be used when the right of attorneys at law to act is brought in question."

It must be remembered, however, that suggesting receivers to the court for appointment is quite a different matter from actually voting

for a trustee in bankruptcy. Attorneys at law have no right to appoint the receiver. Receivers are appointed by the court. Trustees in bankruptcy are appointed by the creditors at a meeting duly called and held for the purpose. It is quite common for creditors who cannot attend in person, when their proof of claim is filed and allowance sought, to have some attorney appear for the sole and only purpose of joining in the selection of a trustee. Such creditors do not intend as a rule that their attorney shall attend all meetings or take part in the proceedings generally. In the ordinary action at law, or in equity, or in special proceedings, when the moving party, petitioner, plaintiff, or complainant, as the case may be, institutes such cause or proceeding through an attorney, it is expected that the attorney will attend to and conduct all proceedings from beginning to end. This court is of the opinion that the practice which has grown up, and which seems to be recognized by the act itself, requiring attorneys at law duly admitted, who appear for a creditor and desire to vote for trustee, to have specific written authority, is a wise and necessary rule of practice. Clearly the wisdom of this rule of practice is sustained by abundant authority. In 4 Cyc. 932, it is said:

"Although in former times it was customary, and even necessary, for attorneys to file in court warrants showing their right to represent clients, this practice has long been discarded, and it is generally no longer necessary, either in the case of an individual or of a corporation, for an attorney to have a warrant of attorney; authority by parol being sufficient."

It is also there stated that:

"Where the relation of attorney and client exists, the law of principal and agent is generally applicable, and the client is bound, according to the ordinary rules of agency, by the acts of the attorney within the scope of the latter's authority."

I think the practice in bankruptcy cases too firmly fixed and settled to allow a departure therefrom, even if the law itself does not expressly require the production and filing of a written power or warrant of attorney. It must be that for the doing of a specific thing the court itself by rules of practice has the right to require the filing of a warrant or power of attorney showing authority to do such specific thing out of the ordinary.

In 4 Cyc. pp. 928 and 929, it is said,

"Proof of Authority—1. In General. Although it is necessary that an attorney be specially authorized to act for a client, his position as an officer of the court makes it unnecessary for him, in the ordinary case, to show his authority in any way, there being a firmly established presumption in favor of an attorney's authority to act for any client he professes to represent. It follows, therefore, that he will not be required to show his authority *unless it is properly called for.*

"2. Who may Demand—a. Court—(1) Generally. In spite of this favoring presumption, however, there is a well-recognized discretion in the court to call for proof of an attorney's authority when it sees fit."

In New York there are many cases to this effect, and there are cases in the United States courts holding the same. It follows, it seems to me, that this rule of practice, which has been adopted and followed generally in the courts of the United States in bankruptcy

proceedings, requiring the production of written authority, is valid and binding. It comes, then, to the question whether or not such a letter or power of attorney in a bankruptcy proceeding must bear a revenue stamp.

[2] Emergency Revenue Law Oct. 22, 1914, c. 331, 38 Stat. 745, extended for one year to December 31, 1916, is a taxing measure or law, and is declared to be "An act to increase the internal revenue and for other purposes." The power of Congress to tax, with certain limitations, is practically unlimited, and when the language is broad and comprehensive it is not the province of the court to limit or restrict or prescribe exceptions to the general language. The duty of legislation is on Congress, and not on the courts. It is the duty of the courts to interpret and execute the laws by appropriate judgments, and not to make or remake them.

In section 5 of the act referred to we find the following:

"That on and after the first day of December, nineteen hundred and fourteen, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule." 38 Stat. 753.

And in said schedule A we find the following:

"Power of attorney to sell and convey real estate, or to rent or lease the same, to receive or collect rent, to sell or transfer any stock, bonds, scrip, or for the collection of any dividends or interest thereon, or to perform any and all other acts not hereinbefore specified, 25 cents: Provided, that no stamps shall be required upon any papers necessary to be used for the collection of claims from the United States for pensions, back pay, bounty, or for property lost in the military or naval service." 38 Stat. 762.

This it is seen relates to stamps on powers of attorney, and there is specified: First, powers of attorney to sell and convey real estate, or to rent or lease real estate, or to receive or collect rent; second, powers of attorney to sell or transfer any stock, bonds, scrip, or for the collection of any dividends or interest thereon; and, third, to perform any and all other acts not hereinbefore specified. The acts before specified relate, first, to the sale and conveyance of real estate, and the renting or leasing of real estate, and to the receiving or collecting of rents of real estate; and, second, to the sale or transfer of stock, bonds, and scrip, or for the collection of dividends or interest thereon; and, third, to powers of attorney to perform any and all other acts not specified and embraced within the general language. The only exception mentioned is:

"That no stamps shall be required upon any papers necessary to be used for the collection of claims from the United States for pensions, back pay, bounty or for property lost in the military or naval service."

I see no room for excepting from the operation of this act powers or letters of attorney authorizing attorneys in fact to act for their prin-

cipal in suits at law or in bankruptcy proceedings. If not stamped, the power or letter of attorney cannot be filed and used, whether necessary or unnecessary. If necessary, it must be stamped and presented. If unnecessary, then, of course, its execution and presentation is not required. However, such a paper is not exempt from the stamp duty or stamp tax when executed and presented, even if its execution and presentation is not required by law. This proposition is covered by the decision of Judge Hand (*In re Hawley* [D. C.] 220 Fed. 372), and it is there stated:

"The opinion which I am about to express is concurred in by the four judges of this court. We think the decision of the referee was correct in both instances."

This would mean that Judges Learned Hand, Mayer, and Hough concur in the holding. I do not think that *Tolman v. Treat* (C. C.) 106 Fed. 679, is to the contrary.

If the instruments executed by Mrs. Stewart and the other creditors, authorizing the persons named therein to vote for trustee, are to be regarded merely as written retainers authorizing an attorney at law to appear in bankruptcy court on behalf of their clients and take certain steps in the litigation which come within the ordinary powers of an attorney at law, then we have a mere written retainer, and not what is ordinarily understood to be "a power of attorney."

If it had been the purpose of Congress to exempt powers of attorney or letters of attorney given to attorneys at law, authorizing them to do certain things in bankruptcy proceedings, I think the exception would have been made. The practice of requiring creditors in bankruptcy proceedings to produce powers of attorney authorizing attorneys at law to vote for trustee has been well understood for many years. If the affixing of a stamp to such powers of attorney is deemed burdensome, the remedy is in applying to Congress for an amendment to the language of schedule A above quoted. Congress did provide that no stamps shall be required upon papers necessary to be used for the collection of claims from the United States for pensions, back pay, bounty, or for property lost in the military or naval service. This demonstrates that the question of proper exceptions from the provisions of the act was considered by Congress. It cannot be assumed that the ordinary powers of attorney used in bankruptcy proceedings were not within the contemplation of the lawmaking body.

I am constrained to hold that the decision of the referee in refusing to file the powers of attorney presented to him and which did not bear the proper stamp was correct.

The order under review is therefore affirmed.

UNITED STATES v. CHIN DONG YING.

(District Court, D. Massachusetts. February 10, 1916.)

No. 1667.

1. ALIENS ⇨32—DEPORTATION OF CHINESE—APPEALS—EFFECT.

Under Chinese Exclusion Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 479, providing, relative to the deportation of Chinese, that any Chinese person convicted before a commissioner may appeal to the judge of the District Court, the taking of an appeal vacates the commissioner's order of deportation, and leaves the case as if it had never been tried and no order of deportation had ever been entered, as the appeal is to be tried de novo and transfers the whole case to the District Court as if the proceedings had been originally instituted in that court.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇨32.]

2. ALIENS ⇨32—DEPORTATION OF CHINESE—APPEALS—DISMISSAL.

While the District Court, in dismissing for want of prosecution an appeal by a Chinese person from a commissioner's order of deportation, might have incorporated into the order of dismissal an order for the deportation of such person, where no such order of deportation was made, the order of dismissal constituted a final judgment, and did not operate to restore to full power and effect the commissioner's order of deportation, which had been vacated by the appeal.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇨32.]

3. ALIENS ⇨32—DEPORTATION OF CHINESE—APPEALS—DISMISSAL.

As an order dismissing for want of prosecution an appeal by a Chinese person from a commissioner's order of deportation finally disposed of the case, it could not be restored to the docket at a subsequent term, even with the consent of the United States attorney.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇨32.]

4. ALIENS ⇨32—DEPORTATION OF CHINESE—AUTHORITY OF UNITED STATES COMMISSIONERS.

An appeal by a Chinese person from an order of deportation made by F., a United States commissioner, was dismissed for want of prosecution, and thereafter, F. having died, H., another commissioner, made an order reciting the dismissal of the appeal, and ordering that the deportation order of Commissioner F. be executed. *Held*, that Commissioner H. had no authority to make this order, and it was of no effect, even assuming that Commissioner F. could have made such an order, as the case was not pending before Commissioner H., and no statute gave him jurisdiction on the death of Commissioner F.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇨32.]

5. ALIENS ⇨32—DEPORTATION OF CHINESE—WEIGHT AND SUFFICIENCY.

In a proceeding to deport a Chinese person on the ground that he was found in the United States in violation of the Exclusion Acts, evidence *held* to show that he was one of two persons arrested on deportation proceedings in 1897 and adjudged entitled to enter the United States on the ground that he had been born there.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇨32.]

6. ALIENS ⇨32—DEPORTATION OF CHINESE—CONCLUSIVENESS OF JUDGMENT.

Where a Chinese person, claiming to have been born in the United States and to have been taken to China when he was three years old, was

arrested on deportation proceedings upon his return to the United States, and adjudged entitled to enter the country upon the ground that he was born there, the government was estopped by such judgment from further deportation proceedings against him.

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

Proceeding by the United States to deport Chin Dong Ying, alias Wok Hong Wang. From a commissioner's order directing his deportation, Chin Dong Ying appeals. Order of deportation denied.

Everett Flint Damon and John H. Casey, both of Boston, Mass., for appellant.

Lewis Goldberg, Asst. U. S. Atty., of Boston, Mass.

MORTON, District Judge. This is an appeal by a Chinese from an order of United States Commissioner Fiske directing his deportation on the ground that he was found in the United States in violation of the Chinese Exclusion Act. The order was entered on November 16, 1904, and the appeal was allowed and was entered in this court on November 16, 1904. On April 15, 1909, this court entered the following order: "The above-entitled case is hereby dismissed from the docket for want of prosecution." On May 4, 1911, United States Commissioner Fiske having died since the entry of his order of deportation, United States Commissioner William A. Hayes 2d made the following entry in his (Mr. Hayes') docket:

"In the Matter of Chin Dong Ying, alias Wok Hong Wang.

"In the above-entitled case, the said appeal having been dismissed for want of prosecution by the Honorable Frederic Dodge, Judge of the United States District Court for the District of Massachusetts, it is now, to wit, May 4, A. D. 1911, ordered that the deportation order of November 16, A. D. 1904, a certified copy of which is annexed thereto, be executed forthwith.

"[Seal]

William A. Hayes 2d, United States Commissioner."

Nothing further was done in the matter until June 1, 1914, when, upon an agreement between the petitioner and the United States attorney, as follows:

"It is hereby agreed that the above-entitled case may be restored to the docket, and that a trial may be had upon the merits when reached"

—this court ordered that the case be restored to the docket for trial upon the merits when reached. On June 19, 1914, the petitioner was ordered to recognize with surety to prosecute his appeal, and did so; and the case was continued from term to term until November 30, 1915, when it was heard in open court; the question whether it was properly upon the docket being at that time raised by the United States and reserved by the court.

The first question is one of jurisdiction, and lies at the threshold of the case. It relates to the effect of the order of dismissal, and involves the nature and effect of an appeal in cases like this. The appellant contends, in substance, that the taking and entering of the appeal vacated the commissioner's order of deportation, and that the order of dismissal, unaccompanied by an order of deportation in this court, either did not dispose of the case so finally as to prevent it from being:

heard on the merits at this time, or, if it did, that the order of the commissioner having been vacated, and no other such order having been entered, he cannot be deported in these proceedings. The government contends that the effect of the appeal was to suspend the order of deportation pending the hearing of the case on the appeal, and that the effect of the dismissal for want of prosecution was to restore the order of deportation by the commissioner to full force and effect.

[1] The statute under which the appeal was taken is section 13 of the act of 1888 (25 Stat. 476), and is as follows:

“But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district.”

The language is broad, and free from any qualification or limitation, and the right of appeal given by it should be equally broad and free, unless there is something in the nature of the proceedings which calls for a different construction. I do not think there is. The intention was, it seems to me, to give to the appellant the right to have the whole case retried in another court—as said in *Liu Hop Fong v. U. S.*, 209 U. S. 453, 461, 28 Sup. Ct. 576, 52 L. Ed. 888, tried “de novo”—and disposed of there without any regard to the proceedings before the commissioner. In other words, the appeal transfers the whole case to the District Court, where it is to be dealt with for all practical intents and purpose as if the proceedings had been originally instituted in that court. *U. S. v. Wong Ock Hong (D. C.)* 179 Fed. 1004. There is no provision for remanding the case to the commissioner, and such a course is not a necessary incident to, or condition of, an appeal. The District Judge has no supervisory power over the commissioner in the matter, except such as pertains to its appellate jurisdiction; and that, as already observed, is confined to the trial and disposition of the appealed case in his own court. If an order of deportation is entered by the commissioner, and is affirmed, as it may be, by the appellate court, it takes effect, not as the order of the commissioner, but as the order of the appellate court, and whatever mandate is necessary to carry it into effect is issued by that court, and not by the commissioner; and such is the established practice in this district. It follows, it seems to me, that the effect of taking and entering the appeal was to vacate the order of deportation entered by the commissioner, and to leave the case just as if it never had been tried, and no order of deportation ever had been entered. See *Murdock, Appellant*, 7 Pick. (24 Mass.) 303, 320, 321 (original paging); *Ball v. Burke*, 11 Cush. (65 Mass.) 80, 82; *Commonwealth v. Oakes*, 151 Mass. 394, 395, 24 N. E. 210; *Derick v. Taylor*, 171 Mass. 444, 446, 50 N. E. 1038; 2 Cyc. 971, C, and notes.

The conditions under which an appeal may be taken vary greatly in different cases and jurisdictions; but the principles of law by which, apart from statute, the effect of an appeal upon the proceedings in the court below is to be determined should be the same under a given state of facts everywhere. Statutory appeals in actions at law—and this appeal is of that nature—are so old in American law, and so widespread, and the principles governing them are so well settled, that it

seems probable Congress had them in mind in passing the statute under consideration. In Massachusetts, for instance, such appeals go back to the statute of 1783 (chapter 42), which in turn was founded on an earlier provincial statute of 1697 (chapter 8). The provisions for appeal in these old statutes are upon the point under discussion closely analogous to that in the statute involved in this case, and they have for several generations received the same construction which I have placed upon it. Cases *supra*. This case differs from writs of error, or exceptions, or appeals in admiralty, probate, or equity, and other instances where the cause remains in the lower court, or is remanded to it for further proceedings, in accordance with the opinion of the appellate court. *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888; *Slaughterhouse Cases*, 10 Wall. 273, 19 L. Ed. 915; *Bronson v. La Crosse R. R. Co.*, 1 Wall. 405, 17 L. Ed. 616; *Penhallow v. Doane's Adm'r*, 3 Dall. 54, 1 L. Ed. 507; *Packman's Case*, 6 Co. Rep. 18b; *Archer v. Hart*, 5 Fla. 234.

It should be noted, although it would perhaps be taken for granted, that the appeals referred to in these decisions are appeals rightfully taken and duly entered, where the conditions of appeal have been complied with. An appeal that is wholly unauthorized can have no effect; and the dismissal of an appeal for the reason, for instance, that the appellant was not a person entitled to appeal, leaves the decree of the court below as if not appealed from. *Cleveland v. Quilty*, 128 Mass. 578. In this case the appeal was well and rightly taken and duly entered in this court.

[2-4] There remains on this branch of the case the question as to the effect of the order of dismissal. The statute imposes on any Chinese person arrested under it the burden of showing that he is lawfully entitled to remain in the United States; and I think that it would have been competent for the court to have incorporated into the order of dismissal an order for the deportation of the appellant. This is in effect what was done in the case of *Chow Loy v. U. S.*, 112 Fed. 354, 50 C. C. A. 279, as appears from an examination of the papers. In *Fong Yue Ting v. U. S.*, 149 U. S. 698, 729, 13 Sup. Ct. 1016, 37 L. Ed. 905, it is said:

"If no evidence is offered by the Chinaman, the judge makes the order of deportation, as upon a default."

As above stated, no such order of deportation was made in this case; the order was of dismissal merely, and nothing more. There can be no question, I think, that it was within the power of the court to make such a disposition of the case, and that the order of dismissal constituted a final judgment. *Jackson v. Ashton*, 10 Pet. 480, 9 L. Ed. 502; *Snell v. Dwight*, 121 Mass. 348. I also think that that order did not and could not operate to restore to full power and effect the order of deportation which had been vacated by the appeal. *Drummond v. Husson*, 14 N. Y. 60; *Derick v. Taylor*, *supra*. The case, having been finally disposed of, could not be restored to the docket at a subsequent term, even with the consent of the United States attorney. *Jackson v. Ashton*, 10 Pet. 480, 9 L. Ed. 502; *U. S. v. Mayer*, 235

U. S. 55, 70, 35 Sup. Ct. 16, 59 L. Ed. 129; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 62, 63, 24 Sup. Ct. 598, 48 L. Ed. 870. The order of deportation by Commissioner Hayes seems to me to have been *ultra vires*, and to be of no effect. The case was in no sense pending before him, and no statute has been referred to under which he could take jurisdiction on the death of Commissioner Fiske, assuming, for the sake of the argument, that Commissioner Fiske could himself have made such an order.

It follows, it seems to me, that as the case stands there is no order of deportation, and that the court has no authority to enter one, and had no authority to restore the case to the docket.

It is possible, however, that this conclusion may be wrong, and, inasmuch as the case has been fully heard, I proceed to consider it upon the merits.

[5, 6] The petitioner testifies that his correct name is Wok Hong Wang; that Chin Dong Ying is his marriage name; that he was born in San Francisco, and lived there until he was 3 years old, when he went to China with his parents; that he returned to this country at the age of 23 years, and entered, with his brother, via Burlington, Vt. He contends that at that time he was arrested on deportation proceedings, was tried upon them, and was adjudged entitled to enter the United States upon the ground that he had been born here. If so, the issue raised by the subsequent deportation proceedings was, concededly *res judicata* in his favor.

It clearly appears that two Chinamen were arrested by the United States authorities in Vermont upon deportation proceedings, and were tried before United States Commissioner Johnson at Burlington, on October 22, 1897. The petitioner claims that he was one of them. They were represented by David J. Foster, a member of the bar, who testified before Commissioner Fiske in these proceedings as follows:

"Q. Whether or not the defendant in this case was the person whom you defended as Wok Hong Wang? A. It is my best judgment that he is the man. I met him for the first time since the trial when I was in Boston to attend the hearing in this case some weeks since, early in September [1904], I believe; I recognized him as the man for whom I appeared at that time. I would say that my remembrance of the case was quite vivid. There were two brothers. The other one, not the defendant, got into Burlington two or three days before this one. They got separated in Montreal. They were a pair of very bright boys. I thought, when my attention was called to it, that I would be able to identify those boys. I think this is the boy. It is my best judgment that he is one of them. * * * Q. The defense was that the defendant was born in this country? A. Yes. * * * Q. From his appearance, have you no question that he is the same man? A. I have no question he is the same man."

Commissioner Johnson's record shows that Wok Hong Wang was discharged, the ground of discharge having been birth in this country.

Mr. Foster's testimony was given in 1904, about 7 years after the occurrence. Moy Loy, who in 1897 was United States interpreter at Burlington, also testified before Commissioner Fiske, a transcript of his testimony being read here by agreement, that this petitioner is one of the persons who was at that time tried before Commissioner Johnson.

Just before deportation proceedings were instituted against the petitioner in 1904, Inspector McCabe found in his possession a certificate, signed by Commissioner Johnson, in the name of Wok Hong Wang. Annexed to this certificate was a photograph of the petitioner, which had been improperly added to it. This photograph bore the impression of a seal, which was a counterfeit of Commissioner Johnson's seal. In all other particulars the certificate was admittedly genuine; the commissioner's signature, the principal seal, the name of the person to whom it was issued, and the date, were as made by Commissioner Johnson.

It is satisfactorily proved that about the year 1902 the petitioner was living in Marlboro, Mass., working in a laundry. At that time the certificate referred to was seen in his possession by Mr. Crotty. Mr. Crotty knew the petitioner under the name shown on the certificate. Mr. Quinn had known the petitioner under that name in 1899 or 1900. The certificate was taken from the petitioner by Inspector McCabe in 1904, and has since been in the government's control.

It thus appears that, within 2 or 3 years after the hearing before Commissioner Johnson, the petitioner was known under the name stated in the certificate, and within 4 or 5 years after the hearing the Johnson certificate is shown by reliable evidence to have been in the petitioner's possession. Plainly some Chinese person under the name of Wok Hong Wang was heard and admitted by Commissioner Johnson. Either the petitioner is that person, or that person disappeared, and this petitioner had assumed his name and secured the certificate within a few years thereafter. The first alternative seems to me the more probable one; and this view is greatly strengthened by the direct evidence of Mr. Foster (which is unimpeached), and by that of Moy Loy, that this petitioner is the man who was heard and discharged. The fraudulent alteration of the certificate, which otherwise is certainly genuine, by the addition of the photograph and the counterfeit seal, though suspicious, is not sufficient, even assuming the addition to have been made by the petitioner, to overcome the other evidence establishing his identity.

Upon all the evidence, I find that the petitioner is the person whose case was heard by Commissioner Johnson, and to whom the certificate was originally issued; that the question of his right to be in the United States has been heard and adjudicated in his favor; and that, if the case is properly before me, the United States is estopped by that judgment from further deportation proceedings against him.

For the reasons stated, no order can be made in these proceedings.

FERNALD WOODWARD CO. v. CONWAY CO. (three cases).

(District Court, D. New Hampshire. February 21, 1916.)

Nos. 555, 556, and 569.

1. APPEAL AND ERROR ⇨1017—REPORT OF REFEREE—REVIEW—QUESTIONS OF FACT.

The finding of a tribunal, whether it be a master, a referee, or a judge, who sees and hears the witnesses and is in the environment of an oral hearing, is entitled to great weight, and great caution should be exercised by any tribunal having the authority, or being under the duty to review such finding, in disturbing it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3911, 3961, 3996-4005; Dec. Dig. ⇨1017.]

2. CONTRACTS ⇨319—RIGHT OF ACTION FOR BREACH CAUSED BY OTHER PARTY'S BREACH.

Where plaintiffs abandoned their operations under a logging contract by reason of embarrassment resulting from defendant's failure to make payments and advancements as agreed, there was no ground for recoupment by defendant.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493-1507; Dec. Dig. ⇨319.]

3. CONTRACTS ⇨319—EXCUSES FOR PERFORMANCE—BREACH BY OTHER PARTY.

Where plaintiffs were unable to perform a contract for the removal of timber from a large tract of land requiring operations extending over several years, because of defendant's failure to make payments in conformity to their agreements, such failure was a breach which justified plaintiffs in not performing.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493-1507; Dec. Dig. ⇨319.]

4. WORK AND LABOR ⇨14—BREACH OF CONTRACT—RECOVERY ON QUANTUM MERUIT.

Where a contract for the removal of timber from a large tract of land provided that plaintiffs might construct roads and camps upon the lands, and make any other reasonable use of the lands for the purpose of carrying out the terms of the contract, but that any roads, camps, or other improvements so made should remain the property of defendant, and defendant broke the contract by failing to make agreed payments, and plaintiffs' abandonment of operations because of their inability to perform on account of the failure to make such payments was warrantable, plaintiffs were entitled to recover on a quantum meruit the value of the improvements so made.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29-33; Dec. Dig. ⇨14; Contracts, Cent. Dig. §§ 1500, 1554.]

5. WORK AND LABOR ⇨14—BREACH OF CONTRACT—RECOVERY ON QUANTUM MERUIT.

Where, however, plaintiffs divided the territory from which the timber was to be removed, and let to subcontractors the work of removing the timber from parts thereof, and the subcontractors built camps and bridges, and made roads upon the territory operated by them, the cost thereof being included in the contract price paid them by plaintiffs, plaintiffs could not recover for the improvements made by their subcontractors.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29-33; Dec. Dig. ⇨14; Contracts, Cent. Dig. §§ 1500, 1554.]

6. CONTRACTS ⇨319—BREACH—MEASURE OF DAMAGES.

Where plaintiffs justifiably ceased operations under a contract for the removal of timber from a large tract of land at specified prices per

thousand for different kinds of the wood, because of defendant's failure to make payments as agreed, they were entitled to recover for the work done according to contract prices and values established by the parties themselves.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493-1507; Dec. Dig. ⚡319.]

At Law. Three actions by the Fernald Woodward Company against the Conway Company. On referee's report on motions directed against his findings and rulings. Judgments for plaintiff.

Drew, Shurtleff, Morris & Oakes, of Lancaster, N. H., for plaintiff.

Streeter, Demond, Woodworth & Sulloway, of Concord, N. H., for defendant.

ALDRICH, District Judge. Here are three cases which were heard together before the Honorable Edwin G. Eastman as referee, and which were heard by me upon the referee's report upon motions directed against his findings and rulings.

There was a contract made on October 12, 1906, between one Ozman W. Fernald and the Publishers' Paper Company, which is a Maine corporation. This contract contemplated extensive logging operations in the towns of Albany, Waterville, and Livermore in the Swift river valley in New Hampshire. The territory described included a large tract of timber land, and it was understood that several years' operations would be required to remove all the softwood and such part of the hardwood timber as was described in the contract.

The enterprise set on foot by the contract of October 12, 1906, involved the construction of railroads, logging roads, bridges, camps, storehouses, other buildings, and the doing of the various things incident to an extensive logging proposition. Under the contract of October 12th, and supplemental agreements, active operations were carried on for something like two years, when the plaintiffs abandoned the work.

Speaking generally of the contract, it was the usual operating contract under which active parties in the woods received so much per thousand for softwood and so much for hardwood cut, hauled, and loaded upon cars.

The referee whose report is under consideration, was appointed upon consent of the parties, and had hearings at various times during a period of a year and a half, or such a matter, in connection with which a view of the territory in question was had, and a large number of witnesses were heard, and the evidence, stenographically reported, covers something like 1,700 typewritten pages.

The plaintiffs present 7 exceptions to rulings made in the course of the trial, and the defendant raises 28 points against rulings, findings, and failures to find; yet, in view of it all, the rights of the parties largely depend upon certain specific findings of the referee and upon a certain clause in the contract. It is well enough to state these at the outset. They are as follows:

Clause 5: "The first party agrees to permit the second party to construct additional roads and camps upon said lands cutting from said lands for this

purpose whenever practicable hardwood rather than softwood, and to make any other reasonable use of said lands for the purpose of carrying out the terms of this contract, but it is expressly understood and agreed that any roads, camps, or other improvements so made shall be and remain the property of the first party during and subsequent to the life of this contract, except that the second party shall have the right to remove the storehouse erected by it at Conway and to take up and remove any rails, railroad fixtures, or machinery which it may place upon said lands for the purpose of carrying out the provisions hereof, when said rails, railroad fixtures, or machinery shall be of no further use in the carrying out of this contract."

Such is the clause, and the findings to which I refer are as follows:

"There was considerable conflict in the evidence as to what caused the plaintiffs to cease operations, but I find the cause to have been the failure on the part of the defendants to make payments and advancements in conformity with the aforesaid contracts, for the work done by the plaintiffs thereunder."

"I find as a fact that the plaintiffs were unable to perform the contract of October 12, 1906, and the supplements thereto because of the failure of the defendants to make payments and advancements to the plaintiffs in conformity with the provisions of said contract and said supplement, and I rule as a matter of law that the defendants are not entitled to recoup for any alleged damages occasioned by the failure of the plaintiffs to perform said contracts."

The defendant claims that the plaintiffs are not entitled to recover at all, because they say they unwarrantably abandoned the operations.

The first of these three cases, and the one which is now under consideration, as originally started, was an action to recover damages in the nature of profits lost through alleged breach of contract by the landowner.

Passing an unnecessary account of preliminaries, that case was changed into one with a declaration in quantum meruit against which the defendant directed a plea of recoupment.

Under the quantum meruit count, the plaintiffs seek to recover the value of improvements of the kind covered by clause 5 to which I have referred, and which it is claimed were beneficial to the landowners.

There was a supplemental contract, an assignment, and there were letters containing conditions and modifications of the original contract; but I do not see that they have any special pertinency to the particular questions which I am now considering.

Under the original contract of October 12, 1906, large sums of money had been expended in the construction of roads and camps in and through the territory covered by the contract; but such expenditures were made under the following circumstances:

For the purpose of facilitating the operations, the territory in question was divided into 15 parts, and the operations in eleven of the subdivisions were let to subcontractors who, by the terms of the contracts between them and the plaintiffs, built camps, bridges, and made the roads upon the territory operated by them; the cost of the roads and the camps being included in the contract price paid them by the plaintiffs. In the other four, the roads and camps and other improvements were made by the plaintiffs themselves.

The referee has found that the reasonable value of the improve-

ments upon the entire territory was \$16,285, and if as a matter of law, upon the facts and findings, the plaintiffs are entitled to recover, that they should have that sum, with interest from the date of the writ, and if as a matter of law they are not entitled to recover for all the improvements, but only for the improvements made by them personally, that they should have under their quantum meruit count \$5,523.02.

Under the referee's finding, the defendant's objections and exceptions, and the plaintiffs' claim, two questions are raised: First, whether the plaintiffs are entitled to recover anything (I am now speaking of No. 555); and, if so, whether it shall be for all the improvements, including those made by the subcontractors or only for such as were made by themselves.

The referee has found that the plaintiffs ceased operations, because the defendant failed to make payments and advancements which they should have made, and for that reason that the plaintiffs were unable to perform the contract.

The defendant moves for judgment notwithstanding this finding, because it says it is not supported by the evidence, or, to be more exact, perhaps, that there is no evidence to support it, and, further, that failure to make payments in and of itself is not a justification for abandoning a contract.

[1] Upon the question whether there is sufficient evidence or any evidence to justify a distinct finding like the one here, I must keep in mind the well-established rule that the finding of a tribunal, whether it be a master, a referee, or a judge, who sees and hears the witnesses, and who is in the environment of an oral hearing, is entitled to great weight, and that any tribunal which has the authority, and is under the duty, to review a finding of fact, should approach the question of its disturbance with great caution. It has been frequently said, and more frequently in modern days than in the older days, that in order to justify rejecting the finding of one who sees the witnesses and gets hold of all the circumstances incident to an oral trial, it must clearly appear that error has been made. The most recent expression in that line is that of the Supreme Court in the case of *Teodora Arana de Villanueva v. Mariano P. Villanueva*, 239 U. S. 293, 36 Sup. Ct. 109, 60 L. Ed. —, in an opinion handed down December 6, 1915, in which Chief Justice White says, in effect, that the circumstances must be such as to give rise to that conviction of clear error which must be entertained in order to authorize a reversal of the findings. See, also, *Bank v. Shackelford*, 239 U. S. 81, 36 Sup. Ct. 17, 60 L. Ed. —.

This rule is based upon considerations of public policy which require that litigation should come to an end, and upon the supposition that as among masters, referees, and judges of equal experience that the one who sees the witnesses and hears all the evidence is more likely to be right than the one who only hears arguments and examines the papers in a case.

The referee in this case was selected by the parties. He is a man of ability, and one who is careful and painstaking in his work.

The defendant's contention is that there is nothing except the evi-

dence contained in the so-called agreed account which bears upon this question of failure of payment, but the referee says:

"There was considerable conflict in the evidence as to what caused the plaintiffs to cease operations, but I find the cause to have been the failure on the part of the defendants to make payments and advancements," etc.

I accept such statement of the referee in a complicated case like this as one entitled to great weight.

While I do not wish it to be understood that I have read all of the evidence in this case, I do say that I have looked into it enough to see that there were disputes as to what was due, and other circumstances tending to show that the plaintiffs were embarrassed by reason of the financial condition for which the defendant was in a sense responsible, and that the circumstances are such as to put it beyond me to say that the referee was clearly in error in the finding which he made.

[2, 3] The referee having found that the plaintiffs abandoned their operations by reason of embarrassment resulting from nonpayment, it follows that there is no ground for recoupment. The point is taken that failure to pay does not amount to a breach of contract. I have considered the authorities upon that question, and it seems to me that much depends upon the question of their application to given situations, and while nonpayment might not amount to a breach in some situations, still, looking at the question as a practical one, it must be apparent that a party engaged in the woods and carrying on operations of the kind involved here might under certain circumstances be prevented from going forward if the party with whom he had the contract failed to make payment according to its terms; and the referee having found in this case that the plaintiffs were unable to perform the contract because of the failure of the party with whom they were operating to make payments in conformity to their agreements, I find and rule that such failure was a breach which justified the plaintiffs in not performing what the referee finds they were unable to perform because of the failure of the defendant to do what it should have done. It would seem that the authorities which distinctively apply themselves to a situation like this sustain such a view.

[4] The findings of the referee that the defendant was guilty of a breach of contract, and, in effect, that the plaintiffs' abandonment of the operations was warrantable, are approved, and I rule that under such circumstances the plaintiffs are entitled to recover under their quantum meruit count, and to this the defendant has an exception.

[5] I have not, however, discovered any plain principle upon which the right to recover for permanent improvements made by the subcontractors inures to the plaintiffs; therefore the judgment in No. 555 should be for \$5,523.02, which covers the value of the beneficial improvements made by the plaintiffs themselves, and to this ruling the plaintiffs have an exception.

If the finding of the referee in respect to the breach on the part of the landowner is to stand, many of the exceptions and requests of the defendant become wholly immaterial, and an examination of the exceptions and requests of the respective parties has not disclosed any

substantial reason for either setting aside or recommitting the report. It is possible that some of the rulings in the course of the trial involved technical error, but it is not perceived that substantive rights would be violated by a refusal to set aside or recommit the report upon that ground. The exceptions on both sides are overruled, subject to the right of the parties to raise such questions about them as they may desire for the Circuit Court of Appeals.

[6] Now, as to cases numbered 556 and 569, in these cases, which were considered together by the referee, the accounting and findings were made upon the theory, if I understand the cases correctly, that, the plaintiffs having justifiably ceased operations, they were entitled to recover for things done according to contract prices and values established by the parties themselves. This would seem to be the correct view.

In the familiar case of *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713, the plaintiff was the one who broke the contract, and, breaking away from the old rule that a party who had not fully performed his contract could not recover at all, it was there held that one breaking a contract might recover for benefits, if there were any above damages, resulting from nonfulfillment.

In the cases at bar, the plaintiffs were not the party at fault, and the nonfulfillment resulted from the fault of the defendant, and the theory upon which the referee made his finding as to the amount due is sustained, and to this ruling and finding the defendant has an exception.

In these two cases, as well as in case No. 555, the finding being that the operations ceased by reason of the fault of the defendant, a finding which is sustained upon this hearing, it follows that the defendant has no standing in respect to its position under the doctrine of recoupment.

Upon the referee's accounting, he finds a balance of \$27,883.18 due the plaintiffs in the two actions numbered 556 and 569, with interest from May 2, 1908. There is apparently nothing in the record which enables me to determine what part of the \$27,883.18 should go into judgment in the respective cases. It may be quite immaterial as to how it is apportioned. If it is material, Burns P. Hodgman is appointed commissioner to ascertain what part of the \$27,883.18 should be entered in No. 556, and what part in No. 569.

Let judgment be entered in No. 555 for \$5,523.02, with interest from the date of the writ, and let judgment be entered in Nos. 556 and 569 for \$27,883.18, in accordance with the apportionment to be made by Mr. Hodgman, with interest from May 2, 1908.

In re HARDY.

(District Court, S. D. Georgia. February 23, 1916.)

BANKRUPTCY ⚡399(3)—**EXEMPTIONS**—**LOSS BY CONCEALMENT OF ASSETS.**

The Constitution of Georgia allows to the head of a family an exemption of property to the value of \$1,600. Code Ga. 1910, § 3380, provides that every person claiming such exemption must make a full disclosure of all personal property of which he may be possessed; that if personal property is fraudulently concealed no exemption shall be made in his favor until it is delivered up, and that a debtor guilty of willful fraud shall lose the exemption. A bankrupt, after verifying his schedules, returned to his store and took from the safe and cash drawer checks which he had not scheduled, and distributed the amounts thereof among his most pressing creditors, most of the payments being made after adjudication entered. He also turned over to his brother, to whom he was indebted, fresh meat on hand when he closed the store, claiming that he feared it would spoil, and permitted his wife to spend for necessities checks aggregating a few dollars. He never offered to account for any of the money or other property so kept back, or to surrender it to the trustee. *Held*, that he violated, not only the state statute, but the Bankruptcy Act, and it was the duty of the court to deny him his exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⚡399(3).]

In Bankruptcy. In the matter of Frank T. Hardy, bankrupt. On petition for review of an order of the referee denying a homestead exemption to the bankrupt. Petition overruled, and exemption denied.

Bennet & Harrell, of Quitman, Ga., for bankrupt.

Branch & Snow and M. Baum, all of Quitman, Ga., for trustee and objecting creditors.

LAMB DIN, District Judge. Frank T. Hardy, the bankrupt, on February 17, 1915, verified his petition and schedules in voluntary bankruptcy, and same were filed and an order of adjudication entered therein on February 19th. The bankrupt in his schedules claimed as exempt the stock of goods, fixtures, and furniture and the notes and accounts due him in his business, which was that of retail grocer in Quitman, Ga. The trustee set apart said property as exempt, and thereupon the trustee and certain of his creditors filed their objections to the allowance of the exemption on the ground that the bankrupt had been guilty of willful fraud in the concealment of a part of his property from his creditors, giving specifications of the same. The referee heard these objections, and sustained same, and denied the exemption, and the bankrupt filed his petition to review this order of the referee, and that is the question now before me for decision.

1. Under Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (Comp. St. 1913, § 9590), the exemption to be allowed the bankrupt in this case is governed by the laws of the state of Georgia. The Constitution of the state allows to a head of a family an exemption of property to the value of \$1,600. Section 3380 of the Code of Georgia of 1910, which is applicable to this constitutional exemption, omitting the immaterial portions, is in the following language:

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

"Sec. 3380. *Schedule Must be Full; Effect of Fraudulent Omission.* It shall be the duty of each and every person who claims the benefit of the exemption allowed in this article, as the allowance is a liberal one, to act in perfect good faith; and as it is in the power of the debtor, claiming the exemption of personal property, to conceal part of his property or money, and to claim the balance as exempt, it shall be the duty of such debtor, when he takes steps in the court of ordinary to have said exemption of personal property set off to him, to make a full and fair disclosure of all the personal property, including money, stocks, and bonds, of which he may be possessed at the time, * * * and if the money or other personal property of which he is possessed at the time of his said application, or at the time he obtains the order of court setting off the property exempt, is fraudulently concealed, or is not delivered up for the benefit of his creditors, no exemption shall be made in his favor till it is so delivered up; and all orders of court obtained by the fraudulent concealment of property as aforesaid, or obtained while the debtor had personal property, money, stocks, or bonds which he kept out of the reach of the levying officer, or did not in good faith deliver up for the benefit of his creditors, shall be null and void and of no effect. * * * The debtor guilty of willful fraud in the concealment of part of his property from his creditors, of which he is possessed when he seeks the benefit of the exemption, shall, on account of his fraud, lose the benefit of such exemption, and his property shall be subject to the payment of all just debts which he owed at the time such fraud was committed."

In order, therefore, to determine the question whether the bankrupt should be allowed his exemption or not, it is necessary to ascertain whether the bankrupt made a full and fair disclosure of all his personal property, or was guilty of willful fraud in the concealment of a part of his property from his creditors, as set out in the section of the Code above quoted.

The trustee and objecting creditors, in their objections which they filed to the allowance of the exemption, set out 13 specifications of money, checks, and other personal property, which they claim that the bankrupt did not set out in his schedules, but willfully and fraudulently concealed from his creditors—some of same being as follows: (1) Checks amounting to \$104.40 collected from one W. J. McDonald by bankrupt; * * * (3) the sum of \$60.64, same being represented by cash and checks held by bankrupt when he filed his petition in bankruptcy; (4) a large amount of fresh meat then owned by him; * * * (10) a large amount of mill checks issued by the Interstate Lumber Company to its employes, which had been taken in by the bankrupt in the conduct of his business and were held by him when he filed his schedules. None of these items of checks, cash, and other articles were set out by the bankrupt in his schedules, which he swore to and filed in court.

It is the opinion of the court that the objectors failed to sustain their objections as to the other items not enumerated above, and therefore it is not necessary to set out same in this opinion. However, the court has carefully read and reread the evidence in the case, and is of the opinion that the first, third, fourth, and tenth specifications, which are set out above, are amply sustained by the evidence.

2. In the answer which the bankrupt filed to the above-mentioned specifications, he admitted receiving two checks, which were given to him by W. J. McDonald, amounting to \$104.40, and also admitted taking in cash and checks from his cash drawer the sum of about

\$40.19, making a total of \$144.59; but he claimed that he paid all this money out to his creditors, and he gave the names and amounts which he paid to each, as follows: \$71.40 to his brother, J. J. Hardy; \$17 to his clerk, J. A. Prosser; \$6 to his bookkeeper, W. T. Bush; \$25 to his wife; \$5.65 to Dr. Parks, and \$5 to Dr. Donaldson; and some amounts paid as insurance. He also stated in his answer that he discovered these McDonald checks and this money in his safe and cash drawer after he had prepared and filed his schedules in bankruptcy. He also admitted that he had on hand a small amount of fresh meat when he closed his store, but said that, knowing that same would not keep until his trustee was elected, he turned it over to his brother, J. J. Hardy, to whom he was largely indebted at the time. He admitted also in his answer that he had \$3.15 worth of lumber mill checks on hand when he closed his business, and said that his wife spent same for necessaries. He also averred in his answer, in conclusion, that he had surrendered all his property and money to his creditors, and had kept nothing for himself and his family, and that they were in destitute circumstances. He attached a pauper affidavit to his petition in bankruptcy, in which he stated that he was without and could not obtain money with which to pay the filing fees.

The evidence before the referee showed that the bankrupt prepared and verified his schedules about 7 or 8 o'clock on the night of February 17th, and then went back to his store and took from the safe the two McDonald checks, amounting to \$104.40 as aforesaid, and also took from the safe and cash drawer about \$40.19 in cash and small checks. The bankrupt testified that he did not know that the McDonald checks were in the safe until after he verified his schedules. Still he had directed his bookkeeper on the 16th to get these checks from McDonald, and the bookkeeper placed them in the safe on that day. He must therefore have known of the existence of these checks; at any rate, it was his duty to ascertain what checks, money, and other property he had on hand, and to make a true statement of same in his schedules. After getting this money and these checks, the bankrupt did not go back to his attorneys and amend his schedules, as he should have done, but kept the same and proceeded to distribute same among his most pressing creditors. His petition and schedules did not reach the office of the clerk of this court until the morning of February 19th; but the bankrupt, according to the evidence, was ignorant of this delay in the mails.

It is clear from the evidence that most, if not all, of this money and these checks was paid out after the petition was filed and the adjudication entered. The largest amount, \$71.40, was paid to his brother, J. J. Hardy, who testified that he kept after his brother until he got the money. He also testified that this amount was paid him in three payments, and that the last payment consisted of one of the checks of W. J. McDonald, which amounted to \$54.40. The bankrupt testified that he paid his brother one or two days after he went into bankruptcy. He paid Dr. Parks \$5.65 on March 22d, and Dr. Donaldson \$5 two or three weeks after he went into bankruptcy. J. J. Hardy further testified that it was not until after he prepared his proof of

claim against the bankrupt that he had a final settlement of his account with the bankrupt; but he said that full settlement was made before March 1st, which was the date of the first meeting of the creditors. At this first meeting of the creditors the proof of the debt of J. J. Hardy against the bankrupt was read out for the full amount in the hearing of the bankrupt, and the bankrupt made no objection to the allowance of same. The fresh meat, which the bankrupt feared would spoil, was turned over to J. J. Hardy on his account a day or two after F. T. Hardy went into bankruptcy. In his testimony at a meeting of the creditors held on March 19th, the bankrupt admitted that he had \$2.30 of the mill checks above mentioned at home on the mantel at the time. The bankrupt never offered to account for any of the money or other property so kept back by him, or to surrender same to the trustee. These were all trust funds belonging to his creditors, and the bankrupt should have kept same intact, and surrendered same to his trustee.

From the foregoing evidence, the court is constrained to uphold the referee in his decision, and to decide that the bankrupt did not make a full and fair disclosure of all his personal property, as required by law, but that he was guilty of willful fraud in concealing the checks, money, and other articles above mentioned. It is clear that he withheld this property from his trustee willfully and with intent to defraud his creditors. The proven facts are utterly inconsistent with ignorance or an innocent intent on his part. Such being the case, it is the duty of the court to enforce the Georgia statute on the subject and to deny the bankrupt his exemption. The destitute condition of the bankrupt and his family appeals to the sympathy of the court, yet his violation of not only the Georgia statute, but the provisions of the Bankruptcy Act itself, is so clear and palpable that the court cannot consult its feelings in the matter. The bankrupt yielded to the temptation to save something from the wreck so as to meet the necessities of his family, and in doing so he sacrificed his claim to his exemption. By unlawfully withholding and concealing \$150, he lost the exemption of \$1,600, which would otherwise have been allowed him. This is a forcible illustration of the old maxim that "honesty is the best policy."

It is not necessary to cite any decisions on this question, but it may be proper for the court to refer to the very thorough opinion rendered by Judge Newman, of the Northern District, on the same subject, in *Re Cochran* (D. C.) 185 Fed. 913. In the case of *Torrance v. Boyd*, 63 Ga. 22, the debtor failed to schedule articles of personal property amounting in value only to \$17.50, and yet his exemption was denied him on account of this concealment. In the case of *McNally v. Mulherin & Co. et al.*, 79 Ga. 614, 4 S. E. 332, the second headnote is in the following language:

"A debtor who applies for an exemption of personalty must make a full and fair disclosure of all his property. He cannot retain any amount of money which he may deem necessary and needful to employ attorneys, pay licenses and carry on business, but he must account for it; and if the schedule exceeds the amount to which he is entitled as an exemption, he must produce the money in court, and pay it over so that his creditors may get it."

The second headnote in the case of *McWilliams v. Bones*, Trustee, 84 Ga. 199, 10 S. E. 723, which is appropriate here, is as follows:

"The sale by the applicant, after making his application, of an iron safe which he had placed on his schedule, was sufficient to have defeated the application, unless he accounted for the money the safe brought, and delivered up the same for the benefit of his creditors."

The bankrupt has nobody to blame but himself. No matter how great were the necessities of himself and family, he should have acted honestly and fairly with his creditors and with the court, and if he had done so he would not have lost his exemption. Not only did he violate the Georgia statute on the subject, but he also apparently violated the provisions of section 29 of the Bankruptcy Act (Comp. St. 1913, § 9613) in making the pauper affidavit to his petition in bankruptcy, and in concealing while a bankrupt from his trustee the above-mentioned property belonging to his estate. His brother also apparently violated the provisions of the same section of the Bankruptcy Act in receiving payment of his debt of \$71.40 against the bankrupt after he knew that his brother had gone into bankruptcy.

3. The referee did not commit any error in the other matters urged in the petition for review.

The court, therefore, has no other alternative but to overrule the petition to review the order of the referee and to deny the exemption asked for.

An order will be entered accordingly.

In re ASHLAND EMERY & CORUNDUM CO.

(District Court, D. Massachusetts. February 1, 1916.)

No. 20611.

1. BANKRUPTCY ⚡346—PAYMENT OF CLAIMS—PRIORITY—TAXES.

Under Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 (Comp. St. 1913, § 9648), providing that the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, etc., in advance of the payment of dividends to creditors, taxes are placed in a class by themselves, and are not preferred claims, but stand ahead of preferred claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. ⚡346.]

2. BANKRUPTCY ⚡346—PAYMENT OF CLAIMS—PRIORITY—TAXES.

A state has the right to charge upon taxes not paid when due such interest as will make the payment, when received, equivalent to payment at the appointed time, and this interest is a part of the tax, and entitled to priority of payment under Bankr. Act, § 64a.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. ⚡346.]

3. BANKRUPTCY ⚡346—PAYMENT OF CLAIMS—PRIORITY—TAXES—"INTEREST"—"PENALTY."

"Interest" is ordinarily understood as a charge for the use of money or damages for its detention, while a "penalty," as applied to the non-payment of taxes when due, is the punishment imposed for failure to

make the payment on time; and while interest on taxes not paid when due is a part of the taxes, and entitled to priority of payment under Bankr. Act, § 64a, penalties are not a part of the taxes and are not entitled to such priority, especially where the estate was in course of administration during the entire period when they accrued.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. ☞346.]

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

4. BANKRUPTCY ☞346—PAYMENT OF CLAIMS—PRIORITY—TAXES.

In determining whether a statute providing that if a tax remains unpaid after it becomes due it shall bear interest at the rate of 1 per cent. per month until paid imposes a penalty for nonpayment of the tax, or merely provides for interest on the tax, the fact that the statute calls the amount to be paid interest is not conclusive upon the bankruptcy court, and that court will examine and decide the question for itself.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. ☞346.]

5. BANKRUPTCY ☞346—PAYMENT OF CLAIMS—PRIORITY—TAXES—"INTEREST"—"PENALTY."

3 Gen. St. N. J. 1895, p. 3339, § 261, provides, relative to the franchise tax assessed against corporations, that if the tax remains unpaid on the 1st day of July, after it becomes due, it shall thenceforth bear interest at the rate of 1 per cent. per month until paid. Under 3 Gen. St. 1895, p. 3704, § 7, the legal rate of interest is fixed at 6 per cent. per annum. *Held*, that 1 per cent. a month exceeds what is fairly required to make good the loss to the state from the delay in payment, and as to such excess above legal interest is not interest, but a penalty imposed for failure to pay promptly, and hence such excess is not entitled to priority of payment in bankruptcy, especially as this penalty becomes due, whether proceedings are instituted to collect the tax and expenses thereby incurred or not.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. ☞346.]

In Bankruptcy. In the matter of the Ashland Emery & Corundum Company, bankrupt. On review of order of the referee disallowing a claim. Order reversed, and claim allowed in part.

Reginald H. Johnson, of Boston, Mass., for trustee.

Francis H. McGee, of Trenton, N. J., for creditor.

MORTON, District Judge. This certificate from Mr. Referee Warner presents the following case:

The Ashland Emery & Corundum Company is a New Jersey corporation, which became bankrupt on March 17, 1914. The state of New Jersey imposes upon corporations organized under its laws a yearly franchise tax, which is assessed as of January 1st, but not payable until the first Monday of June. The statute further provides:

" * * * If the tax of any company remains unpaid on the first day of July, after the same becomes due, the same shall thenceforth bear interest at the rate of one per centum for each month until paid." General Statutes of N. J. p. 3339. (Act of 1884, as amended in 1892.)

Under this law a tax amounting to \$1,315.90 was duly assessed against the company, and, as all parties agree, became entitled to pay-

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

ment as provided in Bankruptcy Act, § 64a. It was not paid, however, by the trustee until April 1, 1915. On that date the trustee paid the face of the tax. He refused to pay the sum of \$118.43, added to the tax as interest under the New Jersey statute above quoted. It is this sum which forms the subject-matter of the present controversy; the state of New Jersey claiming to be entitled to it as part of the tax, and the trustee contending that it is not part of the tax, at least to such an extent as to be entitled to priority under the section referred to. The learned referee held that interest was not allowable, and disallowed the claim.

[1] Under section 64a taxes are placed in a class by themselves. They are not preferred claims against the estate; they stand ahead of preferred claims. If it be not the duty of the trustee to ascertain what they are and to pay them without any proof being made, it is clear that the court is bound to order him to pay them upon application therefor. What the act requires to be paid is "all taxes legally due and owing by the bankrupt" (section 64a); and under section 17 the bankrupt's liability for taxes not paid is not discharged.

[2] The state clearly has the right to charge upon taxes not paid when due such interest as will make the payment, when received, equivalent to payment at the appointed time. It seems to me that this interest is part of the tax and entitled to priority under the section in question; and it was so decided in *Re Kallak* (D. C.) 147 Fed. 276; 2 *Remington on Bankruptcy*, § 2144. The learned referee was of opinion that the decision in *Sexton v. Dreyfus*, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244, that a secured creditor could not take interest after the filing of the petition, applied to this claim; but for the reasons above suggested and those referred to in *Re Kallak*, supra, I am unable to agree with that conclusion.

[3] If the charge here in controversy is to be regarded as interest, the trustee ought to pay it. Penalties, however, stand upon a different footing. It cannot be said that a penalty imposed for failure to pay a tax is a part of the original tax, in the sense that interest is. By "interest" is ordinarily understood a charge for the use of money or damages for the detention of it. A penalty, as applied to cases of this character, means a punishment imposed for failure to make the payment on time. Section 64a contains no provision for the payment of penalties; and I do not think it can fairly be construed to include them, especially when, as here, the estate was in course of administration during the entire period when they accrued. It does not seem just, nor to have been the intention of Congress, that out of a delay in paying the tax caused by the bankruptcy proceedings the state should make a profit or exact a penalty at the expense, for instance, of workmen employed by the bankrupt.

[4] The final question then is whether the 1 per cent. per month is interest on the tax, or a penalty for nonpayment of it. That it is called interest in the statute is not, of course, conclusive upon the bankruptcy court, which will examine and decide the question for itself. *New Jersey v. Anderson*, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284.

[5] The test by which such determination is to be made in actions ex contractu is established.

"It may, we think, fairly be stated that, when a claimed disproportion has been asserted in actions at law, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach *apparent on the face of the contract*, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether bona fide to fix the damages or to stipulate the payment of an arbitrary sum as a penalty, by way of security." White, J., *Sun Printing Association v. Moore*, 183 U. S. 642, 672, 673, 22 Sup. Ct. 240, 252 (46 L. Ed. 366).

There may be doubt under *New Jersey v. Anderson*, supra, whether this court is restricted in determining the question under discussion to the face of the statute.

Assuming, however, that it is, it seems to me plain, and I accordingly find, that 1 per cent. a month exceeds what is fairly required to make good loss to the state from mere delay in payment of the tax, and as to such excess is not interest, but constitutes a penalty imposed for failure to pay promptly. The actual damages sustained by the state of New Jersey from the delay are not obscure nor difficult to estimate. What the state lost was the use of the money. Its damages therefor are the commonest form known to the law, and the most certain of estimation. They are established by statute in New Jersey for individuals at 6 per cent. per annum. Gen. Stats. of N. J. p. 3704. It is difficult to see how, as damages, they can be larger in the case of the state.

"* * * It is sufficient to say that all damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages." Waite, C. J., *Loudon v. Taxing District*, 104 U. S. 771, 774 (26 L. Ed. 923).

The sum here claimed is double the statutory interest and almost double the highest rate of interest which national banks are allowed to charge under United States statutes. Rev. Stats. U. S. § 5197 (Comp. St. 1913, § 9758). Nor is this imposition made for the purpose of reimbursing the state for expense incurred in collecting the tax. It becomes due regardless of whether proceedings are instituted or not. No proceedings appear to have been instituted in this case at the time when the demand for 1 per cent. a month was made by the state upon the trustee. In this respect the New Jersey statute differs from the corresponding statute in Massachusetts. Rev. Laws of Mass. c. 14, §§ 56, 66.

In *Mason v. Callender*, 2 Minn. 350 (Gil. 302), 72 Am. Dec. 102, it was held after careful consideration that the provision in a note, increasing the rate of interest upon default at maturity from 3 per cent. a month to 5 per cent. a month, was in the nature of a penalty and was unenforceable.

"The books abound with cases holding this view, and they universally declare the doctrine that where the stipulation is to pay a greater sum, on default of paying a lesser one, no form of words will change it from a penalty to liquidated damages. Such stipulations are by their nature and effect neces-

sarily comminatory, and to allow any arrangement of words to change that effect would be to permit the parties to override a well-fixed rule of law that the rate of interest shall be the measure of damages. The case at bar falls distinctly within this latter class; the stipulation is that, if the defendants fail to pay the principal sum of the note with interest on a certain day, they will pay that sum with increased rate of interest upon principal and interest, or in other words if they fail to pay the lesser sum as agreed they will pay a greater. The greater sum must be held to have been inserted in terrorem, and as a penalty. I am unable to find any authority that satisfies me of the propriety of abandoning this long and well established rule." Flandrau, J., *Mason v. Callender*, supra, 2 Minn. 369 (Gil. 322) 72 Am. Dec. 102.

The order of the referee disallowing the claim is reversed; the claim is allowed for interest at 6 per cent. on the face of the tax from July 1, 1914, when the tax became due, to April 1, 1915, when it was paid, the amount thereof being \$59.22; the balance of the claim is disallowed.

WINDOW GLASS MACH. CO. et al. v. BROOKVILLE GLASS & TILE CO.

(District Court, W. D. Pennsylvania. February 9, 1916.)

No. 63.

1. DISCOVERY ⚡69—OBJECTIONS TO INTERROGATORIES—WAIVER.

A party which, without any order of court requiring it to do so, answered improper interrogatories propounded by the opposite party, could not afterwards be heard to say that they ought not to have been propounded.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 83; Dec. Dig. ⚡69.]

2. PATENTS ⚡292—INFRINGEMENT SUITS—DISCOVERY.

Equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) authorizes either party to file interrogatories for the discovery of material facts and documents. In a patent infringement suit, plaintiffs filed interrogatories concerning defendant's patents and variations therefrom, and defendant voluntarily answered, giving all the information it believed to be called for, and producing drawings showing the apparatus employed by it. Plaintiffs filed additional interrogatories or objections concerning certain points not made clear by the drawings and descriptions furnished. Held that, as defendant had apparently fully intended to disclose the apparatus and methods used by it, and as plaintiffs had made no attempt to procure an inspection of the apparatus and its use, defendant would not be required to answer further interrogatories.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⚡292.]

3. PATENTS ⚡312—INFRINGEMENT SUITS—EVIDENCE.

In a patent infringement suit, the best evidence on the question of infringement is a comparison of the patented devices.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. ⚡312.]

4. DISCOVERY ⚡36—RIGHT TO DISCOVERY—FISHING EXPEDITION.

A party will not be required to answer interrogatories propounded under equity rule 58, where they suggest a "fishing expedition," or at least an attempt to pry into the adversary's case.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 49; Dec. Dig. ⚡36.]

5. PATENTS ⇐292—INFRINGEMENT SUITS—DISCOVERY.

Supplementary equity rule 7, § 2, of the District Court for the Western District of Pennsylvania (228 Fed. viii), provides that, as soon as a cause is at issue, either party may apply to the court, on notice, for directions concerning further procedure; that on such application the court shall ascertain the real points of controversy, to avoid the taking of evidence as to issues not insisted upon, and may make orders concerning further procedure. In a suit for the infringement of 16 patents, in which there were 156 claims, defendant filed interrogatories under equity rule 58, one of which asked which of such claims would be relied upon at the trial. *Held* that, while defendant was entitled to this information, it should be procured by motion and rule on the plaintiffs, and not by an interrogatory, especially as it was probable that plaintiffs' attorneys were the only persons who knew upon what claims plaintiffs intended to rely, and there is no provision in rule 58 for requiring discovery by an attorney.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⇐292.]

In Equity. Suit by the Window Glass Machine Company and another against the Brookville Glass & Tile Company. On application to require answers to interrogatories. Objections to interrogatories sustained, and neither party required to answer.

Bakewell & Byrnes, of Pittsburgh, Pa., for complainants.

W. G. Doolittle and Kay, Totten & Powell, all of Pittsburgh, Pa., for respondent.

ORR, District Judge. This matter involves questions arising under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) relating to discovery. Both the plaintiffs and the defendant have filed interrogatories, to be answered by opposite parties, respectively. The interrogatories propounded by the plaintiffs to the defendant were answered by the defendant before the matter was brought to the attention of the court. The plaintiffs have filed what they term are objections to the answers of the defendant. The plaintiffs have not answered the defendant's interrogatories, and have filed objections thereto. No order of court has yet been made upon either party with respect to requiring answers to the interrogatories of the opposite party, or with respect to any of the objections filed by either.

[1] We take up first the answers of the defendant to the plaintiffs' interrogatories and the objections thereto. Inasmuch as the defendant has undertaken to answer the plaintiffs' interrogatories, it is not necessary for the court to determine whether the plaintiffs' interrogatories are in proper form, for the reason that, if the defendant is satisfied to answer the interrogatories which may be improper, he cannot afterwards be heard to say that such interrogatories ought not to have been propounded.

[2] Plaintiffs' bill charges the defendant with an infringement of 16 patents, in which there are 156 claims. The patents all relate to apparatus and methods for the manufacturing of glass articles. The defendant denies the validity of plaintiffs' patents in view of prior disclosures, and denies infringement of plaintiffs' patents, and avers that it is operating under 6 patents granted to Robert L. Frink, and

gives the numbers of such patents. The interrogatories filed by the plaintiffs are directed to the apparatus and methods used by the defendant, at the time of and prior to the filing of the bill. It is unnecessary to set them forth at length, because they are 25 in number and they all direct the attention of the defendant to the Frink patents, and to whether there have been variations therefrom, and conclude with the twenty-fifth interrogatory, as follows:

"Is it not a fact that all the Frink patents referred to in the answer show the entire apparatus used by the defendant in drawing cylinders, lowering them on the horses, and cracking them off? If not, please furnish assembly drawings showing the entire apparatus and the relation of the different portions thereof, including the blower's station or pulpit, the take-down device and the horses, and the relation of the said blower's station to the drawing machines."

The defendant, by answers filed, as we have stated, without an order requiring answers, produced "assembled and detailed drawings showing apparatus employed by it, at the time of and prior to the filing of the bill." It goes further to give "all the information it is believed is called for by said interrogatories." It does not answer each of the interrogatories filed by the plaintiffs separately, as it should have done in the case of proper interrogatories properly approved by the court before answers filed. The plaintiffs have raised no question about the improper way in which the defendant has answered, except that they are incomplete and unresponsive in the following particulars:

"All plaintiffs' interrogatories were stated to relate to the apparatus and method used at the time prior to, and at the time of filing the bill of complaint herein. Defendant's answers do not state whether the apparatus shown and described in its answers are the apparatus then used. It is therefore requested that the defendant be required to state whether or not its drawings and statements correctly apply to the machine and method used at that time."

It will be observed that the foregoing objection was unwittingly filed, because it appears the answers of the defendant expressly refer to the time at and prior to the filing of the bill. There follow 15 other specifications of objection, which are all interrogatories. That they are interrogatories, and not objections, may appear from the notice attached thereto, and which was served upon defendant's counsel, which is a notice that the plaintiff "shall present additional interrogatories as per copy attached hereto, the purpose of these being to make clear certain points which are not made clear by the drawings and descriptions furnished." These additional interrogatories relate generally to specific parts of the apparatus or specific steps in the method. One, for instance, the second, contains the statement:

"The drawings supplied by defendant apparently show that there was a cross-head centrally pivoted, etc. * * * Is this correct?"

The court is of the opinion that the objections to the defendant's answers are not well taken, and should be overruled in so far as they are objections, and in so far as they are further interrogatories to be answered by the defendant this court is of the opinion that an answer should not be required thereto. We have arrived at this conclusion because it appears that the defendant has fully intended to dis-

close the apparatus and methods used by it at and prior to the time of the filing of the bill, at its plant for the manufacture of window glass at Brookville, in this district. It does not appear that the plaintiffs have made a request, or that hindrances were thrown in their way, or concealment by the defendant, or deception anticipated.

Rule 58 was not intended to be used to impose unreasonable burdens upon parties, or to require of parties opinions either as to the reading of drawings or as to the functions of particular parts of the machinery. It provides "for the discovery, by the opposite party or parties, of facts and documents material to the support or defense of the cause." Plainly it is intended to aid a party in making out his case, where the ascertainment of facts in support or defense of the cause is *difficult*. We have used the word "difficult," because we have recognized that there is a line of cases holding to the doctrine that discovery will not be permitted if the facts can be otherwise procured. We do not believe that that is a correct expression of the law, because a party should not be put to unnecessary labor or difficulty in making out his case. Yet he should not impose a burden upon the opposite party in requiring the latter to make discovery, if the knowledge of the facts can be procured otherwise with ease. Knowledge of the apparatus and method of the opposite party can be procured with ease by inspection. If there be identity of the plaintiffs' and defendant's apparatus and methods, such identity can be easily ascertained, and be the subject of parol testimony by those who have made such inspection.

[3] The best evidence on the question of infringement is the comparison of the devices of the patents. See 3 Robinson on Patents, § 1041. In *Colgate v. Compagnie Française du Télégraphe de Paris à N. Y.* (C. C.) 23 Fed. 82, is a well-considered opinion by Judge Wallace upon the subject of discovery. It is unnecessary to state the nature of the case in detail, but this quotation is helpful:

"A consideration peculiar to a bill of discovery like the present, in which the complainant seeks a discovery concerning the infringement of a patent, should be adverted to. Courts of equity in patent causes sometimes exercise the power of granting to a complainant an inspection of alleged infringing devices as incidental to ordinary discovery. *Vidi v. Smith*, 3 El. & Bl. 969; *Morgan v. Seward*, 1 Webst. Pat. Cas. 169; *Russel v. Cowley*, Id. 468; *Shaw v. Bank of England*, 22 Law J. Exch. 26."

The case has been cited with approval, though not with respect to the particular quotation we have made, by the Supreme Court in *Carpenter v. Winn*, 221 U. S. 533-539, 31 Sup. Ct. 683, 55 L. Ed. 842.

While the case last cited had under consideration the question whether section 724 of the Revised Statutes (Comp. St. 1913, § 1469), relating to the production of books and writings in the trial of actions at law, and held that the purpose of the section was to provide a substitute for a bill of discovery, in aid of a legal action, yet the opinion contains observations upon the nature generally of a bill of discovery. On page 540 of 221 U. S., on page 685 of 31 Sup. Ct. (55 L. Ed. 842), appears the following language:

"A bill of discovery cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise, or vague guesses is called a 'fishing bill,' and will be dismissed. Story, Eq. Pl. §§ 320 to 325. Such a bill must seek only evidence which is material to the support of the complainant's own case, and prying into the nature of his adversary's case will not be tolerated. The principle is stated by a great authority upon equity thus: 'Nor has a party a right to any discovery except of fact and deeds and writings necessary to his own title under which he claims; for he is not at liberty to pry into the title of the adverse party.' Story, Eq. Juris. § 1490; Kettlewell v. Barstow, 7 Ch. App. Cas. 686, 694."

While the language used was evidently intended to relate solely to bills of discovery in aid of actions of law, yet we see no reason why it should not be equally applicable to bills for relief and discovery, where discovery is merely incidental to the relief sought. A number of the interrogatories propounded in this case, by both plaintiffs and defendant, very fairly, if not fully, disclose an attempt to pry into the nature of the case of the opposite party or parties as the case may be. Many of them appear to come close to the line. However, none of the plaintiffs' further interrogatories should be answered, for the reason that no attempt has been made by the parties to procure an inspection of the apparatus and its use.

[4] The defendant's interrogatories, 51 in number, are in the main subject to the same criticisms hereinbefore expressed with respect to the interrogatories by the plaintiffs. Many of them are questions as to when or where was a particular part of plaintiffs' apparatus first used by the plaintiffs, or either of them. Some of them inquire of the plaintiffs whether they now commercially employ a particular part of the apparatus shown in that particular patent or another particular patent, as the case may be. Question 2 may be quoted as being illustrative of the great majority of the questions.

(2) "Which of the several methods or mechanisms illustrated and described in the 16 patents sued upon were ever used by plaintiffs other than experimentally?"

Indeed, all of the questions, except the first, suggest a "fishing expedition," or at least an attempt to pry into the case of the adversary.

[5] The first interrogatory of the defendant is as follows:

"Which of the 156 claims of the 16 patents sued upon will be relied upon at the trial as infringed?"

It is proper, of course, that the defendant have information with respect to the claims upon which plaintiffs rely; but it does not appear that such information is to be procured under the discovery rule. The interrogatories are intended to be answered by the "plaintiffs by their officers, and especially M. K. McMullen, president of the American Window Glass Company, William L. Monroe, general manager of the American Window Glass Company, and its attorneys, Messrs. Bakewell and Byrnes, who presented the application for patents in suit on behalf of plaintiffs." It is probable that the attorneys are the only ones who know upon what claims the plaintiffs intend to rely, but there is no provision in the discovery rule for requiring an attorney

to make the discovery. This court adopted supplementary rules of practice in equity, and among them rule 7, section 2 (228 Fed. viii), which provides:

"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."

The information required by the first interrogatory propounded by the defendant can be secured under the rule of this court. Again, it has always been the practice to secure such information in pursuance of a motion and rule upon the plaintiff. There is nothing in the equity rules at present in force which has interfered with such a proper practice. We understand that plaintiffs' counsel has agreed to furnish the information asked for in the first interrogatory; but, if not, the information desired can be procured in the way hereinbefore indicated.

Equity rule 58 has been the subject of consideration in a number of adjudicated cases, as, for example, *P. M. Co. v. Ajax Rail Anchor Co.* (D. C.) 216 Fed. 634; *Luten v. Camp* (D. C.) 221 Fed. 424; *Blast Furnace Appliances Co. v. Worth Bros. Co.* (D. C.) 221 Fed. 430; *J. H. Day Co. v. Mountain City Hill Co. et al.* (D. C.) 225 Fed. 622. It is unnecessary to extend this opinion by pointing out a lack of strict harmony between them or to emphasize the points upon which some of them agree.

Neither of the parties are required to answer any of the interrogatories filed. The objections filed by the defendant to plaintiffs' further interrogatories are sustained, and the objections by the plaintiffs to defendant's interrogatories are also sustained.

PATERLINI et ux. v. MEMORIAL HOSPITAL ASS'N OF MONONGAHELA CITY, PA.

(District Court, W. D. Pennsylvania. October 18, 1915.)

No. 1201.

1. CHARITIES ↪45—HOSPITALS—ACTIONS FOR DEATH—SUFFICIENCY OF STATEMENT.

In an action against a hospital and its trustees for the death of a patient, the statement alleged that defendants had substantially completed and occupied a new hospital building and were engaged in removing their equipment and stores of drugs and chemicals thereto, that a pupil nurse in charge of a patient attempted to administer medicine prescribed for him, and with gross negligence gave him instead thereof a dose of poison from which he was killed, that defendants were grossly negligent in keeping such poison in such circumstances as to allow a nurse to make such a mistake, in so conducting the removal of the activities of the hospital from one building to another as to make such mistake possible,

and in the employment of persons charged with the direct management of the hospital and in failing to provide for the patient a safe environment for his care, that it was a custom among hospitals to provide a separate cupboard or closet for the safe-keeping of such poisons and to keep it securely locked with a single key in the custody of some person charged with responsibility therefor, that this custom was well known and universally observed and had theretofore been observed by defendants, that they neglected such custom during the removal of the hospital and allowed the stock of poisons to be taken out of their customary depository and removed without being thus protected and left without such protection for two days before the occurrence of the mistake. *Held*, that a demurrer should be sustained, if for no other reason, because of the indefinite character of the negligence charged to the corporation and its trustees, as the statement did not show what particular agents of the corporation committed a wrongful act or neglected a duty owing the patient, and did not even state where the poison was kept or under what circumstances or in what way they were negligent in moving the hospital or in employing persons charged with the management of the hospital.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 80, 81, 102-104; Dec. Dig. ⚡45.]

2. CHARITIES ⚡45—HOSPITALS—LIABILITY FOR INJURIES OR DEATH.

A charitable hospital for the care and treatment of the diseased and injured and its trustees charged with the management thereof were not liable for the negligence of a nurse in administering poison to a patient by mistake, the nurse not being incompetent or the corporation or its officers negligent in selecting her.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 80, 81, 102-104; Dec. Dig. ⚡45.]

3. COURTS ⚡372—PRECEDENTS—DECISIONS OF STATE COURTS AS PRECEDENTS IN FEDERAL COURTS.

While the decisions of a state court upon a general legal proposition not covered by statute are not binding upon the federal courts, they are naturally given considerable weight by such courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. ⚡372.]

At Law. Action by John Paterlini and wife against the Memorial Hospital Association of Monongahela City, Pennsylvania. On demurrer to the amended statement. Demurrer sustained.

A. O. Fording, of Pittsburgh, Pa., for plaintiffs.

McIlvain, Murphy, Day & Witherspoon, of Pittsburgh, Pa., and Andrew M. Linn, of Washington, Pa., for defendants.

THOMSON, District Judge. This is an action brought by the parents against a hospital and its trustees to recover for the death of their minor son, who lost his life by a dose of poison administered to him through the mistake of a nurse while a patient in the hospital. To the original statement as filed the defendants demurred, and on the argument the court stated that the statement of claim was entirely too vague and general to support the action. Thereupon the plaintiffs asked leave to file an amended statement of claim. To this also the defendants demur, the causes of demurrer assigned being in substance as follows: First, that the amended statement does not set forth a cause of action; second, that if a cause of action be shown there can

be no recovery had upon said amended statement for the reason that more than one year has elapsed between the death of plaintiffs' son and the filing of the amended statement; and, third, that the period of limitation in such actions in Pennsylvania is one year from the date of the death.

I cannot say that the amended statement introduces a new cause of action. The original cause of action, namely, the negligence which caused the boy's death, has not been departed from or abandoned. In the amended statement, the plaintiffs set forth certain additional circumstances comprising the alleged negligence; but it cannot be said that thereby the plaintiffs introduce a new cause of action. The case will therefore be treated on the theory that the amendment should be allowed.

[1] The amended statement alleges: That the defendant, the Memorial Hospital Association, is a corporation organized under the laws of Pennsylvania and is a citizen of the Western district thereof, and that the other defendants are citizens of said district. That the hospital is a charitable and educational corporation organized for the purpose of the reception, surgical treatment, nursing, and care of the diseased and injured and for the mitigation of bodily suffering and for the maintenance of a training school for nurses. That the defendants, naming them, during the months of April, 1914, and for a long time prior thereto, were trustees of the hospital, and that in them were vested the oversight and management of the same and of all its affairs, and were the active agents of the corporation in the control and management of its activities. That in the month of April, 1914, the defendants had substantially completed, and thereupon occupied, a new building erected for the use of the hospital. That on or about the 25th of April defendants were engaged in removing their patients, their force of physicians, nurses, attendants, and servants, and their equipment, and their stores of drugs and chemicals from the old to the new building. That the plaintiffs' son was one of the patients. That he was under treatment at the hospital and had almost recovered. That the said boy had been received and treated for the compensation of \$7 a week. That on April 25, 1914, the hospital put a pupil nurse in charge of the said patient, and the nurse in attempting to administer some medicine prescribed for him, with gross negligence, gave to the patient, instead thereof, a dose of bichloride of mercury, from which he was almost instantly killed. That the defendants were grossly negligent in the management of such hospital in keeping such violent poison in such circumstances as to allow a nurse, whether careful or negligent, to make such a mistake. That they were negligent in so conducting the process of removing the activities of the said hospital from one building to another as to make such a mistake possible. That the defendants were negligent in the employment of persons charged with the direct management of the hospital, and especially with its removal. That the defendants were negligent in failing to provide for the patient a safe environment for his care, and particularly and more specifically for the reason that it was a custom among hospitals to provide a separate cupboard or closet for the safe-keeping therein of such poisons, and

for keeping them separate and apart from all other drugs, and to keep such cupboard or closet securely locked, with a single key in the custody of some person charged with the responsibility thereof, so that no physician or nurse, by design or mistake, could obtain any poison in such hospital without applying to the custodian. That by such precautions the danger of accidents or mistakes was greatly reduced. That this custom has prevailed in the commonwealth for years is well known and universally observed, and that the defendants had theretofore observed such custom. That this is a simple, expedient, and well-known precaution, and that the defendants neglected such custom during the process of the removal of the said hospital from one building to another, and neglected the customary precautions, in that in the said removal they allowed the stock of poisons then on hand to be taken out of their customary depository for removal, and to be removed without being thus protected, and, after removal to the new building, to be left without such separate care, and without the usual protection of lock and key, for two days before the occurrence of the mistake which caused the death of the patient.

I regard the averments of the statement as too vague and general to meet the requirements of good pleading. The corporation acts only by its agents. What particular agent or agents committed a wrongful act, or neglected some duty owing to the plaintiffs, should be set forth clearly and definitely, so that defendants might be fully informed of and be prepared to answer the specific matter charged against them. I think the declaration wholly fails in these requirements of pleading. It is not even stated where the poison was kept or under what circumstances. It is not stated in what way defendants were negligent in removing the "activities of the said hospital" from one building to another. In what way they were negligent in the employment of persons charged with the management of the hospital, or in the duty of its removal to the new building. If for no other reason, I think the demurrer should be sustained because of the indefinite character of the negligence charged against the corporation and its trustees.

[2] But on a broader ground I think the action cannot be sustained. It appears that the corporation is a charitable and educational institution for the care and treatment of the diseased and injured, and that the other defendants were its trustees charged with the management thereof. It also appears that the direct cause of the death was the negligence of the nurse who was in the immediate charge of the patient. Under these circumstances, I think there is no liability against the hospital or its trustees. In Pennsylvania, the law is well settled.

In *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745, it was held that a corporation which in the performance of its corporate duties was acting without gain or profit in aid and ease of the municipal government in the preservation of life and property, whether as a volunteer or not, is a public charity and not subject to the doctrine of *respondeat superior*.

In *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879, an action was brought against the hospital to recover damages by a patient for injuries sustained by the negligent plac-

ing of certain bottles or jars containing hot water against her after an operation, by reason of which her body was burned while she was unconscious and helpless. The court held that a purely public charity cannot be held liable for the tort of its servants; that a corporation which has erected a hospital out of charitable bequests and maintains it from charitable donations, and admits every person to its care, irrespective of religious faith or ability to pay, is a purely public charity, and not liable for personal injuries caused by the negligence of a nurse in the hospital, and it is immaterial that the person injured was a pay patient, and that one-third of the hospital's space was used for the care of pay patients; and it is also immaterial that the person injured in a suit against the hospital has filed a paper disclaiming any right of execution against any fund held for charitable uses, and all income other than that received from pay patients. Justice Stewart says:

"It is a doctrine too well established to be shaken, and as unequivocally declared in our own state as in any other, that a public charity cannot be made liable for the tort of its servants. The doctrine rests fundamentally on the fact that such liability, if allowed, would lead inevitably to a diversion of the trust funds from the trust purposes."

[3] While the decisions of the state court upon a general legal proposition not covered by statute are not binding upon the federal courts, they naturally are given considerable weight by the federal courts. The doctrine as laid down in Pennsylvania, however, seems to be in harmony with the decisions in the federal courts, although the same conclusion may be reached by different courses of reasoning. In *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372, it was held that a patient in a public hospital, chartered as a charitable corporation, although under private management, cannot recover from such corporation for injuries resulting from the negligence of a nurse employed in the hospital and in whose selection due care was used, there being an implied agreement, arising from the acceptance by the patient of the corporation's bounty, that it shall not be liable for the acts of such servant in administering the charity. This case was very fully considered by the Circuit Court of Appeals, and the judgment of the Circuit Court in favor of the defendant was affirmed.

In the case at bar there is no allegation that the nurse was incompetent, or that the corporation or its officers were negligent in selecting this particular nurse, and the accident resulting in the death appears to have been the result of her negligence.

The demurrer is therefore sustained.

THE SAMUEL B. HUBBARD.

(District Court, D. Massachusetts. December 21, 1915.)

No. 1385.

SALVAGE \Leftrightarrow 38—DISTRIBUTION OF AWARD—SALVING OF DERELICT.

The schooner Hubbard, laden with lumber, was caught in a severe gale, and on her signals of distress the fishing schooner Mary, returning laden, went to her assistance. She was then about 50 miles east by south of Boston light. She was leaking, down by the head, and unable to carry sail. Her crew abandoned her and went on board the Mary, but some of the latter's crew, who were working on the lay, and had finished their catch, and were returning to port, went on board the Hubbard, and with considerable labor and risk got sails up. Some stayed, and the others went back. The Mary stood by until the storm abated, and then proceeded to Boston, from where the tug Sadie Ross, on being notified, went to the rescue, and after a search found the Hubbard and towed her to port; the service lasting about 22 hours and involving some risk, on account of the half sunken condition of the tow. A salvage award of 50 per cent., of salvaged value, amounting to about \$2,700, was agreed upon. *Held*, that the tug, having been the actual means of saving the vessel, was entitled to \$1,000 of the award; that the Mary, which incurred no risk and performed no actual service, was entitled to \$400; that of the remainder, to be distributed among her crew, the four men who remained on the vessel and the captain of the Mary should receive \$200 each, and the remainder be distributed to the other members of the crew.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93-102; Dec. Dig. \Leftrightarrow 38.]

In Admiralty. Suit by the Ross Towboat Company and others against the schooner Samuel B. Hubbard. On distribution of salvage award.

Blodgett, Jones, Burnham & Bingham and Sylvester M. Whalen, both of Boston, Mass., for libelants.

James R. Murphy, of Boston, Mass., for intervening petitioners.

MORTON, District Judge. The owners of the cargo have agreed that the salvage should be 50 per cent. of its value. That amount was \$4,028.42, and the salvage on it is therefore \$2,014.21. Counsel for the Hubbard did not desire to be heard in opposition to a similar award as to the vessel; and no sufficient reason appears why the same percentage should not be awarded against her. She sold for \$1,325, and I accordingly award as salvage 50 per cent. of that amount, viz., \$662.50. This makes the total salvage \$2,676.71.

The contested questions relate to the apportionment of the salvage money. The facts are not seriously in dispute and are as follows:

The Hubbard, laden with lumber, was caught in a severe gale. She was sighted in distress by the crew of the fishing schooner Mary, which was inward bound with a fare of fish, at daybreak on Sunday morning October 3, 1915, about 50 miles east by south from Boston Light. She was flying distress signals. The wind was blowing a gale and a heavy sea was running. The Hubbard was leaking, and had settled until her decks were level with the water. She was down by

the head and was unable to carry sail. Her crew were worn out by fatigue and exposure; they abandoned her, and with some difficulty went on board the *Mary* in their own longboat, without any intention of returning to the *Hubbard*. Thereupon some of the men from the *Mary*, from 10 to 14 in number, went on board the *Hubbard*, for the purpose of making an effort to save her. With considerable labor, and with danger that was by no means negligible, they cleared her sails so that they could be hoisted, and got sail on her. The *Mary* stood by during the day, ready to help, if necessary. Late in the afternoon it was apparent that the gale was nearly over and that fine weather was coming. The *Mary* thereupon took off all her men except 4, namely, Bolan, Burns, Welch, and Troy, and proceeded to Boston on the understanding that she would send a tug to bring the *Hubbard* in. The four men named stayed on the *Hubbard*. The *Mary* arrived in Boston early Monday morning. Her captain at once got into communication with the owners of the tugboat *Sadie Ross*, informed them of the circumstances and of the general location in which he supposed the *Hubbard* would be found, and suggested that they go after her on a salvage basis. At first they demurred, their hesitation being chiefly due to the likelihood that some other steamer would pick up the *Hubbard* before their tug could find her. The captain of the *Mary* said that, if they did not care to do the work, he would give somebody else the chance; they referred the matter to the captain of the *Sadie Ross*, and he went out on his own responsibility. He left the port of Boston about 10 a. m. Monday, and proceeded to the vicinity where he had been informed that the *Hubbard* would be found. He did not see her until about 4 o'clock in the afternoon. A heavy sea was still running, but otherwise the weather was not bad. No men from the *Ross* went on the *Hubbard*. By means of a heaving line, a hawser belonging to the *Ross* was pulled aboard the *Hubbard* and made fast by the 4 men who had stayed on her, and the *Ross* towed her to Boston, where they arrived about noon the next day (Tuesday). During the trip the hawser broke, being chafed against the bobstay; but it was again made fast by the men on the *Hubbard*, and the voyage was continued. The salvage service lasted about 22 hours. It was somewhat difficult, because the *Hubbard* yawed continually and could not be steered straight. It is distinctly more difficult to tow a water-logged vessel than one which is not in that condition. In this case there was the added danger to the tug occasioned by the breaking of the hawser, which might have fouled the propeller and caused injury, but did not. When the tow arrived at the Narrows, the *Hubbard* was steering so badly that the captain of the *Ross* considered it unsafe to take her through without the help of another tug; and the *E. D. Haley*, belonging to the same owners, was called into service and assisted from that point into the harbor.

The value of the *Mary*, with the catch which she had on board, was about \$15,000. She carried a crew of 24 men, all told. She was being sailed on a lay, and all her crew were working on shares; her owners were not obligated to pay fixed wages to the men. The work of fishing had been completed for that trip. The *Ross* also was worth

about \$15,000, and carried a crew of 5 or 6 men, all told. The Haley was worth about half as much as the Ross and carried about the same number of men.

The parties who make claim against the salvage money and among whom it is to be apportioned are: (1) The owners of the Mary; (2) the crew of the Mary; (3) the 4 men who stayed on the Hubbard; (4) the owners and crew of the Sadie Ross; and (5) the owners and crew of the E. D. Haley.

The principles upon which apportionment should be made between different salvors are somewhat indefinite. To some extent they are the same as those on which the award itself is made; e. g., the value of the property used by the salvor, the peril to which the property was exposed, the loss of other business by undertaking the salvage work, and the success of the undertaking. These relate to the use of property and concern the rights of its owner. Other elements entering into the apportionment are the initiative, skill, and courage displayed by the officers and men in undertaking work which they were under no obligation to do. What peril of life or limb did they disregard? What public service did they render? What life or property did they succeed in saving? The efforts should be to give to each person interested such an amount as, if the circumstances should repeat, would lead him again to undertake the work. Other considerations also enter into the matter of apportionment, but those referred to are among the most important.

It will be convenient, first, to determine the proper division of the salvage money as between the tugs, and the owners and crew of the Mary.

As to the Haley: Considered as salvage service, that rendered by the Haley was of the lowest possible character. It involved neither enterprise, danger, nor uncertainty of reward. She was really assisting her consort, the Ross, and is entitled to no more than a liberal per hour compensation. She is awarded \$30.

As to the Ross: The initiative in the enterprise was not hers; she did not find the wreck; she was sent to it after being informed as to its general location by the Mary; she was not engaged upon a voyage, or upon other lucrative employment, which she interrupted in order to undertake salvage service; nor in doing so did she depart from her usual line of work. On the contrary, she was acting within the general lines of her business and equipment. She went out with no certainty that she would be the one to bring the Hubbard to port, and with the understanding that, if she did not do so, she would get nothing; she went out knowing, too, that the work would be more difficult and somewhat more hazardous than towing usually is. The elements of enterprise and courage which are so largely recognized in the apportionment of salvage awards are less noticeable in the case of the tug than in the case of the Mary and her men. In *The Carroll*, 167 Fed. 112, 92 C. C. A. 564, it was said:

"It would seem that in a case of this class, where the service rendered, although a salvage service, is not in its nature different from the customary employment of the salvor, and the danger is not certain and extreme, an allowance of a lump sum bearing some relation to the cost of the service, if ren-

dered under a contract, is fairer than a percentage * * * of the salvaged property."

It is, however, true that the actual saving of the Hubbard was almost entirely the work of the Ross; and success is a very important element, both in the award, and in the apportionment, of salvage.

At the time when the Ross started out, there was, somewhere near Boston Light, a vessel in distress, the salvage value of which, as it now appears, was \$2,676.71. What proportion of that amount should be awarded for finding that vessel and towing it in, a service lasting, as before stated, about a day? In *The Annie Torrey*, 2 Pritchard's Adm. Digest, p. 2005, an English court under somewhat similar circumstances awarded the towing vessel one-third of the salvage money. I think that proportion should be slightly increased in this case; and I accordingly award to the owners and crew of the tug *Sadie Ross* the sum of \$970, making a total of \$1,000, for towing service. I am not asked to apportion this sum between the owners and crew.

This leaves \$1,676.71 as the amount to be divided between the owners and the crew of the *Mary*. As to the owners of the *Mary*: It was said by Judge John Lowell, in a somewhat similar case (*The Lovett Peacock*, 1 Low. 143, 147, Fed. Cas. No. 8,555), that "the owners appear to be entitled to the usual share of one-third;" and in *Adams v. Bark Island City*, 1 Clif, 210, Fed. Cas. No. 55 (s. c. 1 Black; 121, 17 L. Ed. 70), Mr. Justice Clifford, on circuit, awarded one-third of the salvage to the owners of the steamer *Westernport*, by which the salvage service was rendered, and two-thirds to her crew. The table of "Apportionments of Salvage Awards" in Pritchard's Adm. Digest, vol. 2, p. 2119 et seq., indicates that, as to the English practice at least, it is hardly correct to say that the "usual share" of the owners is one-third. As that table shows, awards to owners have varied from one-fourteenth, or less, to three-quarters. Generally speaking, a steamer takes more than a sailing vessel, because she is capable of rendering more effective assistance, and her service requires less exposure and exertion by her crew. *Cape Fear Towing & Trans. Co. v. Pearsall*, 90 Fed. 435, 33 C. C. A. 161 (C. C. A. 4th Circuit). In so far as a general statement can be formulated from the English cases, I think that, where a sailing vessel does no more than to put men on the distressed vessel, who there perform salvage service, the assisting vessel being put to no danger herself, and not performing any service, such as towing or furnishing supplies, the award to her has usually been less than one-third. In this case, moreover, the men who performed the actual work of salvage in the first instance were not under fixed pay by the owners, and the time spent by them on the salvage work cannot be regarded as the owners' time. I award \$400 to the owners of the *Mary*.

This leaves \$1,276.71 to be divided among her crew. Obviously the 4 men who boarded the *Hubbard* early Sunday morning and stayed on her, under conditions of much hardship and not a little danger, until she reached port on Tuesday afternoon, are entitled to special consideration. It is true that of themselves they probably never could have got the vessel into port, and that their work in navigating counted

for little or nothing. Their chief service was in keeping possession of the Hubbard, and possibly in preventing her from going ashore. When the Ross reached her, she belonged, subject to the claim of her owners, to these 4 men, who were holding her for themselves and for the owners and crew of the Mary; and they stuck to their possession until port was reached. They displayed courage and perseverance of a high order; without their efforts, it is clear that the owners and crew of the Mary would have but little claim to salvage. Moreover, a derelict, in the vicinity where the Hubbard was, would have constituted a dangerous menace to other vessels. I award these four men \$200 each, and a like amount to the master of the Mary, under whose control the salvage work was entered upon, and who was in charge of it while the Mary stood by the Hubbard.

As to the others members of the crew of the Mary: Some of them, as before stated, went on board the Hubbard and assisted in clearing her rigging, and afterward returned to the Mary and came on to Boston. These men did difficult and risky work, for the seas sometimes came aboard so heavily as to move the lumber on deck where they were working. Their names were not given, and they cannot be separated from the rest of the crew. The rest of the Mary's crew did nothing in the salvage work and suffered no inconvenience therefrom, because she carried so many men that putting 4 on the Hubbard did not materially increase the work of those who remained. As to them, the most that can be said is that, if the Mary had not undertaken the salvage, her crew would have reached Boston about noon on Sunday, instead of about 6 a. m. on Monday; they are entitled to but little. The award to the crew of the Mary must rest chiefly on the work of the men who boarded the Hubbard. I award the balance of the salvage money, \$276.71, among the crew of the Mary in proportion to their lays, excluding her master and the 4 men to whom awards have already been made.

UNITED STATES v. BRAND.

(District Court, S. D. New York. February 5, 1916.)

1. INDICTMENT AND INFORMATION ⇨110—FOLLOWING LANGUAGE OF STATUTE
—TRANSPORTATION OF WOMEN FOR IMMORAL PURPOSES.

Counts in an indictment for violations of White Slave Traffic Act June 25, 1910, c. 395, §§ 2, 3, 36 Stat. 825, *held* substantially in the language of the statute, and sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. ⇨110.]

2. INDICTMENT AND INFORMATION ⇨110—FOLLOWING LANGUAGE OF STATUTE.

It is elementary that, where certain acts or things are denounced by a statute as constituting a crime, an indictment founded upon such statute, which follows substantially the language of the statute, is good.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. ⇨110.]

3. PROSTITUTION \Leftrightarrow 1—OFFENSE—TRANSPORTATION OF WOMEN FOR IMMORAL PURPOSES.

White Slave Traffic Act, § 2, provides that any person who shall knowingly aid in transporting in interstate commerce any woman or girl with the intent to entice or compel her to become a prostitute or to give herself up to debauchery, or who shall knowingly aid in procuring transportation to be used by any woman or girl in interstate commerce with such intent, whereby any such woman or girl shall be transported in interstate commerce, shall be guilty of a felony. Section 3 provides that any person who shall knowingly persuade, etc., any woman or girl to go from one place to another in interstate commerce with intent that she shall engage in prostitution, etc., and who shall aid in causing her to go as a passenger of any carrier in interstate commerce, shall be guilty of a felony. Held, that it is not an element of the offenses denounced that the intent to subject the girl to debauchery shall be consummated by the commission of a specific act of prostitution or debauchery by her.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. \Leftrightarrow 1.]

Katherine Brand was indicted for offenses, and she demurs to the indictment. Demurrer overruled.

Harold A. Content, Asst. U. S. Atty., of New York City, for the United States.

John F. McIntyre, of New York City, for defendant.

CLAYTON, District Judge. This morning, at the opening of the court, the defendant interposed a demurrer to the indictment in the case of United States of America v. Katherine Brand, charged with having violated the White Slave Traffic Act, commonly known as the Mann Act. I have decided the matter, and desire the following memorandum opinion to be put in the record. I have not had time to write an opinion, but now dictate it.

This case is submitted upon the demurrer of the defendant to the indictment. The demurrer, which is reduced to writing, is a general demurrer, and does not meet the requirements of correct practice in the federal courts. The defendant's attorney, however, in his oral presentation of the matter to the court, specified his ground of demurrer to the indictment; that is, the defendant demurs to the indictment because the defendant contends that the indictment is defective, in that it fails to allege that the intent of the defendant was consummated by the commission of a specific act of prostitution or debauchery. And I have heard the argument of counsel in behalf of the defendant on the demurrer, and of the counsel for the government, Assistant District Attorney Content, in opposition—no point having been made as to the form of the demurrer.

[1] The indictment has three counts. The first two counts are predicated upon section 2 of the White Slave Traffic Act, or the Mann Act. The third count is predicated upon section 3 of the act. Referring first to count 1 of the indictment, an examination shows that this count substantially follows in its averment the language of the law. I quote from section 2 of the act the language pertinent for proper consideration of count 1 of the indictment:

"That any person who shall knowingly * * * aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl * * * with the intent and purpose to in-

duce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice."

This count, the first count of the indictment, charges that the defendant—

"did unlawfully, willfully, knowingly, and feloniously aid and assist in obtaining transportation for and in transporting in interstate commerce, to wit, from the city of Dayton, in the state of Ohio, to the city of New York, in the state of New York, in the Southern district of New York, a girl of the name of Annie Planner, with the intent and purpose to induce the said Annie Planner to become a prostitute and to give herself up to debauchery and to engage in other immoral practices," etc.

If the statute and the indictment be put in parallel columns, it will be readily seen that the indictment follows, as I have said, substantially the language of the statute. Of course, it is elementary to say that, when a statute denounces certain acts as an offense, an indictment, as a general rule, which follows the language of a statute, is a good indictment.

As to the second count, which is also predicated upon section 2 of this act, all of the language of the statute, applicable to this count, is as follows:

"Or who shall knowingly * * * aid or assist in procuring or obtaining any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, * * * with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, * * * shall be deemed guilty of a felony. * * *"

And the language of this second count is that the defendant—

"did unlawfully, willfully, knowingly, and feloniously aid and assist in procuring and obtaining a ticket to be used by a girl of the name of Annie Planner in interstate commerce, to wit, from the city of Dayton, in the state of Ohio, to the city of New York, in the state of New York, in the Southern district of New York, in going to the said city of New York, in the state of New York, in the district aforesaid, with the intent and purpose on the part of the said Katherine Brand [the defendant] to induce and entice the said Annie Planner to give herself up to the practice of prostitution, and to give herself up to debauchery and other immoral practices, whereby the said Annie Planner was transported in interstate commerce from the city of Dayton, in the state of Ohio, to the city of New York, in the state of New York, in the Southern district of New York," etc.

And the third count is predicated upon section 3 of the act, the pertinent language of which I quote:

"That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, * * * with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, * * * shall be deemed guilty of a felony. * * *"

The language of this count, the third count of the indictment, is that Katherine Brand, the defendant—

“did unlawfully, willfully, knowingly, and feloniously persuade and induce, and cause to be persuaded and induced, a girl of the name of Annie Planner to go from one place to another in interstate commerce, to wit, from the city of Dayton, in the state of Ohio, to the city of New York, in the state of New York, with the intent and purpose on the part of said Katherine Brand [the defendant] that the said Annie Planner should engage in the practice of prostitution and debauchery and other immoral practices, and unlawfully, willfully, and feloniously did thereby cause and aid and assist in causing the said Annie Planner to go and to be carried and transported as a passenger on the line and route of a common carrier and carriers in interstate commerce, to wit, from the city of Dayton, in the state of Ohio, to the city of New York, in the state of New York, in the Southern district of New York,” etc.

It will be seen that this count follows substantially the language of the statute.

[2] As I have said, it is elementary, where certain acts or things are denounced by a statute as constituting a crime or an offense, an indictment founded upon such statute, which follows substantially the language of the statute, is good. As indicated, I find that in this case the indictment follows substantially the language of the statute, and in that view of the case the indictment is good.

[3] It is urged, however, by the defendant, that the indictment is defective, in that it fails to allege that the intent of the defendant to subject the girl to debauchery was consummated by the commission of a specific act of prostitution or debauchery on the part of the girl, Annie Planner, the subject of the interstate commerce. But the statute does not make that an element of the offense. Congress had in mind the purpose to prevent the abuse of interstate commerce by the transportation therein of a woman or girl for prostitution or other immoral purposes. Of course, the power of Congress over interstate commerce is plenary. This act was passed in pursuance of this power of Congress to regulate interstate commerce, and by this act Congress regulated commerce, so far as this particular case is concerned, by prohibiting the transportation in interstate commerce of a woman or girl for immoral purposes. It is not necessary in an indictment for violation of this statute to go beyond the language or purpose of the statute. The purpose was to prevent the transportation of women and girls for immoral purposes, and the language of the statute goes no further than that. The act does not require the government's pleading to charge that the woman or girl, transported in violation of this law, was actually subjected to debauchery, or that she did actually engage in prostitution. It may be observed, however, though not pertinent to the decision of the question here submitted, that debauchery or prostitution generally follows from the transportation of women and girls, where they are transported in interstate commerce for immoral purposes.

The demurrer, therefore, is overruled, and the order will be entered accordingly.

CLIFFORD v. OAK VALLEY MILLS CO.

(District Court, D. Massachusetts. January 21, 1916.)

No. 626.

1. BANKRUPTCY Ⓒ326—CLAIMS—RIGHT TO SET OFF MUTUAL CLAIMS.

The bankrupt was engaged in manufacturing woolen cloth, and had been receiving wool from defendant and making it into cloth for a price per yard which included all usual manufacturing costs and a profit, to be paid on delivery. It sometimes developed that the goods were not salable as first quality, because the manufacturing was imperfect, and a reduction in the price was charged back against the bankrupt. In November, 1913, taking these countercharges into account, defendant had overpaid the bankrupt over \$7,000, and a demand note for the amount overpaid was taken. Beginning January 1, 1914, a new arrangement was made, whereby only 80 per cent. of the manufacturing charge was paid when the goods were delivered; 20 per cent. being reserved against the countercharges for imperfect work. In May, 1914, the bankrupt informed defendant that it was not able to continue operating its plant, and defendant ran the mill on a rental basis to work out its own stock in process, after which the mill was shut down, and in July an adjudication in bankruptcy was made. *Held* that, under Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (Comp. St. 1913, § 9652), defendant was entitled to apply on its note sums due to the bankrupt out of the reserved amounts and sums due for work done by the bankrupt on the stock in process turned over to defendant, since the determination of the amount due the bankrupt when made would relate back to the adjudication, even though the bankrupt's claim was regarded as not due until the settlement of the accounts had been completed, and each party therefore had a provable claim against the other.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. Ⓒ326.]

2. BANKRUPTCY Ⓒ326—CLAIMS—RIGHT TO SET OFF MUTUAL CLAIMS.

The rent which defendant agreed to pay for the use of the mill to run out the stock in process, not being a debt created for the purpose of set-off, stood upon the same footing as the other sums due the bankrupt, and defendant was entitled to set it off and apply it on the note.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. Ⓒ326.]

In Equity. Suit by Philip G. Clifford, trustee in bankruptcy of the Somerset Woolen Company, against the Oak Valley Mills Company. Bill dismissed.

Robert Hale, of Portland, Me., for plaintiff.

Albert Fuller, of Taunton, Mass., for defendant.

MORTON, District Judge. This is a suit in equity by the plaintiff, as trustee in bankruptcy of the Somerset Woolen Company, to recover certain sums alleged to be due to the bankrupt from the defendant, which the latter claims the right to retain and apply on indebtedness due to it from the bankrupt.

[1, 2] The Somerset Woolen Company was adjudicated bankrupt in voluntary proceedings on July 3, 1914. It had, for about 10 years prior to its failure, been engaged in the business of manufacturing woolen cloths. From 1904 to 1909 it had operated on its own raw

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

stock. Beginning in 1909, Mr. Lancey, who with his brother were its principal stockholders, entered the employment of Mr. Lovering, owner of the Oak Valley Mills. The Somerset Company from that time on largely ceased to manufacture its own raw material. Instead of doing so, it received wool belonging to the Oak Valley Company, which it made into cloth for that company. For doing this work it was paid by the yard; the price fixed including all usual manufacturing costs and a profit.

Up to January 1, 1914, the Somerset Company was paid by the Oak Valley Company the full manufacturing charge for each lot of cloth when the cloth was delivered. It not infrequently developed later, when the goods came to be sold, that the manufacturing had been imperfectly done, and that the goods were not, therefore, salable as first quality. In such cases a large reduction had to be made in the price of the goods, and this was charged back by the Oak Valley Company against the Somerset Company. In November, 1913, the Oak Valley Company discovered that, taking these countercharges into account, it had overpaid the Somerset Company \$7,506.71, and a demand note for that amount, dated November 1, 1913, was given by the Somerset Company to the defendant.

Beginning January 1, 1914, the two companies made a new arrangement covering future payments, which was, in substance, that the Oak Valley Company, instead of paying the Somerset Company the entire manufacturing charge when the goods were shipped out, should only pay 80 per cent. thereof, reserving 20 per cent. of each bill against such countercharges for imperfect work on the goods covered thereby, as might arise when the goods were marketed. This arrangement continued until some time in May, 1914, when the bankrupt informed the Oak Valley Company that it was no longer able to continue the operation of its plant, and arranged with the latter company to take over and run the mill on a rental basis, in order to work out its own stock in process. When that had been done, the mill was shut down, and the dealings between the two companies ended. The wages of the operatives due from the bankrupt when it ceased to operate its mill remain unpaid. The wool in process of manufacture at the time when the bankrupt suspended operations was turned over as it lay to the Oak Valley Company. On some of it a good deal of work had been done.

No payments or settlements have been made on account of the reserved 20 per cent. since the new arrangement went into effect. The Oak Valley Company cannot yet determine how much thereof will be required to meet its countercharges. If there shall be a surplus, the Oak Valley Company claims the right to apply it in reduction of its claim against the bankrupt on the note. The trustee contends that so much of the 20 per cent. as is not required for the countercharges must be paid over to him, and that the proposed application of it by the Oak Valley Company would be a voidable preference. In view of the small amount of property in the estate, the parties have, by agreement, refrained from the expense of stating the account, pending a decision by the court as to their rights.

At the time of the bankruptcy (July 3, 1914) the situation between the Somerset Woolen Company and the Oak Valley Mills Company was, in brief, that the former was indebted to the latter in the sum of \$7,506.71 and interest upon the note, which, of course, was provable; and the Woolen Company had a claim against the Oak Valley Company for such balances of the 20 per cent. as should not be required to meet countercharges for poor work. This latter claim was, of course, founded upon a contract; the amount of it was not then known and is not as yet established. The determination thereof, when made, will relate back to the adjudication; and this is so, even though the claim of the Woolen Company be regarded as not due until the settlement of the accounts shall have been completed. *Ex parte Prescott*, 1 Atk. 230; *Aldrich v. Campbell*, 4 Gray (Mass.) 284; *Bemis v. Smith*, 10 Metc. (Mass.) 194; *Demmon v. Bank*, 5 Cush. (Mass.) 194; *Bigelow v. Folger*, 2 Metc. (Mass.) 255; *Clarke v. Hawkins*, 5 R. I. 219, 224; *Marks v. Barker*, 1 Wash. C. C. 178, Fed. Cas. No. 9096. It follows that, at the time in question, both the bankrupt and the defendant had claims against each other of such nature as to be provable in bankruptcy. The defendant's debt is not within the prohibition of section 68b (2); no contention to that effect is made by the trustee.

The right of set-off given by section 68a is very broad; the fact that the trustee's claim is for a liquidated amount upon a note, while the defendant's claim is for an unliquidated amount upon an open account, does not defeat it. *Studley, Trustee, v. Boylston National Bank*, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313. See, too, *Cumberland Glass Mfg. Co. v. De Witt*, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042, and especially the notes to *Rose v. Hart*, 2 Smith's Leading Cases (8th Am. Ed.) 308 et seq, in which the law as to set-off in bankruptcy is fully discussed. Upon the facts above stated, the defendant has the right to set off and apply upon its note against the bankrupt, whatever sums may become due from it to the bankrupt out of the reserved amounts and for work done on the stock in process, which was turned over. As to the rent amounting to \$85, which the defendant agreed to pay to the bankrupt for the use of the mill to run out the stock in process, this credit arose in connection with the effort of the parties to extricate themselves from a somewhat difficult situation. It was not created for the purpose of set-off. I do not see that it stands upon any different footing from the other sums claimed by the trustee. The trustee does not contend that the total amount due to him equals the amount of the defendant's note.

I give such of the requests for findings and rulings as are contained in, or are consistent with, the foregoing opinion; the others I refuse. It follows that the bill must be dismissed; but as the plaintiff is acting only in a representative capacity, and was justified by the defendant's conduct in submitting the matter to the court, the dismissal will be without costs.

In re HOWE et al.

(District Court, D. Massachusetts. January 6, 1916.)

No. 21677.

PARTNERSHIP ⇨20—CREATION OF PARTNERSHIP BY OPERATION OF LAW.

H. arranged to take over the management of a hotel, but was financially unable to purchase from the former owners of the hotel their right, under the rules of the city licensing board, to nominate the person to whom a liquor license should be issued. At his request P. bought the license and allowed H. to use it, upon paying interest on the cost price and with the understanding that he would sell it to H. whenever H. was able to pay such price. The license was issued in the name of P. and H., "doing business as H.," but P. had in fact no interest in the business and received no payments therefrom, except from the payments of interest. He did not appear on its books as a partner, and no one extended credit to the hotel on the assumption that he was a partner, or in reliance on his name being on the license. *Held*, that he did not become a partner by operation of law, since a partnership arises in that way only where all the necessary incidents of one are found to exist, among which are a joint adventure and a share or interest in the profits as profits.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 6, 7; Dec. Dig. ⇨20.]

In Bankruptcy. In the matter of Francis Howe and Arthur P. Pearce, alleged bankrupts. Petition dismissed.

Barton & Harding, of Boston, Mass., for petitioning creditors.
Henry D. Crowley, of Boston, Mass., for Pearce.

MORTON, District Judge. The question presented is whether Pearce was a partner of Howe in the business of the Hotel Nottingham, so as to make him responsible with Howe for its debts. Both Pearce and Howe deny that any such partnership existed. The facts are fully stated in the report of Mr. Referee Darling, to whom the case was referred to state the facts, and I shall only mention such of them as seem to me specially significant. I agree with and confirm the referee's findings, except as I shall otherwise indicate.

When Howe arranged to take over the hotel, he was confronted with the necessity of procuring a liquor license for it. The former owners (Gay Bros.) had had one. Owing to the fact that the number of such licenses which can be issued in the city of Boston is limited by law, and is less than the demand for them, the right to a liquor license has a value apart from the license itself. The holder of a license is treated by the licensing board as having, generally speaking, a right to a renewal of it, as long as he properly conducts the business, or, if he does not wish a renewal, the right to sell the license; i. e., to nominate the person to whom, if suitable, it will be issued by the licensing board upon the former holder's request.

Gay Bros. valued this right in the liquor license at \$12,000, and they were willing, upon receiving that sum, to nominate such person as might be satisfactory to Howe for it. Howe was not able himself to raise the money. He got Pearce to buy the license and allow him

to use it upon paying Pearce interest at 5 per cent. on the \$12,000, which the license cost. Howe, of course, also paid the annual fee of \$3,000 to the city of Boston. The license was Pearce's property, lent by him to Howe, as an act of friendship for use at the hotel, and with the understanding that he would sell it to Howe whenever the latter was able to pay him \$12,000. It was issued in the name of Pearce & Howe, "doing business as Francis Howe."

In the actual business carried on under the license, Pearce had, as the referee finds, no interest whatever, and he had no interest of any kind in any other part of the business of the Hotel Nottingham. He had guaranteed the performance of the lease by Howe—i. e., the payment of the rent, etc.; but he did this, as the referee finds, without consideration, and as a further act of friendship to Howe, with whom he was on intimate terms. Pearce took no part in the management of the hotel, or of the liquor business connected with it. He did not appear on the books of the hotel as a partner, and the only payments made to him from money received there were those for interest upon the sum which he had paid for the license.

The referee finds:

That "there is no evidence in this case that any one extended credit to the Hotel Nottingham on the assumption that Pearce was a partner, or that in giving credit any one relied on Pearce's name being on the license" (Referee's Report, p. 10), and that "there never was an intention on the part of either Pearce or Howe to become partners, and that in the absence of such intention only joint contribution and sharing in profits or losses could make them such" (Referee's Report, p. 17).

The referee concludes:

"I am satisfied that Pearce intended to be a backer only; but, taking into account all the circumstances connected with the way in which this business and license of Gay Bros. was sold to these two parties and still kept together," which were in substance as above stated, "I must hold that it was a joint enterprise, to which both Pearce and Howe made contributions. Pearce contributed a license worth \$12,000, and at the time of the filing of the petition worth at least \$16,000." (Referee's Report, p. 18.) "Even disregarding any profit by enhanced value, or the unsatisfactory accounting for the \$10 per day items, which I am convinced may have been in some unexplained way, at least at the outset, connected with this license transaction, I find enough to hold that there was a sharing in the profits of this business by Pearce, which, together with his contribution thereto, warrant the finding that he was in law a partner of Howe in this enterprise, and this notwithstanding the fact that the only evidence of any payments of money, or agreement to pay money, to Pearce, were the payments of the \$50 per month carried as interest on the ledger.

"If, however, I am in error as to the legal effect of the license situation, and have given undue weight to the lack of agreement between the parties in this case, as taking it out of a class of cases like *Estabrook v. Woods*, in which it was possible to interpret a specific agreement, and, as to the party receiving a part of the profits of the business conducted by the other, it could be ascertained 'whether he has a share or interest in the profits as profits, or whether his interest in profits is merely a measure of his compensation for something that he does or furnishes under a contract' (*Knowlton, C. J., Estabrook v. Woods, infra*), then I find there has been a failure on the part of the petitioners to sustain the burden of showing a partnership, and there is not evidence sufficient to warrant the finding that Pearce and Howe were partners." (Referee's Report, pp. 19, 20.)

At the time when Howe took over the Hotel Nottingham and started in business there, it is clear that Pearce had no interest in the general business of the hotel. He did not, at the outset, "contribute" a license to a joint enterprise in which he was embarking with Howe. If the learned referee intended to find or rule to the contrary, it seems to me that he was plainly in error in so doing. As to the receipts from the business, Pearce had no right or interest in them as they accrued, whether they came from the rooms, from the restaurant, or from the bar; they belonged to Howe, and to Howe alone. This I understand to have been found by the learned referee; but, whether found by him or not, it is clearly the fact. In view of it, the finding or ruling that there was a "sharing of profits" cannot, I think, be supported. No change in the relations between Pearce and Howe in the important particulars above referred to is found to have taken place after the beginning of the business.

The question is to be determined in accordance with the law of Massachusetts. In *Estabrook v. Woods*, 192 Mass. 499, 78 N. E. 538, it was held, on facts at least as strong against the alleged partner as those here, that no partnership was created by operation of law. The learned referee was of opinion that *Estabrook v. Woods* was distinguishable, because "in that case there was a written agreement clearly setting forth the relationship between the parties," which, being established, controlled and overthrew the natural inference of partnership which otherwise would have followed from the facts shown; while here, if I understand his distinction correctly, the parties, having co-operated in a business enterprise under the circumstances stated, and having failed to provide explicitly that they should not be partners, had therefore become so as a matter of law. But a partnership arises in that way only where all the necessary incidents of one are found to exist. Among those are a joint adventure, and "a share or interest in the profits as profits" by the person sought to be charged, neither of which existed in this case.

It seems to me that the true relations of Pearce and Howe to each other and to the business in question are, upon the evidence and findings, sufficiently clear to be acted upon, and that *Estabrook v. Woods* is in point and is decisive.

Considering that Pearce had no interest in any property used at the Hotel Nottingham, except the liquor license (as to which all that he did was to exercise his right of nomination to a license in favor of Howe for use there), that he had no right to the receipts of the business as they came in, nor to exercise any control over the general conduct of the hotel, and that he never intended to be a partner in the enterprise, it cannot be ruled as a matter of law that his relation to the business of the Hotel Nottingham was such as to constitute him by operation of law a partner therein. I therefore am of opinion that the alternative finding of the learned referee should be adopted and confirmed, and that as to Pearce the petition should be dismissed.

As Howe was adjudicated on his voluntary petition filed on January 6, 1915, this petition should be dismissed as to him also.

Petition dismissed.

LE ROY v. HARTWICK et al.

(District Court, E. D. Arkansas, W. D. February 23, 1916.)

No. 5773.

1. COURTS ⇨328—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

The amount claimed in the complaint determines the jurisdiction of a federal court, unless it appears to a legal certainty from the face of the complaint that in no event can plaintiff recover an amount necessary to give the court jurisdiction, and that a part of the claim necessary to make up the jurisdictional amount is, as a matter of fact, colorable and fictitious, and was inserted in bad faith to invoke the jurisdiction of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. ⇨328.]

2. COURTS ⇨328—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where the amount claimed in a complaint would give a federal court jurisdiction, the fact that upon the trial the amount recovered is less than the jurisdictional amount does not defeat the court's jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. ⇨328.]

3. COURTS ⇨328—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

In an action in a federal court in Arkansas on notes executed and payable in Texas, and containing a stipulation for attorney's fees if they were placed in the hands of an attorney for collection, or if suit was brought, plaintiff claimed that the law of Texas, under which such a stipulation was valid, must govern. Defendant contended that the *lex fori* controlled, under which such a provision will not be enforced. *Held*, that which law controlled, or whether the federal court must decide the question for itself, regardless of the decisions of the highest court of either state, were important questions to be determined, and the right to recover the attorney's fee was therefore a matter in controversy, to be determined, if pleaded as a defense, and the amount of the attorney's fee must be included in making up the requisite jurisdictional amount.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. ⇨328.]

At Law. Action by A. R. Le Roy against M. H. Hartwick and others. On demurrer to the jurisdiction of the court. Demurrer overruled.

This is an action on three notes, executed by the defendants on April 29, 1913, to one A. B. Holbert, a citizen of Iowa, and by him assigned, for value and before maturity, to the plaintiff, who is also a citizen of the state of Iowa. Each of the notes is for \$967. All of them were executed in the state of Texas, and made payable in that state. Each note contains a stipulation to the effect that, "if not paid at maturity, and placed in the hands of an attorney for collection, or suit is brought on them, the makers agree to pay an additional sum of 10 per cent. as attorney's fees." It is alleged in the complaint that by the laws of the state of Texas, as uniformly construed by the highest court of that state, such a provision for attorney's fees is valid and enforceable in its courts; that the defendants having failed to pay the notes at maturity, they were, in the state of Texas, placed in the hands of the attorney who instituted this proceeding for the purpose of collecting them; that this

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

attorney is duly licensed to practice as such. Judgment is asked for \$3,191, principal, and attorney's fees, and also interest and costs.

The defendants demur to the jurisdiction of the court, claiming that it appears from the face of the complaint that the plaintiff can in no event recover a judgment for more than \$2,901, exclusive of interest and costs, as it is the settled law in the state of Arkansas that a contract for attorney's fees, in case of a suit to recover on a note, is against public policy and unenforceable.

William J. Berne, of Ft. Worth, Tex., for plaintiff.
J. C. Clark, of Conway, Ark., for defendants.

TRIEBER, District Judge (after stating the facts as above). [1, 2] It is a well-established rule of law that the amount claimed in the complaint determines the jurisdiction of the national courts, unless it appears to a legal certainty from the face of the complaint that in no event can the plaintiff recover an amount necessary to give the court jurisdiction, and that a part of the claim necessary to make up the jurisdictional amount is as a matter of fact colorable and fictitious, and was inserted in bad faith to invoke the jurisdiction of the court. The fact that upon the trial the amount recovered is less than the sum necessary for the court's jurisdiction does not defeat it. *Tinstman v. First Nat. Bank*, 100 U. S. 6, 25 L. Ed. 530; *Hilton v. Dickinson*, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688; *Smith v. Greenhow*, 109 U. S. 669, 671, 3 Sup. Ct. 421, 27 L. Ed. 1080; *Barry v. Edmunds*, 116 U. S. 550, 566, 6 Sup. Ct. 501, 29 L. Ed. 729; *Wetmore v. Rymer*, 169 U. S. 115, 122, 18 Sup. Ct. 293, 42 L. Ed. 682; *Schunk v. Moline, Milburn & Stoddard Co.*, 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255; *Put-in-Bay Waterworks Co. v. Ryan*, 181 U. S. 409, 431, 21 Sup. Ct. 709, 45 L. Ed. 927; *Smithers v. Smith*, 204 U. S. 632, 642, 27 Sup. Ct. 297, 51 L. Ed. 656; *Bank of Arapahoe v. David Bradley & Co.*, 72 Fed. 867, 19 C. C. A. 206; *Hampton Stave Co. v. Gardner*, 154 Fed. 805, 83 C. C. A. 521.

[3] Tested by this rule, is the claim for attorney's fees merely colorable, for the purpose of conferring jurisdiction on this court, when without that claim the amount involved would be insufficient to authorize this court to assume it? On the part of the plaintiff the contention is that, the notes having been executed and made payable in the state of Texas, the law of that state must govern, and that it is the settled rule of law in that state, as established by an unbroken line of decisions of the Supreme Court of that state, that such a stipulation is valid and enforceable. On the other hand, the claim of the defendants is that the *lex fori* controls, and that the Supreme Court of the state of Arkansas has uniformly held that such a provision is a penalty, and that it is against the public policy of the state to enforce it, even if the notes were executed and made payable in a state where it is valid and enforceable.

Whether the *lex loci* or the *lex fori* controls, or whether this court, being a national court, must decide the question for itself, regardless of the decisions of the highest court of either state, the point involved not being statutory, but one governed by the law merchant, are important questions to be determined, and therefore clearly justiciable.

The authorities on the question whether such a stipulation is enforceable are so conflicting that it is impossible to harmonize them. In a note to *Raleigh County Bank v. Poteet* (decided by the court of last resort of the state of West Virginia) 82 S. E. 332, in L. R. A. 1915B, 928, these conflicting decisions are collected, and their utter irreconcilability shown.

It is therefore beyond question that the right to recover an attorney's fee on these notes is "a matter in controversy," to be determined if pleaded as a defense in the answer, and therefore must be computed in making up the requisite jurisdictional amount. This was expressly determined in *Springstead v. Crawfordsville Bank*, 231 U. S. 541, 34 Sup. Ct. 195, 58 L. Ed. 354. That case rules this. Whether, when the issues are made up, there can be a recovery of the attorney's fees, cannot be decided now, as the only question before the court is that of jurisdiction.

The demurrer to the jurisdiction of the court is overruled.

CHIN TEUNG v. SKEFFINGTON, Immigration Com'r.
(District Court, D. Massachusetts. January 3, 1916.)

No. 1095.

1. ALIENS ⚡32—DEPORTATION PROCEEDINGS—REVIEW OF DECISIONS OF IMMIGRATION AUTHORITIES.

The destination to which a Chinese person arriving at Victoria, British Columbia, on June 18, 1913, and entering the United States surreptitiously in company with another Chinaman and under the guidance of two white men in March, 1914, should be deported, was for the immigration authorities to decide, and where their decision that he always intended to come to the United States by way of Canada, and should be deported to China, was not entirely unsupported by evidence, and was reached after a fair hearing, it was conclusive.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⚡32.]

2. ALIENS ⚡32—DEPORTATION PROCEEDINGS—REVIEW OF DECISIONS OF IMMIGRATION AUTHORITIES.

In a habeas corpus proceeding by a Chinese person entering the country from Canada and ordered deported to China, evidence as to his residence in Canada, not offered to the immigration authorities, was not available to support his contention that he should be deported to Canada.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⚡32.]

Habeas corpus by Chin Teung against Henry J. Skeffington, Commissioner of Immigration. Writ discharged and petitioner remanded.

Herbert F. Callahan, of Boston, Mass., for petitioner.

Leo A. Rogers, Asst. U. S. Atty., of Boston, Mass., for respondent.

MORTON, District Judge. Habeas corpus to the immigration commissioner at Boston. The writ issued; and there was a hearing in open court upon the question of the petitioner's right to be discharged.

The petitioner is a Chinaman. Deportation proceedings were instituted against him under the General Immigration Act (Act Feb. 20,

1907, c. 1134, 34 Stat. 898), on the ground that he was an alien unlawfully in the United States. After a hearing before the immigration authorities he was ordered deported to China. He does not now contend that he was not accorded a fair hearing, nor that the entire order of deportation is illegal. He attacks only that part of it which specifies China as the place to which he shall be deported; he contends that it should be Canada.

It is clear that the petitioner arrived at Victoria, British Columbia, from Hong Kong on June 18, 1913, under the name of Chin Den Soy. He paid a head tax of \$500 and was duly admitted to Canada. On or about March 23, 1914, in company with another Chinaman, Wong Jin Bing, and under the guidance of two white men, he entered the United States surreptitiously in the vicinity of Buffalo, N. Y. The next morning he took train for Boston, and was arrested on deportation proceedings soon after his arrival here.

He testified at the hearing on the habeas corpus that during the nine months following his landing in Canada he had worked in various places in the Dominion, and that he intended when he landed to make Canada his place of residence, and left that country for the United States because he was unable to obtain work there. His testimony in the deportation proceedings was very different. Considered as a whole, it is, and was, so inconsistent and so manifestly false that any tribunal would be well warranted in refusing to find any disputed fact on it alone. The landing certificate issued by the Canadian authorities at Victoria shows that he at that time gave his destination as Winnipeg, Manitoba. This was the only evidence to corroborate his statement as to his alleged intention to remain in Canada.

The immigration tribunals disregarded it, and upon the whole case believed that the petitioner had always intended to come to the United States, and had elected to do so by way of Canada. I cannot say that their conclusion was so entirely without foundation as to make it unreasonable and arbitrary, like that in *Moore v. Sisson*, 206 Fed. 450, 124 C. C. A. 356 (C. C. A., Second Circuit), on which the petitioner relies. In *United States v. Ruiz*, 203 Fed. 441, 121 C. C. A. 551, the alien was a citizen of the republic of Panama, from which he came to the United States, and it was therefore held on habeas corpus proceedings that an order of deportation to Spain was illegal. On facts closely resembling those in this case, it has been held that an order of deportation to China would not be disturbed on habeas corpus proceedings. *Ex parte Jung Sew* (D. C.) 221 Fed. 500.

[1, 2] The destination to which deportation should be ordered was for the immigration authorities to decide. *Lewis v. Frick*, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967. As they have done so after a fair hearing, and their decision is not entirely unsupported by evidence, it is conclusive. The petitioner's counsel suggested at the argument that corroborative evidence as to the residence in Canada could be obtained, although at considerable expense, and would be submitted, if deemed admissible. It was not offered to the immigration tribunals. I do not, therefore, see how it would assist the petitioner here.

Writ discharged.

Petitioner remanded.

KLUG v. MARTINSBURG POWER CO.

(District Court, N. D. West Virginia. February 9, 1916.)

COURTS ⇨311—JURISDICTION—RIGHT OF ACTION BY FOREIGN ADMINISTRATOR.

There being no statute in West Virginia authorizing foreign administrators to sue, an administrator appointed in Pennsylvania cannot sue a resident of West Virginia in a federal court sitting in West Virginia by reason of diverse citizenship, as, independent of statute, an administrator's powers do not extend beyond the limit of the state of his appointment, and his control over the estate of his decedent is limited to such property as is in the state of his appointment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 858; Dec. Dig. ⇨311.]

At Law. Action by Frank Klug, administrator of C. W. Tinnemeyer, deceased, against the Martinsburg Power Company. On plea in abatement. Plea sustained, and case dismissed.

Frank J. Schuck and S. A. Williams, both of Wheeling, W. Va., for plaintiff.

Martin & Seibert, of Martinsburg, W. Va., for defendant.

DAYTON, District Judge. Klug, a citizen and resident of Pennsylvania, has in that state qualified as administrator of Tinnemeyer, deceased, and as such administrator, under such qualification, has instituted this suit in this court for damages, alleging his decedent to have met his death by reason of defendant's negligence while in the employ of the Pittsburg Transformer Company, a Pennsylvania corporation, when the latter company sent him to do certain contract work upon defendant's plant in this state, and he was engaged in doing such work.

A plea in abatement has been filed, raising the single question whether in the federal court in this state such nonresident administrator can institute and maintain such action against a resident individual or corporation of this state by reason of adverse citizenship. I think it very clear that he cannot under the rulings made by the Supreme Court in *Vaughan v. Northup*, 15 Pet. 1, 10 L. Ed. 639, *Aspden v. Nixon*, 4 How. 467, 11 L. Ed. 1059, *Stacy v. Thrasher*, 6 How. 44, 12 L. Ed. 337, *Hill v. Tucker*, 13 How. 458, 467, 14 L. Ed. 223, *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112, *Lawrence v. Nelson*, 143 U. S. 215, 222, 12 Sup. Ct. 440, 36 L. Ed. 130, *Reynolds v. Stockton*, 140 U. S. 254, 272, 11 Sup. Ct. 773, 35 L. Ed. 464, *Overby v. Gordon*, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. 741, *Brown v. Fletcher*, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. Ed. 966, and *Ingersoll v. Coram*, 211 U. S. 335, 362, 29 Sup. Ct. 92, 53 L. Ed. 208, et seq., which establish the rule at common law, independent of a state statute, to be that the powers of an administrator do not extend beyond the limit of the state of his appointment. His control over the estate of his decedent is limited to such property as is in the state of his appointment, and no judgment against an administrator in one state is binding upon an ancillary administrator and the assets in

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

his hands of the same decedent in another state. It is true that some of the states by statute have authorized foreign administrators to sue in their courts. West Virginia has no such statute and adheres strictly to the common-law rule as held by *Crumlish's Adm'r v. Shenandoah Valley Ry. Co.*, 40 W. Va. 627, 650, 22 S. E. 90, and *Oney v. Ferguson*, 41 W. Va. 568, 23 S. E. 710. The same is true in Virginia. *Fugate v. Moore*, 86 Va. 1045, 11 S. E. 1063, 19 Am. St. Rep. 926.

It follows, therefore, that this plea must be sustained, and the case be dismissed without prejudice to any suit brought by a qualified representative in this state appointed, or who may be appointed, to administer the estate of Tinnemeyer.

STEWART v. BOSTON & M. R. R.

(District Court, D. New Hampshire. February 24, 1916.)

No. 171.

NEW TRIAL ⇨71—GROUNDS—WEIGHT OF EVIDENCE.

In an action for personal injuries, a verdict for defendant would not be set aside, though regarded by the District Judge as wrong, where there was a substantial conflict in the evidence, and the jury could reasonably have found for defendant.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. ⇨71.]

At Law. Action by Thomas Stewart against the Boston & Maine Railroad. Verdict for defendant, which plaintiff moves to set aside. Motion denied.

Hollis & Murchie, of Concord, N. H., for plaintiff.

Streeter, Demond, Woodworth & Sulloway, of Concord, N. H., for defendant.

ALDRICH, District Judge. This case was tried by jury. The plaintiff claimed that his foot was caught between the rail, and plank-ing of the Boston & Maine Railroad track in the city of Manchester, and that he was unable to extricate himself; that he gave an outcry and a warning to a train which was approaching at a low rate of speed; that the railroad people were careless in not discovering him and stopping; and that they ran over him and cut off both feet. The railroad claimed that the man's foot was not caught in the rail, but that he was standing beside the track and that he was struck by the moving train; that he was careless, and that the railroad was not careless.

There was a conflict in the evidence upon the question as to how the thing happened. The jury found for the defendant, and, in order to make that finding, the jury must have accepted the defendant's theory.

The plaintiff seasonably moved to set aside the verdict on the ground that it was against the evidence or the weight of the evidence, and upon the ground of newly discovered evidence.

I felt at the time the verdict was rendered that the plaintiff's claim as to how the injury occurred was the correct one, and that the verdict should have been the other way. Yet there was a substantial conflict in the evidence, and reckoning witnesses by numbers I can see that the jury could reasonably enough have found for the defendant. So there is nothing under the doctrine of preponderance of evidence or weight of evidence which would warrant me in disturbing the verdict on that ground, and while I think the finding was wrong, I find nothing to justify me in granting the motion to set the verdict aside.

An additional ground urged for setting aside the verdict is newly discovered evidence.

Proofs of the newly discovered evidence are presented in the form of affidavits. I am going to do, perhaps, what is an unusual thing, decline to decide this question as a question of fact and say what the probable effect of the new evidence would be upon a new trial, and rule as a matter of law that the newly discovered evidence is not of sufficient potentiality to warrant an order granting a new trial. I do this for the purpose of giving the plaintiff an opportunity to raise questions for the Circuit Court of Appeals, if under the circumstances it can become a question of law.

In re HEREFORD.

(District Court, S. D. West Virginia. January, 1916.)

No. 822.

MORTGAGES ⌚169—**PRIORITIES**—**NOTICE**.

A debtor was requested by one of his creditors to make a statement of his financial condition. He informed the credit man of said creditor that he had given his brother a mortgage to secure a debt due him. T., an employé of the L. Co., another creditor, was present, but was charged with no specific duties as to the debtor's account, and subsequently had no recollection regarding the debtor's statement respecting the mortgage. Thereafter the debtor gave the L. Co. a trust deed to secure a debt due it. T. had nothing to do with the transaction, and at that time was not an agent or employé of the L. Co. *Held*, that the L. Co. was not charged with notice of the mortgage given by the debtor to his brother.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 386-388; Dec. Dig. ⌚169.]

In Bankruptcy. In the matter of J. R. Hereford, bankrupt. Upon certificate for review of the action of the referee in reference to the respective priorities of two trust deeds. Order affirmed.

Murray Briggs and Henry S. Cato, both of Charleston, W. Va., for petitioner.

Berkeley Minor, Jr., of Charleston, W. Va., for Lewis-Hubbard Co.

KELLER, District Judge. The certificate of the referee, W. G. Mathews, Esq., quite fully and clearly explains the question at issue and the contentions of the respective parties in relation thereto, and

it will be unnecessary to refer, except in one or two matters, to the testimony before the referee, which is returned with the certificate.

It appears that J. R. Hereford, the bankrupt, in September, 1913, was requested by Claude Sullivan, credit man for Hubbard Grocery Company, to call at his office to make a statement of his financial condition. Mr. Hereford did so call, and Mr. Sullivan, apparently of his own volition, called Mr. W. L. Tabscott, an employé of Lewis, Hubbard & Co., another wholesale grocery corporation, to be present; Mr. Hereford being a customer of both concerns.

It appears beyond doubt that at this conference Mr. Hereford informed Mr. Sullivan that he owed his brother, C. D. Hereford, \$2,200, secured by mortgage on real estate. Mr. Tabscott made no memorandum of any of the information communicated by J. R. Hereford, and when he testified had no recollection of having known that a deed of trust or mortgage was mentioned in the statement. Mr. Tabscott, it appears, had been charged with no specific duties in relation to the Hereford account, was present almost incidentally, and had no recollection in regard to the item of information communicated to Mr. Sullivan in regard to the C. D. Hereford "mortgage" or trust deed. He not only had nothing to do with the transaction resulting in the giving of the trust deed to secure Lewis, Hubbard & Co. in the sum of \$5,642.16, but was not at the time an agent or employé of the corporation.

Had Mr. Tabscott been an agent of the corporation in the negotiations resulting in the deed of trust of April 30, 1914, and had then forgotten (if he had ever known) the information conveyed to Mr. Sullivan by J. R. Hereford in September, 1913, the corporation would not be charged with notice; otherwise, if such information was present in his mind at the time of the transaction. 4 Thompson on Corporations, § 5200. To the same effect, see 2 Thompson on Corporations, § 1647.

Upon the whole case I conclude that the referee was correct in this order of December 7, 1915, and in his findings as set out in his certificate, and in view of the facts with reference to the amount of assets of this estate it becomes unnecessary to consider the otherwise very important matter raised by the petition of W. D. Guyer, trustee in bankruptcy, as to the alleged invalidity of the C. D. Hereford deed of trust as against general creditors.

The order of December 7, 1915, is affirmed in full.

HILLS v. JOSEPH.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916.)

No. 2613.

1. EXEMPTIONS ⇨52—PROPERTY IN LIEU OF SPECIFIC EXEMPTIONS—"OTHER PROPERTY."

Rem. & Bal. Code Wash. § 563, exempts to each householder certain cattle, provisions and fuel for such householder and family for six months, and feed for such animals for six months, provided that, if the householder shall not possess or shall not desire to retain the animals named, he may select from his property and retain other property not exceeding \$250 in value. *Held* that, while the Supreme Court of Washington, applying the rule of *ejusdem generis*, has construed the words "other property" as not including money on hand or due the householder from a third person, a householder not possessing or not desiring to retain the enumerated animals was entitled to select in lieu thereof merchandise from his stock in trade, not exceeding the prescribed value, and was not limited to the selection of other animate property.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 40; Dec. Dig.

⇨52.]

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

2. STATUTES ⇨194—CONSTRUCTION—"EJUSDEM GENERIS."

The rule of "*ejusdem generis*" is that where special words are used, followed by words of more general import, the general words are to be limited to things of the same kind as are described by the special words, unless an intention may be found to extend their meaning.

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

⇨194.]

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

3. EXEMPTIONS ⇨4—STATUTORY PROVISIONS—LIBERAL CONSTRUCTION.

Statutes creating or giving the right of exemption to a debtor are subject to the rule of liberal construction, and are generally subject to the most liberal construction which the courts can possibly give them.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 4; Dec. Dig.

⇨4.]

Gilbert, Circuit Judge, dissenting.

Petition to Revise Order of the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

In the matter of Max Joseph, doing business as the Workmen's Clothing Store, bankrupt. On petition by S. T. Hills, trustee, to revise an order setting aside certain exempt property to the bankrupt. Affirmed.

Cassius E. Gates, of Seattle, Wash., and Louis A. Merrick, of Everett, Wash., for petitioner.

S. A. Bostwick and J. Y. Kennedy, both of Everett, Wash., for respondent.

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

RUDKIN, District Judge. [1] This is a petition to revise an order of the District Court setting aside certain exempt property to a bankrupt. The question presented by the petition is one of law only, namely, the proper construction of subdivision 4 of section 563, Rem. & Bal. Code of Washington, which exempts:

"To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months: Provided, that in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value."

The particular question presented under this statute is: May a householder select merchandise from his stock in trade, not exceeding \$250, coin, in value, where he does not possess or does not desire to retain the animals there enumerated? The following state and federal cases are cited in support of the claim that he may not: *Carter v. Davis*, 6 Wash. 327, 33 Pac. 833; *United States Fidelity, etc., Co. v. Hollenshead*, 51 Wash. 326, 98 Pac. 749; *In re Gerber*, 186 Fed. 693, 108 C. C. A. 511; *In re Scheier* (D. C.) 188 Fed. 745; *Creditors' Collection Ass'n v. Bisbee*, 80 Wash. 358, 141 Pac. 886.

There seems to have been some misapprehension in later cases in the state court, as well as in the federal courts, as to what was actually determined in the case of *Carter v. Davis*. The principal question there decided was that the property of a debtor who leaves the state with intent to defraud his creditors is not exempt from execution or attachment under the express provisions of the state statute. Section 57, Rem. & Bal. Code. In the course of the opinion, however, the court used the following language with reference to subdivision 3 of the section now under consideration:

"The claim to this \$250, in the hands of the sheriff, is manifestly unfounded in law. The section of the statute referred to authorizes the selection of 'other household goods, utensils and furniture,' and prescribes the method and by whom such property may be selected, but confers no right to retain or select other property of a different character, in lieu of that authorized to be selected and retained."

A mere reference to subdivision 3 will show why the claim to the \$250 was manifestly unfounded in law, and why other property could not be selected in lieu of the household goods, utensils, and furniture. Subdivision 3 exempts:

"To each householder, one bed and bedding, and one additional bed and bedding for each additional member of the family, and other household goods and utensils and furniture not exceeding five hundred dollars, coin, in value."

It will thus be observed that subdivision 3 exempts specific property only, and allows no exemptions in lieu thereof, in case the householder does not possess or does not desire to retain the beds and bedding, household goods, utensils, and furniture. It is manifest, therefore, that the householder could not select other property, like or unlike, in lieu of the household goods, utensils and furniture, and that is what the court meant, and all it meant, when it said the house-

holder had no right to retain or select other property of a different character.

The same misapprehension has arisen over the decision in *Re Scheier*. The opinion in that case was written by the writer of this opinion. The court there simply held that a partner could not claim exemptions out of partnership property, and that money could not be claimed in lieu of provisions and fuel and feed for animals under subdivision 4. The reason for that ruling is obvious. Subdivision 4 exempts provisions and fuel and feed for animals, but allows no exemptions in lieu thereof in property of like kind or of a different kind. In that respect the case is similar to *Carter v. Davis*.

The only point decided in *United States Fidelity, etc., Co. v. Hollenshead* was that the exemption claim came too late. It is a significant fact, however, that while in that case the householder was claiming money in lieu of the animals enumerated in subdivision 4, there is not the slightest intimation in the opinion of the court, written by Mr. Justice Chadwick, that the claim was unfounded in law if timely made.

In *In re Gerber* this court held, as in the *Hollenshead* Case, that the claim to the personal property was not timely made under the Bankruptcy Act and the General Orders in Bankruptcy. The court, however, in the course of the opinion, quoted from *Carter v. Davis*, *supra*, and said:

"If, as the court there held, the right given by the Washington statute to select 'other household goods, utensils and furniture,' in cases provided for, was confined to other property of the same kind, and conferred no right to retain or select other property of a different character in lieu of that authorized to be selected and retained, it would seem to follow necessarily that the same construction must be given to like provisions contained in subdivision 4, § 563, Rem. & Bal. Code."

[2] We have sufficiently shown that the question of what was like property or what was not like property was not involved in the *Carter* Case. The above statement was therefore somewhat inaccurate as to what was decided in the *Carter* Case; but it was nevertheless a correct statement of the law, as appears from the recent decision of the Supreme Court in *Creditors' Collection Ass'n v. Bisbee*. In the latter case it was held that a householder could not claim money or a debt due from the Northern Pacific Railway Company in lieu of the animals enumerated in subdivision 4. In the course of its opinion, and as a reason for its conclusion, the court said:

"The words 'other property,' appearing in the proviso of subdivision 4, can refer only to other property of a like nature to that specifically mentioned, under a well-known rule of statutory construction. To hold that money falls within the phrase 'other property' is to do violence to the rule of *ejusdem generis*" (citing *Carter v. Davis*, *In re Gerber*, *In re Scheier*, and other cases).

That decision is of course binding upon this court to the extent that money on hand, or money due the householder from a third person, cannot be selected in lieu of the animals enumerated in subdivision 4; but it still leaves open the question as to what is property of like nature and what is the meaning of the rule of *ejusdem generis* as applied to this statute. The petitioner contends that the householder

may select any kind of animate property, because all the property enumerated in subdivision 4 happens to be of that class. This would no doubt be an easy solution of a rather difficult question; but we are far from convinced that the Legislature had in mind any such arbitrary or unreasonable classification as this. The exemption is granted to householders generally, regardless of their occupation, vocation, or calling in life, and a householder is defined by section 565 as:

“(1) The husband and wife, or either; (2) every person who has residing with him or her, and under his or her care and maintenance, either—(a) his or her minor child, or the minor child of his or her deceased wife or husband; (b) a minor brother or sister, or the minor child of a deceased brother or sister; (c) a father, mother, grandfather or grandmother; (d) the father, mother, grandfather or grandmother of deceased husband or wife; (e) an unmarried sister, or any other of the relatives mentioned in this section who has attained the age of majority, and are unable to take care of or support themselves.”

And notwithstanding the fact that the exemption is thus given in general terms and without qualification to all householders, it is safe to say that not one householder in ten can derive any benefit from the statute if construed as contended for by the petitioner. Nor does a proper application of the rule of *ejusdem generis* lead to any such conclusion. That rule is:

“That where special words are used, followed by words of more general import, the general words are to be limited to things of the same kind as are described by the special words, unless an intention may be found to extend their meaning.” 18 Cyc. 1381.

In this statute there is found a manifest intention on the part of the Legislature to extend the meaning of the special words, because the statute expressly provides that if:

“The householder shall not possess, or shall not desire to retain the animals above named, he may select *from his property* and retain other property not to exceed two hundred and fifty dollars coin, in value.”

This provision shows very clearly that the Legislature did not intend to limit the rights of the householder by any procrustean rule, for what would it avail him to surrender specific animals if he was required to select other animals of like kind. Furthermore, the particular property enumerated in this statute is itself so diversified that any strict application of the rule of *ejusdem generis* would seem to be out of the question. What property can be said to be of like kind as cows and their calves, swine, bees, and domestic fowl? The petitioner would divide property into things animate and things inanimate, and asks us to hold that all animate property falls within the rule and all other property without; but we are satisfied that any such construction would do violence to the legislative intent. That body had in mind the unfortunate debtor rather than any particular kind or class of property. It is of little moment to the creditor what kind of property is claimed as exempt, provided its value does not exceed the statutory limit, while some latitude in the choice or selection is indispensable to the debtor if he is to derive any benefit from the statute: First, to enable him to make the selection from property which he may own; and, second, to select such property as will best contribute to the support and comfort of himself and family.

[3] We are satisfied this liberty of choice was contemplated by the Legislature. The rule of construction applicable to exemption statutes is the most liberal known to the law. As said in 18 Cyc. at page 1380:

"By all but universal rule the statutes which create or give the right of exemption to a debtor are held subject to the rule of liberal construction. Indeed, it would be more proper to say that they are generally subject to the most liberal construction which the courts can possibly give them, the courts taking the ground that, since the statutes have a beneficial object, their first duty is to see that this object is accomplished."

Such is the rule adopted by the Supreme Court of the state of Washington in numerous cases: *Mikkleson v. Parker*, 3 Wash. T. 527, 19 Pac. 31; *Dennis v. Kass & Co.*, 11 Wash. 353, 39 Pac. 656, 48 Am. St. Rep. 880; *Puget Sound Dressed Beef & Packing Co. v. Jeffs*, 11 Wash. 466, 39 Pac. 962, 27 L. R. A. 808, 48 Am. St. Rep. 885; *Becher v. Shaw*, 44 Wash. 166, 87 Pac. 71, 120 Am. St. Rep. 982; *Northern Pac. Loan & Trust Co. v. Bennett*, 49 Wash. 34, 94 Pac. 664; *State ex rel. McKee v. McNeill*, 58 Wash. 47, 107 Pac. 1028, 137 Am. St. Rep. 1038.

Construing the statute thus liberally, we are satisfied that the ruling of the court below is well within the spirit and purpose of the law, and the judgment is therefore affirmed.

GILBERT, Circuit Judge (dissenting). The petitioner relies upon *Creditors' Collection Ass'n v. Bisbee*, 80 Wash. 358, 141 Pac. 886, *In re Gerber*, 186 Fed. 693, 108 C. C. A. 511, *In re Scheier et al.* (D. C.) 188 Fed. 745, and *Carter v. Davis*, 6 Wash. 327, 33 Pac. 833. The majority of the court are of the opinion that the precise question here involved was not adjudged in any of those decisions; that the decision of the Supreme Court of the state in the *Bisbee* Case went no further than to hold that money could not be claimed exempt as "other property," in lieu of the particular property named in subdivision 4; and that the language of that subdivision is plain and unambiguous, and affords no room for the application of the rule of *ejusdem generis*. It is true that in the *Bisbee* Case the ultimate question was whether money was included in the term "other property," so that it might be selected in lieu thereof as exempt from execution. But the reasoning of the court was sufficiently inclusive to meet the question of the construction of the statute which is now before us. The court said:

"The words 'other property,' appearing in the proviso of subdivision 4, can refer only to other property of a like nature to that specifically mentioned, under a well-known rule of statutory construction. To hold that money falls within the phrase 'other property,' is to do violence to the rule of *ejusdem generis*. *Carter v. Davis*, 6 Wash. 327 [33 Pac. 833]; *In re Gerber*, 186 Fed. 693 [108 C. C. A. 511]; *In re Scheier* (D. C.) 188 Fed. 744; *Ballard v. Waller*, 52 N. C. 84."

And the court quoted from the decision in *Ballard v. Waller* the following:

"The enumeration of particular articles, one cow and calf, etc., concluding with the words, 'and such other property,' by an established rule of construction, restricts it to other property of the like kind."

In the Gerber Case a bankrupt sought to retain \$250 in money in lieu of the property specified in subdivision 4. This court, after referring to the decision in the case of Carter v. Davis, 6 Wash. 327, 33 Pac. 833, as suggestive of the proper construction of subdivision 4, although the construction of subdivision 3 only was involved in that case, said:

"If, as the court there held, the right given by the Washington statute to select 'other household goods, utensils and furniture,' in cases provided for, was confined to other property of the same kind, and conferred no right to retain or select other property of a different character in lieu of that authorized to be selected and retained, it would seem to follow necessarily that the same construction must be given to like provisions contained in subdivision 4."

Carter v. Davis, it may be admitted, is not a precedent for the decision of this case, for it involves a construction of subdivision 3, the language of which is different from that of subdivision 4.

Conceding, however, that what was said by the Supreme Court in Creditors' Collection Ass'n v. Bisbee as to the true construction of the statute is obiter, and that the only question actually decided in that case is whether money is such "other property" as may be selected in lieu of the live stock designated, the language of the decision is nevertheless, I think, indicative of the construction which should be given to the statute. In that statute, subdivisions 3 and 4 make provision for exemption of two distinct classes of personal property. In subdivision 3 the householder is given the right to claim as exempt his household furniture to the value of \$500. In subdivision 4 he is given the right to claim as exempt certain specified live stock, bees, and fowls. Under a familiar rule of construction the proviso authorizing him to substitute other property for the precise property so designated should be held to include like property only, such, for instance, as horses, mules, oxen, sheep, goats, ducks, geese, or pigeons, and not to property which is entirely unlike and distinct from the property enumerated in the subdivision, such as the stock of merchandise which a householder may own. In 36 Cyc. 1120, it is said:

"The words 'other,' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of like kind or character."

And in 21 Am. & Eng. Enc. of Law, 1012, it is said:

"Where general words follow particular ones, the rule is to construe the former as applicable to persons or things ejusdem generis. This rule, which is sometimes called Lord Tenterden's rule, has been stated, as to the word 'other,' thus: 'Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces "other" persons or things, the word "other" will generally be read as "other such like," so that persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to or different from, those specifically enumerated.'"

Both text-writers add the qualification, which in its application to this case I have not overlooked, that in all cases of the interpretation of written instruments the question is one of intention, and that the rule of ejusdem generis is not an inflexible rule, but is to be applied as an aid to ascertain the legislative intent.

It is said that a different intention should be imputed to the Legislature from the fact that the statute, unless the exemption is construed to include all kinds of property, will deprive more than 60 per cent. of the householders of the state of the benefit of subdivision 4. This argument is based on the assumption that it was the intention of the Legislature in enacting subdivision 4 to create a substantially uniform exemption to all householders of the state. That assumption, I submit, is absolutely groundless. The exemption statutes of the state may be searched in vain for evidence that the Legislature intended to provide for uniform or equal exemptions to all classes of persons. The contrary intention is apparent. Thus subdivision 5 allows to a farmer, in addition to all the benefits of subdivisions 3 and 4:

"One span of horses or mules, with harness, or two yoke of oxen, with yokes and chains, and one wagon; also farming utensils actually used about the farm, not exceeding in value five hundred dollars in coin; also one hundred and fifty bushels of wheat, one hundred and fifty bushels of oats or barley, fifty bushels of potatoes, ten bushels of corn, ten bushels of peas, and ten bushels of onions for seeding purposes."

Other subdivisions make various exemptions for persons engaged in certain named trades and professions, but no mention is made of persons engaged in mercantile pursuits. Subdivision 4, even as the majority of this court construe it, results in inequality of exemption. If the householder have the animals specified, he must claim them as exempt. He has no option to take other property in place of them. Again, if he selects the animals as exempt, he is allowed to claim as exempt "also feed for such animals for six months," in case he has the feed. If he has it not, he is allowed no equivalent of the value of the feed, although that value may at times be greater than the value of the animals.

Again, it must tax judicial ingenuity to discover a reason why a stock of merchandise is "such other property" and money is not. If it was the intention of the Legislature, in enacting subdivision 4, to grant to all householders a general exemption of personal property of any kind or description except money, to the value of \$250, I am unable to see why the Legislature did not say so, or why pains were taken to enumerate the numbers and kinds of living animals which are mentioned as within the permitted exemption. A case in point is *Brooks v. Cook*, 44 Mich. 617, 7 N. W. 216, 38 Am. Rep. 282. In *Alabama v. Montague*, 117 U. S. 602, 6 Sup. Ct. 911, 29 L. Ed. 1000, it was said:

"While the company is thus specific in its description of the subjects of the mortgage, enumerating with great particularity its land grant from Congress, its telegraph lines and offices, its machine shops, and its coal mines, it is quite unreasonable to suppose that the company would have been thus needlessly minute in its description of the property conveyed, enumerating with great particularity the four or five classes of property, mostly real estate, which were intended to pass, if it had also intended that the three words, 'all other property,' should stand for everything in the four states which the company owned, and especially all its lands."

KEMMERER v. MIDLAND OIL & DRILLING CO.

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

No. 4075.

1. INDIANS ⚡16—LEASE OF LANDS—SUBSEQUENT LEASE OF MINING RIGHTS.

Even in the absence of statute the owner of land in fee who has leased the surface without reservation has the right to drill through the surface for oil or gas, and may convey that right by lease to another; but as to Indian lands coming within its scope such right is reinforced by Act May 27, 1908, c. 190, § 2, 35 Stat. 312, which provides that "leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior," the effect of which is to make a severance of the oil and gas right from the surface.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. ⚡16.]

2. INJUNCTION ⚡135, 161—PRELIMINARY INJUNCTION—DISCRETION OF COURT.

The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and one of the rules with reference to the granting of such injunctions is that the court will take into consideration the amount of damage which the plaintiff will sustain if an injunction be not granted, and the amount which defendant will sustain if it be granted, although such considerations can have no weight, if the rights of one of the parties are clear and indisputable.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 304, 347; Dec. Dig. ⚡135, 161.]

3. INJUNCTION ⚡161—DISSOLUTION OF TEMPORARY INJUNCTION—DISCRETION OF COURT.

In a suit by the lessee of land for agricultural purposes to enjoin a subsequent lessee of the oil and gas rights from drilling a well on the premises, it was within the discretion of the court to dissolve a temporary injunction previously granted, where it appeared from the showing made that the injury to complainant's rights from the drilling of such well would be trifling.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 347; Dec. Dig. ⚡161.]

Sanborn, Circuit Judge, dissenting.

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

Suit in equity by O. Kemmerer against the Midland Oil & Drilling Company. From an order dissolving an interlocutory injunction, complainant appeals. Affirmed.

J. A. Tillotson, of Nowata, Okl. (Tillotson & Elliott and A. C. Hough, all of Nowata, Okl., on the brief), for appellant.

James C. Denton, of Muskogee, Okl. (W. A. Chase, of Nowata, Okl., on the brief), for appellee.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SMITH, Circuit Judge. [1] John S. Woodard, a Cherokee Indian, leased, by written instrument dated December 26, 1911, and ap-

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

proved by the Secretary of the Interior under date of December 19, 1912, to O. Kemmerer 40 acres of land for five years, beginning on January 1, 1913, for \$50 a year, being \$2 per acre for the east 20 acres and 50 cents per acre for the west 20 acres. This instrument was duly filed for record on January 21, 1913. This lease is headed "Agricultural Lease," and recites that it is executed "under and in accordance with the provisions of existing law and the rules and regulations prescribed by the Secretary of the Interior relative to agricultural leases on restricted lands of allottees of the Five Civilized Tribes." It is stipulated in said lease that "the lessee agrees * * * to work and farm said premises in a good husbandlike manner." Seven times the petition refers to the lease as an "agricultural lease."

On November 6, 1912, said John S. Woodard made a lease to the Midland Oil & Drilling Company for 10 years of all the oil deposits and natural gas in or under the same land leased by "agricultural lease" to Kemmerer. This lease was filed for record with the superintendent of Union Indian agency the 6th day of December, 1912, and before the lease to Kemmerer was approved by the Secretary of the Interior. It was filed for approval February 18, 1913, and was approved by the Secretary of the Interior April 9, 1913. Both these leases were executed in pursuance of the authority conferred by the act of May 27, 1908, which, so far as material, is as follows:

"That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." 35 Stat. 312.

Shortly after approval by the Secretary of the Interior of the agricultural lease to Kemmerer, he took possession of the tract under the same. The 40 acres in question was then fenced, but had no buildings thereon. The east 20 acres was then broken out and under cultivation, but the west 20 acres was still in prairie grass. About June 6, 1913, the Midland Oil & Drilling Company entered upon the northwest corner of the 40—that is, upon the land in prairie grass—took possession of about one-half acre, installed a drilling machine, and commenced to drill for oil and gas. It is expressly stipulated that the Oil Company has used only such portion of the surface as was necessary to properly develop said land for oil and gas. This suit was brought by Kemmerer against the Oil Company in the district court of the county of Nowata to enjoin the prosecution of drilling by the Oil Company and a temporary injunction was granted in the state court. The case was then removed to the United States District Court for the Eastern District of Oklahoma. Several orders were there made as to the temporary injunction, which was finally dissolved, and the plaintiff appeals.

It is settled law that the right to excavate coal under the surface of land is a corporeal hereditament. *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 293, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544. It is equally well settled that in a fugitive article like oil or gas the right to bore or mine for it is an incorporeal hereditament. *Priddy*

v. Thompson, 123 C. C. A. 277, 204 Fed. 955. In the latter case we held an action of ejectment would not lie to recover an incorporeal hereditament, but it does not follow that an action of injunction will lie to prevent exploration by the owner of such incorporeal right.

The petition fairly shows that the defendant had been in possession of the northwest corner of the land in question and boring for oil and gas for nearly a week when this suit was brought. It seems to be settled that the original owner of the fee to land owns from the clouds to the center of the earth; that he can plat and subdivide the surface of the earth within his own boundaries substantially according to his will and pleasure is beyond question; in other words, he can by vertical planes subdivide his property as he chooses. In like manner he may subdivide his property by as many horizontal planes as he may see fit, either above or beneath the surface of the earth. The writer well remembers when the owner of property adjacent to a large hotel was about to erect a building which would preclude all air and light from one side of the hotel. The city commenced condemnation proceedings to take enough of his property for alley purposes to insure light and air to the hotel. To avoid condemnation proceedings the property owner conveyed his entire tract to the proprietor of the hotel, who conveyed back to him the lot below the second story windows and reserved the title from the top of the first story to the sky, thus asserting at least the power to divide the property by a horizontal plane about 20 feet above the ground.

The most common illustration of the right to divide property by horizontal planes as well as by vertical planes is of course found within the earth's crust. It is a common thing for the owner of a portion of the earth's crust to convey the coal or other mineral beneath the surface, and thus the owner of the surface has parted with a stratum or strata in the midst of what was once his, and continues to own from the center of the earth to the bottom of the part sold and from the top of the part sold to the clouds, while the vendee owns the part conveyed.

No case that we have found involves the right of the parties in case of a sale of a part of a stratum. Ordinarily the sale or leasing of a stratum beneath the surface by implication carries with it the right to the use of so much of the surface as may be actually necessary to mine from the stratum conveyed. Cases directly in point with this one are very rare.

In *Rend v. Venture Oil Co.* (C. C.) 48 Fed. 248, a temporary injunction was sought by the owner of a coal mine to restrain the sinking of an oil and gas well through it where at the particular place where the well was being sunk the coal had been mined, except sufficient of it to furnish the necessary support to the surface above. It seems to have been assumed in that case either that the defendant had an implied right to go through the coal mine, or at least that the owner of the coal mine must show that there would be danger of explosion or the like in the mine from escaping gas. This last would not be true unless there was a general right to go down through

the coal mine by the oil company. This case was decided in November, 1891.

The next case, and one more nearly in point, is *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645. That case was decided in January, 1893. The court was divided upon some questions four to three. It was unanimously agreed, however, that where the owner of an entire tract leased or sold the coal beneath his tract, without any reservation of a right of way through the coal to explore for oil or gas or anything else, and when it was unlikely that either the owner of the surface or his vendee of the coal knew of the existence of oil or gas beneath the coal, and subsequently the owner of the surface leased the oil and gas privilege to a third person, who commenced to bore from the surface down through the coal in search of oil and gas, that the right of access to the oil and gas existed always, and in the absence of statute the owner of the coal could not rightfully procure a temporary injunction to restrain the oil and gas lessee from boring through the coal. The difference between the members of the court was as to the extent of the powers of a court of equity and the necessity for legislation on the subject.

On the same day, in *Mansfield Coal & Coke Co. v. Mellon*, 152 Pa. 286, 25 Atl. 601, the Supreme Court of Pennsylvania followed the case of *Chartiers Block Coal Co. v. Mellon*. In *Telford et al. v. Jenning Producing Co.*, 121 C. C. A. 516, 203 Fed. 456, the case of *Chartiers Block Coal Co. v. Mellon*, supra, is cited and quoted from at length with approval.

While the questions here involved have not often been considered the announcement in the *Chartiers Block Coal Co.* Case has never been questioned, so far as we can ascertain, in the more than 22 years since its announcement. If these cases are correct, there can be no doubt that the decision of the court below was correct, because if the grant of a right in the subsurface necessarily implies the right of access, and if the grant of the first stratum below the surface necessarily implies a right to penetrate that stratum by the grantor or his lessee in reaching a stratum below, even where such right has not been reserved, then the same right of access exists as against the owner of the surface and in favor of the owner or lessee of a stratum below, even though no such right was reserved in a lease made of the surface.

II. This point is strengthened in this case by the federal statute heretofore referred to. It is provided in section 2 of the act of May 27, 1908 (35 Stats. 312):

"That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior."

By thus expressly authorizing, with the approval of the Secretary of the Interior, the leasing of the oil and gas right in what was formerly Indian Territory, Congress itself made a severance of the oil and gas right from the surface, and of necessity authorized access to

the oil and gas, and this more than three years before the lease to the plaintiff was even executed by the Indian allottee, and more than four years before his lease was approved by the Secretary of the Interior.

III. The land taken was a part of the unbroken prairie. This was leased to plaintiff at 50 cents per acre cash and 40 cents per acre on the 1st day of January of each year thereafter for five years. The defendant took possession of one-half an acre. There is nothing to indicate this half acre was of more or less rental value than the average, or than the plaintiff had agreed to pay. Presumptively the one-half acre was worth 25 cents a year, or \$1.25 for the entire period of the lease. He now seeks, upon this trifling investment of 45 or perhaps 65 cents, and his promise to pay 20 cents a year for three or four more years, and his promise to pay not to exceed a total of \$1.25, to obstruct the exploration of this land for oil and gas until the expiration of his lease. In the meantime it appears there were three wells adjacent to the land, which were sucking out the oil and gas beneath this land, perhaps to the total loss of the chief value of this land to the Indian. It is very questionable whether over so small a matter to the plaintiff the law would concern itself at all. "De minimis non curat lex."

[2, 3] IV. It was said in *American Grain Separator Co. v. Twin City Separator Co.*, 120 C. C. A. 644, 648, 202 Fed. 202, 206, that:

"The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and, where that court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it abused its discretion. The question is not whether or not the appellate court would have made or would make the order. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below? *Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co.*, 198 Fed. 650, 653 [117 C. C. A. 354]; *Massie v. Buck*, 128 Fed. 27, 31, 62 C. C. A. 535, 539; *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 330, 107 C. C. A. 403; *High on Injunctions* (4th Ed.) § 1696; *Higginson v. Chicago B. & Q. R. R. Co.*, 102 Fed. 197, 199, 42 C. C. A. 254, 256; *Interurban Ry. & Terminal Co. v. Westinghouse E. & Mfg. Co.*, 186 Fed. 166, 170, 108 C. C. A. 298, 302; *Kerr v. City of New Orleans*, 61 C. C. A. 450, 454, 126 Fed. 920, 924; *Thompson v. Nelson*, 18 C. C. A. 137, 138, 71 Fed. 339, 340; *Soci t  Anonyme Du Filtre Chamberland Sys. Pasteur v. Allen*, 33 C. C. A. 282, 285, 90 Fed. 815, 818; *Murray v. Bender*, 48 C. C. A. 555, 559, 109 Fed. 585, 589; *U. S. Gramophone Co. v. Seaman*, 51 C. C. A. 419, 423, 113 Fed. 745, 749."

That opinion was by Sanborn, Presiding Judge, and was again approved by him in the case of *Magruder v. Belle Fourche Valley Water Users' Association*, 133 C. C. A. 524, 219 Fed. 72.

One of the rules with reference to the granting of a temporary injunction is that the court will take into consideration the amount of damage which the plaintiff will sustain if an injunction be not granted and the amount which the defendant will sustain if it be granted. Of course such considerations can have no weight if the rights of one of the parties are clear and indisputable, but under the facts of this case we entertain no doubt that the District Court was well within its discretion when it dissolved the injunction in this case.

It follows that for all of the reasons assigned in this opinion the action of the District Court in dissolving the injunction must be affirmed.

SANBORN, Circuit Judge (dissenting). While the value of the property which is the subject of this litigation is not large, and the amount of damage which is being inflicted upon the plaintiff is apparently small, the controlling questions of law which it presents seem to me to be of general and public interest, and the decision of them by the majority, if that decision should pass into precedent, cannot fail to have far-reaching and lasting effects upon the property and upon the value of the property of many who are not parties to this lawsuit. The main question in the case is: May the owner of a tract of land, who has leased it for years without any reservation, restriction, or exceptions to a lessee who has taken possession thereof under a lease, vest in a second lessee by a subsequent lease of the right to take oil or gas from the land, or by any other subsequent grant or lease, the right to deprive the first lessee of his right to the exclusive possession of every part of the surface of and of the land itself during the term of his prior lease? The majority answer this question in the affirmative. It seems to me that it should be answered in the negative.

The leases in controversy took effect when they were respectively approved by the Secretary. Before the dates of those approvals they were respectively ineffective. Hence, in legal effect, Woodard, the owner of the land, leased it to Kemmerer on December 14, 1912, and, after Kemmerer had taken possession under his lease of the land which was already inclosed by a fence, and on April 9, 1913, Woodard leased to the Midland Oil & Drilling Company the oil and gas deposits in the land and so much of the surface thereof as should be reasonably—

“necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or other sources, by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations.”

The subsequent lessee on June 6, 1913, over the protest of the first lessee, entered upon about half an acre of the land, placed a Star drilling rig thereon, and commenced to drill for oil and gas therewith. The majority are of the opinion that the lessor of this subsequent lease lawfully vested in the subsequent lessee a right to the exclusive possession and use of the half acre tract which it has seized, a right which is superior to the right to the exclusive possession thereof which the lessor had previously granted to the first lessee. If this conclusion be right, it necessarily follows that the lessor by the subsequent lease vested in the second lessee a right superior to that of the first lessee to the exclusive possession and use of every part of the surface of this land which then was or should thereafter become necessary to enable the second lessee to prospect for, extract, pipe, store, and remove the oil or gas it might find therein, to sink wells for water therein, and to pipe it in order to carry on its operations, and, if all the surface be or should become necessary for these purposes, then he

took that from his first lessee, and vested in the second lessee the right to the exclusive possession of all the surface of the land previously leased to Kemmerer. It seems to me that the decision ought to be that by the first lease the absolute right to the exclusive possession of the entire tract of land to the exclusive possession of every inch of its surface and of every other part of it was vested in the first lessee, and that thereafter the lessor had no right or power to revoke any part of his grant, or to vest in the second lessee any right whatever to interfere with or disturb the first lessee's exclusive possession of every part of the surface of the land, much less to evict him from it, or from any part of it. The following principles of law and facts converge with compelling power to force my mind to this conclusion:

It is true that the words "Agricultural Lease" are printed at the head of the first lease, and that that lease is repeatedly called an agricultural lease by the parties and their counsel in this proceeding, and that the words "Oil and Gas Mining Lease" are printed at the head of the second lease, and it is so called. But neither of these terms appears in any of the stipulations or covenants contained in either of the leases, and their legal effect must be deduced, not from the names printed at their heads, or applied to them, but from the written agreements which the leases contain and which the parties deliberately signed when they executed the writings. The controlling parts of the lease to Kemmerer are:

"The lessor doth hereby let and lease unto the said lessee the lands and premises described as follows, to wit: W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 4, township 25, range 17 east, and containing 40 acres, more or less, for the period beginning on the 1st day of January, 1913, fully to be completed and ended on the 31st day of December, 1917, subject to the conditions hereinafter provided for. The said lessee, in consideration of said premises as above set forth, covenants and agrees with the lessor to pay said lessor, as rental for the same, the sum of two hundred and fifty dollars, * * * to keep said premises in good repair, to work and farm said premises in a good husbandlike manner, * * * and to turn the same over at the expiration of this lease in as good condition as they now are, the usual wear, inevitable accidents, and loss by fire excepted. * * * The covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, assigns, executors and administrators of the parties to this lease."

This lease contains no restrictions to agricultural, mining, or any other purpose; no exceptions; no reservations. It was a lease, not of the surface only, nor of any stratum only, but of the lands and premises described in it. It was a lease, not of the right to the possession and use of the premises for farming, or for any other single purpose only; but it was a lease of the entire lands and premises described for the term of years specified in the lease, and in my opinion its legal effect was to vest in the lessee the right to the exclusive possession of every part of the entire surface of the land and premises and of the land itself described therein during the full term of the lease, and to assure that exclusive possession by the implied covenant of quiet enjoyment of the lessor to the effect that the lessee paying the rent should peaceably and quietly have, hold, and enjoy the possession of every

part of the premises for the term mentioned. It vested in the lessee an estate for years, and it divested the lessor of all right to the possession or control of every part of the surface of the premises and of the premises themselves until the expiration of the lease and left him nothing but the reversion. The books upon examination seem to me to demonstrate these conclusions and to illustrate the jealousy with which the courts guard this right of a lessee for years to the exclusive possession of the premises leased to him.

"The legal understanding of a lease for years is a contract for the possession of land for a determinate period with the recompense of rent," said the Supreme Court in *United States v. Gratiot*, 14 Pet. 526, 538, 10 L. Ed. 573, cited in *Raynolds v. Hanna* (C. C.) 55 Fed. 783, 800; *Pelton v. Minah Consolidated Min. Co.*, 11 Mont. 283, 28 Pac. 310, 311. And this was such a lease. "It is obvious that in principle the right of a lessee is the same as that of the purchaser in fee," said the Supreme Court in *Waskey v. Chambers*, 224 U. S. at 564, 565, 32 Sup. Ct. 597, 598 [56 L. Ed. 885, Ann. Cas. 1913D, 998]. "A lease is a contract between the lessor and lessee, vesting in the latter a right to the possession of the land for a term of years. * * * It becomes an estate when it takes effect in possession." *Tiedemann on Real Property*, § 538. Such an estate vested in Kemmerer when he took possession under his lease. "And as soon as a lessee shall have entered under a written lease the lessor is so effectually divested of the possession that he cannot maintain trespass against a stranger who should enter and cut trees upon the premises, although the tenant himself is restricted from cutting them (*Greber v. Kleckner*, 2 Pa. 289, 291), though, had he excepted them in his lease, he might have maintained trespass for cutting them (*Schermerhorn v. Buell*, 4 Denio [N. Y.] 422, 423; *Van Rensselaer v. Van Rensselaer*, 9 Johns. 377). In the former case the tenant might have trespass for the cutting of the trees if done by a stranger, and the owner of the inheritance trover for the value of them. *Burnett v. Thompson*, 51 N. C. 210, 213. But the lessor would have no right to enter upon the premises, although the lessee should have actually left and abandoned possession of the same. *Shannon v. Burr*, 1 Hilton, 39." 1 *Washburn on Real Property*, 497, 498. If by a lease for years a lessor is so effectually divested of the right of possession that he cannot maintain trespass for trees cut by a stranger which the lessee is restricted by the lease from cutting, the lessor in this case certainly could not lawfully deprive, or empower another to deprive, the prior lessee of the exclusive possession of any part of the surface, or of any other part of the land leased.

A lessee can maintain trespass against his landlord for forcibly breaking and entering the leased premises during the term. *Barneycastle v. Walker*, 92 N. C. 198. He may recover damages for wrongful dispossession by his landlord. *Miller v. Uhlman* (D. C.) 198 Fed. 233, 241, 242. A demise of premises in possession of lessees under a prior valid lease is void. It is neither effectual lawfully to disturb the prior lessees in possession or lawfully to evict them. *Post v. Martens*, 25 N. Y. Super. Ct. 437, 439.

Again, the entry upon and interference with the exclusive possession of Kemmerer by the lessor, or by the Midland Oil Company claiming under him, by a subsequent lease, was wrongful and without justification because it was a breach of the lessor's implied covenant of quiet enjoyment with Kemmerer which runs with the land and to which the Midland Oil Company's claims are subject. The law implies from the use in a lease of the word "let" or the word "lease" a covenant with the lessee for the latter's quiet enjoyment of the premises leased against the lessor and against all claiming under him. *Duncklee v. Webber*, 151 Mass. 408, 24 N. E. 1082; *Owens v. Wight* (C. C.) 18 Fed. 865; *Playter v. Cunningham*, 21 Cal. 229, 233; *Hart v. Windsor*, 12 M. & W. 68, 85; *Lanigan v. Kille*, 97 Pa. 120, 125, 39 Am. Rep. 797; *Maule v. Ashmead*, 20 Pa. 482, 484; *Ross v. Dysart*, 33 Pa. 452, 453; *Maeder v. City of Carondelet*, 26 Mo. 112, 114, 115; *Hamilton v. Wright's Adm'r*, 28 Mo. 199, 205, 206; *Wade v. Halligan*, 16 Ill. 507, 511; *Abrams v. Watson*, 59 Ala. 524; *Pickett v. Ferguson*, 45 Ark. 177, 199, 55 Am. Rep. 545; *Field v. Herrick*, 10 Ill. App. 591; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 125, 52 Am. Rep. 680; *City of New York v. Mabie*, 13 N. Y. 151, 154, 64 Am. Dec. 538; *Edwards v. Perkins*, 7 Or. 149; *Steel v. Frick*, 56 Pa. 172, 174. This covenant of quiet enjoyment runs with the land. *Shelton v. Codman*, 57 Mass. (3 Cush.) 318. And the lease to Kemmerer contains an express contract that it shall do so. The stream cannot rise higher than its source, the subsequent lessee has no better right to disturb the exclusive possession of the first lessee than the lessor has, and the lessor is liable upon his covenant of quiet enjoyment for any interference authorized by him by his subsequent lessees with the exclusive possession of the first lessee. *Sherman v. Williams*, 113 Mass. 481, 485, 18 Am. Rep. 522; *Baughner v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279. Where a landlord makes a lease to a third party of all or a portion of the premises already by him leased to another, the acts of such third party within the terms of his lease are authorized by the landlord, and he is liable therefor. *Conrad Seipp Brewing Co. v. Hart*, 62 Ill. App. 212, 217.

In *Duncklee v. Webber*, 151 Mass. 408, 24 N. E. 1082, the Supreme Judicial Court of Massachusetts held that a lessor's covenant of quiet enjoyment was implied by law from an informal lease containing the names of the parties and reading:

"I have leased to * * * for the term of three years, paying therefor 800 per annum, the rent to be payable monthly, on the 1st of each month."

In *Sherman v. Williams*, 113 Mass. 481-485, 18 Am. Rep. 522, the defendants leased for 7 years and 6 months a certain brick building in Boston. At the time of the lease and thereafter the defendants named owned a strip of land, not under the building, but parallel with the side of the building, 10 inches wide and 27 feet and 6 inches long. The coving and eaves of the building extended out beyond the building 10 inches and over a part of the strip a part of the way. The lessors, after making the lease, gave to the owners of the land adjoining the strip permission to construct a party wall thereon, and they built such a wall, a part of which was upon the strip and under the eaves

of the leased building. The court held that the lease of the building was the lease of the land under the eaves; that the acts of the adjoining owners in building a wall were the acts of the lessors, because they were done by their permission; that these acts deprived the plaintiffs of the exclusive possession of so much of the leased premises as the wall covered, and constituted a breach of the lessors' covenant of quiet enjoyment.

In *Case v. Minot*, 158 Mass. 577, 585, 587, 33 N. E. 700, 22 L. R. A. 536, the defendants leased to the plaintiffs for years the second, third, fourth, and fifth stories of the east half of their building. Subsequently they leased the entire building to one Jordan and another, subject to the lease to the plaintiffs, and subject to one or two other leases of parts of the building. In this second lease they authorized Jordan to put in an electric apparatus and to build a chimney on the east side of the building upon land owned by the defendants which was not covered by the building. Jordan constructed the chimney, and when completed it obstructed somewhat the light and air in front of some of the windows in that part of the building leased to the plaintiffs. The lease contained no covenants. The Supreme Judicial Court of Massachusetts held that the defendants were liable for any interference or disturbance by their subsequent tenants of the plaintiffs' exclusive possession of the premises leased to them and of the light and air appurtenant thereto, and that the erection of the chimney by the subsequent lessees with the permission of the lessors constituted a breach of their implied covenant of quiet possession.

Where a tenant for years, after subletting to a third party and before the underlease has expired, surrenders to the landlord, the latter is guilty of a trespass in entering upon the sublessee. *Krider v. Ramsay*, 79 N. C. 354. A removal by the lessor of fences enclosing the leased premises is a material disturbance of the rights of the lessee for which the lessor is liable in damages. *Abrams v. Watson*, 59 Ala. 524, and *State v. Piper*, 89 N. C. 551. In *Levitzky v. Canning*, 33 Cal. 299, 306, 308, the defendant leased his building to the plaintiff for years. During the term he gave leave to a washerwoman without charge to use the roof of the building to hang clothes out to dry, and she did so. The court held that this was beyond all question a breach of the lessor's covenant of quiet enjoyment for which he was liable.

If a lessor may not lawfully disturb the possession of his lessee for years of a building by permitting an adjoining owner to put a party wall on part of a 10-inch strip and in part under the eaves of the building, or disturb the possession of the lessee for years of the second, third, fourth, and fifth stories of a building by permitting the subsequent lessee of the entire building to erect a chimney obstructing in some degree the light to the windows leased to the first lessee, although on land not beneath the stories covered by that lease, or disturb the possession of his lessee by removing a fence upon the leased premises, or disturb the possession of his lessee of a building by subsequently permitting a washerwoman to dry her clothes on the roof of it, is it not reasonably clear that neither a lessor nor his subsequent lessee may lawfully disturb the possession of his prior lessee for years of an en-

tire tract of land by leasing or entering upon a half acre, or any other part of the land, much less all of the surface of the tract which is or may become reasonably necessary to enable the subsequent lessee to prospect for, mine, store, and remove the gas within it? Other illustrations of the application of the general rules of law which have been recited may be found in the authorities to which reference has been made above, but which have not been here reviewed at length. An examination of these and other decisions has convinced that the following propositions of law are founded in reason and are established without dissent by the authorities:

A lessee for years of a tract of land from the owner, without reservation, restriction, or exception, has the absolute right to the exclusive possession of every part of the surface and of every part of the land from the zenith to the nadir during the term of the lease. A stranger has no right to enter upon or in any way disturb the possession of such a lessee without his consent, and if he does so the lessee may maintain a suit, against him for appropriate relief. Neither the lessor nor any one by his subsequent authority, grant, or lease, has any such right: (1) Because by the lessor's lease of the entire premises without exception or reservation he divests himself of all right to enter upon or to interfere in any way with the exclusive possession by the first lessee of every part of the surface of, and of every part of the entire, premises leased; and (2) because the law implies from his use of the word "let," or the word "lease," or any similar word in his lease, his covenant with the lessee that the latter shall enjoy the quiet possession of the entire premises leased, free from any interference with or disturbance of his exclusive possession of every part thereof, either by the lessor or by any one claiming under him, and all subsequent lessees take subject to this covenant which runs with the land. So it is that a lessor and those claiming under him have much less appearance of right to enter upon and occupy any part of the leased premises, or to interfere with or disturb the exclusive possession of the first lessee, than an entire stranger, for they have no better right than such stranger, and he is not bound by any covenant of quiet enjoyment or subject thereto. And because the lessee in the case at bar first leased for years the entire tract of land here in question and every part of it, and the lessee took possession of it under the lease before the lessor made the subsequent lease to the Midland Oil Company of the right to take and occupy the land for the purpose of prospecting for and removing oil and gas therefrom, my mind finds no way of escape which is to it either logical or reasonable from the conclusion that neither the lessor nor the subsequent lessee has any right whatever to enter upon or to occupy any part of the surface of the land first leased to Kemmerer, or any other part of that land, or to interfere with or disturb Kemmerer's exclusive possession thereof during the term of the lease.

This conclusion has not been reached without a careful study and deliberate consideration of the argument and the authorities upon which the majority base their decision of the question under discussion; but they have not proved convincing, and they seem to me

to be inapplicable to the facts of this particular case. As I understand the argument it is substantially this: The original owner of a tract of land may subdivide it by horizontal planes and lease the stratum between two such planes to one party, and that between other planes to another, and the surface to another in the same way that the owner of a tall building may lease different stories to different tenants. The sale or leasing by such owner of coal or other mineral beneath the surface of the land is by implication a sale or lease of the right to use so much of the surface of the land as is reasonably necessary to enable the lessee to remove the coal or other mineral from the stratum beneath the surface in which it is found. Therefore the subsequent lease by the lessor in this case to the Midland Oil Company of the right to enter upon and use so much of the surface of the land here in question as should be necessary to prospect for and remove the oil and gas under it gave to the Midland Company a right to enter upon and use that surface which was superior to the right of Kemmerer to whom this lessor had previously granted for a term of years the absolute right to the exclusive possession of every part of the surface of, and of every other part of, the land.

But to my mind the conclusion is neither the logical, the natural, nor the reasonable result of the premises. Conceding that the original owner of a tall building, or of a tract of land, may subdivide it by horizontal planes, may convey, or mortgage, or lease the different stories of the building, or the different strata of the land, to different lessees, and that under such sales, or mortgages, or leases, the different lessees may have such implied rights against the owner and those subsequently claiming under him, to the use of the halls, exits, and entrances of the building, and to the use of the surface of the land as may be reasonably necessary to enable them to derive the intended benefits of their leases, it does not follow that an owner who has sold, or mortgaged, or leased for years his entire building, or his entire tract of land, to a lessee who has taken possession thereunder, can thereafter, as against such lessee, lawfully subdivide, sell, mortgage, or lease any story or any part of the building, or any stratum or any part of the land, so as to take back to himself from the first lessee and to vest in the subsequent lessee any right to enter upon, use, disturb, or interfere with the right of the first lessee to the exclusive possession of the building or land leased and every part thereof. If the owner sells and conveys a building, and the grantee takes possession thereof, the grantor cannot thereafter lawfully subdivide that building, or sell, mortgage, or lease any part of it, so as to give to the second grantee any right to any part of the property as against the first grantee. If the lessor in this case had had the power to alienate this land, and had sold and conveyed instead of letting and leasing it by the very description used in the lease to Kemmerer, he certainly could not thereafter have granted or leased any part of it, or anything in it, so as to have given his second grantee any right to the possession or use of any part of it, or of anything in it as against his first grantee. If he had mortgaged it, he could not subsequently, by leasing or selling the ore or the oil and gas in it, or the stratum in which these are or may be found, have deprived the mortgagee, or

empowered his grantee or subsequent mortgagee to deprive him, of his security, or of any part of it.

One who takes a mining lease in the face of a prior mortgage by the lessors takes subject to the rights of the mortgagee, and must account to him for the proceeds he derives from the mines. *First National Bank v. G. V. B. Min. Co.* (C. C.) 89 Fed. 449, 451. And by the same mark this lessor, by his lease to Kemmerer for years of the entire tract without restriction, exception, or reservation, granted to him the absolute right to the exclusive possession of every part of the surface and of every other part of the land during the term of the lease, and divested himself of all power and right as against Kemmerer to enter himself upon or to interfere with Kemmerer's exclusive possession of every part of the surface and of every other part of the land, and of all power and right by attempted subdivision, lease, grant, or permit subsequently to authorize the Midland Oil Company, or any other party, so to do during the term of Kemmerer's lease.

It is not claimed that any authority has been discovered which directly decides to the contrary, or which holds that the crucial question, May the owner of a tract of land, who has leased it for years without any restriction, or reservation, or exception, to a lessee who has taken possession of it under the lease, vest in a second lessee by a subsequent lease the right to take oil and gas from that land, or by any other subsequent grant, or lease, the right to deprive the first lessee of his right to the exclusive possession of every part of the surface of the tract during the term of his prior lease, should be answered in the affirmative. But *Rend v. Venture Oil Co.* (C. C.) 48 Fed. 248, *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645, *Mansfield Coal & Coke Co. v. Mellon*, 152 Pa. 286, 25 Atl. 601, and *Telford v. Jenning Producing Co.*, 121 C. C. A. 516, 203 Fed. 456, are cited as cases tending toward support to such an answer. Bearing in mind that the facts in this case are a first lease for years of the entire tract of land, and every part of it, and possession of the lessee thereunder, against a lease thereafter made by the same lessor of the right to prospect for and take oil and gas from the land, and to enter upon, occupy, and use so much of the surface as should be necessary for that purpose against the prior right of the first lessee to the exclusive possession of every part of the land, let us apply to the opinions in these cases the familiar rules announced by Chief Justice Marshall that "an opinion in a particular case, founded on its special circumstances, is not applicable to cases under circumstances essentially different" (*Brooks v. Marbury*, 24 U. S. [11 Wheat.] 78, 90, 6 L. Ed. 423); and "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used; if they go beyond the case, they may be respected but ought not to control the judgment in a subsequent suit, when the very point is presented for decision" (*Cohens v. Virginia*, 19 U. S. [6 Wheat.] 264, 398, 399, 5 L. Ed. 257);—and see how far they indicate that the question at issue should be answered in the affirmative.

In *Rend v. Venture Oil Company*, which was decided in 1891, the owner of the land had first granted to Rend, the plaintiff, all the coal in the land and a perpetual right to use the underground entries to

remove the coal mined therein, or any other coal for which the entries were convenient. Subsequently the owner, still owning the surface of the land and in its possession, granted to the Venture Oil Company permission to enter upon that surface and drill for oil and gas, and the company had done so and threatened to extend its well through the space where the coal had been into the land beneath. Rend had removed all the coal from this space years before, except some pillars left to support the surface, and had ceased active operations at that place. He asked the court to enjoin the Venture Company until the hearing from sinking its well through the space where the removed coal had been, and his request was denied by the court, because Rend failed to show a clear legal or equitable right to the exclusive possession of this vacant space, and because he failed to show that any substantial injury was likely to be inflicted upon him or upon his property before the final hearing of the case by permitting the casing of the well to pass through the space from which the coal had been removed.

Two years later the cases of *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 Atl. 597, 599, 18 L. R. A. 702, 34 Am. St. Rep. 645, and *Mansfield Coal & Coke Co. v. Mellon*, 152 Pa. 286, 25 Atl. 601, were decided by the Supreme Court of Pennsylvania. The latter case was not essentially different from the former, and no opinion was delivered in it. In the former the Block Coal Company, the plaintiff, had purchased in 1881 of the owner of the land all the coal under it and the right to enter upon the surface of the land, to take into and place thereon any material it might desire to use in its mining operations, and the right to make and use entries to take and carry away the coal. In 1891 the owner of the land made leases thereof for oil and gas purposes, and one of the lessees was drilling and threatening to drill wells through the spaces where the coal had been, and in some places through some of the veins of coal still remaining in the land, in order to reach the oil and gas below. The Block Company sought an injunction. The trial court granted a preliminary injunction against the drilling of some of the wells, and refused to grant it against the drilling of others, and his decision was affirmed above by a divided court. The two judges who delivered opinions held that, as the owner of the land before he made any sale or lease of any of it, or of any minerals in it, owned it from the zenith to the nadir, and had the right of access to every part of it, he did not part with his right of access to the part beneath the coal by a sale of the coal in the land, and that by a subsequent lease he might grant this right of access to a lessee. Chief Justice Paxson placed this right of access through the coal sold on the ground that a sale or lease of the coal did not convey the space in which it was found, but left that and a right of way through it in the owner of the land. He said:

“Prior to the sale of the coal his estate, as already observed, reached from the heavens to the center of the earth. With the exception of the coal, his estate is still bounded by those limits. * * * The grantee of the coal owns the coal, but nothing else, save the right of access to it, and the right to take it away. Practically considered, the grant of the coal is the grant of the right to remove it. * * * It cannot be seriously contended that, after

the coal is removed, the owner of the surface may not utilize the space it had occupied for his own purposes, either for shafts or wells, or to reach the underlying strata. The most that can be claimed is that, pending the removal, his right of access to the lower strata is suspended. The position that the owner of the coal is also the owner of the hole from which it has been removed, and may forever prevent the surface owner from reaching the underlying strata, has no authority in reason, nor do I think in law. The right may be suspended during the operation of the removal of the coal to the extent of preventing any wanton interference with the coal mining, but for every necessary interference with it the surface owner must respond in damages. The owner of the coal must so enjoy his own rights as not to interfere with the lawful exercise of the rights of others who may own the estate above and below him. The right of the surface owner to reach his estate below the coal exists at all times. The exercise of it may be more difficult at some times than at others, and attended with both trouble and expense. No one will deny the title of the surface owner to all that lies beneath the strata which he has sold. It is as much a part of his estate as the surface. If he is denied the means of access to it, he is literally deprived of an estate which he has never parted with."

In *Telford v. Jenning Producing Company* the plaintiffs agreed to procure and deliver to the defendant for \$75 per acre an oil and gas lease of 262½ acres of land, "together with good and sufficient title." They procured such a lease from the owners of the land, but former owners had previously sold and conveyed the coal under 50 acres of the land to a third party, and the defendant refused to take and pay for the oil and gas lease on the ground that on account of the previous sale of the coal the title was not good and sufficient. The court, citing and quoting from *Chartiers Block Coal Co. v. Mellon*, held that the defendant was in no sense prejudiced by the sale of the coal, and that the lease tendered offered him good title to the oil and gas and to the right of access to it through the space occupied by the coal.

It seems clear that there is nothing in these decisions or in the opinions in them in any way tending to overthrow the long and firmly established principles sustained and illustrated by the decisions and text-books to which reference has been made, to the effect that neither a lessor nor his subsequent lessee can lawfully interfere with and disturb the exclusive possession of a prior lessee for years, without restriction, reservation, or exception, of an entire tract of land. They go no farther than to sustain the familiar principle that the sale and conveyance by the owner of a tract of land, while he still owns it and still has the right to the exclusive possession and use of the surface of it, of the coal in it or of the oil and gas in it, carries to the respective lessees, by implication, the right, as against the lessor and against each other, to such entry upon and use of the surface, and of the spaces containing the coal and the oil and gas, as shall be reasonably necessary to enable each of them to have access to and to remove the mineral granted to them. They do not hold that after an owner has sold and conveyed or mortgaged, or leased for years, a tract of land without restriction to any specific purpose, and without any reservation, he or his subsequent lessees or grantees for mining purposes, or for any other purpose, may lawfully assail the title or disturb the possession of the prior grantee, mortgagee, or lessee. They

in no way challenge or deny these indisputable propositions: While one is the owner of a tract of land, he may separate it into different strata, and grant the right to one stratum to one party, and the right to another stratum to another party; but when he has parted with all his right and title to all of his tract he can no longer subdivide it, or grant any right in it. While one is the owner of the exclusive right to the possession of a tract of land, or even of the surface of it, he may grant by express lease, or by implication by means of mining leases, rights to the possession and use of parts of the surface of his tract. But the whole of the surface is greater than any of its parts and contains all of them, and after he has granted and covenanted to one by a lease for years the exclusive possession of the entire surface of a tract of land, or the exclusive possession of the entire tract, he cannot lawfully grant to another by express leases, or by implication by means of mining leases, or in any other way, any right to the possession of any part of the surface of that tract during the term of the lease.

As careful a search of the authorities as I have been able to make has disclosed no decision or opinion which seems to me to contradict or to challenge this proposition, or to support an affirmative answer to the question at issue, and I am unable to bring my mind to consent to such an answer. The more the question has been studied the stronger has become my conviction that reason and indisputable authority sustain the position that the owner of a tract of land, who has leased it for years without any restriction, reservation, or exception to a lessee who has taken possession of it under the lease, cannot vest in a second lessee by a subsequent lease of the right to take oil and gas from that land, or by any other subsequent grant or lease the right to deprive the first lessee of his right to the exclusive possession of every part of the surface of the land and of every part of the land itself during the term of his lease. In my opinion this case is governed by this proposition. Kemmerer has the absolute right to the exclusive and undisputed possession of every inch of the surface of this land, and neither Woodard nor the Midland Oil & Drilling Company have the shadow of any right to enter upon or occupy any part of it, or to disturb in any way his exclusive possession of every part of it during the term of his lease.

It is true that the leases which have been considered were made under the act of May 27, 1908 (35 Stat. 312), which provides, among other things:

"That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

But this provision merely grants owners of restricted lands rights to lease which owners of unrestricted lands have without such a grant. It does not forbid, but authorizes, owners of restricted lands to lease them for years without restriction, exception, or reservation, and when so leased it leaves the lessors and lessees subject to the general rules of law applicable to the rights of lessors and lessees of unre-

stricted lands. It does not command or require owners of restricted lands to make separate leases of them for oil and gas, or for coal, or for grazing, or for agricultural purposes, to different lessees, but gives them power to lease them for years for all purposes, without reservation or exception, and it nowhere enacts that as to such leases the familiar and established principles of law shall be repealed or reversed, or that the rights of subsequent lessees from the owners of restricted lands shall be superior to the rights of prior lessees granted by the same lessors. The provision, therefore, does not, in my opinion, modify, repeal, or reverse, as to the leases and the rights of the parties in this case, the general principles and rules of law to which reference has been made, but leaves them subject thereto, and the lessor and the Midland Oil & Drilling Company without any right whatever to enter upon or occupy any part of the surface of the land leased to Kemmerer, or to disturb in any way his exclusive possession of every part of it during the term of his lease.

The result is that the defendant, the Midland Oil & Drilling Company, was continually and repeatedly, day after day, trespassing upon the estate for years of the plaintiff, disturbing and depriving him of the exclusive possession of the surface of the land leased to him, to which he was lawfully entitled, and upon these facts he prayed for an interlocutory injunction. It is said that he was not entitled to it, because measured by the rent to be paid by the plaintiff the use of the half acre upon which the defendant was repeatedly trespassing was worth only \$1.25, and much money would be lost by the trespasser by reason of the abstraction of the oil and gas it was seeking by others if it were not permitted to continue its trespasses, and in the second place that the court below denied the injunction, and where the trial court "has not departed from the rules and principles of equity established for its guidance its orders in this respect may not be reversed by the appellate court without clear proof that it has abused its discretion," and that where there has been no such departure it is the discretion of the trial court, and not that of the appellate court, that is to determine whether or not such an injunction should issue.

But in my opinion the court below, by its refusal of the injunction, did depart from the rules and principles of equity established for its guidance; those rules and principles left no discretion for that court or this court to exercise, and for that reason its order should be reviewed and reversed. It is one of the established rules and principles of equity jurisprudence that it is the duty of a court of chancery to protect one clearly entitled to the exclusive possession of real estate from repeated or continuing trespasses upon it by its injunction, whenever the resulting damages from those trespasses are so small and so frequent, or so continuous, that actions at law for them would cost more than they would produce, and would not be likely to stop the disturbance of his possession, or prevent the continuance of the trespasses, and thus would afford no adequate remedy at law. *U. S. Freehold Land & Emigration Co. v. Gallegos*, 89 Fed. 769, 773, 32 C. C. A. 470; *Lembeck v. Nye*, 47 Ohio St. 336, 353-5, 24 N.

E. 686, 691, 8 L. R. A. 578, 21 Am. St. Rep. 828; Richards v. Dower, 64 Cal. 62, 64, 28 Pac. 113; Clowes v. Staffordshire Potteries Waterworks Co., L. R. 8 Chan. App. 125, 142; The Attorney General v. Sheffield Gas Consumers' Co., 19 English Law and Equity Reports, 639, 648; Goodson v. Richardson, L. R. 9 Chan. App. 221, 224; Wilts & Berks Canal Navigation Co. v. Swindon Waterworks Co., L. R. 9 Chan. App. 451; Galway v. Metropolitan Elevated Ry. Co., 128 N. Y. 132, 145, 147, 28 N. E. 479, 13 L. R. A. 788; Dimick v. Shaw, 94 Fed. 266, 268; 2 Wood on Nuisances, § 778, note pages 1126, 1127; 2 Beach on Injunctions, §§ 1129, 1146; Evans v. Ross, 8 Pac. 88;¹ Tallman v. Metropolitan Elevated R. R. Co., 121 N. Y. 119, 123, 124, 23 N. E. 1134, 8 L. R. A. 173; Uline v. N. Y. C., etc., R. R. Co., 101 N. Y. 98, 122, 4 N. E. 536, 54 Am. Rep. 661; Poirier v. Fetter, 20 Kan. 47; Johnson v. City of Rochester, 13 Hun (N. Y.) 285.

One who has the right to the exclusive possession of real estate also has the right to the prevention by an adequate remedy of the infringement or disturbance of that right. The duty of a court of equity by its injunction to protect such a right to possession is not conditioned by the value of the right, or by the amount of the damage from its infringement, but by the absence of an adequate remedy at law to protect that right and to prevent the infringement. The owner of the right to the exclusive possession of a farm or of a lot in a city, of little value, which is repeatedly or continuously infringed by such trespasses as the wrongful turning of a horse or hog into his field or pasture, the daily picking of flowers which he cultivates, not for profit, but for his pleasure, upon his lot, the oft-repeated or continuous trampling of his grass on his lot, and the repeated or continuous breaking or hacking of his shade trees, is as much entitled to the injunction of a court of chancery to protect his right to the exclusive possession of his property and to prevent its disturbance by such trespasses, although his pecuniary damage therefrom is so small as to be almost negligible, as is the owner of property of great value from trespasses causing damages so great that the wrongdoer can never repay them; and this for the reason that actions at law for such trespasses would be more expensive than compensatory, and as the amounts which could be received would be so small as to be negligible they would not be likely to deter the trespasser from continuing his disturbance of the possession of the owner. Nor is it any defense to the prayer of one, whose right to the exclusive possession of real estate is being wrongfully infringed by continuing and vexatious trespasses, for the injunction of a court of chancery to stop them and to prevent their repetition, that the trespasser is deriving, or probably will derive, thousands of dollars of profits from his wrongdoing, and it will inflict a damage of only a few cents upon the injured man. The power and duty of a court of equity to protect the owner of the right to the exclusive possession of real estate from continuing trespasses, against which he has no adequate remedy at law, is not measured by the

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 67 Cal. xix.

value of the right, by the amount of damage to it by the trespasses, or by the great profit which the wrongdoer is obtaining by continuing them. It has long been a rule of action in this court that:

"A continuing trespass upon real estate, or upon an interest therein, to the serious damage of the complainant, warrants an injunction to restrain it. A suit in equity is generally the only adequate remedy for trespasses continually repeated, because constantly recurring actions for damages would be more vexatious and expensive than effective." *U. S. Freehold Land & Emigration Co. v. Gallegos*, 89 Fed. 769, 773, 32 C. C. A. 470.

It is often said that irreparable damage is a condition of the issuance of an injunction. But within the meaning of that saying damage caused by continuing trespasses upon the right to the exclusive possession of real estate so small as to be negligible, or so small that its recovery by actions at law would cost more than they would produce, while they would not be likely to prevent the continuing trespasses, is irreparable damage, because it is damage that cannot be repaired by actions at law. Wood, in the second volume of his work on Nuisances (3d Edition, at section 778), well states this rule in these words:

"By irreparable injury is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor necessarily great injury, or great damage, but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which, because it is so large on the one hand, or so small on the other, is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law."

And the reason for this rule is nowhere better stated than by Lord Justice Mellish in his opinion in *Clowes v. Staffordshire Potteries Company*, L. R. 8 Chan. App. 125, 142. In that case an injunction was sought against the maintenance of an expensive reservoir which had already been built, for the reason that its maintenance caused water used by the plaintiff's tenants to be muddy. The defendant had offered the tenants a filter, and the evidence was that the use of such a filter would remedy the muddy condition of the water. But the tenants had declined to accept the offer, and the Vice Chancellor had denied the injunction with the remark:

"If you can recover at law at all, I think you will get no greater damages than would be sufficient to pay for a filter, and that would be a sufficient compensation."

Lord Mellish, in reversing the order of the court below, said in his opinion:

"But, with submission to the Vice Chancellor, I do not think the plaintiff would get at law a sum sufficient to put up a filter. She would only get, in the first instance, nominal damages, because in a case of this kind she cannot prove specific damage, and there is no evidence here of specific damage, and upon that evidence she would only get 40s. damages. Then you must bring a second action, and what you would get in the second action would be the actual damage which you had proved you sustained between the bringing of the first action and the second. Then you would bring a third action, with the same result. It is because it is most inconvenient to leave the rights of parties to be determined in that way, and in fact because it is impossible to leave it in that way, that this court has always in such cases given relief."

The writer of note 4, page 1127, 2 Wood on Nuisances, after quoting these remarks, adds:

"The learned Lord Justice in this case gave expression to the true rule controlling this class of cases. The very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot in damages compensate the injury or stop the wrong, furnishes the best possible reason for the interference of a court of equity, and the fact that the actual injury resulting from the violation of the right is small, and the interest to be affected by the injunction is large, is not to weigh against the interposition of preventive power, when on the one hand a right is violated, and on the other a wrong is committed. It will not do to lose sight of small rights. If their violation is tolerated, gradually the violation of larger rights will find an equal toleration, and the wildest chaos and confusion will ensue. The majesty and dignity of the law is best preserved when the scales of justice are balanced evenly, and its powers asserted to uphold even the smallest interests, against aggression from others. Vice Chancellor Bruce, in *Attorney General v. Sheffield Gas Co.*, 19 Eng. Law & Eq. 648, gave utterance to a rule which, although not adopted in that case, has since become the rule which governs the English courts in all such cases. 'It seems to me,' said he, 'that even slight infringements of rights respecting real estate * * * require to be watched with a careful eye and repressed with a strict hand by a court of equity where it can exercise jurisdiction.' * * * See also a strong case in support of the doctrine of the text, *Goodson v. Richardson*, L. R. 9 Chan. App. 224, where it was held that the mere invasion of a right without actual damage, which was continuous in its nature, entitles a party to an injunction. In a recent English case, *Wilts, etc., v. Swindon Waterworks Co.*, L. R. 9 Chan. App. 451, the right of a party to an injunction to restrain the violation of a right, where no actual damage was shown, was raised and decided."

In that note many authorities are cited in support of the text and of the note.

In my opinion the foregoing rules and principles apply to this case. The plaintiff has the clear and undoubted right to the exclusive possession of every inch of the surface of the land which is the subject of this controversy. The defendant, without right or lawful authority, is committing repeated and continuing trespasses upon it, which interfere with and disturb that possession. The plaintiff has the right to the complete protection of his right to the exclusive possession of every inch of the surface of this land by an adequate remedy. The pecuniary damage inflicted by the trespasses is so small and so continuous that actions at law to recover damages would cost more than they would produce, and they would not be likely to stop or prevent the continuing wrong. In other words, such actions would not only fail to furnish an adequate remedy for the trespasses, but they would bring upon the plaintiff additional cost and damage in excess of all he could possibly recover. As the plaintiff has a clear right to the stoppage and to the prevention of the continuing trespasses, and is without remedy at law, it is within the power, and is the duty, of a court of equity to stop and prevent these wrongs by its injunction.

For these reasons, the order denying the injunction should, in my opinion, be reversed, and the court below should be directed forthwith to issue the injunction sought.

STATE OF OHIO v. HARRIS.

SAME v. CLUM.

SAME v. FERRIS.

(Circuit Court of Appeals, Sixth Circuit. January 4, 1916.)

Nos. 2737, 2739, 2816.

1. TAXATION Ⓒ117—CORPORATE FRANCHISE—INSOLVENCY AND RECEIVER.

It is not the intent of the Ohio statute to exact a franchise tax in respect of an insolvent domestic corporation, not shown to have a surplus of assets in excess of its indebtedness, where the corporation has either been adjudged a bankrupt or its assets have been placed in the hands of a receiver (who, though empowered to continue the business, is not shown or claimed to have done so except only as this may have been involved in the collection of claims and discharge of debts), and where the tax claimed is for a time subsequent to the tax year in which the adjudication or appointment took place.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. Ⓒ117.]

2. TAXATION Ⓒ117—CORPORATE FRANCHISE—INSOLVENCY AND RECEIVER.

While the corporations here involved fall nominally within the class to which the franchise fee or tax (section 5495, General Code of Ohio) applies, still, in view of the status of each, they are not corporations intended by the statute to be taxed, since the paramount purpose of the statute is to tax corporations which are in the exercise of their franchises.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. Ⓒ117.]

3. TAXATION Ⓒ58—INTENTION TO TAX—STRICT CONSTRUCTION.

The intention to tax must be expressed by the Legislature in distinct and unambiguous language, and the language employed cannot be extended by implication beyond its clear import, and well-founded doubts engendered in attempting to apply the statute must be resolved in favor of the taxpayer.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 134, 135; Dec. Dig. Ⓒ58.]

4. TAXATION Ⓒ117—CORPORATE FRANCHISE—LIEN—INSOLVENCY.

Section 5506, General Code Ohio, providing that the franchise tax shall be the first and best lien on all property of the corporation, whether such property is employed by the corporation in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of creditors, does not signify that the lien is a source of power to tax; the lien affords simply security for collecting a tax otherwise specifically authorized and assessed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. Ⓒ117.]

5. TAXATION Ⓒ117—CORPORATE FRANCHISE—INSOLVENCY AND RECEIVER.

Where a corporation is in process of winding up by proceedings in assignment or bankruptcy as provided in section 11975, General Code Ohio, omission to file the certificate called for by section 11974, Id., does not have the effect of sanctioning the exaction of the franchise tax, where the state officials charged with its collection have actual knowledge of the condition of the corporation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. Ⓒ117.]

6. TAXATION ⚡117—CORPORATE FRANCHISE—INSOLVENCY AND RECEIVER.

Where assets of an insolvent corporation are in the custody of the law for the sole purpose of being converted into money and applied towards payment of debts, and such seizure is prior to the tax year in question, it is immaterial whether title is in a trustee or the property is merely in the custody of a receiver, since the effect on the corporation in both cases is the same, and the question of title is not the test of right to recover the tax, since the imposition of a tax on franchises necessarily implies a privilege to exercise them; that is, the franchise to exist and the right to exercise the powers contemplated by the charter as well.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. ⚡117.]

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Clarke, Judge.

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

Bankruptcy proceedings against the Smokeless Heat & Power Company (George B. Harris, trustee) and the Georgian Bay Company (Alfred Clum, trustee), and action for a receivership of the Dominion Coal Company (Aaron A. Ferris, receiver), in each of which the State of Ohio intervened. From decrees granting insufficient relief, the State of Ohio appeals, and also files a petition to revise the decree in the first proceeding. Petition to revise dismissed, and decrees affirmed on appeal.

These appeals are from decrees entered in three intervention suits brought by the state of Ohio. The first and second interventions were commenced in bankruptcy proceedings, one in the matter of the Smokeless Heat & Power Company, bankrupt, and the other in that of the Georgian Bay Company, bankrupt; and the third was begun in an equity suit commenced by George H. Keeney against the Dominion Coal Company, in which an order was at the same time entered appointing a receiver and placing the property of defendant in possession of the receiver. The companies mentioned had been organized as Ohio corporations, though for different purposes; and at the commencement of the bankruptcy proceedings and the suit involving receivership, each company was in possession and control of its property and business. The object of the interventions was to recover certain franchise fees or taxes which were claimed to have accrued against the respective companies and ripened into a lien upon the corporate property; and, moreover, enforcement of the alleged liens was asked through orders, one against each of the trustees in bankruptcy and another against the receiver, requiring the officer to pay the tax out of the funds of the estate in his hands.

The first intervention concerned the tax for 1910, 1911, and 1912; and the trustee was ordered to pay, subject to the cost of administration, the tax that accrued in 1910, with interest, though without penalty. The second intervention related to the tax for 1904 to 1913, inclusive; and recovery was granted, in the form of preferred tax claims, for 1905 to 1910, inclusive, with interest, but without penalty. The third intervention had reference to the tax for 1911, 1912, and 1913; and the receiver was ordered to pay as a preferred claim, out of the funds in his possession, the tax that accrued in the year 1911, without penalty. The adjudication in bankruptcy involved in the first intervention took place November 23, 1910, and in the second on the 9th of that month; but the appointment of the receiver did not occur until November 3, 1911. It will thus be seen that the recoveries allowed were for such unpaid franchise taxes as had accrued before, and also in, the year (a) of the adjudications in bankruptcy and (b) of the appointment of the receiver,

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

and that the recoveries denied related to each of the subsequent years, when the trustees and the receiver, not the corporations, were in possession and control of the corporate assets and engaged exclusively in applying them toward payment of the corporate debts.

The state appeals from the decree, and also files petition to revise in matter of law, in the first of the interventions, but simply appeals from the decrees in the second and third. The assignments of error, however, are confined to the denials of recovery for the years subsequent to those in which the adjudications in bankruptcy and the appointment of the receiver occurred, and so do not concern the recoveries allowed. The appeals were heard together in this court, but nothing was then said by counsel, and nothing appears in the briefs, in regard to remedy. It is therefore assumed that each decree was open to the appeal taken, and hence the petition to revise the order involved in the first decree must, in accordance with the settled practice, be dismissed.

C. D. Laylin, of Columbus, Ohio, and C. F. Hornberger, of Cincinnati, Ohio, for the State of Ohio.

W. L. R. Flory, of Cleveland, Ohio, for appellee Harris.

G. B. Marty, of Cleveland, Ohio, for appellee Clum.

A. A. Ferris, of Cincinnati, Ohio, for appellee Ferris.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above).

[1] Is it the intent of the Ohio statute to exact a franchise tax in respect of an insolvent domestic corporation, where the corporation has either been adjudged a bankrupt or its assets have been placed in the hands of a receiver (who, though empowered to continue the business, such as that of mining and selling coal, is not shown or claimed to have continued the business except only so far as this may have been involved in his admitted collection of claims and discharge of debts of the corporation), and where the tax claimed is for a time subsequent to the tax year in which such adjudication or appointment took place?

The facts deducible from the present records do not call for decision upon some features of the arguments of counsel. For example, whether the tax would be recoverable for such a period: (1) If it were made to appear in respect of a corporation, which is in bankruptcy or whose assets are in the hands of a receiver, that there will be a surplus of assets after discharge of the indebtedness; or (2) if a receivership were created with authority in the receiver to continue the business, and the business were in fact conducted by him during a period for which the tax is not paid. No such case is before us, but simply stating these instances serves measurably to clarify the present situation. The instant cases have to do with corporate assets which had been taken from the corporations in virtue of judicial orders, and at times when the corporations were admittedly insolvent; and, further, it is to be remembered that the present claims for taxes are not for the years in which any of the corporate assets were seized, but are for years subsequent to the seizures, and while the assets were in the custody of the law for the sole purpose of being converted into money and applied toward payment of the corporate debts.

[2] Concededly, these corporations fall nominally within the class to which the franchise fee or tax claimed in terms applies, for they were

organized under the laws of Ohio "for profit." 3 P. & A. O. G. C. § 5495. Before giving attention to the nature of the fee as it has been judicially defined, reference will be made to its statutory sanction. The amount is computed according to a prescribed standard. Domestic corporations are required to file reports annually with the state tax commission in either May or June; and every report must be made under oath by one of the officials of the corporation (sections 5495, 5496, Id.), and must show, among other facts not now important, the issued and outstanding capital stock of the company (section 5497, Id.). The tax commission is then required to determine, and certify to the auditor of state, the amount of stock outstanding. The auditor must by August 15th "charge for collection, * * * from such corporation, a fee of three-twentieths of one per cent." upon the amount of stock so certified to him; the fee is payable by the 1st of the following October (section 5498, Id.). It will be observed that the fee is thus made an annual charge, though the statute does not specify the year for which the charge is made. Judge Clarke held, in the present bankruptcy interventions, that this period is the current calendar year, while Referee Doyle held in *Bank v. Aultman*, 12 Am. Bank. R. 13 (same case, 14 O. F. D. 298), that it is "the year ensuing after the filing of the annual report." It is not necessary to determine which of these periods is the correct one, for it must be one or the other, and, in view of the tax recoveries allowed below, each of the corporations lost possession and control of its property within a tax-paid period; but we are disposed to believe Judge Clarke's conclusion is right.

The particular portion of the Ohio legislation which, as we have seen, authorizes the charge to be made, calls it a "fee," and this was true of the original act, commonly known as the Willis Law. 95 Ohio Laws, 124, 125. The evident reason for adopting this name, when it is considered in connection with the mode selected for computing the amount to be exacted, was to distinguish the charge from a tax on property, and so to avoid the limitation of the Ohio Constitution which requires "all real or personal property" to be taxed "according to its true value in money." Article 12, § 2, Const. of 1851 and 1912. Franchises have never been regarded as property, within the meaning of this limitation. *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 593, et seq., 64 N. E. 564; article 12, § 10, Const. of 1912. It was because of this distinction that the Willis Law was sustained; the charge it imposed being defined as "a franchise tax, and not a tax on property." *Southern Gum Co. v. Laylin*, supra, 66 Ohio St. at page 578, syl. 6, 64 N. E. 564. The decision, however, did not point out the particular franchise that was affected by the act; that is, whether it was the right of the corporation to exist or its right to exercise the powers contemplated by its charter—its articles of incorporation—or both, though it was said in the course of the opinion (66 Ohio St. 596, 597, 64 N. E. 564) that the fee was not a tax on the stock, since the stock was not owned by the company but by the stockholders. Mr. Justice Day, when considering a kindred statute (of New Jersey) and the different names which had there been applied to a similar charge, said of the provision requiring corporations to "pay an annual license fee or fran-

chise tax * * * on all amounts of capital stock issued and outstanding" (P. L. 1892, p. 136; 3 Gen. Stat. N. J. p. 3338) that it was "a tax imposed by the state upon the corporation for the privilege of existence and the continued right to exercise its franchise." *New Jersey v. Anderson*, 203 U. S. 483, 490, 493, 27 Sup. Ct. 137, 51 L. Ed. 284.¹ The effect of the New Jersey statute, as thus defined by Mr. Justice Day, would seem to justify imposing the tax while the corporation through permanent dispossession of its property was in no sense active, but simply passive, as respects alike the franchises to be and to do; and yet this hardly could have been intended, since that question was not involved in the case. The tax there claimed and allowed was for the year of the bankruptcy and the year next preceding; and it is worthy of notice that the state did not seek allowance for any year in which the bankrupt company had not, for at least part of the year, exercised its franchises. *New Jersey v. Anderson*, 203 U. S. 485, 494, 27 Sup. Ct. 137, 51 L. Ed. 284.

The Ohio franchise tax must be laid with reference to "the reasonable value of the privilege or franchise originally conferred, or its continued annual value thereafter." *Southern Gum Co. v. Laylin*, supra, 66 Ohio St. 578, syl. 3, and page 594, 64 N. E. 564. The court was then, it is true, dealing with a general law and its operation on all corporations of given classes throughout the state, and not with isolated companies which were in the exercise of their franchises, though under such exceptional conditions as would render the tax a hardship (*Ohio Tax Cases*, 232 U. S. 577, 589, 34 Sup. Ct. 372, 58 L. Ed. 737; *Ohio River & W. Ry. Co. v. Dittey* [D. C.] 203 Fed. 537, 541—three judges sitting—affirmed in *Ohio Tax Cases*); still the fact that the statute has survived the restriction so declared in the *Laylin* Case would seem to indicate that it could not have been the legislative purpose to impose the tax upon any distinct class of corporations, such as insolvent companies, whose property has been taken from them permanently and whose franchises are neither exercised nor of any practical value. The obvious burden that must otherwise be cast on the creditors gives emphasis to this view. Indeed, the paramount pur-

¹ The difficulty to define the nature and incidence of the tax under the New Jersey act may be seen in decisions of that state. Thus an earlier statute required the corporation to pay "a yearly license fee or tax * * * on the amount of capital stock," and in *Honduras Co. v. Board of Assessors*, 54 N. J. Law, 278, 282, 23 Atl. 668, 670, this was construed to be "a franchise tax exacted from the company as the price of the right and privilege, which it received from the state, of being a corporation." *Lumberville Bridge Co. v. Assessors*, 55 N. J. Law, 529, 533, 537, 26 Atl. 711, 25 L. R. A. 134, is to the same effect. *Marsden Co. v. Assessors*, 61 N. J. Law, 461, 462, 39 Atl. 638, applied the language just quoted from the *Honduras Co.* Case when considering the tax defined, as above stated, by Mr. Justice Day. In *re United States Car Co.*, 60 N. J. Eq. 514, 516, 43 Atl. 673, 674, says of the exaction: "In fact it is not, strictly speaking, a tax at all, nor has it the elements of one. It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its property or of its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence." *Hancock, Comptroller, v. Singer Mfg. Co.*, 62 N. J. Law, 289, 336, 41 Atl. 846, 42 L. R. A. 852, defines the charge to be "a tax on the capital stock of the corporation."

pose of the statute is to tax corporations, which are in control of their property and engaged in the exercise of their franchises. This appears in several ways. It is seen in the provision of the statute which requires the secretary of state to keep a correct list of the corporations "engaged in business" within the state, and monthly to certify reports to the tax commission showing new corporations, changes in capital stock, dissolution of corporations, and giving such other information as the commission may require. Section 5514, vol. 3, O. G. C. It is seen also in the provision which authorizes a corporation, upon mere retirement from business, to secure exemption from the requirement either to file annual reports or to pay the tax, if only it file a certificate of such retirement with the secretary of state. Section 5520, Id., and sections 11974 and 11975, vol. 5, Id.

Further, the remedies best calculated to bring about prompt compliance with the act, and so produce the revenue contemplated, are evidently aimed against going concerns, since those concerns alone would be injuriously affected by enforcement of the remedies. For example, upon failure for 90 days to file the annual report or pay the tax, the secretary of state is clothed with power, if he is not under duty, to cancel the articles of incorporation, when "all the powers, privileges and franchises conferred * * * by such articles * * * shall cease and determine" (section 5509, Id.); but the effect of this may be avoided through compliance with the statute at any time within two years (section 5511, Id.); or, upon such failure, the Attorney General may on request of the tax commission institute suit to enjoin the corporation from transacting business until the report is filed or the tax paid, according as the one or the other failure is involved (section 5512, Id.). It is true, after such failure and on request of the tax commission, resort may be had to proceedings in quo warranto, "to forfeit and annul" the "privileges and franchises." Section 5513, Id. But it is not to be presumed that this remedy would be invoked in the absence of convincing reasons for believing that the other remedies would fail. Where the corporation is in control of its assets, its officers will naturally either yield to the other remedies, or place the corporation in retirement, or voluntarily dissolve it, and so secure exemption. Sections 5520, 11974, 11975, and 11976, before cited. The significance, then, of such a remedial scheme as this, and of the means of retirement and dissolution pointed out, is that they strike at the vital interests of companies worth saving, and force into retirement or dissolution companies not worth perpetuating though having assets sufficient to interest their officers and stockholders. It results, we think, that the statutory provisions thus far alluded to tend to show a legislative design not further to tax an insolvent corporation, whose tax has been paid for every year in any part of which the company exercised its franchises through pursuit of its business, and whose assets have ever since been in course of distribution among creditors under proceedings, such as are involved here, in bankruptcy or receivership. Plainly, as respects a situation like this, resort to any of the special remedies mentioned would be futile in an attempt to compel the corporation itself to pay the tax.

[3] In view, however, of certain other parts of the statute, to which attention will presently be called, the state contends that the tax accrued against the present corporations after the tax years respectively in which the trustees in bankruptcy and the receiver were appointed, and that it will continue to accrue until formal corporate dissolution (or its equivalent) takes place. We cannot accept this view of the statute; but obviously it is not necessary to pass upon counsel's interpretation of the act as respects a time after the corporate assets are fully converted and applied to the debts. It is now important carefully to discriminate between the part of the statute which distinctly authorizes the tax to be laid, and the parts which either secure payment of the tax or provide for putting an end to it. For it is a long-settled and familiar doctrine, applicable to all forms of taxation, that the legislative body must express its intention to tax in distinct and unambiguous language; the language employed cannot be extended, by implication, beyond its clear import, and well-founded doubts engendered in attempting to apply the statute must be resolved in favor of the taxpayer. *Eidman v. Martinez*, 184 U. S. 578, 583, 22 Sup. Ct. 515, 46 L. Ed. 697; *United States v. Wigglesworth*, 2 Story, 368, 374, Fed. Cas. No. 16,690; *People ex rel. N. Y. M. & N. T. Co. v. Gaus*, 198 N. Y. 250, 255, 91 N. E. 634; *Martin L. Hall Co. v. Commonwealth*, 215 Mass. 326, 329, 102 N. E. 364; *Supervisors v. Tallant*, 96 Va. 723, 726, 32 S. E. 479.

[4] One provision relied upon in terms makes the tax the first and best lien on all property of the corporation, "whether such property is employed by the * * * corporation in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of the creditors and stockholders thereof." Section 5506, *Id.* No lien was provided by the original Willis Act, and so the effect of a lien was not passed on in *Southern Gum Co. v. Laylin*, nor do we find that it has been considered in any other decision. We have seen that one feature of the relief sought in the present interventions is to have this lien enforced through orders to be entered against the trustees and the receiver. It is not claimed in behalf of the state that the lien operates even indirectly to impose the tax, as a tax, upon the property. To treat the lien as in effect a tax would be to violate the principle upon which the tax was or can be sustained under the Constitution of Ohio; for it scarcely is necessary to say that taxing a corporation according to a rate computed upon its issued and outstanding capital stock is not taxing the corporate property "according to its true value in money." The lien, therefore, cannot have any reason to exist save to secure payment of the tax for such period only as the statute intends that it shall be imposed; the tax failing, the lien must fail with it.

The argument is, however, that the words which immediately follow those specifically creating the lien—that is, the words "whether such property" is held by the company or is "in the hands of an assignee, trustee or receiver"—should be regarded as a source of authority to continue the tax. These words do not purport to authorize a tax to be laid; they refer to one already rightfully laid; and hence the words

are given effect, and we think due effect, when construed, in instances like those now in issue, to apply only to such taxes as accrue before and during the tax year in which the corporate property passes into the hands of "an assignee, trustee or receiver." The lien also is thus given effect; and the other words are, moreover, kept in accord with the paramount purpose of the act as before pointed out in connection with the only provision that explicitly authorizes a tax at all. It is to be borne in mind, too, that the statute does not automatically fix and impose the amount of the tax, which is to be charged against any particular company. The present records fail to show that a tax was in fact charged against any of the companies for the years here in dispute; and the omission seems quite natural, since the words now under consideration certainly do not in terms authorize the tax to be charged as respects such a time against companies which were then in the plight here revealed.

[5] A still further provision, which is found in the chapter of the Ohio statutes relating to "Dissolution of Corporations," is relied on. It is there provided that in case of "* * * the winding up of a corporation * * * by proceedings in assignment or bankruptcy," a certificate to that effect shall be signed by the clerk of the court in which the proceedings are pending and also be filed with the secretary of state. Volume 5, Id., §§ 11974 and 11975. This language, instead of being appropriate to authorize the tax either to be laid or continued, shows an intent to omit the tax. The contention, however, is that the provision requires the tax to be collected through enforcement of the lien against the assets in the hands of a trustee in bankruptcy, unless and until the certificate of the clerk is filed with the secretary of state. This, of course, concedes that the act of filing the certificate would operate to prevent further accrual of the tax; and the concession is rightly made, since the Willis Law by clear implication treats a certificate so filed as a legislative direction to exempt the corporation from the requirement either to make annual reports or pay the tax. Volume 3, Id., § 5520, and vol. 5, Id., §§ 11974 and 11975. The statute employs the words "winding up of a corporation * * * by proceedings in assignment or bankruptcy" to describe a corporate condition, which signifies that the corporation ought not to bear the burden of a franchise tax.

The contention is thus reduced to one concerning the effect of an omission to certify to the existence of the condition. The evident object of requiring the certificate to be filed is to apprise the state officials of the fact that such a condition exists. The condition, however, in each of the present instances, must have been known to the state representatives when they caused the interventions to be made in the bankruptcy proceedings. It is true the interventions occurred after the years had elapsed for which the present tax claims are made; but the opportunity, not to say necessity, to ascertain the dates of commencement of the bankruptcy proceedings, is none the less apparent. The existence of the condition, not the certificate, is manifestly the ultimate token of the purpose not to impose the tax. Surely an omission to give formal notice of the condition was not meant to have the

effect of sanctioning exaction of the tax in the face of actual knowledge of the condition.

The real effect of these two statutory provisions will be more clearly seen when they are considered together and applied to the three corporations in question. The first provision is made applicable where the property is in the hands of an "assignee, trustee or receiver," and the second where the corporation is involved in "winding up" proceedings in "assignment or bankruptcy." It is plain that the terms employed in these two provisions contemplate corporate conditions which may be identical, as, for instance, the property of a given corporation may be "in the hands of an assignee," according to the first provision, and at the same time involved in "winding up" proceedings, within the meaning of the second; and it is manifest that the question of accrual of the tax, or of the means of avoiding it, would have to be tested by a consideration of both provisions. The reason for this is that the second provision is bottomed on a corporate condition, which, in the legislative mind, cannot in justice bear the burden of a franchise tax. It certainly is not to be said that a corporation which would answer to the descriptive terms of each provision would be both amenable to the tax under the first and excusable under the second. It must follow that, wherever a corporate condition such as this actually exists, an exaction of the tax in spite of the condition would contravene a well-defined legislative purpose.

No better illustration of this can well be found than the one presented in the instant cases. It so happens that the particular receivership proceeding involved here is in legal effect a "winding up" proceeding, quite as certainly as it would have been if the corporation had made an assignment under the laws of Ohio; and whether such a course would have been an occasion for a bankruptcy proceeding or not, the Ohio statute, as we have seen, treats the one as well as the other proceeding as signifying a corporate condition that ought to excuse the tax. It is therefore to stick in the bark, to try to differentiate the present interventions by reason of the forms of proceedings which happened to have been resorted to for the purpose, common to all, of turning over the corporate properties to the creditors. Hence we see no reason why the construction which we have already placed on the provision relating to an "assignee, trustee or receiver" should not be applied to the tax claims made in respect of the corporate bankrupts and their assets, as well as to the claim made in relation to the corporation and its assets involved in the receivership; the corporate conditions being the same, the rule ought to work both ways.

[6] Nor, as regards the present question, are we able to see any ground for effective distinction between the cases because of the fact that the receiver was not, and the trustees were, invested with the titles in trust to the property which came into their hands respectively. The question of title of this character does not seem to be the test of the right to recover a tax; for, if it could be rightly said that the tax was intended automatically to continue to accrue and the lien to attach, it is not at all clear that the property in the hands of each of these officials would not be bound regardless of any question of title

in them. In *re Keller* (D. C.) 109 Fed. 131, 132, 133. It is true that Judge Shiras was dealing with a tax on personal property in *Re Keller*, but manifestly this can make no difference, since the property here would in the event stated be affected by the lien, the same as it would have been if the incidence of the tax had been the property instead of the franchises.

When we thus treat the interventions alike for purposes of the tax in dispute, we appreciate the fact that we could not do so if the receiver had during the tax years in question conducted the corporation business in the regular way; for he then would have been chargeable with having exercised the franchises. *Central Trust Co. v. N. Y., C. & N. R. R. Co.*, 110 N. Y. 250, 257, 18 N. E. 92, 1 L. R. A. 260, opinion by Judge (later Mr. Justice) Peckham. As we understand the facts of the present cases, however, the receiver was during those years no more engaged in exercising the corporate franchises than the trustees in bankruptcy were during the tax years for which recoveries are sought against them. The corporations were, and so far as appears still are, to all intents and purposes extinct, and so could not then, any more than they can now, exercise their franchises.² The imposition of a tax on franchises implies, if as here it does not express, a privilege to exercise them; and we have seen that the statute contemplates the occurrence of conditions which effectually prevent the use of the privilege. It is therefore not perceived why the contention that the present tax can be imposed in respect of any of these corporations or the properties is not opposed to the principle of the settled rule prevailing in Massachusetts concerning a similar tax and also corporations in effect similarly situated. This rule is stated in *Commonwealth v. Lancaster Savings Bank*, 123 Mass. 493, 496:

"Being a tax upon the privilege of transacting a particular business, it would seem necessarily to follow that if, at the time when the tax is to be assessed and is declared to accrue, the corporation has for the purpose of transacting its business practically ceased to exist and can no longer enjoy the privilege, then no tax is to be exacted."

True, the corporation in that case had been perpetually enjoined from doing any further business, and receivers had been appointed to wind up the affairs of the corporation; but the corporation was permitted to continue its organization for the purpose of doing such acts as were necessary in settling its affairs. However, in *Greenfield Savings Bank v. Commonwealth*, 211 Mass. 207, 210, 97 N. E. 927, it was in substance held that the fact alone that the bank was dispossessed of its property, though an injunction was not issued against resumption of its business, was sufficient to excuse the tax. The Massachusetts rule, as it existed prior to the decision in the *Greenfield Savings Bank Case*, was recognized as sound by Judge Peckham in *Central Trust Co. v. N. Y., C. & N. R. R. Co.*, supra, 110 N. Y. at p. 258, 18 N. E. 92, 1 L. R. A. 260; and the reason for the ap-

² The officers, directors, and agents of the company whose property was in the hands of the receiver were "enjoined from interfering with or disposing of" the company's property "in any way, except to transfer, convey, and turn over the same to the receiver."

proval would seem still to apply, though the rule has in effect been modified in the later Massachusetts decision.

Attention has been called to the recent decision of the Court of Appeals for Cuyahoga county, Ohio, in *Morley v. Hippodrome Co.*, 13 Ohio Law Rep. 295. It was there decided that a franchise tax accruing after appointment of a receiver for the corporation is entitled to preference as against the funds in the hands of the receiver. The facts stated in the report of the decision do not distinctly show whether they are in all essential respects like the facts of the present receivership case, though we regret that the decision in that case and the present decision seem in some particulars not to be in accord. We may be mistaken, however, since the two decisions of the Supreme Court of Ohio, there cited, *La Fayette Bank v. Buckingham*, 12 Ohio St. 419, and *Cheney v. Maumee Cycle Co.*, 64 Ohio St. 205, 60 N. E. 207, have no apparent relevancy to the receivership case presented here; and if the decision cited from New Jersey (*In re West Car Company*) was, as we think, meant to be *In re United States Car Co.*, 60 N. J. Eq. 514, 43 Atl. 673, it is not necessarily applicable here, for although it passed upon a "tax assessed" after appointment of the receiver, it fails to state for what period with reference to the appointment the assessment was made.

Upon all the foregoing considerations, we are constrained to believe that the language relied on by the learned counsel for the state is insufficient to sustain the claim that the tax continued to accrue for the periods now under review. The language is certainly not explicit; it is ambiguous, to say the least of it, and so gives rise to doubts which are fatal to the right of recovery. Since the basis of the decision is that no tax accrued, there can be no lien; and hence it is not necessary to pass upon the provisions of the Bankruptcy Act under which it is claimed the tax should be allowed and the lien enforced.

The decree in each case is affirmed, with costs.

PUBLIC SERVICE RY. CO. et al. v. HEROLD
(and sixteen other cases).

(Circuit Court of Appeals, Third Circuit. January 21, 1916.)

Nos. 2011-2027.

1. INTERNAL REVENUE — 9 — EXCISE TAX ON CORPORATIONS — CORPORATION ENGAGED IN BUSINESS.

Corporation Tax Law (Act Aug. 5, 1909, c. 6) § 38, 36 Stat. 112 (Comp. St. 1913, § 6300), 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," imposes such excise tax, not because of every act performed by a corporation under its incidental powers, but upon the privilege of doing and carrying on the business for which the corporation is organized, and when it ceases the conduct of such business by turning it over to be carried on by another, it ceases to

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

be subject to the tax so long as it commits no act by which the resumption of its business is to be inferred.

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

2. INTERNAL REVENUE ☞9—EXCISE TAX ON CORPORATIONS—CORPORATIONS ENGAGED IN BUSINESS.

Various acts of lessor public service corporations considered, and *held* not to constitute the carrying on or doing business within the meaning of the Corporation Tax Law.

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

3. INTERNAL REVENUE ☞9—EXCISE TAX ON CORPORATIONS—CORPORATIONS "ENGAGED IN BUSINESS."

A corporation authorized by its charter to "manufacture, buy, sell, lease and let power plants and generating stations for the manufacture and distribution of electric current" is not, because a part of its authorized business is the leasing of property, carrying on or doing business within the meaning of the Corporation Tax Law, where by a lease it divested itself of all of its property, and has since merely maintained its entity and collected and disbursed the rents for the demised property.

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

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

4. INTERNAL REVENUE ☞38—EXCISE TAX ON CORPORATIONS—SUITS TO RECOVER TAXES PAID.

Pleadings of plaintiffs in suits brought to recover taxes paid under protest under the Corporation Tax Law construed, and *held* to show that the suits were brought against the collectors officially to enforce the statutory remedy and were therefore subject to the limitations imposed by statute.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ☞38.]

5. INTERNAL REVENUE ☞38—EXCISE TAX ON CORPORATIONS—SUIT TO RECOVER TAX PAID—LIMITATION.

Corporation Tax Law (Act Aug. 5, 1909, c. 6) § 38, 36 Stat. 112 (Comp. St. 1913, § 6307), extends all laws relating to the remission or refund of internal revenue taxes so far as applicable to the tax imposed thereby, and Rev. St. §§ 3220, 3226-3228 (Comp. St. 1913, §§ 5944, 5949-5951), thereby made applicable, provide that no suit for the recovery of such taxes shall be maintained until an appeal has been taken to the Commissioner of Internal Revenue and acted on by him, nor unless brought within two years after the cause of action accrued, and that all claims for refund must be presented to the Commissioner within two years. *Held* that, where no claim under said act is so presented within the two years, no suit can be maintained thereon.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ☞38.]

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

Actions by the Public Service Railway Company and the Consolidated Traction Company, by the Public Service Railway Company and the Rapid Transit Street Railway Company, by the Public Service Gas Company and the Newark Consolidated Gas Company, and by the Public Service Electric Company and the United Electric Company of New Jersey, all against Herman C. H. Herold; by the

Public Service Railway Company and the Camden Horse Railroad Company and by the Public Service Railway Company and the Camden & Suburban Railway Company against Isaac Moffett; by the Public Service Electric Company and the South Jersey Gas, Electric & Traction Company and by the Public Service Corporation of New Jersey and South Jersey Gas Electric & Traction Company against Herman C. H. Herold; by the Public Service Corporation of New Jersey and the South Jersey Gas, Electric & Traction Company against Isaac Moffett; and by the Public Service Railway Company and the Bergen Turnpike Company, by the Public Service Railway Company and the New Jersey & Hudson River Railway & Ferry Company, by the Public Service Corporation of New Jersey and the Gas & Electric Company of Bergen County, by the Public Service Electric Company and the Somerset, Union & Middlesex Lighting Company, by the Public Service Corporation of New Jersey and the Somerset, Union & Middlesex Lighting Company, by the Public Service Gas Company and the Hudson County Gas Company, by the Public Service Corporation of New Jersey and the Paterson & Passaic Gas & Electric Company, and by the Public Service Gas Company and Essex & Hudson Gas Company, all against Herman C. H. Herold. From the judgments, plaintiffs bring error, and in two cases defendant also brings error. Certain of the judgments affirmed, and others reversed. See, also (D. C.) 219 Fed. 301, and (D. C.) 227 Fed. 486, 490, 491, and 494.

Frank Bergen, of Newark, N. J., for plaintiffs in error.

J. Warren Davis, U. S. Atty., and J. L. Bodine, Asst. U. S. Atty., both of Trenton, N. J., for defendant in error Herold.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The plaintiffs in these cases are public utility corporations organized under the laws of the State of New Jersey. They are lessors and lessees of the property of such corporations. The defendants were Collectors of Internal Revenue for the United States in the First and Fifth Districts of New Jersey respectively.

This litigation, including seventeen cases, numbered in this court 2011 to 2027 inclusive, grew out of the collection of taxes for the years 1909, 1910, 1911 and 1912, assessed against the lessor plaintiffs under section 38 of the Act of Congress, approved August 5, 1909 (36 Stat. 112, U. S. Comp. Stat. 1913, §§ 6300-6307), being a portion of the tariff act of that year and commonly called the Corporation Tax Law. The tax under this law is imposed upon the privilege of carrying on or doing business in a corporate capacity. The lessor plaintiffs contend that they were not subject to the tax, because prior to the year 1909 they had leased their property and franchises to the lessee plaintiffs, and had not been engaged in business within the meaning of the act since the leases were made.

The taxes were paid under protest, and after claims for their refund had been made and rejected, these suits were brought to recover the amounts paid. The lessees were joined with their respective lessors

as parties plaintiff, because the money paid was advanced by the lessees under terms of the leases which imposed upon them the payment of taxes.

There are two questions involved in these cases: (1) Were the lessor plaintiffs engaged in business within the meaning of the act, and therefore subject to the tax; and (2) Is recovery of the amounts paid for the years 1909 and 1910 barred by the federal statute of limitations, being sections 3220, 3226, 3227 and 3228 of the Revised Statutes of the United States? These two issues are raised in the respective cases by appropriate pleadings. The facts are established by a special verdict in each case. (D. C.) 219 Fed. 301; (D. C.) 227 Fed. 486; (D. C.) 227 Fed. 490; (D. C.) 227 Fed. 491; (D. C.) 227 Fed. 494.

In order to avoid confusion from the multiplicity of parties, the cases will be considered by their numbers rather than by their titles. In cases Nos. 2017, 2018, 2021 and 2023, the first question alone is involved. In Nos. 2011, 2012, 2019, 2025, 2026 and 2027, only the second question is involved. In the remaining cases, Nos. 2013, 2014, 2015, 2016, 2020, 2022 and 2024, both questions are raised upon writs of error taken by one party or the other, that is, in this group of cases, the defendants allege that the lessor plaintiffs were engaged in business taxable under the act during the years 1909 to 1912 inclusive, and that recovery of payments for the years 1909 and 1910 is barred by the statute of limitations. Excepting in Nos. 2013 and 2020, the court gave judgment to the defendants in these cases for all payments made in the four years. The finding of the court in Nos. 2013 and 2020, that the lessor corporations were not doing business within the meaning of the act, is challenged by the defendant's writs of error.

The first question, whether the lessor corporations were doing business in a manner to make them liable to the corporation tax, had its rise in leases made between the different groups of lessor and lessee plaintiffs. These leases were similar in form to those commonly entered into by utility corporations when one surrenders to another for a long term its property and franchises, and reserves to itself only its non-delegable powers or franchises, which, under covenants, it undertakes to exercise for the benefit of the lessee.

The acts performed by the lessor corporations under their reserved powers, other than the maintenance of their corporate existence, as they appear in the special verdicts, were done in pursuance of the terms of leases, made before the enactment of the Corporation Tax Law, and were performed at the direction of the lessee corporations. They may be summarized as follows:

In No. 2013, the lessor (1) authorized the voting of the stock of another company owned by it in favor of a proposed lease by that company; (2) authorized the voting of stock in another company for the election of directors; (3) extended pipe lines for the use of the lessee under the terms of the lease.

In No. 2017 (227 Fed. 486), the lessor (1) sold certain stocks and bonds, and directed its trustee under a mortgage to pay the proceeds to the lessee; (2) applied to the Board of Public Utility Commissioners for leave to issue bonds to repay lessee for improvements; (3) direct-

ed the trustee under the mortgage to pay to the lessee insurance money received from fire losses, for the restoration of the property.

In No. 2018, the lessor (1) issued bonds to pay the lessee for expenditures made on the demised property; (2) rectified a mistake respecting the deposit of certain shares of stock; (3) authorized the cancellation of an option.

In No. 2020, the lessee (1) maintained its corporate organization; (2) received and distributed rents.

In No. 2021 (227 Fed. 490), the lessor (1) authorized the purchase of property; (2) applied for a franchise to lay tracks; (3) renewed leases; (4) called for the return of old certificates of stock of merged companies for cancellation.

In No. 2023, the lessor (1) requested the trustee of a mortgage of underlying property to deliver bonds for cancellation; (2) delivered for cancellation bonds that had been paid; (3) delivered its own bonds for certain shares of stock under a consolidation antedating the lease.

In No. 2015 (227 Fed. 494), the lessor (1) provided for an issue of bonds to refund maturing bonds; (2) conveyed certain real estate covered by the lease; (3) petitioned for and accepted an ordinance for additional railway tracks.

In No. 2016, the lessor performed the same three acts as in No. 2015.

In No. 2022 and No. 2024, the lessor's acts were similar to those done in one or several of the preceding cases.

In No. 2014 (227 Fed. 491), the lessor, under its corporate powers to engage in the business of leasing property, leased all its property and franchises to the Public Service Corporation of New Jersey.

These several corporate activities (excepting those in Nos. 2013 and 2020), were held by the trial court to constitute doing business within the meaning of the Corporation Tax Law. This law provides:

*"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. * * *"* Comp. St. 1913, § 6300.

It has been repeatedly held by the Supreme Court of the United States, *Anderson v. The Forty-Two Broadway Co.*, 239 U. S. 69, 36 Sup. Ct. 17, 60 L. Ed. —; *Stratton's Independence v. Howbert*, 231 U. S. 399, 414, 34 Sup. Ct. 136, 58 L. Ed. 285; *McCoach v. Minehill Ry. Co.*, 228 U. S. 295, 306, 33 Sup. Ct. 419, 57 L. Ed. 842, that the tax thus imposed is not an income tax, but is an exise upon the conduct of business in a corporate capacity. The character of corporate business intended to be taxed is described by the law only by the general expression "carrying on or doing business." From the beginning, therefore, the courts have been called upon to construe the law and to determine what corporate acts constitute doing business within its meaning.

It was recognized at once that certain corporate acts concern only the maintenance of corporate existence, and have no relation to the conduct of the business for which a corporation is organized, while others are done and performed solely in furtherance of that business

without relation to the maintenance of the corporate entity. It was conceded, that with respect to the former, the law does not impose a tax, and with respect to the latter, it does. Between these extremes appeared corporate acts partaking of the nature of business transactions, but pursued under circumstances that indicated the performance of contractual undertakings rather than the conduct of corporate business. Such transactions were presented for adjudication in a number of cases pending but not decided at the time judgments were entered in the cases under review. These were, therefore, not available to the trial court in aid of its conclusions. These decisions rule the cases under review, not merely because of the similarity in fact and in principle to the issues here involved, but because of the breadth of construction which the courts have given the statute.

[1] The substance of this construction is, that the statute imposes an excise, not because of every act performed by a corporation under its incidental powers, but upon the privilege of doing and carrying on the business for which the corporation is organized, and when the corporation ceases the conduct of such business by turning it over to be carried on by another, it ceases to be subject to the tax so long as it commits no act by which the resumption of its business is to be inferred. *Anderson v. Morris & Essex R. R. Co.*, 216 Fed. 83, 132 C. C. A. 327 (C. C. A. 1st); *N. Y. C. & H. R. R. Co. v. Gill*, 219 Fed. 184, 134 C. C. A. 558 (C. C. A. 2nd); *Lewellyn v. Pittsburgh, B. & L. E. R. Co.*, 222 Fed. 177, 137 C. C. A. 617 (C. C. A. 3rd); *Traction Companies v. Collectors*, 223 Fed. 984, — C. C. A. — (C. C. A. 6th); *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825; *McCoach v. Minehill & Schuylkill Haven R. R. Co.*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842. It has thus been held that a railroad company, whose business is the transportation of passengers and freight, ceases to be engaged in the business for which it was organized when it leases and surrenders its entire property to another railroad company to be exclusively used and operated by it. *McCoach v. Minehill R. R. Co.*, supra; *Lewellyn v. Pittsburgh, B. & L. E. R. Co.*, supra. It has also been held that such a corporation does not resume the business for which it was organized, when by subsequent acts, it elects directors and officers for the maintenance of its corporate existence, *McCoach v. Minehill R. R. Co.*, supra; collects and distributes rents reserved by a lease, *McCoach v. Minehill R. R. Co.*, supra; Corporation Tax Cases, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389; collects income from securities, and reinvests the same, *McCoach v. Minehill R. R. Co.*, supra; issues bonds to meet the cost of acquisition and construction of property to be added to demised premises, *Anderson v. Morris & Essex R. R. Co.*, supra; *N. Y. C. & H. R. R. Co. v. Gill*, supra; acquires real estate by purchase or the exercise of the power of eminent domain for the use of a lessee, *Lewellyn v. Pittsburgh, B. & L. E. R. Co.*, supra; *N. Y. C. & H. R. R. Co. v. Gill*, supra; sells real estate and reinvests the proceeds in other property subject to a lease, *Traction Companies v. Collectors*, supra; issues treasury stock previously authorized in payment for improvements made by a lessee

to demised premises, *Anderson v. Morris & Essex R. R. Co.*, supra; *Traction Companies v. Collectors*, supra.

[2] A review of the reasons upon which these decisions are based would add nothing to the subject. It is therefore sufficient to say we are of opinion that the acts found by the special verdicts in the cases under review to have been done and performed by the lessor corporations were not done or performed by them in the conduct of the body or substance of the business for which they were organized and from which they had retired when they turned over their property to their lessees, but were corporate acts performed under the incidental powers of the corporations pursuant to the terms of contracts into which they had entered.

[3] This view was not seriously resisted by the defendants in any of the cases, excepting in Nos. 2013, 2020 and 2014. In the latter case, the lessor corporation had very broad powers, among which was the power "To manufacture, buy, sell, *lease* and let, power plants and generating stations for the manufacture and distribution of electric current." On July 1, 1907, the lessor corporation leased its property, and thereafter the lessee conducted the business of manufacturing and distributing electric current. The learned trial judge held that by leasing a power plant under its corporate authority to engage in the business of leasing such property, the lessor corporation was carrying on a business within the definition of its charter powers. Applying to this case the test suggested by the Supreme Court in *United States v. Emery-Bird-Thayer Realty Company*, 237 U. S. 29, 35 Sup. Ct. 499, 59 L. Ed. 825, we are not inclined to agree with this conclusion. In that case the court said:

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

Under its powers, this corporation could have engaged in the business of building and leasing power plants, and in the prosecution of that business would have been subject to taxation under the Corporation Tax Law. What it did was to divest itself by lease of its entire corporate property and corporate powers, except its power to exist, just as the other lessor corporations did under appropriate powers. What it was doing when the taxes in dispute were assessed against it, was the maintenance of its corporate entity and the collection and distribution of rents received for its demised property.

We are of opinion that the trial court erred in holding in this and other cases, that the lessor plaintiffs were doing business within the meaning of the act, and were therefore subject to the corporation tax, but that it did not err in holding in Nos. 2013 and 2020, that the lessor plaintiffs were not doing business within the meaning of the act.

The second question in these cases, whether recovery of the amounts paid for the years 1909 and 1910 is barred by the federal statute of limitations, depends upon the nature of the actions and the character in which the defendants are sued. 219 Fed. 301.

In the cases grouped in the beginning of this opinion, in which the second question appears, the plaintiffs sought to recover for taxes paid for the years 1909 and 1910, as well as in some of the cases for

taxes paid for the years 1911 and 1912. The circumstances connected with the payment of the taxes for the years 1909 and 1910, and the institution of suits to recover the same, are these: The taxes were assessed under the Corporation Tax Law of 1909 and were paid under protest. More than two years after the dates of payment, the plaintiffs appealed to the Commissioner of Internal Revenue for their abatement or refund. The appeals were rejected on the ground, among others, that the appeals were not filed within two years from the time the taxes were paid, whereupon these suits were instituted.

The statutes limiting the period within which the government subjects itself to the judgments of the courts for the recovery of revenues erroneously or illegally collected, are these:

The Corporation Tax Law of 1909 (section 38) provides:

"That all laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section." Comp. St. 1913, § 6307.

The particular statutes contemplated are sections 3220, 3226, 3227 and 3228 of the Revised Statutes of the United States, the provisions of which, in so far as they affect the issues of these cases, are as follows:

"Sec. 3220. The Commissioner of Internal Revenue * * * is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected."

"Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeal shall have been duly made to the commissioner of internal revenue * * * and a decision of the commissioner has been had therein.

"Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued.

"Sec. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected * * * must be presented to the commissioner of internal revenue within two years next after the cause of action accrued." Comp. St. 1913, §§ 5944, 5949-5951.

The plaintiffs maintain that they are not subject to the two year limitation of these statutes, for the reason that they have not pursued the remedy prescribed by the statutes, but have followed another remedy afforded by law. In other words, they claim that they have not sued the collectors in their official capacity under a federal law which limits their right of action to two years, but have sued the collectors in their personal or individual capacity under a state law, which extends their right of action to four years.

This distinction is based upon the contention, that in collecting taxes from corporations for the privilege of doing business when in fact they were not doing business within the meaning of the act, the defendant collectors acted without warrant of law and committed torts for which they are personally liable. This contention is based, first, upon the legal proposition that a public official who attempts to enforce an unconstitutional act of Congress or of a State legislature, and thereby invades personal or property rights, is liable personally

for the resulting damages, *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; *Virginia Coupon Cases*, 114 U. S. 270, 297, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, and second, upon the deduction, that a public official who attempts to enforce a valid act of Congress or of a State legislature against a party to whom the act does not apply, and thereby invades personal or property rights, is likewise liable personally for damages. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; *Tindal v. Wesley*, 167 U. S. 222, 17 Sup. Ct. 770, 42 L. Ed. 137; *Cunningham v. Macon R. R.*, 109 U. S. 446, 452, 3 Sup. Ct. 292, 609, 27 L. Ed. 992.

Opposed to these contentions the defendants maintain, that the remedy provided by the statute for the recovery of taxes erroneously or illegally collected, is an exclusive remedy and no other can be substituted for it. *Snyder v. Marks*, 109 U. S. 189, 193, 3 Sup. Ct. 157, 27 L. Ed. 901; *De Bary v. Dunne (C. C.)* 162 Fed. 961; *Cheatham v. United States*, 92 U. S. 85, 88, 89, 23 L. Ed. 561. Therefore, if the defendants are sued officially, the plaintiffs are limited by the federal two year statute of limitation, and if sued personally, they are without right to recover at all.

[4] Interesting as this question of law may be, we are clearly of the opinion that it has not been raised and therefore cannot be decided under the pleadings in these cases. Whether the statutory remedy for the recovery of taxes erroneously or illegally collected is or is not an exclusive remedy, it nevertheless is one remedy. Whether there was open to the plaintiffs another which they might have pursued against the collectors personally, is unimportant in face of the fact that they did not select such a remedy, but, their protestations to the contrary notwithstanding, elected to adopt and pursue the remedy provided by the statute. It is true that the names of the defendants appear in the titles of the suits without words descriptive of their official positions, and so far as the titles disclose, the defendants were sued personally. But the form of an action and the rights and liabilities of parties are not controlled by the title of the suit. They are determined by the disclosures of the pleadings. And so the character in which a party sues or is sued is determined from the body of the pleading and not from the caption of the suit. We must therefore look to the complaints in these cases to find the nature of the actions and the character in which the defendants were sued.

Similar complaints, *mutatis mutandis*, were filed in the seventeen cases. One of the complaints, with matters unimportant to the present consideration omitted, is excerpted in the margin.¹

1 No. 2011.

Plaintiffs, Public Service Railway Company and Consolidated Traction Company, corporations and bodies politic of the State of New Jersey, say:
"1. Consolidated Traction Company * * * leased all of its property and franchises, except its franchises to be a corporation, to the North Jersey

These complaints show that the plaintiffs pleaded the statute with the particularity and nicety of common law pleading by stating the facts which brought their cases within it, and that they went even further and counted upon the statute by making express reference to it, and concluded with declarations that their actions accrued upon the statutory acts of the Commissioner of Internal Revenue in refusing to allow their appeals and to refund the taxes. And in this regard it may be noted that if the defendants were sued in their personal capacity, the actions against them would have accrued to the plaintiffs when the torts were committed, without awaiting the subsequent conduct of the Commissioner of Internal Revenue, and the plaintiffs in their pleadings would have so declared. On the contrary it manifestly appears from a reading of the complaints, that in preparing their grounds of action, as well as in declaring upon the actions, the plaintiffs conformed in detail to the acts and the conditions prescribed by the statute as prerequisites to the remedy it affords.

Street Railway Company * * * for the term of 999 years; * * * since which time *it has not done or carried on any business whatsoever except the receipt of the rental under said lease and the distribution thereof among its stockholders.*

"2. By virtue of a merger and consolidation agreement, Public Service Railway Company was formed by said North Jersey Street Railway Company and others, and thereby all of the said leasehold property became vested in Public Service Railway Company.

"3. Defendant was * * * *Collector of Internal Revenue for the United States in the Fifth District of New Jersey * * * and as such duly commissioned under the laws of the United States.*

"4. The Commissioner of Internal Revenue of the United States, claiming to act under and by virtue of the provisions of *an act of Congress, approved August 5, 1909*, assessed a special excise tax against the plaintiff Consolidated Traction Company, *for excise taxes for the year ending December 31, 1909*, for the sum of \$6,225, and that notwithstanding the fact that under and by virtue of the aforesaid lease, said company *was not doing business within the meaning of the said act*, nor could it do the same, but was simply maintaining its corporate existence and collecting and distributing to its stockholders the rental paid to it under said lease, and said plaintiff, the said Consolidated Traction Company, *was not liable under the law for the payment of said taxes.* Nevertheless, *the said defendant* required and compelled the payment of said sum of \$6,225, in spite of the *protests* of the plaintiffs, and thereby the plaintiffs, Public Service Railway Company, as lessee in possession and operation of said leasehold property under the terms of said lease (which required it to pay all taxes against said Consolidated Traction Company or the leasehold estate) was thereupon wrongfully, illegally and improperly compelled by the defendant to pay the said sum of \$6,225, which sum the plaintiff Public Service Railway Company, under protest that said company was not lawfully liable for said taxes, did pay on June 10, 1910, to the said defendant.

"5. (A claim with similar averments covering taxes assessed for the year ending December 31, 1910, and collected and paid on June 29, 1911.)

"6. Plaintiffs *made claim for a refund* of the said several sums so paid to the said defendant as aforesaid *to the Commissioner of Internal Revenue, on the ground* that the same were severally *illegally, improperly and wrongfully* assessed and collected, *by several applications in writing*, which applications are now on file with the Commissioner of Internal Revenue and to which plaintiffs pray leave to refer, which claim was refused by said Commissioner of Internal Revenue on November 18, 1913; *whereby on that date an action accrued therefor to the plaintiffs.*

"7. By reason of said payments * * * Public Service Railway Company demands as damages, the sums so paid as aforesaid."

[5] Holding, as we do, that the plaintiffs declared upon and seek to recover under the statute, it follows that they are subject to the limitation prescribed by the statute. This limitation provides that an appeal for a refund shall be made within two years after payment. With respect to this provision, the Supreme Court in *Kings County Savings Institution v. Blair*, 116 U. S. 200, 6 Sup. Ct. 353, 29 L. Ed. 657, held:

“A suit cannot be maintained against a collector of internal revenue to recover back taxes alleged to have been illegally exacted, when the tax payer has failed within two years next after the cause of action accrued to present to the Commissioner of Internal Revenue his claim for the refunding in the manner pointed out by law.”

In speaking for the court, Mr. Justice Woods said:

“In our opinion no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law. When the law says the claim must be presented within two years, the implication is that, unless so presented, the right to demand the repayment of the tax is lost, and the Commissioner has no authority to refund it, and, of course, the right of suit is gone. We regard the presentation of the claims to the Commissioner of Internal Revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the Government consents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the Commissioner within the time and in the manner pointed out by law and relief has been denied him. *Cheatham v. United States*, 92 U. S. 85 [23 L. Ed. 561]; *Railroad Co. v. United States*, 101 U. S. 543 [25 L. Ed. 1068]; *Arnson v. Murphy*, 115 U. S. 579 [6 Sup. Ct. 185, 29 L. Ed. 491].”

We are of opinion that the learned trial judge committed no error in ruling in the cases in which the question arose that recovery by the plaintiffs for the taxes paid for the years 1909 and 1910 is barred by the federal statute of limitations.

In Nos. 2017, 2018, 2021 and 2023, the judgments of the court below are reversed. In Nos. 2011, 2012, 2013, 2019, 2020, 2025, 2026 and 2027, the judgments below are affirmed. In Nos. 2014, 2015, 2016, 2022 and 2024, the judgments below are reversed, and new trials are directed in conformity with this opinion.

McPHERSON, Circuit Judge, did not participate in the consideration and decision of these cases.

HUDSON COUNTY GAS CO., to Use of PUBLIC SERVICE GAS CO., v.
McCOACH.

(Circuit Court of Appeals, Third Circuit. January 21, 1916.)

No. 1973.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by the Hudson County Gas Company, to use of the Public Service Gas Company, against William McCoach. Judgment for defendant, and plaintiff brings error. Affirmed.

Frank Bergen, of Newark, N. J., and Morgan, Lewis & Bockius, of Philadelphia, Pa., for plaintiff in error.

Francis Fisher Kane, of Philadelphia, Pa., and Edward S. Kremp, Asst. U. S. Atty., of Reading, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This case presents the same questions that were involved in the Public Service Corporation Cases decided by this court at the present term. 229 Fed. 902, — C. C. A. —. The reasoning upon which the decisions in those cases was based applies with equal force to the facts of this case, and compels a like decision.

The judgment below is affirmed.

McPHERSON, Circuit Judge, did not participate in the consideration and decision of this case.

PABST BREWING CO. v. E. CLEMENS HORST CO.*

(Circuit Court of Appeals, Ninth Circuit. February 21, 1916.)

No. 2639.

1. SALES ⇨340—BREACH BY PURCHASER—REMEDIES OF SELLER.

Upon the breach of a contract of sale by the purchaser, the seller is at liberty to fully perform on his part, and when he has done all that is necessary to effect a delivery of the property, so as to pass title, he may store or retain the property for the purchaser and sue for the contract price, or resell the property as agent for the purchaser, in which case his recovery will be the difference between the contract price and the net proceeds of the sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. ⇨340.]

2. SALES ⇨384—BREACH BY PURCHASER—REMEDIES OF SELLER.

Upon the breach of a contract of sale by the buyer, it is not obligatory upon the seller to store the property for the buyer or sell it as the buyer's agent, and if he does not care to do so he is entitled to recover the difference between the contract price and the market price or value of the property at the time and place of delivery fixed by the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. ⇨384.]

3. SALES ⇨345, 371—BREACH BY PURCHASER—REMEDIES OF SELLER.

Upon the breach of a contract of sale by the buyer, the seller cannot sue for the contract price or sell the property as the buyer's agent and sue for the deficiency, unless the subject-matter of the sale is identified or in some manner appropriated to the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 956-961, 1086-1088; Dec. Dig. ⇨345, 371.]

4. SALES ⇨384—ACTIONS FOR PRICE—MEASURE OF DAMAGES.

In a seller's action for damages from a buyer's breach of a contract for the purchase of hops, where there was no allegation that the hops were resold, or as to the price for which they were resold, the measure of damages was the difference between the contract price and the market price at the time and place of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. ⇨384.]

5. SALES ⇨181—ACTIONS FOR PRICE—ADMISSIBILITY OF EVIDENCE.

In a seller's action to recover the difference between the contract price and the market price of hops, which the buyer refused to accept on the ground, among others, that the samples furnished by the seller were not

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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*Rehearing denied May 8, 1916.

cleanly picked, witnesses testified that the samples did not exhibit the quality of hops contracted for, because they contained stems and leaves and were not cleanly picked. It was conceded that the hops tendered were picked by a picking machine. The buyer offered to prove that leaves and stems were being put in the hops by instructions of the seller; that the witnesses saw the hops being baled, and saw the leaves and stems being put into the drier. *Held*, that this evidence was admissible, as it tended to show that the hops were not of choice quality, and, conceding that the testimony should have been limited to the quality of the hops contained in the samples tendered, the rejected testimony had a direct tendency to corroborate the witnesses, who testified that the samples contained stems and leaves and were not cleanly picked.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. ⚡181.]

6. EVIDENCE ⚡166—BEST AND SECONDARY EVIDENCE—BOOKS OF ACCOUNT.

In a seller's action for damages from a buyer's breach of the contract of sale, it was error to permit a witness to testify from figures compiled from the seller's books, showing office expenses and insurance and other charges, and that the hops were sold at a price specified over and above these various charges, where the books themselves were accessible and unaccounted for, as they were the primary evidence of their contents, and evidence as to what they contained or showed was secondary and incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 556, 557; Dec. Dig. ⚡166.]

7. EVIDENCE ⚡376—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT.

The books themselves were incompetent, where there was no testimony as to how or by whom they were kept, when the entries were made, or the sources from which they were made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1628-1646; Dec. Dig. ⚡376.]

8. EVIDENCE ⚡142—MARKET VALUE—OTHER SALES.

In a seller's action for breach of a contract for the sale of hops to be delivered at Milwaukee, evidence was admitted as bearing upon the question of market value as to the prices for which sales of hops were made in April, May, and June, and even as late as July, 1913, though the buyer canceled the contract in November, 1912. *Held*, that this evidence was improperly admitted, especially where the price of hops declined rapidly after the cancellation of the contract, and also in view of the fact that the sales were made in many different states, and even in Canada, while the market value or price at Milwaukee was the basis of the measure of damages.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416-423; Dec. Dig. ⚡142.]

9. CUSTOMS AND USAGES ⚡15—DELIVERY OF GOODS.

In a seller's action for damages from the buyer's refusal to accept hops, where it appeared that the buyer canceled the contract in November, 1912, and the complaint alleged a tender of performance about that time, evidence that it was customary under hop contracts to ship hops during the shipping season, which extended to the end of February or March of the following year, was incompetent, as the market price, forming the basis of the measure of damages, was to be fixed as of the date of the cancellation of the contract, or soon thereafter, especially where there was no testimony that the seller could have tendered or delivered hops of a quality superior to the samples rejected by the buyer at any time during such shipping season.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30-33; Dec. Dig. ⚡15.]

10. SALES ⇨382—ACTIONS FOR PRICE—ADMISSIBILITY OF EVIDENCE.

In an action for damages from a buyer's refusal to accept hops under a contract for the sale of air-dried Consumnes hops, where it appeared that the only air-dried Consumnes hops in existence were those produced by the seller, and that they had no market value as distinguished from other hops from the same district, but that air-dried hops and kiln-dried hops of equal quality had the same market value, evidence as to the market price of Consumnes hops should have been admitted, though not limited to air-dried hops.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1096; Dec. Dig. ⇨382.]

In Error to the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Action by the E. Clemens Horst Company against the Pabst Brewing Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Heller, Powers & Ehrman, of San Francisco, Cal. (Thomas J. Geary, of Santa Rosa, Cal., and James L. Robison, of San Francisco, Cal., of counsel), for plaintiff in error.

Devlin & Devlin, of Sacramento, Cal., W. H. Carlin, of Marysville, Cal., and Maurice E. Harrison, of San Francisco, Cal., for defendant in error.

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

RUDKIN, District Judge. This was an action to recover damages for the breach of a contract for the sale of hops. The E. Clemens Horst Company is a corporation organized and existing under the laws of the state of New Jersey, and for a number of years last past has been extensively engaged in the business of growing, buying, and selling hops. The Pabst Brewing Company is a corporation organized and existing under the laws of the state of Wisconsin, and is engaged in the manufacture of beer. For convenience of reference the parties will be hereafter referred to as the Horst Company and the Brewing Company. The Horst Company is the owner of a hop ranch of about 400 acres in the Consumnes river district in Sacramento county, Cal., upon which it grows and cures hops for market. The entire Consumnes district consists of about 800 or 900 acres. The hops produced by the Horst Company in this district are known as air-dried, as contradistinguished from kiln-dried. Kiln-dried hops are cured or dried by heat produced by a stove or furnace within the building, while the air-dried hops are cured or dried by hot air forced or blown into the building from without. The difference between the quality of the air-dried and kiln-dried hops is that the former retain the oils and resins better than the latter, and this is supposed to be an advantage. At least, such is the view of the Horst Company. No air-dried hops were produced in the year 1912 in the Consumnes district, except by the Horst Company.

In the month of August, 1911, the Horst Company entered into a contract by wire with the Brewing Company for the sale of 2,000 bales of choice, air-dried, Consumnes hops of the year 1912, at 20 cents per pound, plus freight, delivered at Milwaukee, Wis. On the 28th day of September, 1912, the Horst Company, at the instance of the Brewing Company, mailed to the latter 20 samples of Consumnes air-dried hops of the crop of 1912. On the 4th day of October, 1912, the Brewing Company notified the Horst Company that it would not accept hops of the quality shown by these samples, for the reason that they were not choice as called for by the contract of sale. On the 10th day of October, 1912, the Brewing Company mailed to the Horst Company 4 samples of Consumnes hops of a quality such as it would be willing to accept. On the 29th day of October, 1912, 14 additional samples were forwarded to the Brewing Company by the Horst Company. On the 4th day of November, 1912, the contract was canceled by the Brewing Company on the ground that the hops tendered were not of the quality agreed upon, and thereafter the present action was instituted to recover damages for breach of the contract of sale.

The complaint alleges in general terms the incorporation of the parties, the execution of the contract for the sale of the hops, the tender of the hops in performance of the contract, the refusal of the defendant to accept the tender, and the resulting damages in the sum of \$32,000. Trial was had before the court and a jury, and the present writ of error was sued out to reverse a judgment entered on a verdict in favor of the Horst Company.

[1-3] The record contains 148 assignments of error, and objections and exceptions almost without number. Before taking up these several assignments, it might be well to refer briefly to the familiar rules of law applicable to actions of this kind. Upon the breach of a contract of sale by the purchaser, the seller is at liberty to fully perform on his part, and when he has done all that is necessary to effect a delivery of the property, so as to pass title to the purchaser, he may store or retain it for the purchaser, or he may resell it as agent for the purchaser. If he pursues the former course, he is entitled to maintain an action for the contract price of the goods. If he pursues the latter, his recovery will be the difference between the contract price and the net proceeds of the sale. But it is not obligatory upon him to adopt either of these courses, and if he does not care to do so he is entitled to recover the difference between the contract price and the market price or value of the property at the time and place of delivery fixed by the contract.

Every seller, however, may not pursue all three of these remedies. He cannot, for instance, pursue the first or second, unless the subject-matter of the sale is identified or in some manner appropriated to the contract, because in the one case he holds the property as agent for the purchaser, and in the other he sells it as agent for the purchaser, and unless the property is identified, or in some way appropriated to the contract, it can neither be held nor sold. As said by the court in *Cherry Valley Iron Works v. Florence Iron River Co.*, 64 Fed. 569, 575, 12 C. C. A. 306, 312:

"If the subject-matter is identified when the contract is made, the title passes to the vendee, in the absence of controlling stipulations. When the subject-matter is subsequently identified by its appropriation to the contract, the title passes at the time of such appropriation. But when there has at no time been identification of the subject, the title remains in the vendor. In those cases where the title has passed before the contract is broken, and the rights of the parties have been converted into claims for damages arising from the breach, the nature and kind of remedies to which the vendor may resort are the subject of much controversy in the opinions of the courts. There is high authority for the proposition that the vendor, in such a case, may, among other remedies, by virtue of a species of lien for the purchase price, sell the goods as those of the vendee, and hold the latter for the difference between the price obtained and the contract price. This was the remedy resorted to here. It is not necessary for us to decide whether the vendor has this remedy in the class of cases just mentioned. It is clear that this case does not belong to that class. Here the title never passed, and the goods at all times remained the property of the vendor, subject to any disposition it might be pleased to make of them, until it finally sold them on the market to other parties. The implied authority of the vendor to segregate the goods and appropriate them to the contract had long previously expired. In such cases the rule is general, if not universal, that the measure of the damages which the vendor may recover is the difference between the contract price and the market price at the time fixed by the contract for delivery."

[4, 5] In this case the measure of damages was the difference between the contract price and the market price at the time and place of delivery, because there was no allegation in the complaint that the hops were resold, or of the price at which they were resold. In other words, the action was not brought to recover the difference between the contract price and the selling price, with expenses added, but to recover general damages; and the law fixes these at the difference between the contract price and the market price at the time and place of delivery. The issues in the case then were: First, was there a contract of sale? Second, was that contract breached by the Brewing Company? and, third, if there was a contract and a breach, what, if any, damages resulted therefrom? The court instructed the jury as a matter of law that there was a contract as alleged in the complaint, and this charge was justified by the admitted facts. It was likewise admitted that the Brewing Company canceled the contract and refused to accept the hops as tendered, so that the only vital issues remaining in the case were: Was the Horst Company ready, able, and willing to perform its part of the contract; and, if so, what damages resulted from the breach?

Let us now review some of the rulings complained of in the light of these issues and the general principles of law to which we have referred. One of the main issues in the case was the quality of the hops tendered by the Horst Company in performance of the contract. One of the objections urged against the samples furnished by the Horst Company was that the hops contained stems and leaves and were not cleanly picked. Upon that question the Brewing Company called two witnesses. The witness Chalmers testified that he had been engaged in the hop business in the Consummes district for 30 years, that he knew the Horst Company ranch, and that he visited the ranch during the picking season of 1912 with one Traganza. He was then asked the following questions and the following proceedings occurred:

"Q. What did you observe about the picking machine? Just explain what you saw. A. Do you mean for me to tell you just what I saw? Q. Yes. A. Well, I will tell you.

"The Court: What is the purpose of this?

"Mr. Powers: To show that the leaves and stems were being put in these hops by instructions of Mr. Horst to put them in there.

"The Court: That has nothing to do with this case at all. It would depend upon the condition of the hops shown here.

"Mr. Powers: I would like to make my offer, so that your honor will understand. I offer to prove by this witness that he was present while these very hops were being baled; that he saw the leaves and stems being put into the drier; subsequently these hops were baled as they are here; that he actually saw those things with his own eyes.

"The Court: The evidence is excluded as wholly immaterial to the issue.

"Mr. Powers: Exception."

The witness Traganza was called, and stated that he was a farmer; that he knew the witness Chalmers, and accompanied him to the Horst Company ranch; that he saw the hop drier in operation; and that he remained there probably about two hours. Counsel for the Horst Company interposed an objection to his testimony at this point, on the ground that it was evidently in line with the previous testimony of Chalmers. The court asked if this was the purpose of the testimony, and upon receiving an affirmative answer the objection was sustained, and an exception taken.

These rulings were erroneous. It was conceded throughout the trial that the hops tendered came from the ranch in question and were picked by a picking machine. The testimony thus offered tended strongly to show that the hops were not of choice quality, and that the Horst Company was not able to perform its contract with the Brewing Company. The testimony should not have been limited to the quality of the hops contained in the samples, because it was incumbent on the seller to go further, and show that the hops actually tendered were equal in quality to the samples furnished, in order to show its ability to perform the contract. But, if it be conceded that the testimony should have been limited to the quality of the hops contained in the samples, we still think the rejected testimony had a direct tendency to corroborate the witnesses, who testified that the samples did not exhibit a choice quality of hops, for the reason that the hops contained stems and leaves and were not cleanly picked.

[6-8] One of the witnesses for the Horst Company was permitted to testify from figures compiled from the books of the Horst Company, showing office expenses in New York and Chicago, insurance charges, warehouse charges, freight charges, and other miscellaneous charges, and that the 2,000 bales of hops sold at an average net price of 13.66 cents per pound over and above these various charges. This testimony was clearly inadmissible. The books themselves afforded the primary evidence of their contents, and as long as they were accessible and unaccounted for any evidence as to what they contained or showed was secondary and incompetent. This rule is elementary. Furthermore, the books were not identified or proved, so as to render them competent, if offered. It appears from the compilations referred to that the books recorded transactions which took place in New York,

Chicago, and various other places throughout the United States, and there was not the slightest testimony as to how the books were kept, by whom they were kept, when the entries were made, or the sources from which they were made.

But, outside and beyond all this, many of the figures and computations were irrelevant and immaterial for any purpose. As already stated, this action was brought to recover general damages, or the difference between the contract price and the market price, and the books would only be competent in so far as they tended to establish the market price. No doubt evidence of sales made by the Horst Company of these hops within a reasonable time after the breach of the contract would be competent, as bearing upon the question of market value; but the testimony offered showed sales made in April, May, and June of 1913, and one as late as July 9, 1913. It must be self-evident that a sale of hops made on July 9th is no evidence whatever of market value six or eight months previously, especially in view of the testimony on the part of the Horst Company that the price of hops declined rapidly after November 4th, the date of the cancellation of the contract. Furthermore, the market value or price at Milwaukee, the place of delivery, was the criterion, and these sales were made in many different states, and even in the Dominion of Canada. For these reasons the testimony offered was incompetent and irrelevant, and should have been excluded.

[9, 10] The Horst Company offered testimony over objection tending to show that in a hop contract such as this, where no time of delivery is specified, it is customary to ship the hops during the shipping season of that year, which extends from the time of harvest up to the end of February or March of the following year. The contract in suit was canceled by the Brewing Company on the 4th day of November, 1912, and the complaint alleged a tender of performance, which must have been made at or about that time. The only purpose of fixing the date of delivery would be to fix a date for the ascertainment of the market price, and under the circumstances of this case that date should be fixed as of November 4, 1912, or soon thereafter. If it be urged that the Horst Company had the entire hop season within which to tender choice hops in compliance with the terms of the contract, even though the samples furnished were not of that quality, the answer is that there is no testimony tending to show that it could at any time tender or deliver hops of a quality superior to the samples. Indeed, all the testimony is clearly to the contrary. The evidence of custom was therefore irrelevant and immaterial.

The Brewing Company offered testimony tending to show the market value of Consummes hops in November, 1912. The court rejected this testimony, on the ground that the offer of proof was not limited to *air-dried* Consummes hops. This ruling was erroneous. It clearly appears from the testimony that all the *air-dried* Consummes hops in existence were produced by the Horst Company, and that they had no market value as distinguished from other hops from the same district. The *air-dried* hops differed from the *kiln-dried* hops only in the matter of curing, and all the testimony shows that the market value of

the one is the same as the market value of the other, where the hops are equal in quality. Under these circumstances we think testimony as to the market price of Consumnes hops would be a material aid to the jury and that the evidence should have been admitted. This ruling is of little moment, because no testimony of any consequence was excluded by reason thereof.

Finally, the Brewing Company assigns as error the refusal of the court to submit its counterclaim to the jury. There is no merit in this assignment for two reasons: First, because the jury found that the contract was breached by the Brewing Company, and not by the Horst Company; and, second, because the testimony offered by the Brewing Company itself showed that it was benefited rather than injured by the breach, inasmuch as the market price of hops was considerably below the contract price.

We deem it unnecessary to discuss or consider the remaining assignments of error. If it be said that this court has considered objections to some of the testimony in addition to those urged in the court below, the answer is that these questions will necessarily arise on a retrial of the action, which must be ordered on other sufficient grounds.

For error in the admission and exclusion of testimony the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

SCHULTZ v. STACK-GIBBS LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1916.)

No. 2604.

1. PLEADING Ⓒ11—EVIDENTIAL FACTS.

In an action for breach of a contract under which plaintiff was to cut timber owned by defendant into logs and drive them, the complaint alleged that defendant failed to make a payment of money to plaintiff, and that when the contract was made plaintiff had \$700 to his credit in a bank and owned a homestead, which constituted his entire assets, and he so informed defendant; that when it made default in payment plaintiff had mortgaged the homestead; that his expenditures under the contract had exhausted his resources; that he was unable to obtain further money or credit, unless defendant paid the amount due, to defendant's knowledge; and that because of defendant's default plaintiff was obliged to suspend work under the contract. *Held* that, assuming that these allegations in some way supported plaintiff's claim for consequential damages, they were nevertheless evidentiary, and not properly pleadable as elements of a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. Ⓒ11.]

2. LOGS AND LOGGING Ⓒ8—LOGGING CONTRACTS—PERFORMANCE—CONDITIONS PRECEDENT.

Defendant owned timber some miles from a stream in which logs were to be floated to market, and had no right of way to the stream. It contracted with plaintiff to cut the timber into logs, haul, and drive them. Plaintiff agreed to furnish all rights of way, and defendant agreed to pay

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

plaintiff on the 15th day of each month \$3.25 per thousand feet for all logs placed on skids during the preceding month, provided plaintiff should have roads made from the skidway to the banking ground on the stream, so that the logs could be hauled thereto without additional expense, excepting for hauling. *Held*, that the construction of the roads by plaintiff was a condition precedent to the payment of any money by defendant, and where plaintiff had not constructed such roads defendant was under no obligation to make the stipulated payment, though, to its knowledge, plaintiff was financially unable to perform unless such payment was made.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 15-17; Dec. Dig. ¶8.]

In Error to the District Court of the United States for the Northern Division of the District of Idaho.

Action at law by Rudolph Schultz against the Stack-Gibbs Lumber Company for damages for alleged breach by the defendant of two certain logging contracts. Judgment for defendant, and plaintiff brings error. Affirmed.

This action was commenced in the district court of the First judicial district of the state of Idaho in and for Shoshone county, and subsequently removed to the court below, upon petition of the defendant; the plaintiff being a citizen of the state of Idaho, and the defendant a corporation organized and existing under and by virtue of the laws of the state of Michigan.

On October 15, 1912, the plaintiff and the defendant (the latter will hereafter be referred to as the Lumber Company) entered into a logging contract by the terms of which the plaintiff agreed to cut into saw logs, and skid, haul, float, and drive to the main North fork of the Cœur d'Alene River, Idaho, all of the merchantable white pine and yellow pine timber situated on certain lands owned by the Lumber Company in Shoshone county, Idaho, of which not less than 1,000,000 feet of white pine timber was to be hauled and floated to such place before the spring drive of 1913 should pass Pine creek; the balance of the timber to be cut into logs and hauled and floated to the main North fork of the Cœur d'Alene river before the spring drive of 1914 moved, or not later than June 1, 1914. The contract contained specific recitals concerning the lengths and diameters of the logs to be cut, and the markings to be placed thereon, and also provided that the logs should be scaled by a scaler to be mutually agreed upon by the parties. The plaintiff agreed to furnish all right of way over which to haul the logs to be cut under the contract, and further to furnish receipts for all labor performed on the logs, or satisfactory evidence that the labor had been paid, and also receipts for payment for all supplies used in the logging of the timber, or satisfactory evidence that the supplies had been fully paid for. In consideration of the acts to be performed by the plaintiff, the Lumber Company agreed to pay to him, on the 15th day of each month, the sum of \$3.25 per thousand feet, board measure, for all logs which should have been placed on skids by the plaintiff during the preceding month, provided "that the party of the first part [the plaintiff] shall have roads made from the skidway to the banking ground on Pine creek, so that the said logs can be hauled to the banking on Pine creek without additional expense, excepting for hauling." The payments to the plaintiff were to be made as follows: \$2.25 per thousand feet, board measure, on the 15th day of each month for all logs which should have been hauled and floated in Pine creek by the plaintiff during the preceding calendar month, and the balance of \$1 per thousand feet, board measure, on the 15th day of each month for all logs delivered in the North fork of the Cœur d'Alene river during the preceding calendar month.

By a second agreement between the same parties, of even date, the Lumber Company agreed to sell to the plaintiff, and the plaintiff agreed to buy, all of the mixed timber on the lands owned by the Lumber Company and described in the contract, at the price of 50 cents per thousand feet board measure, the price to be paid by the plaintiff to the Lumber Company on the 10th day of

each month for all timber cut and scaled during the preceding calendar month; the plaintiff agreeing to cut and move all of the timber within four years, and to pile and burn the brush resulting from the cutting thereof in conformity to the fire law of the state of Idaho.

The complaint filed by the plaintiff in the court below embraced two causes of action—the first being founded upon an alleged breach by the Lumber Company of the first contract between the parties: the second being for damages and loss alleged to have been suffered and sustained by the plaintiff owing to his inability to carry out and perform the terms of the second contract, such inability being alleged to have been caused by the breach by the Lumber Company of the first contract.

In the first cause of action, the plaintiff, after setting forth the material provisions of the first contract, alleged that upon its execution and delivery he entered upon its performance, employed a large number of men, secured by purchase and lease the right of way for the necessary roads and skidways at a cash outlay of more than \$1,100, purchased and furnished teams and invested more than \$700 in camp equipage, tools, and supplies, and expended the sum of \$250 for labor; that by December 15, 1912, he had felled, cut, and placed upon skids and skidways 250,000 feet of white and yellow pine, and in addition thereto he had felled 100,000 feet of timber preparatory to placing the same upon skids, and had in every respect complied with the conditions of the said contract upon his part; that thereupon, pursuant to the provisions of the contract, it became the duty of the Lumber Company to pay to him the sum of \$812.50 (the said logs having been scaled as required by the contract). The plaintiff further alleged that at the time of the making of the first contract with the Lumber Company he had to his credit in the bank the sum of about \$700, which represented his total cash capital, of which fact he informed the defendant; that he further informed the defendant that he owned a homestead, which he could and would incur for as large amount as he could by his best endeavor obtain; that these two items constituted his entire assets, which the Lumber Company well knew. The plaintiff further alleged that before the 15th day of November, 1912, he had mortgaged his homestead for as large amount as he was able to obtain, and that the expenditures made in and about the said business by him, and required to be made under the terms of the contract, had exhausted all of his resources; that on the last-mentioned date the plaintiff requested the Lumber Company to pay him the sum of \$812.50 for the logs already placed upon the skids, the same being due to him at that time from the Lumber Company, which sum the Lumber Company refused to pay; that the plaintiff, at the time of such refusal, had expended all the cash money which he had, and was utterly unable to obtain further money or credit from any source whatsoever, all of which facts were known to the Lumber Company; that because of the refusal of the Lumber Company to pay the plaintiff the amount alleged to be due him the plaintiff was unable to complete his part of the contract, and was obliged to suspend all efforts to carry out the contract and abandon the same.

In his second cause of action, the plaintiff set forth the material provisions of the second contract and alleged that it was dependent upon and in its execution was to follow the completion of the first contract; that by reason of the default of the Lumber Company as above set forth the plaintiff was prevented from carrying out and performing his part of the second contract, and he was obliged by reason of the acts and conduct of the Lumber Company to abandon the same; that there was growing and situate upon the lands of the Lumber Company 3,500,000 feet of mixed timber, and that, if the Lumber Company had kept its obligations with the plaintiff, he, in the performance of the second contract, would have made a profit of \$2,625; that by reason of the acts of default on the part of the Lumber Company he had been damaged in that sum.

The Lumber Company interposed a motion to strike from the first cause of action the allegations respecting the financial condition of the plaintiff at the time of entering into the first contract, the mortgaging of his homestead, the subsequent exhausting of his resources, his inability to obtain credit, and his inability to proceed with the contract by reason of such facts. The Lumber

Company also interposed a motion to strike from the second cause of action the allegations relating to the inability of the plaintiff to perform the second contract, owing to alleged acts of default of the Lumber Company, and the profits which the plaintiff would have realized, had the second agreement been performed. The motions were granted. Subsequently the Lumber Company demurred specially to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and, further, that it was ambiguous, unintelligible, and uncertain in various particulars. The demurrer was sustained.

The plaintiff having elected to stand upon the complaint, judgment of dismissal was entered against him. The granting of the Lumber Company's motions to strike, and the sustaining of its demurrer to the complaint, are assigned as error.

Chas. E. Miller and Justin H. Wixom, both of Wallace, Idaho, for plaintiff in error.

Reese H. Vorhees, of Spokane, Wash., and Ezra R. Whitla, of Cœur d'Alene, Idaho, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The plaintiff seeks to recover upon two causes of action based upon alleged breaches of two contracts, copies of which are attached to the complaint. The second contract is dependent upon the first. The first contract provides, among other things, that the plaintiff should cut into sawlogs a quantity of white and yellow pine timber located upon land belonging to the Lumber Company, and skid, haul, float, and drive said logs to a point mentioned in the contract. In consideration of this service, the Lumber Company agreed that on the 15th day of each month it would pay to plaintiff the sum of \$3.25 per thousand feet, board measure, for all the white and yellow pine logs which should be placed on skids by the plaintiff during the preceding calendar month. To this part of the contract there was attached the following proviso:

"Providing, however, that the party of the first part shall have roads made from skidways to the banking ground of Pine creek so that the said logs can be hauled to the banking on Pine creek without additional expense."

Plaintiff alleges that on the 15th day of December, 1912, he had felled, cut, and placed upon skids and skidways 250,000 feet of white and yellow pine; that on the last-mentioned date the plaintiff requested the Lumber Company to pay him the sum of \$812.50 for the logs placed upon the skids, which said sum the Lumber Company refused and neglected to pay.

The Lumber Company's obligation to pay this sum we shall assume for the present was dependent upon plaintiff's compliance with the terms of the proviso attached to the Lumber Company's obligation to pay, and with respect to which plaintiff alleges only a part compliance. He alleges:

"That on or about the said November 15, A. D. 1912, the plaintiff had expended for right of way for said road the sum of \$200 and more than \$1,100 for building and constructing such road and to fit the same for the purpose of hauling the logs to water."

In other words, by his own showing, plaintiff had not complied with his part of the contract, and, under its terms, no payment was then due from the Lumber Company to him; nevertheless, he demanded that the Lumber Company should comply with its part of the contract and pay to him the sum of \$812.50. Plaintiff alleges, further, that by reason of the failure of the Lumber Company to pay him this sum of \$812.50, which would have enabled him to proceed with his contract, he was unable to complete his part of the contract and was compelled to abandon the same. For the failure of the Lumber Company to carry out its part of the contract the plaintiff seeks to recover \$5,000, which he alleges he would have realized as profits had the contract been completed; \$700, expended for supplies and rent of building; \$200, expended for right of way; \$1,100, expended in making a roadway; and \$255, expended for labor—making a total of \$7,255, which plaintiff alleges was his loss by reason of the acts of the Lumber Company as set forth in the first cause of action.

Referring now to the allegations in the complaint struck out by the court below: They are to the effect that at the time of making the contract plaintiff had to his credit in the bank the sum of about \$700, his total cash capital; that he owned a homestead at or near Kingston, in the county of Shoshone, which he could and would incumber for as large amount as he could by his best endeavors obtain, and that these two items constituted his entire and obtainable assets, and he so informed the Lumber Company; that it well knew the same and was fully advised of plaintiff's financial condition; that on December 15, 1912, when, it is alleged, the Lumber Company was in default to plaintiff in the payment of the amount then due, namely, the sum of \$812.50, the plaintiff had mortgaged his homestead for as large amount as he was able to obtain, and that the expenditures made in and about the said business by plaintiff and required to be made under the terms of said contract had exhausted all of his resources; that he was utterly unable to obtain further money or credit from any source whatever, and that unless the Lumber Company paid to plaintiff the amount alleged to be due him, he would be unable to carry out his part of the contract, all of which facts plaintiff alleges were fully understood by the Lumber Company; and that because of the refusal of the Lumber Company to pay plaintiff the amount so alleged to be due him, the payment of which would have enabled plaintiff readily to proceed with his contract and to carry out his part of the same, the plaintiff was obliged to suspend all efforts to carry out his part of the said contract and to abandon the same.

[1] Assuming that these allegations may be construed as in some way supporting the claim for consequential damages, the fact remains that they are evidentiary, and not properly pleadable as elements of a cause of action. But there is the more serious objection that they are plainly intended to anticipate the defense that there was nothing due the plaintiff under the proviso requiring the plaintiff to have a road made from skidway to the banking ground. This objection is made clear by the question of the sufficiency of the complaint raised

by the defendant Lumber Company upon the special demurrer to the complaint.

A special demurrer is the method provided in Idaho for reaching an ambiguity or uncertainty in the complaint. The demurrer in this case was special, as well as general, and pointed out a number of ambiguities and uncertainties in detail, among others that the complaint was ambiguous, unintelligible, and uncertain in this:

"That it alleges in paragraph 6 that said contract provided and required plaintiff to furnish all right of way over which to haul logs to be cut from the land at his own expense, and also alleges that plaintiff had expended for right of way the sum of \$200, and more than \$1,100 for building and constructing such road and to fit the same for the purpose of hauling the logs to water, but does not allege, state, or show that plaintiff had secured or had any legal contract for the right of way or use of the road, or an easement for hauling logs across the land from the place of the skidding of said logs to the place where they were to be delivered in Pine creek, or that such road had been built its entire distance sufficient or proper over which to haul said logs."

The court below, in discussing the demurrer, said:

"It is provided that the first payment shall be made to the plaintiff at a certain time, in case that at such time the plaintiff shall have built roads from the skidways to the banking ground on Pine creek so that the logs can be hauled to Pine creek without additional expense. Under a fair construction of the contract, the building of these roads is a condition precedent to the maturity of the obligation to make the first payment. It is possible that the plaintiff intended to plead the construction of these roads, but there is no direct allegation to that effect, and there is no reasonable inference. It is alleged that he, the plaintiff, spent certain moneys for that purpose; but that fact alone does not imply the completion of the road. I think, if it be a fact that the road is completed, there should be inserted a positive statement to the effect that this provision of the contract has been complied with. This insertion may be made by interlineation, if the plaintiff so desires."

[2] The complaint was not amended in this respect, by interlineation or otherwise, and the plaintiff subsequently filed an election to stand upon the sufficiency of his complaint. We have, therefore, a virtual admission on the part of the plaintiff that the roads had not been constructed; and the question is: Was their construction a condition precedent to the payment of any moneys by the Lumber Company to the plaintiff under the contract?

There is nothing technical or ambiguous about the proviso in question. Language could hardly indicate a plainer intent on the part of the Lumber Company that roads from the skidways to the banking ground should be constructed prior to the payment of any moneys by it to the plaintiff. It was a vital term of the contract, as appears from its terms, and we may assume from the facts alleged that the logs were to be cut several miles from the river in which they were to be floated out to market. The Lumber Company had no right of way from its lands to the river. Without a right of way having been obtained and roads built, the logs would be valueless when cut, as there would be no way to get them to the market. If the rights of way were not obtained and the roads constructed, the defendant would be at the mercy of every one over whose lands the rights of way would have to be secured and roads constructed in order to take its logs to

market. On the other hand, if the rights of way were obtained and the roads built, and the plaintiff for any reason failed to bring the logs out of the woods, then the Lumber Company would have an opportunity to secure the services of others to haul the logs to the river, thereby saving its property from loss.

The difficulty with the plaintiff's case is that, conceding that his financial condition was as alleged in the complaint and that it was known to the Lumber Company, nevertheless there was, as a matter of law, no duty imposed upon the Lumber Company to come to his rescue to the extent of making a payment prior to the construction of the roads. The contract is complete. The payments to be made by the Lumber Company to the plaintiff under its terms are dependent upon certain acts to be performed by the latter. There is nothing to indicate that the first payment, or any payment, would be made by the Lumber Company, regardless of the failure of the plaintiff to perform any or all of the conditions, whether such failure to perform was caused by the financial inability of the plaintiff or by reason of any other fact whatsoever. Nothing may be read into the contract by implication, and, indeed, there is no suggestion on the part of the plaintiff that he was induced to enter into the contract by reason of any promises of financial assistance on the part of the Lumber Company, should he find himself unable to perform any of the conditions of the contract, through lack of funds.

The case is readily distinguished from that of the Skagit Railway & Lumber Co. v. Cole, 2 Wash. 57, 25 Pac. 1077, and the cases there cited, on the authority of which the plaintiff claims to have drafted his complaint. In that case the defendant had *specifically contracted* to furnish the plaintiff with supplies during the continuance of the logging contract, and the plaintiff's case was based upon a breach of such express provision. In Graham v. McCoy, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235, and Federal Iron & Brass Bed Co. v. Hook, 42 Wash. 668, 85 Pac. 418, the same element of contract existed; the defendants having by the terms of the respective agreements bound themselves to perform certain acts for the breach of which the suits were instituted.

As the conclusion which we have reached calls for an affirmance of the judgment entered in the court below, it will be unnecessary to consider specifically the assignments of error based upon other grounds of demurrer to the first cause of action; and as the second cause of action of plaintiff's complaint is based upon an alleged default of the Lumber Company in the performance of the first contract, our determination that there was no such default disposes of the questions raised by the sustaining of the demurrer to the second cause of action.

The judgment is affirmed.

UNITED STATES v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1916.)

No. 2636.

1. RAILROADS ⇨229—STATUTORY REGULATIONS—EQUIPMENT OF TRAINS.

Act March 2, 1893, c. 196, 27 Stat. 531 (Comp. St. 1913, §§ 8605-8612), provides that it shall be unlawful for any carrier engaged in interstate commerce by railroad to use any locomotive not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train not so equipped with power or train brakes that the engineer can control its speed without requiring brakemen to use the common hand brake for that purpose. The amendatory act of April 1, 1896 (29 Stat. 85, c. 87 [Comp. St. 1913, § 8610]), imposes a penalty for violations, and Act March 2, 1903, c. 976, § 2, 32 Stat. 943 (Comp. St. 1913, § 8614), provides that, whenever any train is operated with power or train brakes, not less than 50 per cent. of the cars shall have their brakes operated by the engineer. Act April 14, 1910, c. 160, § 2, 36 Stat. 298 (Comp. St. 1913, § 8618), provides that all cars must be equipped with efficient hand brakes. *Held*, that it is unlawful to permit the use of hand brakes in connection with the power brakes required by the statute, though the engine and the required percentage of cars are properly equipped, as the title, of the original act and the reports of congressional committees, as well as the language of the act, shows that it was intended to make it unlawful to require brakemen to use hand brakes, and the hand brakes required by the act of 1910 are intended to control cars in yards and elsewhere, when trains have been broken up, or are being made up.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⇨229.]

2. RAILROADS ⇨254—STATUTORY REGULATIONS—PENALTIES—CONSTRUCTION OF STATUTE.

In a civil action to recover a penalty, the Safety Appliance Acts are not to be construed by the rules which govern the construction of criminal statutes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 764-772; Dec. Dig. ⇨254.]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action for statutory penalties by the United States against the Great Northern Railway Company. Judgment for defendant on demurrer, and the United States brings error. Reversed and remanded.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., and Philip J. Doherty and M. C. List, Sp. Asst. U. S. Attys., both of Washington, D. C.

Charles S. Albert and Thomas Balmer, both of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. [1] An action consisting of 12 counts was brought against the defendant in error to recover penalties for

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

violations of the Safety Appliance Act approved March 2, 1893, c. 196, 27 Stat. 531, as amended by Act April 1, 1896, c. 87, 29 Stat. 85, and by Act March 2, 1903, c. 976, 32 Stat. 943. It was alleged that the defendant ran on its line of railroad, in interstate commerce, certain freight trains drawn by its own locomotive engines, but that at times the speed of the trains was controlled by brakemen who were required to use common hand brakes for that purpose. There was a stipulation between the parties that each engine was equipped with a power driving wheel brake and appliances for operating a train brake system; that in each train not less than 85 per cent. of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing such train to control its speed, in connection with the hand brakes. The court below sustained a demurrer to the complaint, on the ground that none of the counts therein set forth facts sufficient to constitute an offense against the United States.

The statute of March 2, 1893, provides:

"That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

The amendment of April 1, 1896, imposes a penalty upon any such common carrier—

"using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act."

The amendment of March 2, 1903, provides (section 2):

"That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated."

The act gave the Interstate Commerce Commission authority from time to time to increase the minimum percentage of cars in any train required to be operated with power, or train brakes, and at the time of the acts complained of the percentage of cars required to have their brakes used and operated by the engineer of the locomotive drawing the train had been increased to 85.

The court below construed the acts and amendments thereto as permitting the use of hand brakes in connection with the specific power brakes referred to in the act. The plaintiff assigns error to that construction, and contends that it was the intention of the act to require that the movement of all such trains must be controlled by power brakes, and that no brakeman should be required to use hand brakes. We have carefully considered the questions involved, and have reached these conclusions:

First. Aside from the language of the act and the amendments, there is external evidence that it was the intention of Congress thereby to make it unlawful to require brakemen to use hand brakes in the ordinary management and movement of freight trains in interstate commerce. This is shown by the title of the act and the reports of committees during the passage of the bill through Congress. The title of the act is:

"An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes."

The House Committee on Interstate Commerce, in its report on the bill, after referring to the number of train hands killed in falling from trains and engines, said:

"It is the judgment of this committee that all cars and locomotives should be equipped with automatic couplers, obviating the necessity of men going between the cars, and continuous train brakes that can be operated from the locomotive, and dispense with the use of men on the tops of the cars; that the locomotive should be provided with power driving wheel brakes, rendering them easy of control. The brakes now have to be largely operated by the brakemen, traveling over the tops of the cars by night and day, through sleet and rain, exposed to great danger of falling from the cars, or from overhead obstructions."

The chairman of the committee which had charge of the bill in the Senate explained the bill by saying:

"When we get the cars of this country equipped with uniform couplers, with air brakes, so that the men will not be required to go between the cars, so that the men who are on top of the cars to-day will be taken off and thereby relieved from the danger of such positions, there will be no cause for any further legislation on the subject, in my judgment."

The Interstate Commerce Commission also so understood the act. In its Eleventh Annual Report it said:

"The requirement, therefore, is not that a carrier shall equip its cars with the brake or the coupler, but that it shall not use in interstate traffic a train which is not controlled by the train brake."

In its Thirteenth Annual Report the Commission, anticipating the time when the law should go into effect, said:

"The men will not then be obliged to use the tops of the cars for braking, nor to walk on the running boards. The freight train will be as completely under control of the engineer as passenger trains are at the present time."

Second. The act by its terms expresses with sufficient certainty the intention of Congress that hand brakes shall not be used on freight trains in the ordinary movement of such trains in interstate commerce. By the act Congress adopted for freight trains the system of braking that was in use on passenger trains. It made no specific mention of the number of cars in a train that should be equipped with power brakes, but it enacted in general terms that the train should be sufficiently equipped to be run without requiring the use of the common hand brake. The clause "without requiring brakemen to use the common hand brake," as found in the first section of the act, is used in the same sense as the words "without the necessity of men

going between the ends of the cars," in the second section, which provides for automatic couplers. The language of the act was equivalent to declaring that after the date named freight trains should not only be equipped to run, but should actually be run without requiring brakemen to use the common hand brake. No implication to the contrary is to be found in the provision in section 2 that all cars must be equipped with "efficient hand brakes," a provision which is ascribable to the necessity of controlling the movement of cars in yards and elsewhere, when trains have been broken up or are being made up. In an act, the express purpose of which is to relieve brakemen from the danger of using hand brakes, a provision that the train shall be so equipped as to run without requiring the use of hand brakes is a prohibition against the use of hand brakes in the ordinary movement of the trains. In view of the protection which was intended to be afforded by the act, it would have been idle for Congress to declare that freight trains must be equipped with appliances to operate a power brake system, and at the same time leave it optional with a railroad company to decide whether it would or would not operate its trains with that system. To say that trains shall be provided with power brakes, and in the same breath to say that the carrier may refuse to use them, is to contradict the very purpose and terms of the act. Yet such is the effect of the law, if it be given the construction contended for by the defendant in error.

[2] The act is not to be construed by the rules which govern the construction of criminal statutes. The action is a civil action to recover a penalty. The Supreme Court has held that, if the language of a penal statute is plain, it will be construed as it reads, and that the words will be given their full meaning, and, if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial in its nature. *Bolles v. Outing Co.*, 175 U. S. 262, 20 Sup. Ct. 94, 44 L. Ed. 156; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. In the case last cited, the court quoted with approval the language of Mr. Justice Story in *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740, as follows:

"I agree to that rule in its true and sober sense; that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. * * * And where a word is used in a statute, which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature."

The only reported case which supports the decision of the court below is *United States v. Baltimore & O. R. Co.* (D. C.) 176 Fed. 114, in which it was held that the law is complied with so long as it is shown that trains contain the required percentage of cars equipped with power brakes. The order of nonsuit in that case was affirmed

by the Circuit Court of Appeals for the Third Circuit in *United States v. Baltimore & O. R. Co.*, 185 Fed. 486, 107 C. C. A. 586, but that court declined to express an opinion as to the construction placed on the statutes by the District Court. On the other hand, in *Virginian Ry. Co. v. United States*, 223 Fed. 748, 139 C. C. A. 278, the Circuit Court of Appeals for the Fourth Circuit, in a carefully considered opinion, reached the opposite conclusion. The court said:

"It is impossible to believe that the Congress compelled the equipment of locomotives and cars with the appliances specified in the act for the declared purpose of doing away with the dangerous operation of hand brakes, and then left it to the carriers themselves to decide when and under what circumstances those appliances should be used."

The judgment is reversed, and the cause is remanded to the court below for further proceedings.

ROSS, Circuit Judge (dissenting). The sufficiency of the complaint in this case is to be considered in the light of this stipulation entered into by and between the respective parties:

"It is stipulated that, in consideration of the demurrer to each of the causes of action herein in this court or in any appellate proceedings, it may be accepted as a fact as to each of said causes of action that each engine was equipped with a power driving wheel brake and appliances for operating a train brake system, and that in each train not less than 85 per cent. of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand brakes.

"Dated this 14th day of June, 1915.

"[Signed] Francis A. Garrecht,
"M. C. List,
"Attorneys for Plaintiff.
"Charles S. Albert,
"Thomas Balmer,
"Attorneys for Defendant."

The facts of the case therefore are that, as to each of the causes of action counted on, each engine was not only equipped with a power driving wheel brake and appliances for operating a train brake system, and that in each train not less than 85 per cent. of the cars therein were equipped with power brakes, but that they were used and operated by the engineer of the locomotive drawing such train to control its speed in connection with the hand brakes. The sole question, therefore, in the case, is not whether Congress should have under such circumstances prohibited the use of any hand brakes, but whether it has done so by its legislation upon the subject. That it has not done so seems to me very plain from a mere reading of its enactments. That of March 2, 1893, referred to in the opinion of the court, declares:

"That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train

can control its speed without requiring brakemen to use the common hand brake for that purpose."

It will be observed that in that act Congress did not specify the number of cars that should be equipped with the train brake system, only requiring that the number should be "sufficient" for the purpose designed. But by its amendment of March 2, 1903, also referred to in the opinion, Congress declared:

"That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power brake cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the object of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

Pursuant to the power thus delegated to it, the Interstate Commerce Commission, on the 6th day of June, 1910, promulgated this order:

"It is ordered, that on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Acts as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent. of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power brake cars in each such train which are associated together with the 85 per cent. shall have their brakes so used and operated."

It is thus seen that at first Congress only required a "sufficient" number of the cars of a train to be equipped with the power brake system, without specifying the number, then by amendment fixed that number at not less than 50 per centum and gave to the Interstate Commerce Commission power to increase that number, after a full hearing before it, to the extent it should deem wise. There is in no act of Congress that has been cited any provision prohibiting the equipment of the cars with hand brakes also; on the contrary, by section 2 of its act of April 14, 1910, c. 160 (36 Stat. 298), Congress expressly provided, among other things, that "all cars must be equipped with secure sill steps and efficient hand brakes," with a certain proviso not important to be here mentioned.

There is certainly nothing in the above-quoted provisions of the statute either expressly or in my opinion by implication prohibiting the use of hand brakes in connection with the power brake system, and the facts of the present case as made to appear by the record are that the full percentage of the cars constituting the trains in question, required by the Interstate Commerce Commission pursuant to its legislative authority to be equipped with the power brake system, were so equipped, and that the trains in question were operated thereby. For the court to hold that a larger percentage of the cars of the trains should have been equipped with and operated by the power brake system would be for it to assume the function devolved by Congress upon the Interstate Commerce Commission, which, of course, it has no power to do.

The case of *Virginian Railway Co. v. United States*, 223 Fed. 748, 139 C. C. A. 278, quoted in the opinion as sustaining the conclusion of the court, does not, I think, in any respect do so. The trains there under consideration consisted of 100 cars each, each of which was equipped with power brakes and also with hand brakes, and the driving wheels of the engines were also properly equipped; nevertheless, upon each of those trains the power brakes were not used at all, but, on the contrary, the trains were controlled solely by the use of the hand brakes, which the court very properly held was a clear violation of the act of Congress.

In my opinion, the judgment of the court below should be affirmed.

KIEFER OIL & GAS CO. v. McDOUGAL.

(Circuit Court of Appeals, Eighth Circuit. December 15, 1915. Rehearing Denied March 27, 1916.)

No. 4227.

1. COMPROMISE AND SETTLEMENT ↔8—BETWEEN PARTIES TO PENDING SUIT—VALIDITY AND ENFORCEMENT.

Complainant obtained an oil and gas lease on Indian land from the father and mother of the deceased allottee, claiming to be his sole heirs. Before the lease was recorded the lessors sold the land, and the purchaser executed a lease, afterward acquired by defendant, which went into possession, claiming priority, because its lessors obtained title before the recording and without knowledge of complainant's lease. One M. obtained a conveyance of the land from other relatives of the deceased allottee, and claimed adversely to both lessees. Complainant brought suit against all adverse claimants and obtained a receiver. Both complainant and defendant made offers to M., who leased to defendant for a royalty and an agreement to carry on the litigation and conditionally to pay a bonus. The court determined that the father was the sole heir, but that defendant's lease from his grantee was prior because of complainant's failure to record. Thereupon M. filed an ancillary bill to recover the royalty on oil sold by the receiver. *Held*, that the lease and contract were in effect a compromise and settlement between two of the three adverse claimants, that they were the consideration for the surrender by M. of his claim to the oil rights, and that he was entitled to his share of the fund in the hands of the receiver in accordance with their terms.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 17-31, 33; Dec. Dig. ↔8.]

2. COMPROMISE AND SETTLEMENT ↔8—VALIDITY—MISTAKE OF LAW.

An agreement of compromise and settlement is not invalidated because of a mistake of law by one of the parties.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 17-31, 33; Dec. Dig. ↔8.]

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

Suit in equity by Albert W. Shulthis against the Kiefer Oil & Gas Company and others, with ancillary bill by D. A. McDougal against said Oil & Gas Company. Decree for complainant, and defendant appeals. Affirmed.

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

N. A. Gibson and Franklin P. Schaffer, both of Muskogee, Okl., for appellant.

A. J. Biddison, of Tulsa, Okl. (Gray Carroll and Harry Campbell, both of Tulsa, Okl., on the brief), for appellee.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SMITH, Circuit Judge. [1] George Franklin Berryhill was a part Creek Indian. He was married; his wife's name being Clementine Berryhill. She was not of Indian blood at all. They had a son, Andrew J. Berryhill, who was born prior to May 25, 1901, and died in November of the same year. By "An act to ratify and confirm a Supplemental Agreement with the Creek Tribe of Indians, and for other purposes," passed June 30, 1902 (32 Stat. 500), it was provided:

"Rolls of Citizenship.

"7. All children born to those citizens who are entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

It thus appears that Andrew J. Berryhill was never entitled to an allotment in his lifetime, but under the statute quoted an allotment was made to Andrew J. Berryhill, deceased. Among the lands thus allotted was the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 18, township 17 N., range 12 E. of the Indian principal meridian. On October 10, 1904, the Principal Chief of the Creek Nation issued a deed or patent of said land to the heirs of Andrew J. Berryhill which was approved by the Secretary of the Interior on October 31, 1904. On March 24, 1906, George F. Berryhill and wife, reciting that they were father and mother and sole and only heirs at law of Andrew J. Berryhill, deceased, executed and acknowledged an oil and gas mining lease of the land above specifically described to Albert W. Shulthis for a period of 15 years. April 19, 1907, this lease was approved by the Secretary of the Interior. On June 5, 1906, George F. Berryhill and wife deeded the land to Edmond McKay and Perry McKay, again reciting in the instrument that the grantors were the sole and only heirs of said Andrew J. Berryhill. On October 12, 1906, the two McKays and their wives executed, and on the next day acknowledged, an oil and gas lease of the premises to Arthur B. Reese for 15 years. This lease, by various assignments, became the property of the Kiefer Oil & Gas Company. It entered upon the premises and bored a well for oil and gas, striking oil about the latter part of August, 1907. From the middle of August, 1907, on, seven uncles and aunts, and their wives and husbands, of Andrew J. Berryhill on his paternal side, conveyed the land in question to D. A. McDougal. On October 21, 1907, McDougal and wife executed an oil and gas lease to the Kiefer Oil & Gas Company, and the same day the parties to this lease signed a collateral contract.

About December 24, 1907, Mr. Shulthis brought this action in equity against D. A. McDougal, Edmond McKay, Perry McKay, and the Kiefer Oil & Gas Company, to determine the title to the oil and gas rights, to enjoin the defendants, for the appointment of a receiver, for a discovery, and for other relief. The defendants filed their joint and several answer. In this answer they deny that George Franklin Berryhill and wife were the owners in fee of the land in question, or any part thereof, at any time, and in answer to the prayer for a discovery the defendants answered that at the time of the deed from George Franklin Berryhill and wife to Edmond and Perry McKay they firmly and honestly believed that the devolution of the land in controversy was fixed and controlled by the Creek law of descent and distribution, and that they were advised and informed that the Creek law controlled the inheritance of the allotment of said Andrew J. Berryhill, and that under the Creek law the father, or the father and mother, inherited the fee-simple title in and to all the allotment of the said Andrew J. Berryhill, deceased, and defendants aver and plead that the defendants Edmond and Perry McKay, acting and relying upon their advice and belief that the Creek law controlled, purchased as they thought the fee-simple title in and to said land from George Franklin Berryhill and Clementine Berryhill, and they allege substantially the same facts with reference to the taking of a lease by Arthur B. Reese, but that defendants are now advised, and therefore aver and plead, that the devolution of the allotment of Andrew J. Berryhill, deceased, was fixed and controlled by chapter 49 of Mansfield's Digest of the Laws of the State of Arkansas. They then alleged that the uncles and aunts of said Andrew J. Berryhill claimed to have inherited the fee to the land in controversy subject to a life estate of the father; that D. A. McDougal had purchased from all of the uncles and aunts and collateral kindred of said Andrew J. Berryhill all their right, title, and interest in and to the land in controversy for a valuable consideration.

"In further response to complainant's prayer for discovery, and as a muniment of title in the defendant Kiefer Oil & Gas Company to the oil and gas rights to the land in controversy, defendants state that on October 21, 1907, defendant D. A. McDougal, with his wife, Myrtle A. McDougal, joining therein, entered into a lease contract with the defendant Kiefer Oil & Gas Company, whereby said D. A. McDougal, for a valuable consideration, and a one-fifth part of all oil produced and saved from the premises by said Kiefer Oil & Gas Company, its successors and assigns, did grant, demise, lease, and let unto said Kiefer Oil & Gas Company, its successor and assigns, for the sole and only purpose of mining and operating for oil and gas, the said N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 18, township 17 N., range 12 E., containing 40 acres, being the land in controversy, for and during the term of 15 years from and after October 12, 1906, and so long after the expiration of the 15 years as oil or gas, or either of them, is produced from the land by defendant Kiefer Oil & Gas Company, its successors or assigns, in paying quantities."

In the same document the defendants aver and plead that the Kiefer Oil & Gas Company is rightfully and lawfully entitled to operate the land in controversy for oil and gas purposes and extract said minerals therefrom under and by virtue of the McKay lease, "in connection and conjunction with the lease contract executed to it, Kiefer Oil & Gas Company, by D. A. McDougal and wife, on October 21, 1907, and

accepted by said Kiefer Oil & Gas Company on October 26, 1907." In the same instrument—

"defendants further aver and plead that, if they be mistaken as to the quantum of title taken by George Franklin Berryhill, or George Franklin Berryhill and wife, Clementine Berryhill, and it should be held and decided by the court that George Franklin Berryhill, or George Franklin Berryhill and wife, Clementine Berryhill, was or were vested with the fee-simple title in and to the land in controversy under the laws of descent and distribution in force at the time, then defendants rely upon their superior rights to the oil and gas in the land in controversy under the deed from George Franklin Berryhill and Clementine Berryhill to Edmond and Perry McKay, heretofore set up, and the lease made by them to Arthur B. Reese on October 12, 1906, now owned by Kiefer Oil & Gas Company."

On March 4, 1908, George Franklin Berryhill with leave of court filed a bill of intervention, in which he claimed that the complainant's lease was valid and that the deed to the McKays was invalid, because he was then under restrictions, and asked that the title be quieted to the land and for other relief. To this bill of intervention the Kiefer Oil & Gas Company and D. A. McDougal made an answer in which they said:

"Defendants aver and plead that the uncles and aunts and grandmother of Andrew J. Berryhill, from the father's side, took the entire title to said land, and that the title in fee is now in defendant D. A. McDougal, under and by virtue of deeds executed to him by the uncles and aunts of Andrew J. Berryhill, deceased, to wit, the brothers and sisters of intervener, George Franklin Berryhill, named and specified in the answer of defendants and in the intervening petition of intervener, and in addition thereto defendant D. A. McDougal is the owner and holder of whatever right, title, and interest the grandmother, Airy Anne Berryhill, acquired in said land by virtue of the deed executed and delivered by her to said D. A. McDougal on October 18, 1907."

The case was tried in the District Court, and resulted in a finding and decree that George Franklin Berryhill took a life estate only in the lands in question, and the uncles and aunts of Berryhill took the remainder; that George Franklin Berryhill was under no restrictions as to conveying his life estate, but that as a tenant for life could not grant the right to mine for oil and gas, and dismissed the bill and the petition of intervention. *Shulthis v. MacDougal*, 162 Fed. 331. This case was appealed to this court, where it was held that George Franklin Berryhill took the land in fee, and therefore had the right to grant an oil and gas lease thereto, but that the complainant, having failed to record his lease until May 18, 1907, and long after the deed to the McKays, the complainant's lease was of no validity as against the McKays and their grantees, who took their interest for a valuable consideration and without actual or constructive notice. *Shulthis v. McDougal*, 170 Fed. 529, 95 C. C. A. 615.

It will be observed that, while there was a difference of opinion between the District Court and this court as to the law applicable to this case, there was no difference in the result reached, and the case was accordingly affirmed. *Shulthis* and *Berryhill* attempted to appeal from the decree of this court to the Supreme Court, but their appeals were on motion of the original defendants dismissed. *Shulthis v. McDougal*, 225 U. S. 561, 32 Sup. Ct. 704, 56 L. Ed. 1205. The opinion of this court was, however, in part sustained by the subse-

quent case of *Skelton v. Dill*, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. 198, and more fully in *McDougal v. McKay*, 237 U. S. 372, 35 Sup. Ct. 605, 59 L. Ed. 1001.

The lease from McDougal to the Kiefer Oil & Gas Company, and accompanying contract, provided that the Kiefer Oil & Gas Company would pay to McDougal \$5,000 and one-fifth of all oil produced, or its equivalent in money, and certain other stipulated sums. A receiver had collected, after deducting his expense of operating and developing the property, \$169,480.97. After this court had affirmed the action of the District Court, Mr. McDougal filed his ancillary bill against the Kiefer Oil & Gas Company, asking that the receiver pay to him \$41,913.44 out of the funds collected by him. On June 21, 1913, the Kiefer Oil & Gas Company filed its amended answer to said ancillary bill and its cross-bill. In the latter it sought an injunction and cancellation of the lease and contract with McDougal. On July 2, 1913, Mr. McDougal moved to strike the cross-bill. The case was tried November 25, 1913, and the court ordered the money in the hands of the receiver turned over to McDougal and made the following order:

"This cause came on to be further heard at this time, and was argued by counsel upon the motion of D. A. McDougal to strike the cross-bill heretofore filed herein by the Kiefer Oil & Gas Company; and it is by the court considered, ordered, adjudged, and decreed that said motion be and is hereby sustained, and that said cross-bill be and the same hereby is stricken, to which order and decree of the court the said Kiefer Oil & Gas Company except."

And:

"Provided, however, that this order and decree does not adjudicate or determine the rights of the said D. A. McDougal or of the said Kiefer Oil & Gas Company as to any other things or matters than the aforesaid sum now in the custody and control of this court, nor does it determine the rights of either of said parties in or to the premises described in said ancillary bill, nor to the rents, issues or profits thereof that may have accrued or may hereafter accrue, subsequent to the restoration of said premises to the said Kiefer Oil & Gas Company, under the decree of this court herein entered on the 19th day of July, 1912, nor in or to the \$5,000 promissory note described in said ancillary bill."

And the Kiefer Oil & Gas Company appeals.

There was neither in the lease nor the supplemental contract any warranty of title in McDougal. At the outset it appears that there were, shortly prior to the commencement of this suit, three conflicting claims to the oil and gas upon the land in question:

First. The claim of Shulthis under the lease from Berryhill, which is conceded was first in time of origin.

Second. The claim of the Kiefer Oil & Gas Company from the McKays, which the Oil & Gas Company claimed was superior to the Shulthis lease, because the latter was not recorded, and they claim that Reese and his grantees had no notice of it, actual or constructive. The last question was far from being a clear one. See *Shulthis v. McDougal*, 170 Fed. 529, 538, 95 C. C. A. 615. But if Berryhill only had a life estate then his lease to complainant, without the remainderman similarly leasing, was not valid. *Marshall v. Mellon*, 179 Pa. 371, 36 Atl. 207, 35 L. R. A. 816, 57 Am. St. Rep. 601; *Gerkins v.*

Kentucky Salt Co., 100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 370; Hook v. Garfield Construction Co., 112 Iowa, 210, 83 N. W. 963; Thornton on Oil and Gas (2d Ed.) § 815; 16 Cyc. 625. If, therefore, it was held that the Kiefer Oil & Gas Company was entitled to the land as against Shulthis, but that Berryhill only held a life estate, its rights were subject to extensive litigation under the next claim.

Third. McDougal had title from all the supposed remaindermen. McDougal had received an offer from Shulthis of \$25,000 bonus and one-eighth of the oil and gas. McDougal asked \$40,000 bonus. Then negotiations commenced with the Kiefer Oil & Gas Company, at its instance, as testified to by Mr. McDougal. His claims were adverse to those of Shulthis and the Kiefer Oil & Gas Company. The latter had at considerable expense sunk a well, and knew it had struck oil, and had every incentive to want to hold its previously assumed rights. To show that the question involved was doubtful only needs that it be recalled that the learned District Judge, upon reiterated pleading of the McDougal claim by the Kiefer Oil & Gas Company, decided the question practically upon and in favor of his rights. Under these circumstances after prolonged negotiations the two claimants, the Kiefer Oil & Gas Company and McDougal, compromised their claims, and McDougal took a \$5,000 bonus after he had been offered \$25,000 by Shulthis and increased his royalty. He agreed in the supplemental contract which was made at the time of the lease:

"The Kiefer Oil & Gas Company agrees and binds itself to faithfully and diligently prosecute the pending suit with Albert W. Shulthis over the oil and gas mining rights to the said land, and to take, perfect, and prosecute appeals to the higher courts from any and all judgments, orders, and decrees adverse to it in said litigation with Albert W. Shulthis."

In addition in the same contract it is stipulated:

"Said D. A. McDougal waives any and all claims to improvements placed on said land, and agrees that Kiefer Oil & Gas Company may remove them at the expiration of this lease, and may remove them, should Albert W. Shulthis win his said suit in the end."

Thus the Kiefer Oil & Gas Company was in full charge of all litigation. It secured a written stipulation that the \$5,000 bonus should not be in fact turned over to McDougal unless it finally won its suit with Shulthis. There is present every evidence that, the three parties all claiming the right, McDougal and the Kiefer Oil & Gas Company decided to compromise their contention, and this lease was made as a part of the compromise.

"The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. * * * On the same ground a mutual compromise is sustained. With the courts of this country, the prevention of litigation is not only a sufficient, but a highly favored, consideration, and no investigation into the character or value of the different claims submitted will be entered into for the purpose of setting aside a compromise; it being sufficient if the parties entering into the compromise thought at the time that there was a question between them. So giving up a suit, or any equivalent proceedings, instituted to try a question of which the legal result is doubtful, is a good consideration for a promise to pay a sum of money for an abandonment thereof. And in these cases inequality of consideration does not constitute a valid objection; it is enough if there be an actual controversy, of

which the issue may fairly be considered by both parties as doubtful." Parsons on Contracts (9th Ed.) 477.

This doctrine is abundantly sustained, not only by the authorities there cited, but by *Hager v. Thompson*, 1 Black, 80, 17 L. Ed. 41; *Hennessy v. Bacon et al.*, 137 U. S. 78, 11 Sup. Ct. 17, 34 L. Ed. 605; *Railway v. Clark*, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099; *Williams v. Bank*, 216 U. S. 582, 30 Sup. Ct. 441, 54 L. Ed. 625; *Coffee v. Emigh*, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125; *Wells v. Neff*, 14 Or. 66, 12 Pac. 84, 88; *Smith v. Farra*, 21 Or. 395, 28 Pac. 241, 20 L. R. A. 115; *Cassell v. Ross*, 33 Ill. 244, 85 Am. Dec. 270; *Rowe v. Barnes*, 101 Iowa, 302, 70 N. W. 197; *Hall v. Wheeler*, 37 Minn. 522, 35 N. W. 377; *Tessendorf v. Lasater*, 10 Kan. App. 19, 61 Pac. 677; *Sango v. Parks (Okl.)* 143 Pac. 1158; *Tyson v. Woodruff*, 108 Ga. 368, 33 S. E. 981; *Pomeroy's Equity Jurisprudence*, § 850; 5 *Ruling Case Law*, 882, 883. And the doctrine has been sustained by this court. *Daly v. Busk Tunnel Railway Co.*, 129 Fed. 513, 64 C. C. A. 87; *Sovereign Camp v. Bridges*, 165 Fed. 342, 91 C. C. A. 328.

[2] And it is held quite uniformly that, where the parties are mistaken as to the law, they are nevertheless bound by a contract of compromise. *Prout v. Pittsfield Fire District*, 154 Mass. 450, 28 N. E. 679; *Fidelity & Casualty Co. v. Gillette Herzog Co.*, 92 Minn. 274, 99 N. W. 1123; *City Electric Railway Co. v. Floyd County*, 115 Ga. 655, 42 S. E. 45; *Lewis v. Cooper, Cooke (Tenn.)* 467; *Connor v. Ethridge*, 3 Neb. (Unof.) 555, 92 N. W. 135; 5 *Ruling Case Law*, 898.

There is no question of fraudulent representation of the facts. Both parties understood the elementary facts fully, but it is claimed that, as they did not understand the law as it was ultimately determined to be, this led to a mutual mistake as to the ultimate fact of ownership; but this was one of the very matters in dispute at the negotiations. The representative of the Oil & Gas Company claimed at that time that they had a good title, and Mr. McDougal in substance said the courts must determine that. Then they compromised, and Mr. McDougal surrendered \$20,000 of his bonus offered him by Shulthis and agreed to lose the remaining \$5,000 if the Kiefer Oil & Gas Company did not win its suit with Shulthis for an increased royalty, and agreed to turn the management of the litigation over to the Kiefer Oil & Gas Company. They took charge of the litigation and stood upon their rights under the lease and contract with McDougal as a defense, won their suit substantially on these alleged rights in the District Court, and now want to repudiate the contract because they ultimately won their case on other grounds in this court. This, under the facts shown here, they cannot do. The District Court was right in ordering that the sum in the hands of the receiver of \$41,913.44 be paid to Mr. McDougal.

The decree of the district court is affirmed.

SIMPSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916. Rehearing Denied March 6, 1916.)

No. 2608.

1. INDICTMENT AND INFORMATION ⚡125—DUPLICITY—SERIES OF ACTS CONSTITUTING SAME OFFENSE.

Rev. St. § 5209 (Comp. St. 1913, § 9772), provides that every cashier, etc., of a national banking association, who without authority from the directors issues or puts forth any certificate of deposit with intent to injure or defraud the association, shall be deemed guilty of a misdemeanor. *Held*, that an indictment charging that defendant, without authority and with intent to injure and defraud the bank of which he was cashier, did issue and put forth a certain certificate of deposit was not duplicitous and bad, since, when an offense may be committed in one or more of several ways, or where a penal statute mentions several acts disjunctively and prescribes that each shall constitute the same offense, an indictment may in a single count charge any or all of the acts conjunctively, or charge the commission of the offense in any or all of the ways specified.

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

2. CRIMINAL LAW ⚡182—FORMER JEOPARDY—DISCHARGE OF JURY WITHOUT VERDICT.

A prosecution on a defective indictment did not bar a subsequent prosecution, where there was no acquittal on the merits, but the court, upon the defects being called to its attention, after the close of the testimony and the arguments to the jury, discharged the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 330-332; Dec. Dig. ⚡182.]

3. INDICTMENT AND INFORMATION ⚡133—OBJECTIONS—MANNER OF TAKING OBJECTIONS.

Orderly procedure requires that objections to an indictment should be made either by motion to quash, by demurrer, or by motion in arrest of judgment, and the practice of permitting such objections to be urged during the trial by objections to the testimony, or by requests for instructions, is not to be commended, and should not be encouraged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454-468; Dec. Dig. ⚡133.]

4. CRIMINAL LAW ⚡113—VENUE—OFFENSES COMMITTED PARTLY IN DIFFERENT DISTRICTS.

Judicial Code (Act March 3, 1911, c. 231) § 42, 36 Stat. 1100 (Comp. St. 1913, § 1024), provides that, when any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, tried, and punished in either district as if it had been actually and wholly committed therein. *Held* that, where a certificate of deposit was signed in blank by the cashier of a bank in Idaho, and was filled in by another party in Mississippi, and negotiated in Kentucky, a prosecution for issuing and putting forth such certificate with intent to injure and defraud the bank, and for aiding and abetting the cashier to so issue and put it forth, was maintainable in Idaho.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 190, 232; Dec. Dig. ⚡113.]

5. BANKS AND BANKING ⚡256—CRIMINAL OFFENSES—DEFENSES.

Where a certificate of deposit was issued by the cashier of a national bank without authority from the directors and with intent to injure and

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

defraud the bank, in violation of Rev. St. § 5209 (Comp. St. 1913, § 9772), the criminal act was then complete, and the subsequent ratification of its issuance by the directors could not change the character of the acts.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 958-964, 967; Dec. Dig. ⚡256.]

6. BANKS AND BANKING ⚡257—CRIMINAL PROSECUTIONS—INSTRUCTIONS.

In a criminal prosecution in which the cashier of a national bank was charged with unlawfully issuing and putting forth a certificate of deposit with intent to injure and defraud the bank and without authority from the directors, and another party was charged with aiding and abetting him, evidence was rejected that the cashier executed a deed to his home to secure one of the directors, who advanced money to take up the certificate. The court charged that, when the certificate was sent to another bank at C. and presented for payment, some arrangement was made by which defendants, or one of them, took care of it and protected the bank against loss; that the charge was not that the bank was injured or defrauded, but that the certificate was issued with the intention to injure or defraud; that defendants were not relieved or acquitted because they took care that the bank did not suffer loss; that evidence of this fact of payment would not have been received, except for the contention that the money realized by the use of the certificate got into defendants' private accounts as a result of a misunderstanding between them, and that the mistake was not discovered until some time later; that if defendants had immediately repaired the wrong, before others had knowledge of the existence of the certificate, the jury might very properly conclude that the restoration to the bank of the value of the certificate tended to corroborate their contention of innocent mistake; that whether the jury would give such significance to the restoration at the later date, when the certificate had come to C. and its existence was known, he left to the jury to say; that, except for such light as the payment threw upon the question whether the certificate was intended to be used for defendants' personal benefit, or whether such benefit was the result of inadvertence and misunderstanding, the payment was without significance. *Held*, that this gave defendants the full benefit of any inference that might be drawn from the fact that the certificate was taken up and paid by them.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 966, 970-976; Dec. Dig. ⚡257.]

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

W. G. Simpson and another were convicted of offenses, and they bring error. Affirmed.

Jas. H. Hawley, of Boise, Idaho, William H. Atwell, of Dallas, Tex., W. A. Stone, of Caldwell, Idaho, and C. H. Lingenfelter, of Boise, Idaho, for plaintiffs in error.

J. L. McClear, U. S. Atty., and J. R. Smead, Asst. U. S. Atty., both of Boise, Idaho.

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

RUDKIN, District Judge. Section 5209 of the Revised Statutes of the United States relating to national banking associations provides as follows:

"Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits, of the association; or who, without authority from the directors, is-

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

sues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The indictment in this case charges that on the 27th day of March, 1913, at Caldwell, in the county of Canyon and state of Idaho, one S. D. Simpson, cashier of a national banking association known as the American National Bank of Caldwell, did willfully, unlawfully, and feloniously, without authority from the directors of said association, and with intent to injure and defraud said association, issue and put forth a certain certificate of deposit drawn upon said association in the sum of \$2,500, therein and thereby certifying that there had been deposited by one W. G. Simpson in and with said association the sum of \$2,500, whereas in truth and in fact the said W. G. Simpson, to whom said certificate of deposit was so issued and put forth, did not have at the time said certificate of deposit was so issued and put forth, on deposit with said association an amount of money equal to the amount then and there specified in such certificate, or any amount or sum of money whatsoever, as he, the said W. G. Simpson, then and there well knew. It is then further charged that the said W. G. Simpson did, at the time and place aforesaid, unlawfully and feloniously and with the intent to injure and defraud the said association, and without authority from the directors, aid, abet, incite, counsel, and procure the said S. D. Simpson as such cashier to willfully, unlawfully, and feloniously, and with the intent aforesaid issue and put forth the said certificate of deposit in manner and form aforesaid, he, the said W. G. Simpson, then and there well knowing that he did not have the said sum of \$2,500 or any other sum on deposit with said association.

On the trial of the action the jury returned a verdict of guilty as to both defendants, and to reverse a judgment entered upon that verdict the present writ of error was sued out. The record contains 31 assignments of error in all; but many of these present the same questions in different forms, and we will now take up such of the assignments as we deem worthy of consideration in the order in which the rulings occurred at the trial, rather than in the order in which the assignments appear in the record.

[1] 1. The overruling of a demurrer and motion to quash is assigned as error. It will be observed that the indictment charges that the certificate of deposit was issued *and* put forth with intent to injure *and* defraud the association. For this reason it is urged the indictment is duplicitous and bad. There is no merit in this assignment.

"It is a well-settled rule of criminal pleading that, when an offense against a criminal statute may be committed in one or more of several ways, the in-

dictment may, in a single count, charge its commission in any or all of the ways specified in the statute. So where a penal statute mentions several acts disjunctively, and prescribes that each shall constitute the same offense and be subject to the same punishment, an indictment may charge any or all of such acts conjunctively as constituting a single offense. Or, as the same rule is frequently stated, where a statute makes either of two or more distinct acts, connected with the same general offense and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when each shall have been committed by different persons and at different times, they may, when committed by the same person and at the same time, be coupled in one count as together constituting but one offense; and this is true, although a disjunctive particle is not employed in the statute, but a conjunction is used which is disjunctive in sense." 22 Cyc. 380.

Again:

"In the case of substantive acts which are made unlawful when done from particular motives or with particular intents, it is not duplicity to charge the single substantive act in combination with more than one of the expletives which give it character." Id. 382.

The rule thus stated is amply supported by the authorities cited. Thus in *United States v. Fero* (D. C.) 18 Fed. 901, the statute provided that:

"Every person who shall receive any money or other valuable thing under a threat of informing, or as a consideration for not informing, against any violation of any internal revenue law, shall, on conviction thereof, be punished," etc.

And it was held that an information charging that the defendant received a certain sum of money under a threat of informing, and as a consideration for not informing, was not duplicitous. See, also, *Tiberg v. Warren*, 192 Fed. 458, 112 C. C. A. 596; *Ackley v. United States*, 200 Fed. 217, 118 C. C. A. 403.

[2] 2. The overruling of a plea of once in jeopardy, or the directing of a verdict in favor of the government on that issue, is assigned as error. The plea of former jeopardy was based on the following facts: A previous indictment had been returned against the defendants charging the same crime, but omitting to charge that the certificate of deposit was issued and put forth "without authority from the directors." A plea of not guilty was interposed to that indictment, and the case came on regularly for trial. After the close of the testimony and the arguments to the jury, one of the counsel for the defendants suggested to the court that the indictment was bad because it omitted the clause in question. The court thereupon, of its own motion, over the objection and protest of the defendants, discharged the jury and remanded the defendants to abide the action of another grand jury.

"In England, an acquittal upon an indictment so defective that, if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported any conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal. 2 Hale, P. C. 248, 394; 2 Hawk. P. C. c. 35, § 8; 1 Stark. Crim. Pl. (2d Ed.) 320; 1 Chit. Crim. Law, 458; Archb. Crim. Pl. & Ev. (19th Ed.) 143; 1 Russell on Crimes (6th Ed.) 48. And the general tendency of opinion in this country has been to the same effect. 3 Greenl. Ev. § 35; 1 Bishop's Crim. Law, § 1021, and cases there cited." *United States v. Ball*, 163 U. S. 662, 666, 16 Sup. Ct. 1192, 41 L. Ed. 300.

Many of the states have provided by statute that an acquittal on the merits may be pleaded in bar of a subsequent prosecution, notwithstanding defects in the form or substance of the indictment. This statutory rule is in substance the one adopted by the Supreme Court of the United States in the Ball Case. At page 669 of 163 U. S., at page 1194 of 16 Sup. Ct. (41 L. Ed. 300), the court said:

"The American decisions in which the English doctrine has been followed have been based upon the English authorities, with nothing added by way of reasoning. After the full consideration which the importance of the question demands, that doctrine appears to us to be unsatisfactory in the grounds on which it proceeds, as well as unjust in its operation upon those accused of crime; and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing."

Had there been an acquittal on the merits at the first trial this case would fall directly within the decision of the Ball Case. But here there was no acquittal on the merits. The attention of the trial court was challenged to the sufficiency of the indictment before the jury retired to consider of their verdict, and this challenge was sustained thus preventing the submission of the case to the jury at all. Neither under the decision of the Supreme Court, nor under any other authority that has been called to our attention, will a prosecution on a defective indictment, without an acquittal on the merits, bar a subsequent prosecution. *United States v. Rogoff* (C. C.) 163 Fed. 311.

[3] Orderly procedure requires that objections to an indictment should be made either by motion to quash, by demurrer, or by motion in arrest of judgment, and the practice of permitting such objections to be urged during the trial by objections to testimony, or by requests for instructions, is not to be commended and should not be encouraged. But in this case the first indictment was clearly defective; there has been no acquittal on the merits, and therefore the former proceeding is no bar to the present prosecution.

[4] 3. The charge of the court on the question of venue is assigned as error. It appears from the uncontradicted testimony that the certificate of deposit in question was signed in blank by the cashier of the bank in the District of Idaho, was filled in by the other plaintiff in error in the state of Mississippi, and was negotiated in the state of Kentucky. Under these facts the plaintiffs in error contend that the certificate was not such when it left the district of Idaho, and that therefore the crime, if any, was committed without the jurisdiction of the Idaho court. True, a certificate of deposit signed in blank is no certificate; but it is equally true that a certificate filled in, but without the signature of the proper officer of the bank, is no certificate. The one is as essential to the validity and existence of the certificate as the other. The case, therefore, clearly falls within section 42 of the Judicial Code, which provides that:

"When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in

either district, in the same manner as if it had been actually and wholly committed therein."

There was no error in the charge of the court or in the refusal to charge as requested in this respect.

[5] 4. Testimony was offered tending to show that the issuance of the certificate of deposit was ratified by the directors of the bank as soon as they received notice of its existence, and the refusal of the court to admit this testimony, or to charge the jury that such ratification would constitute a defense, is assigned as error. It is a little difficult to understand upon what theory this offer and request were made. The criminal act was complete when the certificate of deposit was issued without authority from the directors, and with intent to injure and defraud the association, and no act of the directors could change its character. The doctrine of ratification has but little application to the criminal law. It certainly has no application here.

[6] 5. Testimony was also offered tending to show that the plaintiff in error S. D. Simpson executed a warranty deed of his home to secure one of the directors who advanced the money to take up the certificate in question. The rejection of this testimony is assigned as error. Upon that question the court instructed the jury as follows:

"When the certificate of deposit was sent to another bank at Caldwell for collection, and was presented for payment, some arrangement was made by which the defendants, or one of them, took care of it and protected the bank against loss. Such is the testimony on behalf of one or both of the defendants. And you will bear in mind that the charge here is not that the American National Bank was injured or defrauded, but that the certificate was issued with the intention to injure or defraud. And the defendants are not to be relieved or acquitted merely because they took care that the bank did not ultimately suffer loss. The question is not whether the bank was actually defrauded or not. The question is whether the certificate was issued with that intention. Evidence of this fact of payment would not have been received but for one consideration, and that is the contention of the defendants that the money which was realized by using the certificate as collateral in Kentucky got into the private accounts of the defendants as a result of a misunderstanding between them, and that the mistake was not discovered until W. G. Simpson came to Idaho about the middle of August. If, to illustrate my meaning, the defendants had immediately repaired the wrong, before others had knowledge of the existence of the certificate, you might very properly conclude that the restoration to the bank of the value of the certificate at that time tended to corroborate their contention of innocent mistake. Whether you will give such significance to the restoration at the later date, when the certificate had come to Caldwell and its existence was known, or must have become known, and under all the circumstances of the case, I leave it to you to say. Except for such light, if any, as you may conclude it (that is, the payment) throws upon this question (that is, the question whether the certificate was intended to be used for the personal benefit of the defendants, or whether such benefit was the result of inadvertence and misunderstanding), the restoration or payment is without significance."

It will thus be seen that the court gave to the plaintiffs in error the full benefit of any inference that might be drawn from the fact that the certificate of deposit was taken up and paid by them.

This covers the principal assignments of error, and the only ones discussed at the argument. The other assignments are mainly amplifications of those already considered, and call for no further dis-

cussion on our part. The charge of the court was full and fair and free from error, and the evidence legally sufficient to sustain the conviction.

The judgment is therefore affirmed.

EL DORA OIL CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. December 4, 1915.)

No. 2660.

1. APPEAL AND ERROR ⇨185—JURISDICTION—EQUITY—WAIVER OF OBJECTION.
A defendant, by failing to raise objection to jurisdiction in equity in the trial court, waives the same, and cannot raise it on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1176, 1375; Dec. Dig. ⇨185.]
2. WASTE ⇨17—JURISDICTION—SUIT TO RESTRAIN WASTE.
Equity has jurisdiction of a suit, the essential and primary purpose of which is to restrain waste which, if continued, would work irreparable injury to the property in controversy, although the defendant may be in possession.
[Ed. Note.—For other cases, see Waste, Cent. Dig. §§ 38-42; Dec. Dig. ⇨17.]
3. MINES AND MINERALS ⇨2—RIGHT OF GOVERNMENT—SUIT TO RESTRAIN WASTE—JURISDICTION OF EQUITY.
A court of equity has jurisdiction of a suit by the United States to enjoin the taking of petroleum from land which complainant claims to own and which constitutes its chief value, and where complainant also owns adjoining oil lands.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2; Dec. Dig. ⇨2.]

Appeal from the District Court of the United States for the Northern Division of the Southern District of California; Maurice T. Dooling, Judge.

Suit in equity by the United States against the El Dora Oil Company, J. L. Campbell, H. M. Jackson, and John Shrader, doing business under the firm name of the Ohio Valley Construction Company, and John Shrader and T. J. Green. From an order granting a preliminary injunction, defendants appeal. Affirmed.

The United States, the appellee herein, was the plaintiff in a suit in the court below, the purpose of which was to stay waste of oil on a certain quarter section of government land, to obtain an accounting for oil theretofore removed from said land, to enjoin further waste, and for the protection of said property to secure the appointment of a receiver, and to obtain a decree that the title to said property is in the United States. The complaint alleged that the value of the land involved was \$1,000,000; that on September 14, 1908, the land was withdrawn by the Secretary of the Interior from settlement, entry, and purchase under the nonmineral land laws of the United States; that on June 9, 1909, it was duly classified by the Secretary of the Interior as oil-bearing mineral land; that on September 27, 1909, the President, acting by and through the Secretary of the Interior, and under the authority legally vested in him, duly withdrew and reserved said land, together with other contiguous public land, from mineral exploration, and from

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

all forms of location, settlement, selection, filing, entry, or disposal under any of the public land laws of the United States; that since said date said land has not been subject to exploration for minerals, or to the initiation of any right under any of the public land laws of the United States; that on July 2, 1910, the President, acting under the authority legally vested in him, and especially by virtue of the provisions of the act of Congress of June 25, 1910, entitled "An act to authorize the President of the United States to make withdrawal of public lands in certain cases," duly ratified, affirmed, and continued in force and effect the order of withdrawal of September 27, 1909, and further withdrew and reserved said land from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral land laws of the United States, subject only to the provisions of said act of Congress; that subsequent to January 1, 1910, the defendants entered upon the said land and pretended to acquire and assert mineral rights therein, and have from time to time and are now committing trespass and waste thereon; that the defendant the Midway Oil Company wrongfully and unlawfully entered on the land, and thereafter drilled and caused to be drilled an oil well, and extracted from the land and appropriated to its use a large quantity of petroleum and gas; that subsequent to July 4, 1910, the defendant El Dora Oil Company and other defendants entered on said land and thereafter drilled oil wells and extracted from the land and appropriated to their use large quantities of petroleum and gas. Similar allegations are made as to other defendants, and the complaint alleged that the defendants, in disregard of the withdrawal of September 27, 1909, attempted to make mining locations on said land, but that no work of exploration or development for the discovery of petroleum, mineral oil, or gas, or other mineral, was ever commenced or prosecuted by any of the defendants on said land prior to July 4, 1910, and that no discovery of any minerals was made by any of the defendants on said land prior to October 10, 1910. The bill further alleged that, unless restrained therefrom, the defendants will continue to hold possession of the land and will drill oil wells thereupon, and extract petroleum or mineral oil and gas therefrom, and otherwise commit trespass and waste thereupon, to the great and irreparable injury of the plaintiff.

The defendants moved to dismiss the complaint for insufficiency of facts to constitute a cause of action in equity against them, and on the ground that the withdrawal of the land on September 27, 1909, was unconstitutional and void, and of no force and effect, and that no withdrawal of mineral in said land had been made. The motion was overruled, a receiver was appointed to take possession of the property, and the defendants were enjoined from removing oil or gas from the land, and from further producing oil from said land pending the suit. From that order the defendants have appealed, and among other assignments of error they assign that the court below erred in making the order in this: That the court had no jurisdiction to make the same. It is upon that assignment alone that the defendants rely in presenting their case upon the appeal.

George E. Whitaker and E. L. Foster, both of Bakersfield, Cal., and A. L. Weil, of San Francisco, Cal., for appellants.

T. W. Gregory, Atty. Gen., and E. J. Justice, Special Asst. Atty. Gen., for the United States.

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

GILBERT, Circuit Judge (after stating the facts as above). It is contended that upon the facts shown on the face of the bill the plaintiff has an adequate remedy at law in ejectment, and it is also urged that where, as here, a bill alleges that the defendant is in possession, equity has no jurisdiction of an action to recover possession, or to remove a cloud, or to quiet title, even though other relief be asked.

[1, 2] As to the suggestion that there is an adequate remedy at law, it is to be said that the defendants failed in the court below, by motion, plea, or otherwise, to raise that objection to the jurisdiction in equity, and therefore they have waived the same. *Southern Pac. R. Co. v. United States*, 133 Fed. 651, 66 C. C. A. 581; *McCloskey v. Pacific Coast Co.*, 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673. But, even if timely objection had been made on that ground, we are of the opinion that the court below had jurisdiction of the suit, for the reason that the essential and primary purpose of the same is to restrain waste, which, if continued, will work irreparable injury to the property in controversy. Said the court in *Wood v. Braxton* (C. C.) 54 Fed. 1005:

"The jurisdiction of courts of equity by way of injunction to restrain waste, to prevent the cutting of timber, and the mining of minerals, is one of comparatively recent origin; but it is now fully recognized and well established in this country, as well as in England. * * * If the nature of the injury complained of goes to the substance of the estate, thereby producing irreparable mischief, equity will interfere in limine, and not require the party to resort to an action at law, and this independent of the question of the insolvency of the defendant."

In *Peck v. Ayers & Lord Tie Co.*, 116 Fed. 273, 53 C. C. A. 551, a case in which neither party to the suit was in possession of the land in controversy at the time of the commencement of the suit, the Circuit Court of Appeals for the Sixth Circuit, while it was of the opinion that the jurisdiction of the Circuit Court could not have been sustained upon the bill regarded solely as one for quieting title, said:

"But we think the bill could be properly entertained as one for restraining the waste and destruction of property, and incidentally for an accounting for waste already committed. For such a purpose it is not necessary that the plaintiff should be in possession. Indeed, the jurisdiction was originally exercised in cases where the defendant was in possession as tenant for years, as trustee, or as owner of a life or other limited estate. *Story, Eq. Jur.* §§ 915-918. And, having obtained jurisdiction for that purpose, we think the court might, for the purpose of preventing a multiplicity of suits, retain it for further relief by settling the question of title—a question deeply involved in the determination of the controversy over the right to an injunction to stay waste, and requiring similar proofs."

That ruling was followed by the same court in *Douglas Co. v. Tennessee Lumber Mfg. Co.*, 118 Fed. 438, 55 C. C. A. 254.

In *Big Six Development Co. v. Mitchell*, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332, a case in which the defendant was in possession of mining property which the complainant claimed to own, the Circuit Court of Appeals for the Eighth Circuit said:

"The trespass here complained of, as disclosed by the record, is not an ordinary case of trespass upon lands, of temporary duration, but, as we think the evidence shows, was a continuous trespass, which threatened to destroy the character of the property as a mine, and would render the plaintiff's interest therein valueless. * * * In such cases the threatened injuries are to the res, and diminish the value of the property itself, and an injunction will be granted to prevent the continuing waste or continuing trespass, although the plaintiff is not in possession, and although the legal title has not been settled or questioned by an action at law. * * * If the only relief sought by the bill in this case was to remove the cloud upon plaintiff's title, it may well be doubted whether the bill could be sustained. * * * But the bill

goes further, and seeks to enjoin the defendant from committing waste and destroying the property as a mining property. In such a case jurisdiction in equity attaches, even where the plaintiff is not in possession; and, having obtained jurisdiction for that purpose, the court may, for the purpose of preventing a multiplicity of suits, retain it for further relief, and may remove a cloud upon the title, quiet the title, and determine the right of possession."

The decision in that case was followed in *United States v. Mackey* (D. C.) 214 Fed. 137-141, a case very similar in its facts to the case at bar. See, also, *Bettes v. Brower* (D. C.) 184 Fed. 342, *Graves v. Ashburn*, 215 U. S. 331, 30 Sup. Ct. 108, 54 L. Ed. 217, and *Archer v. Greenville Gravel Co.*, 233 U. S. 60, 34 Sup. Ct. 567, 58 L. Ed. 850.

[3] From the allegations of the bill it is apparent that the whole value of the land in controversy consists in the oil and gas beneath its surface, and that the situation with reference thereto is the same as that described in the opinion in *United States v. Midwest Oil Co.*, 236 U. S. 459-466, 35 Sup. Ct. 309, 310 (59 L. Ed. 673), where it was said:

"Large areas in California were explored; and, petroleum having been found, locations were made, not only by the discoverer, but by others on adjoining land. And, as the flow through the well on one lot might exhaust the oil under the adjacent land, the interest of each operator was to extract the oil as soon as possible, so as to share what would otherwise be taken by the owners of nearby wells. The result was that oil was so rapidly extracted that on September 17, 1909, the Director of the Geological Survey made a report to the Secretary of the Interior which, with inclosures, called attention to the fact that, while there was a limited supply of coal on the Pacific Coast, and the value of oil as a fuel had been fully demonstrated, yet at the rate at which oil lands in California were being patented by private parties it would be impossible for the people of the United States to continue ownership of oil lands for more than a few months. After that the government will be obliged to repurchase the very oil that it has practically given away."

It is also evident that, to remedy the wrongs described in the bill, no legal action is adequate. The injury to the plaintiff's estate consists, not only in the past and threatened extraction of petroleum from the ground in controversy, but in probable injury to or destruction of the sources of supply of oil in that and adjacent lands owned by the plaintiff. In 22 Cyc. 771, it is said:

"To defeat the equitable jurisdiction, however, it is not sufficient that the law should merely afford some remedy; that remedy must be as practical and efficient as is the equitable remedy in rendering justice, and as prompt in its administration. An injunction is in many cases more prompt and efficient than any legal remedy, and because of this promptness and efficiency there is a strong tendency to grant injunctions in cases where formerly the remedy at law would have been deemed fully adequate."

The order is affirmed.

ROSS, Circuit Judge. I agree that the court below was not without jurisdiction to stay waste upon the property described in the bill, of which it alleges the government is, and was at the times therein mentioned, the owner, and for the protection of the substance of the property to appoint a receiver to take and hold possession under the orders of the court pending the litigation; but since no issue has been raised by the defendants, or either of them, there is manifestly nothing in the case so far for trial. Therefore, I do not think we should de-

cide or consider whether the defendants would or would not be entitled to a jury trial, should an issue of title be subsequently presented.

For the reason stated, I concur in the affirmance of the order appealed from.

RUDKIN, District Judge. It was conceded on the argument that the appellee is entitled to equitable relief in some form and to some extent on the case made by the bill, and in my opinion the court committed no error in granting the temporary order from which this appeal is prosecuted. As said by the court in *Oolagah Coal Co. v. McCaleb*, 68 Fed. 86, 88, 15 C. C. A. 270:

"The chief ground on which the defendants below, who are the appellees here, seek to sustain the action of the trial court in sustaining the demurrer and in dismissing the bill, is that the plaintiff company had a plain, adequate, and complete remedy at law. This view, however, overlooks the important fact disclosed by the record that the injury complained of by the plaintiff company was not an ordinary trespass upon lands, of temporary duration, but was a continuous trespass, which threatened to destroy the character of the property as a mine, and to render the plaintiff's interest therein utterly valueless. It also overlooks the fact that the bill charged, in substance, that whatever colorable right the defendants had to mine coal on the lands in controversy was derived under a license that had either been issued by mistake, or had been obtained by one of the defendants through fraud. It is now well settled by many adjudications, beginning with the case of *Mitchell v. Dors*, 6 Ves. 147, that an injunction may be granted to restrain a trespasser from entering into a mine and removing the minerals therefrom. Trespasses of that kind, as well as those which consist in cutting down and removing timber, or in removing buildings or other improvements of a permanent character, standing upon lands, are readily enjoined, because, as has sometimes been said, such acts alter the character of the property, and also tend to destroy it, and to occasion irreparable loss and damage. * * * It is also held that, even when the title to the property on which the trespass is committed is in dispute, a court of equity will at least award a temporary injunction against the commission of such acts as tend to permanently alter its character or destroy its value, until the title thereto is determined in an appropriate proceeding inaugurated for that purpose. * * * We fail to see, therefore, that the plaintiff company was without right to equitable relief, even if it be true, as the defendants contend, that the bill discloses a controversy between the parties as to who has the superior right to mine coal on the lands in question, which can only be appropriately determined by a court of law. If such was the fact, it would nevertheless be competent for a court of equity to restrain the commission of such trespasses as are charged in the bill, which tend to render the property valueless for mining purposes, until the controversy existing between the parties is settled by the proper tribunal."

Should the court below on the final hearing simply continue the present order in force and conserve the property until the title can be determined in an appropriate proceeding inaugurated for that purpose, the appellants will have no ground of complaint. If, on the other hand, the court undertakes to determine questions of title or right of possession, the ruling will be subject to review on an appeal from the final decree. The question of jurisdiction was not raised by the motion to dismiss, and in the absence of an answer the issues to be tried are undetermined. The court has not as yet denied the defendants a jury trial, and has never ruled upon that question. It has committed no error as far as it has gone, and to map out its future course is no part

of the duty of an appellate tribunal. The question discussed at the bar is a moot one, not presented by the record, and as said by the Court of Appeals of New York in *Re Manning*, 139 N. Y. 446, 34 N. E. 931:

"The demands of actual practical litigation are too pressing to permit the examination or discussion of academic questions, such as this case in its present situation presents."

It may be that the owner in possession of mineral land or timber land forfeits his constitutional right to a trial by jury at the suit of an adverse claimant by making a legitimate use of the property in his possession; but I am unwilling to so declare until the question comes properly before us, especially in view of the fact that other parties not now before the court are vitally interested in a decision of that question.

For the reasons thus briefly stated, I concur in the judgment of affirmance.

BOULTBEE v. INTERNATIONAL PAPER CO.

(Circuit Court of Appeals, First Circuit. February 10, 1916.)

No. 1168.

1. COURTS ⌚347—FEDERAL COURTS—PRACTICE IN STATE COURTS—DEMURRER—OVERRULING—JUDGMENT.

Even though, under Rev. St. Me. c. 84, § 35, a state court would have no other course, upon the overruling of a demurrer to a replication tendering an issue of fact, except to enter judgment for plaintiff, the statute did not control the discretion of a federal court, nor its power as to amendments, and the court properly proceeded to hear and determine the issue tendered by the replication.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⌚347.]

2. COURTS ⌚274—FEDERAL COURTS—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

Pub. Laws Me. 1911, c. 152, § 1, requires foreign corporations having a usual place of business in the state, or engaged in business therein without a usual place of business, to appoint a resident of the state its true and lawful attorney, upon whom all processes may be served, and provides that service of such process shall be made by leaving a copy of the process in the office of such attorney. *Held*, that service upon an agent in Maine expressly authorized by a foreign corporation would have been sufficient to subject it to the jurisdiction of the federal court for that district, as its consent to be so sued in Maine in the federal as well as in the state courts would be implied as a condition of being allowed to do business within the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. ⌚274.]

3. COURTS ⌚274—FEDERAL COURTS—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

To make service upon an alleged agent of a foreign corporation doing business in Maine valid for the purpose of the jurisdiction of a federal court, the person served must be representing the company with respect to the business itself being done in Maine in such sense that authority in him to receive service on its behalf could be properly implied.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. ⌚274.]

4. CORPORATIONS ⚡668—FOREIGN CORPORATIONS—ACTIONS—SERVICE OF PROCESS.

Whether an alleged agent of a foreign corporation, upon whom process was served, so represented the corporation that authority in him to receive service on its behalf could be properly implied, depended upon the character of the agent, and, in the absence of express authority from the corporation, the surrounding facts, and proper inferences therefrom.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. ⚡668.]

5. CORPORATIONS ⚡673 — FOREIGN CORPORATIONS — ACTIONS — SERVICE OF PROCESS.

A foreign corporation doing business in Maine had designated an agent upon whom process might be served, but in an action against the corporation service was made by leaving a copy of the summons and writ with S., described in the marshal's return as the superintendent of the company. He was in fact superintendent only of its operations in a particular mill, with authority to hire and discharge employes, but with no authority to fix or pay their wages, purchase supplies, or sell the product of the mill; another resident agent had charge of these and other matters connected with the business in Maine; and still other matters relating to such business were referred to the New York office. *Held*, that the conclusion of the District Court that S.'s authority with respect to the corporation's Maine business was not such as carried with it the implication that he was agent or attorney for the purpose of service of process was not erroneous.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2534, 2535, 2557, 2558, 2650; Dec. Dig. ⚡673.]

6. COURTS ⚡344—FEDERAL COURTS—FOREIGN CORPORATIONS—SERVICE OF PROCESS.

In an action against a foreign corporation doing business in Maine, where the marshal's return showed service of the writ upon S., described therein as the superintendent of the company, without any recital of further facts showing him to have been an agent in whom authority to receive service of process could be implied, it was not aided by any presumption to that effect, as all facts essential to federal jurisdiction must appear affirmatively.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⚡344.]

7. EXCEPTIONS, BILL OF ⚡27—RECITALS.

On appeal from a judgment sustaining a plea in abatement and quashing the writ, in an action against a foreign corporation, on the ground that there was no valid service of process, where the evidence as to the extent of authority of the alleged agent upon whom process was served was made a part of the exceptions, a recital in the bill of exceptions that he was superintendent and general manager, in charge of the corporation's mill and its operations, could add nothing to what the evidence itself showed.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 34; Dec. Dig. ⚡27.]

In Error to the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Action by Maud Boultee, administratrix, against the International Paper Company. Judgment in favor of defendant, and plaintiff brings error. Affirmed.

Gerry L. Brooks, of Portland, Me., for plaintiff in error.

William C. Eaton, of Portland, Me. (William H. Gulliver, of Portland, Me., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The defendant, according to the pleadings on both sides, was a New York corporation having its principal place of business in New York, of which state it was a citizen. The plaintiff, a citizen of Maine, sued it in the Maine District Court, to recover damages, under a Maine statute, for the death of her intestate, alleged to have been killed in its employ, through its negligence, in a mill operated by it in Orono, Me.

The service of the writ, appearing from the marshal's return thereon, was by a nominal attachment and by "giving in hand to John H. Stinchfield, superintendent of said company," an attested copy, with a summons.

The defendant pleaded in abatement that no valid service upon it had been made. The plea alleged, in substance, that Stinchfield was not its tenant, agent, or attorney, in Maine, upon whom service of the writ could be made without previous actual attachment of goods, effects, or credits, and that another person residing in Maine (upon whom there had been no service) had been duly appointed, and was at the time its agent for such service according to the laws of Maine.

The plaintiff replied that good, sufficient, and legal service had been made. The defendant demurred, on the grounds that the replication denied no material fact stated in the plea, and tendered an issue of law, not of fact.

The replication was held good, and the demurrer overruled, whereupon the plaintiff moved for judgment in her favor. She assigns here as error the denial of this motion and the action of the District Court in proceeding, against her objection, to hear the case on the issues raised by the plea.

[1] We find no error in either respect. The plaintiff does not convince us that the Maine statute on which she relies (Rev. Stats. Me. c. 84, § 35) would leave open to a Maine court no other course under such circumstances than that of entering the judgment demanded. And even if that statute is to be so understood, we cannot regard it as conclusive to the same extent upon the federal court, wherein, as to such matters, neither the court's discretion nor its power as to amendments are controlled by the state practice. The ruling that an issue of fact was tendered by the replication is not questioned in this court. We think the court rightly proceeded to hear and determine that issue. That the ruling gave the plaintiff an immediate right to judgment in her favor, not to be refused her without reversible error, is a proposition which we are unable to accept.

Before filing its demurrer, the defendant had asked leave to withdraw its plea in abatement, appear generally, and plead to the merits. This motion was opposed by the plaintiff and denied by the court. Upon what grounds it was so opposed or denied the record does not show, nor has the denial been assigned as error. From what appears

in the record, the motion seems to us one which might well have been granted, with the advantage of avoiding considerable delay and expense. A similar offer made by the defendant at the argument in this court met with no response from the plaintiff.

No valid judgment for the plaintiff could have been entered, except upon a record showing due service upon the nonresident defendant, sufficient to give the District Court in Maine jurisdiction over it, independently of any attachment of property belonging to it within the district. The defendant was before that court only for the purpose of objecting that such jurisdiction had never been obtained, for the reasons set forth in its plea. Both parties having waived a jury, both submitted evidence to the court, which evidence is before us, upon the issues raised by the plea. The result of this hearing was that a motion by the plaintiff for "judgment on the facts" was denied, the plea in abatement was sustained, and the writ was quashed. The plaintiff assigns all this as error. Judgment for the defendant followed.

[2] That the defendant corporation was doing business in Maine was undisputed. The evidence submitted showed, without contradiction, that a resident of Maine, other than Stinchfield, had been duly appointed by it, and was at the time its attorney to receive service of process, in accordance with the requirements of a Maine statute then in force (Pub. Laws 1911, c. 152, § 1); also that the appointment had been filed, as the same statute provided, with the state secretary. Service upon an agent in Maine, thus expressly authorized by it, would have been sufficient to subject it to the jurisdiction of the federal court for that district. Its consent to be so sued in Maine, in the federal as well as in the state courts, would be implied, as a condition of being allowed to do business within that state. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853.

The defendant contends that the Maine statute "prescribes the exclusive method for service" upon foreign corporations doing business within the state. Whether or not this view was adopted by the District Court does not appear, no opinion having been filed. Under a state statute of this kind, going no further than to provide that process "may be served" upon the agent appointed in accordance with its requirements, and imposing no penalty for failure to appoint any such agent, it has been held that the method of service established is not exclusive, and that valid service may be made upon any agent within the state sufficiently representative in character. *Henrietta, etc., Co. v. Johnson*, 173 U. S. 221, 19 Sup. Ct. 402, 43 L. Ed. 675. Although the Maine statute here in question does impose such a penalty, and although the language of one of its clauses is that service of process "shall be made" by leaving a copy in the appointed agent's hands or in his office, we are not prepared to hold that under no circumstances is service upon any other agent or representative of a nonresident corporation to be recognized as valid. That this was the legislative intent does not seem to us sufficiently clear from the above features of the Maine statute.

[3, 4] To make the service valid for the purpose of jurisdiction,

however, it was at least essential that the person served should be representing the company with respect to the business it was then doing in Maine, in such sense that authority in him to receive service on its behalf could be properly implied. *Conn., etc., Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Board of Trade v. Hammond*, 198 U. S. 424, 438, 25 Sup. Ct. 740, 49 L. Ed. 1111. The question whether or not a given person so represents a nonresident corporation turns, as was said in these cases, "upon the character of the agent," and, in the absence of express authority given by the corporation, "depends upon a review of the surrounding facts and the inference that the court might properly draw from them."

In most of the cases wherein such questions have been raised, the nonresident corporation, though doing business within the jurisdiction, has had no appointed agent therein with express authority, and unless authority to receive service could be implied from the authority regarding the corporation's business within the state or district then being exercised by the person served, it followed that no jurisdiction except by actual attachment of property was there obtainable.

[5, 6] The present case presented no such situation. The evidence shows that, besides the attorney expressly authorized in compliance with the state law, there were at least two other persons acting for the corporation in Maine, but performing distinct functions in connection with its business in that state, of whom Stinchfield was only one. Implied authority in him for purposes of service did not conclusively appear from the marshal's return on the writ. He might have been "superintendent of the company," as he is therein described, without being an agent in whom such authority could be implied. No further facts showing him to have been such an agent appear from the return, and it is not aided by any presumption to that effect, because all facts essential to federal jurisdiction must appear affirmatively.

[7] The bill of exceptions, after reciting that Stinchfield was "superintendent," adds to this, "and general manager, who was in charge of said mill and its operations"; but, as all the evidence as to the extent of Stinchfield's authority is made part of the exceptions, this recital can add nothing to what the evidence itself shows, and from the evidence it appears without contradiction that Stinchfield, though called "superintendent of said company" in the return, was in fact superintendent only of the operations carried on in its Orono mill. While his authority included hiring and discharging the employes there, it did not extend to fixing or paying their wages, or to purchasing supplies, or to selling the product of the mill. Another resident of Orono, expressly employed by the defendant as "agent," had charge of these and other matters connected with the defendant's business in Maine, while still other matters relating to that business were referred to its New York office. The attorney appointed under the state statute as above was still another agent. His residence was not in Orono, but in Portland.

We think the conclusion that Stinchfield's authority with respect to the defendant's Maine business was not such as carried with it the implication that he was agent or attorney for the purpose of service

of process cannot be said to have been without support in the evidence. There was testimony consistent with such a finding, particularly in view of the fact that express authority to accept such service had been given to another resident of Maine. There was evidence which tended to show that Stinchfield, instead of occupying a representative character as regarded the defendant company, was performing duties for it limited to those of a subordinate employé, or to particular transactions on its behalf. *St. Clair v. Cox*, 106 U. S. 350, 359, 1 Sup. Ct. 354, 27 L. Ed. 222. It being clear that the defendant had never expressly consented that service on Stinchfield should be service upon it, the surrounding facts shown would have warranted the conclusion that no such consent could fairly, reasonably, and justly be implied. We are therefore unable to hold that the court below was wrong in sustaining the plea in abatement, in refusing to order judgment for the plaintiff on the facts disclosed, or in quashing the writ.

The judgment of the District Court is affirmed, and the defendant in error recovers its costs of appeal.

SIEGESMUND v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916.)

No. 2300.

1. MASTER AND SERVANT ⇨286—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Plaintiff, a machinist's helper, was holding by an iron bar a journal from turning on the axle, while the machinist was chipping therefrom with a chisel and hammer. On the machinist's order he laid down the bar, helped to turn the box over, and without any further direction stooped down to pick up the bar. While doing so the machinist resumed chipping on the box, and a chip struck plaintiff's eye. There was no protection from the chips, nor warning that the machinist was about to resume chipping. There was evidence that chipping such boxes was particularly dangerous to bystanders, and that it was a good practice, and the general practice in that shop, to provide some barrier, such as a canvas, board, box, or broom. *Held*, that the evidence made a question for the jury as to the employer's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. ⇨286.]

2. MASTER AND SERVANT ⇨288—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

The danger to plaintiff was not necessarily incident to his employment, or so obvious that the court could say as a matter of law that he assumed the risk and the question whether he knew of the danger or ought reasonably to have anticipated it, should have been left to the jury, as it might well be presumed that when he knew chips were being driven towards him, he averted his head or closed his eyes, and it might well be concluded that he did not know and could not reasonably have anticipated that chipping would be resumed at that time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. ⇨288.]

In Error to the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

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

Action by Otto Siegesmund against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

The complaint in this action charges that plaintiff, Siegesmund, was employed by defendant, Chicago, Milwaukee & St. Paul Railway Company, as a machinist's helper, working in its locomotive repair shops at Milwaukee; that on April 7, 1914, he was injured while engaged in helping the machinist make repairs on a locomotive, which was used by defendant in interstate commerce; that defendant was negligent in failing to supply plaintiff a safe place to work, in making the repairs in the manner in which they were made, and in failing to supply and use proper means and appliances whereby the accident and injury to plaintiff might have been avoided; and that the machinist, under whom plaintiff then was working, was negligent in the manner of doing his work, whereby the machinist, who was with a chisel and hammer chipping off pieces of metal from a part of the locomotive, caused a piece of such metal to fly off and strike plaintiff's eye.

Defendant's answer admits the accident and injury to plaintiff while in its employ as a machinist's helper, doing repair work on a locomotive used in interstate commerce, and for defense alleges that plaintiff was for several months prior to his injury doing the same kind of work that he was then doing, and was familiar with the manner in which the work was done, and its dangers, and that he assumed the risk incident thereto. There is also a general denial of every other allegation of the complaint.

The evidence tends to show that the machinist ordered his helper, Siegesmund, to get a tool box and an iron bar and bring them to a place in the shop where, on a track, there was a pair of locomotive driving wheels about 58 inches high, having spokes with openings between, connected together by an axle, and fastened to the axle, between the wheels, and near one of them, was a journal or driving box of about 200 pounds weight on which the machinist was about to do some work; that these driving wheels were part of a locomotive which defendant was using in interstate commerce, and then in the shop undergoing repairs; that the helper, standing on the outside of the wheel nearest the box, by order of the machinist inserted the bar (which was about 2 feet long) between the spokes of the wheel, with it holding the box to keep it from turning about on the axle, and that while he was in this position, the machinist, being between the wheels, with a chisel and hammer began to chip from the upper surface of the box while so held; that after chipping about 10 minutes the helper, on order of the machinist laid down the bar, and with his hands reached in between the spokes to help the machinist turn over the box on the axle, and that when it was turned, the helper without further direction from the machinist, stooped down to pick up the bar, and that while he was in the act of picking up the bar, the machinist, without the helper's aid, resumed chipping on the box, and a metal chip thereby dislodged struck the helper's eye, causing its loss; that while he was picking up the bar he was close to the machinist, the wheel being between them; that there was no protection from the chips, nor warning to the helper that the machinist was about to resume chipping.

The evidence tends further to show that this helper had worked for the company several months, helping the machinist as from time to time directed, prior to which he was for 12 years an iron worker for the Illinois Steel Company, helping in the work of rolling iron shapes; that he had more or less experience in observing the chipping of metal, and that this was his first experience in working on one of these boxes, and that he knew that a metal chip striking the eye was likely to cause injury; that there was no other chipping then being done in the vicinity of where they were working, the nearest workman being then about 50 feet away engaged in putting brakes on an engine; that the helper did not know why the box was turned over, nor suppose that there was to be any chipping done after the box was turned, and that he did not think that chipping of the box would or could then be done unless he held it, as he had just before held it for chipping the other side.

The testimony of witnesses other than the plaintiff tends to show that

chipping such boxes was particularly dangerous to bystanders, unless something was interposed for the chips to strike against; that it was usual in that shop to chip those boxes before putting them on the axle, and in a place away from other work; that it is good practice in chipping, and was the general practice in that shop, to provide some barrier, such as a canvas, a board or a box or a broom, for the chips to strike against; and that the machinist in chipping has control over the direction in which the chips will fly.

On the trial, after presentation of the case for plaintiff, defendant's motion for a directed verdict in its favor was granted, and a verdict rendered accordingly. Motion for a new trial being overruled, judgment for defendant was entered. Error is assigned on action of the court in directing the verdict.

J. Elmer Lehr, Julius Kiefer, Leo Reitman, and Horace B. Walmsley, all of Milwaukee, Wis., for plaintiff in error.

C. H. Van Alstine and Rodger M. Trump, both of Milwaukee, Wis., for defendant in error.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] That the evidence tended to prove negligence on the part of the company resulting in the accident does not seem to be seriously controverted. The evidence of the special danger in this particular work, of the necessity, and the practice in this shop, of imposing some barrier for the chips to strike against, of the control the machinist may exercise as to the direction in which the chips will fly, and of the act of beginning to chip while Siegesmund was in the particular situation of picking up the bar, make it plain that if the determination of this cause had depended wholly on whether or not negligence on the part of the company were shown, that question should and would have been submitted to the jury, and with it, of course, any question of contributory negligence of the plaintiff, which, if shown, would not under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665])—the applicability whereof is not controverted—bar recovery, but would be considered in reduction of damages.

[2] The controlling question here is whether, under the evidence, the District Court was warranted in finding, as a matter of law, that the injury to the plaintiff was the result of the dangers and hazards usual to the plaintiff's employment, the risk whereof he assumed. In respect to this employment, the evidence tends to show that where chipping was being done in this shop, particularly on such boxes, the flying of chips could be and usually was avoided by the use of means to intercept them. From this it might be concluded that the flying of metal chips was not a danger which was usual, or of necessity incidental to the work in and about the shop, even if it appeared that sometimes such protective and preventive means were not employed, and that at such times chips might fly about.

In order to conclude that an employé in this shop, who was injured by flying chips, assumed the risk of such injury, it must appear from the evidence, not only that in his then particular employment there was such danger from flying chips, but also that the employé knew of such danger, or by the exercise of reasonable care ought to have

known or anticipated that there would be flying chips thereabout which might injure him. The helper was under the machinist's orders, working wherever and at such work as he was directed. At the machinist's orders he inserted his bar between the spokes of the wheel and held the box in place, while the machinist, just on the other side of the wheel, was chipping the box, driving the chips toward the direction where the helper was standing. It does not appear there was any other chipping in the shop at that time; at least, not in the vicinity of the helper. The helper testified that there were no machines near by, and that the nearest workman was upwards of 50 feet away, engaged in putting brakes on a locomotive.

Such is the instinct of self-preservation, and particularly that of guarding the eyes from injury, that it may well be presumed that, knowing chips were then being driven towards him, he averted his head or closed his eyes to protect the eyes from injury. Indeed, it might well be said that, failing to do so, and voluntarily remaining in a situation in which he knew the chips were being driven towards him, and appreciating the danger therefrom, while in such situation he assumed the risk of injury which might then have come from the flying chips. But, when the machinist ceased chipping and ordered him to drop his bar and help turn the box about the axle, at once a different situation and relation arose. Siegesmund testified he did not know why the box was to be turned, that he did not know any further chipping was to be done upon it, and that he supposed that, if chipping was to be done, he would first be required to insert his bar and hold the box just as he had done shortly before.

In the brief for defendant in error it is stated:

"Appellant knew exactly what the machinist had to do to finish this particular work, and knew, furthermore, that the machinist was through with him after the box had been turned."

If by this it is meant that plaintiff in error knew that chipping was to be done on the other side of the box, the evidence does not support the assertion; neither can it be said that he knew that the machinist was through with him. He may, as he testified, have assumed that the work of chipping was completed; and the fact that his machinist, under whose direction he was, had as yet given him no further orders, might have warranted him in concluding he was to remain there until the machinist told him to go elsewhere, or to do something else.

In the same brief it is further said:

"There is no evidence that plaintiff had been ordered to pick up the bar, * * *" nor "that there was any necessity to pick up the bar at that particular moment."

Presumably, unless directed to the contrary, he was expected to pick up the bar which he had thus laid down, and to pick it up when he did seems a rational and natural act, and the evidence suggests no plausible reason why he should have delayed it. Might it not, with greater show of reason, be inquired: Why did not the machinist wait with resuming his chipping until he had some assurance that the helper was not in special danger therefrom?

If, as contended in the brief for the company, the helper's work on

this box was done, he was nevertheless subject to the further direction of the machinist, who might well have supposed the helper would pick up the bar and remain where he was until ordered elsewhere by the machinist. If the helper had any reason to believe that chipping would then be resumed in such dangerous proximity to himself, he would have had opportunity at least to have taken such precaution as to avert his head, and thus in large measure protect his eyes.

From the evidence it might well be concluded that danger to employes from flying chips was not necessarily and usually incident to employment in and about that shop, and that plaintiff in error in the work in which he was then engaged did not know, and could not reasonably have anticipated, that chipping would at that time be done. The danger to Siegesmund from flying chips not being necessarily incident to his employment, or so obvious that the court may say as a matter of law that he assumed the risk therefrom, the question whether he knew of the danger, or ought reasonably to have anticipated it, should have been left to the jury. *Texas & Pac. Ry. Co. v. Swearingen*, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382; *Oregon Short Line & U. N. Ry. Co. v. Tracy*, 66 Fed. 931, 14 C. C. A. 199; *Peirce v. Clavin*, 82 Fed. 550, 27 C. C. A. 227; *Penna. Ry. Co. v. Jones*, 123 Fed. 753, 59 C. C. A. 87; *N. P. Ry. Co. v. Wendel*, 156 Fed. 336, 84 C. C. A. 232; *Katalla Co. v. Rones*, 186 Fed. 30, 108 C. C. A. 132; *Benson Lumber Co. v. McCann*, 223 Fed. 1, 138 C. C. A. 415.

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

BOURS v. UNITED STATES.

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

No. 2064.

1. POST OFFICE ⚡31—CRIMINAL OFFENSES—MAILING UNMAILABLE MATTER—“WILL.”

Penal Code (Act March 4, 1909, c. 321) § 211, 35 Stat. 1129 (Comp. St. 1913, § 10381), declares unmailable every article or thing designed, adapted, or intended for preventing conception or producing abortion, and every written or printed card, letter, etc., giving information, directly or indirectly, where, or how, or from whom, or by what means any of the articles or things therein mentioned “may” be obtained or made, or where or by whom any act or operation for the procuring or producing of abortion “will” be done or performed, and prescribes the punishment for mailing any such unmailable matter. *Held* that, if a person uses the mails to give information that he elects, intends, or is willing to perform illegal abortions, he is guilty, though he does not expressly or impliedly bind himself to operate; but, while no obligation, promise, or assurance is essential, there must be the indication of a positive intent that the act will be done not merely that it may perhaps be performed.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52; Dec. Dig. ⚡31.

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

2. POST OFFICE Ⓒ31—CRIMINAL OFFENSES—MAILING UNMAILABLE MATTER—“ABORTION.”

The word “abortion” in Penal Code, § 211, prohibiting the mailing of information as to where operations producing abortions will be performed, must be taken in its general medical sense, irrespective of local statutory definitions.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52; Dec. Dig. Ⓒ31.]

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

3. POST OFFICE Ⓒ31—CRIMINAL OFFENSES—MAILING UNMAILABLE MATTER.

While the letter of Penal Code, § 211, prohibiting the mailing of information as to where operations producing abortions will be performed, would cover all acts of abortion, a reasonable construction, in view of its purpose, excludes acts in the interest of the natural life, and a physician may lawfully use the mails to say that, if an examination shows the necessity of an operation to save life, he will operate, if such in truth is his real position.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52; Dec. Dig. Ⓒ31.]

4. POST OFFICE Ⓒ31—CRIMINAL OFFENSES—MAILING UNMAILABLE MATTER.

While to render matter unmailable under Penal Code, § 211, as giving information concerning the performance of abortion, a positive intent that the act will be done must be indicated, the intent need not be apparent from the document itself, and a letter innocent on its face, a general statement that a person performs abortions, or an advertisement reading “Women’s Diseases a Specialty,” may be shown to have conveyed, and to have been intended to convey, the prohibited information.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52; Dec. Dig. Ⓒ31.]

5. POST OFFICE Ⓒ48—UNMAILABLE MATTER—INDICTMENT.

An indictment for mailing information as to where or by whom abortions will be performed must charge that apparently innocuous words were used and intended to be used in a wrongful sense, and must allege such matters as justify the charge.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. Ⓒ48.]

6. POST OFFICE Ⓒ48—UNMAILABLE MATTER—INDICTMENT.

An indictment charged that defendant, a doctor, advertised “Women’s Diseases a Specialty”; that he received a letter which, as therein set out, was dated September 16, 1912, stated that the writer’s daughter was in a family way, and asked him if he would take her and relieve her of her disgrace; that on September 25th defendant, intending to give information where, how, from whom, and by what means an abortion might be produced, mailed a letter therein set out; and that he meant and intended to give and convey such information. His letter purported to be in answer to “your letter of the 24th,” referred to “the operation you speak of,” and stated that “would have to first see the patient before determining whether I would take the case or not.” *Held* that, as the indictment neither charged nor alleged facts to show that defendant’s letter was in answer to the letter of the 16th, and as it neither directly nor indirectly charged that the language of his letter was designed merely to disguise, in a form recognizable by the addressee, the prohibited information of a willingness to perform the illegal act, it was fatally defective as charging merely an intent to convey information as to where or by whom an abortion might be produced, and not information as to

where or by whom it would be produced, and as failing to allege facts showing the essential intent.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. ¶48.]

In Error to the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

T. Robinson Bours was convicted of an offense, and he brings error. Reversed and remanded.

W. B. Rubin, of Milwaukee, Wis., for plaintiff in error.

Guy D. Goff, U. S. Atty., and Otto H. Breidenbach, Asst. U. S. Atty., both of Milwaukee, Wis.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

MACK, Circuit Judge. The defendant was convicted under an indictment based on section 211 of the Penal Code, copied in the margin,¹ and was sentenced to two years in the penitentiary. The indictment, after alleging a newspaper advertisement by defendant reading: "Women's Diseases a Specialty. Consult Dr. T. Robinson Bours"—and giving his address and telephone number, charged the receipt by him on September 16, 1912, of the following letter:

"Sparta, Wis., Sept. 16, 1912.

"Dr. T. Robinson Bours, 403-404 Merrill Bldg., Milwaukee, Wis.—My Dear Doctor: I am at a loss as to begin to tell you my troubles. I am about worried to death of the recent discovery of the condition of my only daughter. The dear girl has had the misfortune to repose to implicated confidence of a

¹ Sec. 211. (*Obscene, etc., Matter Nonmailable.*) Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing advertisement or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. (35 Stat. L. 1129.)

man who took advantage of her innocence and tried to ruin her, and now that she is in a family way the hound has deserted her. We are willing to make any sacrifice to preserve her good name and reputation. Will you take the girl and relieve her of her disgrace so she can once more face the world. How long would she have to remain there before it would be safe to move her? And what would the cost of the operation be, as well as all other charges? Please answer soon.

"Very respectfully,

Mrs. Chas. C. Wilson, Box 352."

It then proceeded:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further say and present: That on the 25th day of September, 1912, the said T. Robinson Bours, then and there designing and intending to give information directly and indirectly to one Mrs. Charles C. Wilson, of Sparta, Wisconsin, where, how, and from whom, and by what means conception might be prevented and an abortion produced, unlawfully, feloniously and knowingly did at," etc., "place and cause to be placed in the post office at Milwaukee, Wisconsin, * * * a certain letter of the tenor following, to wit:

"Milwaukee, Wis., Sept. 25th/12.

"Mrs. Chas. C. Wilson, Sparta, Wis.—Dear Madam: Your letter of the 24th I just received and believe me I feel very sorry for you. The operation you speak of would cost from \$50.00 to \$100. Would have to first see the patient before determining whether I would take the case or not. She could stop at a hotel near by; she would be here about three days. Hotel bill about \$10.00. no other expense. (Should come right away.)

"Sincerely yours,

T. Robinson Bours, M. D.'

—which said letter * * * was then and there nonmailable matter * * * and was intended by the said T. Robinson Bours, with full knowledge of its contents and import, to be delivered by the said United States post office establishment, at Milwaukee, Wisconsin, to the said Mrs. Chas. Wilson, at Sparta, Wisconsin. * * * That on the said 25th day of September, 1912, the said T. Robinson Bours, when he so deposited and caused to be deposited said last named letter in said post office, did so with full knowledge upon his part of its said contents and import, and unlawfully, feloniously and knowingly meant and intended thereby to give, and did thereby give, and convey information directly and indirectly to the said Mrs. Chas. Wilson, where, how and from whom, and by what means conception might be prevented, and an abortion produced."

While errors have been assigned on the admission and rejection of testimony and on portions of the charge to the jury, we shall confine ourselves to the error based on the overruling of a demurrer to the indictment. On the adoption of the Penal Code, March 4, 1909, the clauses "where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed or how or by what means conception may be prevented or abortion produced" were introduced into the act. Before that, the statute forbade the use of the mails for obscene literature or writings, for articles and things adapted to prevent conception or produce abortion, and for printed or written matter giving information as to where, how, from whom, or by what means such articles or things might be obtained or made. It aimed to keep out of the mails (1) obscene matter; (2) articles or things designed or intended for a use denounced by the act as immoral; and (3) written or printed matter in respect to such articles. Until the amendment, however, a letter or other written or printed information in respect, not to the articles excluded from the mails, but to the act

of abortion itself, did not fall within the statute. We cannot concur in the contrary views expressed in *United States v. Somers* (D. C.) 164 Fed. 259, under which the word "thing" in the original act was held to cover such a letter.

While the indictment charges that the letter of September 25th gave information both as to conception and abortion, it is properly conceded in the supplementary brief that, if it be unmailable, it must be because it comes within the clause prohibiting the mailing of a letter giving information "where or by whom any act or operation of any kind, for the procuring or producing of abortion will be done or performed," and not "how or by what means conception may be prevented or abortion produced," or within any other clause of the act.

[1] What significance, if any, has the use of the word "will" in this clause, as contradistinguished from "may," in the other clauses? The government insists that it indicates merely futurity; that information as to where or by whom such acts are done, irrespective of any indication that any specific act will be done, is thereby forbidden. Defendant contends that, to be unmailable, the letter must contain an express or implied obligation that the illegal operation will actually be performed.

[2, 3] Neither position is to be upheld. The amendment, closing the mails to written or printed information "where or by whom any operation for producing abortion will be performed," was adopted by Congress under the same power that was exercised in passing the original section, the national power of controlling the mails. Congress has no power to penalize or to legalize the act of producing an abortion. That is a matter for the states. In applying the national statute to an alleged offensive use of the mails at a named place, it is immaterial what the local statutory definition of abortion is, what acts of abortion are included, or what excluded. So the word "abortion" in the national statute must be taken in its general medical sense. Its inclusion in the statute governing the use of the mails indicates a national policy of discountenancing abortion as inimical to the national life. Though the letter of the statute would cover all acts of abortion, the rule of giving a reasonable construction in view of the disclosed national purpose would exclude those acts that are in the interest of the national life. Therefore a physician may lawfully use the mails to say that if an examination shows the necessity of an operation to save life he will operate, if such in truth is his real position. If he use the mails to give information that he elects, intends, is willing to perform abortions for destroying life, he is guilty, irrespective of whether he has expressly or impliedly bound himself to operate.

The information may be given as well by a third person as by the prospective operator; if by the former, there surely need be no implied obligation. A statement that X. will perform the operation would suffice. On the other hand, the bare statement that hundreds of illegal abortions are performed or will be performed every year in the city of Chicago, or even by Dr. X., would not make the letter per se unmailable.

[4] But while an obligation, promise, or assurance is not essential, the language of the act, in our judgment, requires that there must be the indication of a positive intent that the act will be done, not merely that it might perhaps be performed. This intent need not be apparent from the document itself; a letter, however innocent on its face, may, by proper allegations, be shown to convey, and to have been intended to convey, the prohibited information. *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550. The single word "Yes," if charged and proven to have been written and mailed in answer to an inquiry whether the writer would perform an illegal operation would be sufficient.

No disguise or subterfuge will be of any avail. The word "rupture" may be shown to have been used to indicate abortion to the knowledge of both parties (*United States v. Kline* [D. C.] 201 Fed. 954); the general statement that X. performs abortions, or an advertisement by X. "Women's Diseases a Specialty," may be proven to have been used and understood as meaning that X. will perform a certain definite abortion, or an abortion for any woman in trouble.

[5] The indictment, however, must charge that the apparently innocuous words were used and intended to be understood in the wrongful sense, and must allege such matters as justify the charge.

[6] While the government offered evidence that the letter of the 16th, a decoy letter, was in fact mailed on the 24th, thereby tending to prove that the reference in the letter of the 25th to one of the 24th was a mistake, and that in fact the letter of the 25th was in answer to that of the 16th, and not, as defendant testified, in answer to another letter, dated the 24th, and stating that the girl had done something to herself and was then in a dangerous condition, the indictment contains no allegation whatsoever to support the evidence or the inference therefrom; it does not even state that the letter of the 25th was in answer to that of the 16th; it merely avers the receipt of the latter and the mailing of the former; neither directly nor indirectly does it charge that the sentence, "Would have to first see the patient before determining whether I would take the case or not," was designed merely to disguise, in a form recognizable by the addressee, the prohibited information of a willingness to perform the illegal act.

The letter of the 25th, construed as written by one who had received the letter of the 16th, but as intended to be in reply to some letter of the 24th, the contents of which are not set out, conveys information that an abortion might possibly be produced, not that the act would be done. If in fact the defendant intended to operate, and to have Mrs. Wilson understand that he would operate only under such circumstances as would make it the duty of any reputable physician to perform the act, as, for example, only if an examination disclosed the conditions stated in the letter which defendant testified was dated the 24th, concededly he could not be found guilty.

The indictment is fatally defective in charging that the defendant by his letter intended to give information only as to where or by whom an abortion *might* be produced, not as to where or by whom it *would* be produced and in failing to allege facts that would support a con-

struction of the letter of September 25th as conveying and intending to convey information that the act would be performed.

Judgment reversed, and cause remanded.

NOTE.—SEAMAN, Circuit Judge, concurred in a reversal of the judgment, but did not read the opinion.

WORTHEN LUMBER MILLS v. ALASKA JUNEAU GOLD MINING CO.*

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916. Rehearing
Denied March 6, 1916.)

No. 2640.

1. MINES AND MINERALS Ⓒ27—LODE LOCATION—ESTOPPEL.

Where one claiming land under mining lode locations purchased mill site locations located by others upon the same land, it was not thereby estopped to claim under the mining lode locations.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 64, 65; Dec. Dig. Ⓒ27.]

2. MINES AND MINERALS Ⓒ27—ENTRY—MISREPRESENTATIONS.

Where plaintiff, who claimed land under mining lode locations, purchased mill site locations located by others upon the same land, the representations of the mill site locators in entering the land that it was non-mineral could not be imputed to plaintiff, unless plaintiff procured such locations to be made.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 64, 65; Dec. Dig. Ⓒ27.]

3. INDIANS Ⓒ15—POSSESSORY RIGHTS—CONVEYANCES—STATUTORY PROVISIONS.

Act May 17, 1884, c. 53, § 8, 23 Stat. 26, providing, relative to public lands in Alaska, that Indians or other persons in the district of Alaska should not be disturbed in the possession of any land actually in their use or occupation or claimed by them, but that the terms under which such persons might acquire title to such lands were reserved for future legislation, did not prevent Indians in possession of land at the time of the passage thereof from transferring their possessory rights.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. Ⓒ15.]

4. INDIANS Ⓒ15—POSSESSORY RIGHTS—CONVEYANCES—STATUTORY PROVISIONS.

Act May 17, 1906, c. 2469, 34 Stat. 197 (Comp. St. 1913, § 5096), authorizing the Secretary of the Interior to allot not to exceed 160 acres of nonmineral land in Alaska to any Indian or Eskimo, and providing that the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable, did not of its own force terminate Indian rights of occupation of land, or place any bar upon the alienation of their possessory rights.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. Ⓒ15.]

5. NAVIGABLE WATERS Ⓒ39—LITORAL RIGHTS—LOSS.

The laying out of a street by a municipal corporation on tidelands on the shore of a navigable channel in front of plaintiff's upland, without securing any right so to do from plaintiff, or obtaining such right by

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

*Second petition for rehearing denied May 8, 1916.

condemnation proceedings, did not sever plaintiff's littoral rights from the upland, or merge them in the public right.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. ☞39.]

6. PUBLIC LANDS ☞47—STATUTORY PROVISIONS—RESERVATIONS.

Act May 14, 1898, c. 299, § 10, 30 Stat. 413 (Comp. St. 1913, § 5091), authorizes citizens or corporations, possessing and occupying public lands in Alaska for the purposes of trade, manufacturing, or other productive industry, to purchase one claim of not exceeding 80 acres, provided, no entry shall be allowed thereunder on land abutting on navigable waters of more than 80 rods, and provided, further, that there shall be reserved by the United States a space of 80 rods between tracts sold or entered thereunder abutting on any navigable water, and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen, association, or corporation for landings and wharves, with the provision that the public shall have access to and proper use thereof, and that a roadway 60 feet in width parallel to the shore line shall be reserved for the use of the public as a highway. *Held*, that this did not have the effect of reserving a roadway 60 feet wide across mill site locations abutting on a navigable channel.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 133, 137; Dec. Dig. ☞47.]

7. NAVIGABLE WATERS ☞39—LITTORAL RIGHTS—ENJOINING INTERFERENCE.

Where the owner of upland fronting on a navigable channel had a right of access over tidelands in front of such upland to the navigable waters of the channel, and the District Court found that to avail itself of this right of access it was necessary to construct a wharf covering the whole space in front of the upland, and that all of such area was reasonable and necessary to be used in aid of its ingress and egress to and from such upland, a decree enjoining another party from constructing, continuing, or maintaining on such tidelands any structure of any nature or description in any way cutting off, obstructing, or interfering with such free and uninterrupted access and the building of such wharf, did not grant the owner of the upland a greater or more extensive right than was reasonable under the circumstances.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. ☞39.]

Appeal from the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Suit by the Alaska Juneau Gold Mining Company against the Worthen Lumber Mills. Decree for plaintiff, and defendant appeals. Affirmed.

The appellant and its predecessors in interest had for 13 years been operating a sawmill on the shores of Gastineau Channel at Juneau, and had established booming grounds for logs along the beach. It had built platforms over tidewaters on the seaward side, and adjoining the city street known as Franklin street, for use as lumber yards. It had driven piles on the tide flats, and was placing a platform thereon, when the appellee brought suit to enjoin it from further maintaining the platform, and to establish the right of the appellee to the use and possession of the premises so occupied by the appellant. The appellee alleged three sources of title: First, two mining claims, the General Grant lode location and the Abraham Lincoln lode location; second, two mill site locations; and, third, the grant of the right of occupation of certain Indians, who, prior to May 17, 1884, were in possession of the upland above the tidelands in question. The court below found that the appellee was the owner of the lode mining claims, the owner of the mill sites, and the grantee of the Indians' right of occupation; that the appellee is building

a large milling plant upon the premises embraced within the lode claims and the mill sites and the tracts so purchased from the Indians, and that in order to carry out its work of construction it is necessary that the appellee have access to the deep waters of Gastineau Channel, and that wharves be built from the upland to said deep water for the purpose of facilitating such access, and enabling it to land its construction material, and convey the same to the point where the milling plant is being constructed, and for other purposes; and the court found that the plank road constructed in 1912 by the city of Juneau over the tideland lying in front of the said upland, and which the appellant alleged operated to sever littoral rights from the upland, was constructed without the appellee's consent, and that it does not interfere with any of the appellee's rights, but that it is so constructed that the appellee can wharf out and have access to deep water notwithstanding said roadway. And the court ruled, as a conclusion of law, that the appellee is the owner of the uplands and entitled to all the littoral rights attached to uplands abutting on a navigable highway, including the right to construct a wharf, and the court enjoined the appellant from constructing and continuing or maintaining on the tidelands in question any structure of any nature or description which in any way cuts off or obstructs or interferes with such free and uninterrupted access and the building of the appellee's wharf. From that injunction order the present appeal is taken.

John Rustgard, of Juneau, Alaska, for appellant.

Hellenthal & Hellenthal, of Juneau, Alaska (Curtis H. Lindley, of San Francisco, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1-4] The appellant contends that upon the established facts in the case the court below erroneously reached the legal conclusion that the appellee had established its title or right to the possession of the upland. It is argued that by entering the mill sites the appellant waived its right under the mining lode claims, that by presenting affidavits that the land was nonmineral in order to enter the land as mill sites the appellee became estopped to claim the same under the mineral lode locations, and that by proving the right of possession of certain Indians in and to the upland prior to the act of Congress of 1884, and continuously thereafter until 1913, when the appellee received conveyances from them, the appellee has proved that the land was not open to location as mining claims or mill sites, and that no right of possession could be acquired under either thereof. The appellant, admitting that the right of possession was in the Indians as was found by the court below, contends that the Indian right of occupation was not transferable and never became vested in the appellee.

We do not think it is necessary to determine by which of the three sources of title pleaded in the complaint the appellee acquired possession of the upland. We do not agree with the appellant that by acquiring the mill sites the appellee became estopped to claim under the mining lode locations. We find no ground of estoppel in the mere fact that the appellee, while claiming under mining lode locations, purchased mill site locations located by others upon the same land. The representations which the mill site locators had made to the effect that the land was nonmineral could not be imputed to the appellee, unless it were shown, which it is not, that the appellee had procured such locations to be made. We are of the opinion, also, that

the right of the Indians was transferable. This court recognized that right in *Heckman v. Sutter*, 119 Fed. 83, 55 C. C. A. 635. The act of Congress of 1884 provided in section 8:

"That the Indians or other persons in the said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

We do not think that it was the purpose of this act merely to protect the possession of the Indians of lands which they then occupied in Alaska, and to deny them the power to convey to others their right of occupation. It was an act, not only for the benefit of the Indians, but also for the white settlers. It was enacted with a view to conditions which then existed in Alaska. Since the time of its acquisition, settlers and miners had been entering the territory. They had located mining claims and town sites, and had transferred lands in tracts and in lots and blocks. They had erected buildings for mercantile purposes and dwelling purposes. The mining claims and lands so occupied by Indians and settlers were held under a claim of possession only, and such possessory rights had been freely conveyed and transferred. Those possessory rights as they then existed were recognized and protected by the act. The act made no distinction between the rights of the white settlers and the rights of the Indians, and it is not to be presumed that Congress intended thereby to deprive either of the power to exercise rights which they had theretofore possessed.

We find nothing to the contrary in *Russian-American Co. v. United States*, 199 U. S. 570, 26 Sup. Ct. 157, 50 L. Ed. 314, in which Mr. Justice Brown said of section 8 of the act:

"It is quite clear that this section simply recognized the rights of such Indians or other persons as were in possession of lands at the time of the passage of the act, and reserved to them the power to acquire title thereto after future legislation had been enacted by Congress."

Nor does the Act of May 17, 1906 (34 Stat. 197), authorizing the Secretary of the Interior in his discretion to allot nonmineral land to any Indian or Eskimo as a homestead for the allottee and his heirs in perpetuity, which "shall be inalienable and nontaxable until otherwise provided by Congress," of its own force terminate the rights of occupation which the Indian had prior thereto, or place any bar upon the alienation thereof.

[5] The appellant invokes the doctrine of *McCloskey v. Pacific Coast Co.*, 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673, in which this court held that the plaintiff therein had, by dedication of a street and by deed, parted with all its littoral rights, and it contends that the appellee's littoral rights are cut off by a public street 20 feet wide, known as Franklin street, which extends along the line of mean high tide on the shore of Gastineau Channel in front of the appellee's upland. The evidence is that in the year 1912 the city council of Juneau caused surveys to be made for a street along the beach between the appellee's upland and the waters of the channel, and between high and low water mark, which was made a plank road

placed upon piling, and has become one of the principal streets of Juneau.

The cases cited in support of the decision in the McCloskey Case are to the effect that a littoral proprietor may be deprived of littoral rights by his own act in dedicating a street to the public use, or by a conveyance; also that upland purchased after a public street has been laid out between the same and navigable water is taken severed from all littoral rights. The principle of those decisions does not apply to a case where, as here, the facts go no farther than to show that a municipal corporation has laid out a street on tide lands in front of the upland, and has used it for two or three years without having secured from the upland proprietor any right so to do, or obtained that right by condemnation proceedings. In such a case there is no ground on which it can be said that the right of the littoral proprietor has become merged in a public right. As alleged in the complaint, and as found by the court below, Franklin street interposes in fact no obstacle to the appellee's access to the waters of Gastineau Channel, and we hold that it interposes no obstacle in law.

[6] The appellant contends that by virtue of the mill site locations there was reserved between the land so located and the Gastineau Channel a roadway 60 feet in width under section 10 of the Act of May 14, 1898 (30 Stat. 409). The contention is contrary to the decision of this court in *Dalton v. Hazelet*, 182 Fed. 561, 105 C. C. A. 99. We are not convinced that that case was erroneously decided.

[7] The court below found that the appellee had need of access to the navigable waters of Gastineau Channel in connection with its mining plant on the upland, and that to avail itself of this right of access it was necessary to construct a wharf covering the whole space in front of said upland, or from the appellant's southerly line to the present Alaska-Juneau wharf, and that all of said area is reasonable and necessary to be used in aid of the appellee's ingress and egress to and from such upland. The appellee having, as we have found, the right of access to the navigable waters of the channel, we are not convinced that the court below has by its decree accorded to it a greater or more extensive right than is reasonable under the circumstances.

The order is affirmed.

SCHARRENBERG v. DOLLAR S. S. CO. et al. *

(Circuit Court of Appeals, Ninth Circuit. February 14, 1916.)

No. 2614.

ALIENS ⤵56—"CONTRACT LABORER"—"UNITED STATES"—STATUTORY PROVISIONS.

It was not a violation of Immigration Act Feb. 20, 1907, c. 1134, § 4, 34 Stat. 900 (Comp. St. 1913, § 4248), making it a misdemeanor to prepay the transportation or assist in the importation of contract laborers into the United States, for the operators of a merchant vessel flying the Amer-

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

*Rehearing denied May 8, 1916.

ican flag to bring aliens from China to the port of San Francisco under contract to join the crew of such vessel, since, while the public and private vessels of every nation, while on the high seas and without the territorial limits of any state, are subject to the jurisdiction of the state to which they belong and are in many respects considered a part of its territory, a merchant vessel flying the American flag is not a part of the United States within the immigration laws, nor is a sailor whose home is on the sea a contract laborer within those laws.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113-116; Dec. Dig. 6-56.

For other definitions, see Words and Phrases, First and Second Series, Contract Laborer; United States.]

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Action by Paul Scharrenberg against the Dollar Steamship Company and others. Judgment for defendants on demurrer, and plaintiff brings error. Affirmed.

This was an action by a private party to recover penalties for knowingly assisting, encouraging, and soliciting the migration and importation of contract laborers into the United States in violation of the Act of Congress of February 20, 1907, as amended by the Act of March 26, 1910, commonly known as the Immigration Act. 34 Stat. 898; 36 Stat. 263 (Comp. St. 1913, §§ 4244, 4247). Section 4 of that act provides:

"That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section 2 of this act." Comp. St. 1913, § 4248.

Section 5 provides:

"That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid." Comp. St. 1913, § 4250.

The complaint contains 19 counts or causes of action in all; but the several counts or causes of action are identical, except as to the name of the alien immigrant. After alleging the incorporation of the defendants the Dollar Steamship Company, Dollar Steamship Line, and the Robert Dollar Company, that the defendants were the operators of a certain steam merchant vessel flying the British flag, known as the Bessie Dollar, and of a certain American steamship merchant vessel flying the American flag, known as the Mackinaw, and that the defendant Abernethy was in the employ of the defendants as master of the steamship Bessie Dollar, the complaint proceeds as follows:

"That as plaintiff is further informed and believes, and so avers, the defendant herein, at the times hereinafter mentioned, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person, named Dung Pau, into the United States of America, for the purpose of his performing labor in the said United States, he at all of the times herein mentioned being a Chinese person, whose birthplace and residence was and is the city of Shanghai, in China, as follows:

"That on the 3d day of December, A. D. 1913, the said vessel Bessie Dollar was lying in the port of Shanghai, in China, with a full complement of officers and a full crew on board, each of whom had signed shipping articles to serve in their respective capacities on said vessel on a voyage thence to other parts of the world and return, and at that time the defendants herein other than defendant James Abernethy, desiring to procure a Chinese person, alien and contract laborer, to bring to the United States of America to perform labor for them therein, to wit, to serve as a seaman on board of the said vessel Mackinaw, and with that intent, they caused the said James Abernethy to engage said contract laborer for that purpose, which he did, and to and he did enter into a contract in writing with said contract laborer before consul of Great Britain at said Shanghai, which said contract was a contract designated and known as shipping articles, and in the instance herein mentioned were additional and other shipping articles to the shipping articles already as hereinbefore mentioned signed by the officers and crew of the said vessel Bessie Dollar, which said additional shipping articles were signed by the said defendant Abernethy and the said contract laborer at the request of the other defendants herein, the said Abernethy and the said contract laborer both signing the same as aforesaid, and in said shipping articles the said contract laborer agreed to go on board of the said vessel Bessie Dollar and work for defendants, and they agreed to employ him thereon and to bring him to the said United States, so that he could work for the said defendants therein other than said defendant Abernethy, although at that time no seaman or other persons were needed to work upon the said Bessie Dollar, the said shipping articles so signed by said Abernethy and the said contract laborer describing the latter's employment as follows; that is to say: Said contract laborer was to work as a purported seaman on said vessel Bessie Dollar, 'on voyages from Shanghai to San Francisco, there to join the S. S. Mackinaw, or any other vessel, within the limits of 70 degrees north and 70 degrees south latitude, trading to and from as may be required, and back to Shanghai, to be discharged with consent of local authorities. Term of service not to exceed two (2) years. The master has the option to transfer any or all of the within mentioned persons to any other British or foreign ship bound to Shanghai in the same capacity and at the same rate of wages.'

"That the real purpose of defendants other than the defendant Abernethy, was to employ said contract laborer within the United States of America, and that after the signing of said contract and on or about the 3d day of December, 1913, the said contract laborer went on board of said vessel Bessie Dollar at said Shanghai, and was by the defendants brought on said vessel to the port of San Francisco, in the state of California, he working as a seaman on said vessel on her passage from said Shanghai to said port of San Francisco, at which said last-named place and on or about the 15th day of January, 1914, at said last-named place the defendants caused the said contract laborer to be discharged from said vessel, and he was by them discharged from service on her, and thereafter and upon the same day the defendants herein other than defendant James Abernethy, in pursuance of the purpose for which they had brought the said contract laborer from said Shanghai, hired and employed him in the said port of San Francisco, and caused him to sign a contract of shipment before the United States shipping commissioner for the said port of San Francisco, on a voyage on said vessel described in said contract of shipment, as follows: 'From San Francisco, Cal., to Shanghai, China, and such other Asiatic ports as the master may direct, via Grays Harbor, Seattle, Wash., and such other ports on the Pacific Coast as the master may direct; final port of discharge shall be Shanghai, China.'

"That the Grays Harbor and the Seattle mentioned in said contract of shipment are each ports, to wit, seaports in the state of Washington. That after

the signing of such shipping articles or contract of shipment the said contract laborer went on board of said vessel Mackinaw in the employ of defendants other than said James Abernethy, at said Port of San Francisco, on or about the said 15th day of January, 1914, under and pursuant to his said hiring at said Shanghai, to work as a seaman on said vessel Mackinaw and worked on board of said vessel in the said port of San Francisco, for some days, and also on a voyage of said vessel from said San Francisco, to said Grays Harbor and at said Grays Harbor also worked on said vessel as a seaman and pursuant to his said hiring, and did and is now so performing labor on board of said vessel."

The complaint then alleges that the contract laborers were not exempted under the terms of the last two provisos contained in section 2 of the act in question. A demurrer to this, the second amended complaint, was sustained, without leave to amend, and the present writ of error was sued out to reverse a judgment dismissing the action.

H. W. Hutton, of San Francisco, Cal., for plaintiff in error.

Nathan H. Frank, of San Francisco, Cal., for defendants in error.

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

RUDKIN, District Judge (after stating the facts as above). No doubt, as contended by the plaintiff in error, the public and private vessels of every nation while on the high seas, and without the territorial limits of any state, are subject to the jurisdiction of the state to which they belong, and are in many respects considered a part of its territory. *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430; *Wilson v. McNamee*, 102 U. S. 572, 26 L. Ed. 234. But it does not follow from this that a merchant vessel flying the American flag is a part of the United States within the meaning of the immigration laws, or that a sailor whose home is on the sea is a contract laborer within the purview of these laws. *Taylor v. United States*, 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130; *United States v. Sandrey (C. C.)* 48 Fed. 550; *United States v. Burke (C. C.)* 99 Fed. 895; *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

In *Taylor v. United States*, supra, the court said:

"'Landing from such vessel' takes place and is complete the moment the vessel is left and the shore reached. But it is necessary to commerce, as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their doing so. The contrary always has been understood of the earlier acts, in judicial decisions and executive practice. If we reject the ambiguous interpretation of 'to land,' as we have, the necessary result can be reached only by saying that the section does not apply to sailors carried to an American port with a bona fide intent to take them out again when the ship goes on, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert, and get in, but there is no evidence that they were doing so in fact. Whether this result is reached by the interpretation of the words 'bringing an alien to the United States' that has been suggested, or on the ground that the statute cannot have intended its precautions to apply to the ordinary and necessary landing of seamen, even if the words of the section embrace it, as in *Church of Holy Trinity v. United States*, 143 U. S. 457 [12 Sup. Ct. 511, 36 L. Ed. 226], does not matter for this case. We think it superfluous to go through all the sections of the act for confirmation of our opinion. It is enough to say that we feel no doubt when we read the act as a whole."

In *United States v. Sandrey*, supra, the court said:

"As clearly appears, the act deals only with the importation of aliens under contract to labor and alien immigration. It is only with regard to alien immigrants that the act imposes duties upon the masters and agents of vessels, or provides penalties for the nonperformance of duties by such masters and agents. An alien immigrant to the United States is an alien who comes or removes into the United States for the purpose of permanent residence. Aliens composing crews of vessels visiting our seaports are in no sense immigrants, and, as a review of the statute as above shows, are in no wise affected by the law in question. With regard to them the said law imposes no duties nor penalties upon the masters and agents of vessels."

In *United States v. Burke*, supra, the court said:

"The legislation contained in the various statutes that have been passed relating to immigration is clearly directed against the immigration into this country of certain classes of persons, who come in with the intent to enter into and become a part of the mass of its citizenship or population. Immigration is defined to be the entering into a country with the intention of residing in it. The earlier statutes merely prohibit contract laborers being brought in. The later ones prohibit the bringing in of immigrants—persons who come into the country with the intention of remaining, of fixing a residence here, and who are calculated to become a charge upon the country, or who are unfit, on account of moral character, previous convictions of crime, or disease, to be admitted as citizens. Nothing in the scope of the statutes seems to contemplate, or can be rationally held to contemplate, the prohibition of the bringing within the country by vessels of their crews engaged under contract made out of the country, to labor on the vessels while approaching and while in the ports of this country, and to sail again with the vessels from this country."

And after reviewing the different sections of the Immigration Act the court continued:

"A consideration of the whole legislation on the subject of immigration, of the circumstances surrounding its enactment, and of the unjust results which would follow from giving such meaning to it as is here claimed for it, makes it unreasonable to believe that Congress intended to include a case like the present one. My opinion is that these statutes do not contemplate the exclusion of the crews of vessels which lawfully trade to our ports, and that they do not, in spirit or in letter, apply to seamen engaged in their calling, whose home is the sea, who are here to-day and gone to-morrow, who come on a vessel into the United States with no purpose to reside therein, but with the intention, when they come, of leaving again, on that or some other vessel, for the port of shipment or some other foreign port in the course of her trade. To hold that these statutes apply to aliens comprising the bona fide crews of vessels engaged in commerce between the United States and foreign countries would lead to great injustice to such vessels, oppression to their crews, and serious consequences to commerce."

In an opinion to the Secretary of the Treasury, Acting Attorney General Beck quoted at length from the decision in *United States v. Burke*, supra, and said:

"Were I at liberty to disregard this authoritative interpretation of the immigration statutes, I would feel constrained to say that the reasoning of Judge Toulmin seems to me entirely sound, and that it would be injurious to our commerce, and therefore to the public interests, to hold broadly and without exception that seamen as a class are within the purview of the immigration statutes. It is true that Congress has not excepted them from the express language of these statutes, but in the practical administration of these laws they have always been excepted, and their inclusion in the class of alien immigrants would lead to consequences so destructive to legitimate commerce that such inclusion can fairly be disregarded as beyond the intention of Congress." 23 Ops. Attys. Gen., 521.

The rules adopted and promulgated by the Department of Labor, which is charged with the administration and enforcement of the immigration laws, are in entire harmony with these views.

For these reasons, the demurrer was properly sustained, and the judgment of the court below is affirmed.

C. E. WHITE & CO. v. CENTURY SAVINGS BANK OF DES MOINES, IOWA.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916.)

No. 2227.

1. FACTORS ⚡49—LIABILITY TO THIRD PERSONS.

A factor, though he acts innocently and in good faith, is liable in tort to the true owner or lienor of chattels against whom the principal's act of placing the chattels with the factor is a tort; but this liability is limited to cases in which there were defects in the principal's right of possession when he turned the chattels over to the factor.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 81; Dec. Dig. ⚡49.]

2. FACTORS ⚡49—AUTHORITY—REVOCATION.

If a principal has in fact good title and right of possession when he delivers chattels to a factor to sell, the factor's possession is lawful, and his authority to sell continues until he has notice of revocation.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 81; Dec. Dig. ⚡49.]

3. CARRIERS ⚡58—BILLS OF LADING—OWNERSHIP OF CHATTELS—CONVERSION.

A stock buyer, who had been shipping hogs to commission merchants with instructions to sell them on commission, shipped hogs and received a "straight" bill of lading designating the commission merchants as consignees. He indorsed the bill of lading in blank and delivered it, with a draft on the commission merchants, to a bank, which discounted the draft. Before the draft was presented to the commission merchants, and before notice to the commission merchants of the transfer of the bill of lading the commission merchants received the hogs from the carrier and sold them. *Held*, that the sale of the hogs was not a tort, and did not render the commission merchants liable in trover to the bank, since, while the transfer of an "order" bill of lading may be deemed evidence of an intended pledge of the chattels described therein, as an assignment of the shipper's rights against the carrier, a straight bill of lading is not a true document of title, possession of which is symbolic of actual possession, and the carrier's possession is on behalf of the consignee, and though the consignor may transfer his interest in the shipment, neither he nor his transferee can disturb the effect of the straight bill of lading as against the carrier or the consignee without notice.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. ⚡58.]

In Error to the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Action by the Century Savings Bank of Des Moines, Iowa, against C. E. White & Co., a corporation. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

Dan McGlynn, of East St. Louis, Ill., for plaintiff in error.

Edward C. Kramer, Rudolph J. Kramer, and Bruce Campbell, all of East St. Louis, Ill., and W. C. Marshall and W. W. Henderson, both of St. Louis, Mo., for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

BAKER, Circuit Judge. This is an action in trover, instituted by defendant in error, a bank at Des Moines, Iowa, against White & Co., a commission house at East St. Louis, Ill. Judgment for the bank was entered upon a directed verdict.

To sustain the charge of a tortious appropriation of the bank's chattels, the following proofs were made: On June 22, 1908, Hough was a stock buyer at Des Moines and was the owner and in possession of 319 hogs. He took them that day to the Wabash Railroad, which loaded them into cars and issued to him a bill of lading for their transportation from "Shipper L. R. Hough," at Des Moines, to "Consignee C. E. White & Co.," at East St. Louis. Hough on the same day took the bill of lading to the bank, indorsed it in blank, and signed a demand draft on White & Co. in favor of the bank for \$3,900. On delivery of this draft and bill of lading the bank paid Hough the face value less lawful discount. From prior similar, but separate and independent, transactions the bank knew that Hough was a stock buyer who was accustomed to retain ownership of his shipments and to place them in the hands of White & Co. and other factors to be sold on commission. In taking the draft and bill of lading now in question the bank relied on the facts being, as they were, that Hough was the owner of the 319 hogs, and that White & Co. had no title to them, and no interest except to sell them on commission. In the evening of the same day the bank deposited the draft with the bill of lading attached in the mail; but, instead of forwarding them directly to a bank at East St. Louis, it sent them to its correspondent bank at Kansas City, with which it had an arrangement for avoiding collection charges. So the draft and bill of lading did not reach East St. Louis and were not presented to White & Co. until June 25th. In the meantime, on the morning of June 23d, the hogs arrived in East St. Louis and were delivered by the railroad to White & Co. Prior to this time White & Co. had continuing authority and instructions from Hough to receive his hogs and sell them promptly on commission. During the day of June 23d White & Co. sold the hogs. Hough never directly revoked his instructions. If his transfer of the bill of lading to the bank was an indirect revocation, White & Co. had no knowledge thereof until two days after they had parted with possession of the hogs.

Do these facts sustain the judgment in tort?

[1] Ordinarily a factor must rely upon his principal's honesty or financial responsibility to protect him in dealing with chattels placed in his hands by the principal. No matter what innocence and good faith may characterize the factor's acts, he is liable in tort to the true owner or lienor against whom the principal's act of placing the chattels with the factor is a tort. This liability, however, is limited to cases in which

there were defects in the principal's right of possession when he turned the chattels over to the factor.

[2] If the principal has in fact good title and right of possession when he delivers the chattels to the factor to sell, the factor's possession is lawful, and his authority to sell continues until he has notice of revocation. In *Jones v. Hodgkins*, 61 Me. 480, for example, McLaine, principal, owner of logs, put them in possession of Hodgkins, factor, with authority to sell. McLaine in March sold the logs to Jones, but neither McLaine nor Jones did anything towards transference of possession. In April Hodgkins, without knowledge of his principal's sale to Jones, sold and delivered the logs to an innocent purchaser. Held, that Jones' action in trover against Hodgkins was not sustainable on these facts. But the principle there declared does not solve the present problem. There no bill of lading as representative of the chattels was involved, and the factor was in actual possession under perfect authority before and at the time his principal transferred title to a third party. Here the logs were in the actual possession of the carrier under a bill of lading hereinbefore described, Hough had transferred his interest as owner to the bank as collateral security, and the indorsed bill of lading was in the hands of the bank, before White & Co. came into actual possession.

Nor is an answer found in any of the following classes of cases:

1. Where, as in *Reed v. Racine Boat Co.*, 156 Iowa, 12, 137 N. W. 458, there is an "order" or "bearer" bill of lading, requiring production and surrender of the bill before the carrier can lawfully surrender possession, in which cases the carrier and the innocent factor may severally be liable. For here the bill of lading is not of that kind.

2. Where, as in *Taylor v. Turner*, 87 Ill. 296, there is a "straight" bill of lading to a named consignee other than the shipper, under which the carrier may lawfully deliver possession to the consignee without the production and surrender of the bill of lading, and where the indorsee or holder of the bill of lading has in fact consented to the sale by the factor consignee. For here the bank did not in fact consent to the sale by White & Co. If the bank's consent is found, it must be as a matter of law, contrary to the bank's actual intent.

3. Where, as in *Means v. Bank of Randall*, 146 U. S. 620, 13 Sup. Ct. 186, 36 L. Ed. 1107, there is a "straight" bill of lading to a factor as consignee, and the factor, while still in possession and control of the chattels, has actual notice of his principal's prior sale of the chattels and transference of the bill of lading to a third party. For here there is in fact no question of White & Co.'s ignorance of the bank's interest and of their good faith in making the sale.

[3] In our judgment the difficulties in the present case arising from an apparent conflict between principles concerning factors and principles concerning the rights of indorsees or holders of bills of lading are solvable by reference to the different aspects in which a transference of a bill of lading may be considered.

These are three: 1. As evidence of an intended sale, pledge, or mortgage of the chattels described in the bill of lading, the same as a separate document would be evidence. 2. As an assignment of the

shipper's rights against the carrier. 3. As a symbolic delivery of the chattels, equivalent in law to manual delivery. It would seem that there could be no doubt that all these elements characterize the transference of an "order" bill of lading.

But is the third element present as against the factor consignee of a "straight" bill of lading? In our judgment, No. We believe that a "straight" bill of lading is not a true document of title, possession of which is symbolic of actual possession, and that the carrier's possession, though not for all purposes the actual possession of the consignee, nevertheless is on his behalf. Williston on Sales, par. 413. If the consignor be in truth the owner and the consignee merely his factor, the consignor may transfer his interest as owner to a third person. But for that purpose his assignment on and delivery of the bill of lading are of no greater force than would be a separate bill of sale while the chattels were in the actual possession of the carrier for the factor consignee. For, "strictly speaking, no person but such consignee can, by an indorsement of the bill of lading, pass the legal title to the goods." *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 445, 7 L. Ed. 189. In other words, though the owner consignor may deal with his interest as owner by separate documents (and they are separate even if written upon the bill of lading), he is powerless to disturb the effect of the "straight" bill of lading as against the carrier or the factor consignee without notice. And this we believe is just, because the owner is the one who creates the bill and selects its form. Necessarily the transferee of such a bill is bound to take notice of its form and acquires no greater rights than the transferrer had. And so the bank, succeeding only to Hough's interest as owner of the consigned hogs, and failing to prove notice to White & Co. of its interest before sale by White & Co., has not sustained its declaration in trover.

In addition to the authorities hereinabove mentioned, we have examined, among others, the cases noted in the margin.¹

The judgment is reversed, with the direction to grant a new trial.

¹ *Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. Ed. 214; *North Penn. R. Co. v. Commercial Bank of Chicago*, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287; *Lee v. Bowen*, 5 Biss. 154, Fed. Cas. No. 8,183; *Flannery et al. v. Harley*, 117 Ga. 483, 43 S. E. 765; *Dawes v. Rosenbaum*, 179 Ill. 112, 53 N. E. 585; *Hamilton v. Joseph Schlitz Brewing Co.*, 129 Iowa, 172, 105 N. W. 438, 2 L. R. A. (N. S.) 1078; *Bullitt, Miller & Co. v. Walker*, 12 La. Ann. 276; *Harper v. Little*, 2 Greenl. (Me.) 14, 11 Am. Dec. 25; *Wigton v. Bowley*, 130 Mass. 252; *Forbes v. Boston & Lowell Railroad*, 133 Mass. 154; *Singer v. Merchants' Despatch Transportation Co.*, 191 Mass. 449, 77 N. E. 882, 114 Am. St. Rep. 635; *Bank of Litchfield v. Elliott*, 83 Minn. 469, 86 N. W. 454; *Johnson v. Martin*, 87 Minn. 370, 92 N. W. 221, 59 L. R. A. 733, 94 Am. St. Rep. 706; *Davenport National Bank v. Homeyer*, 45 Mo. 145, 100 Am. Dec. 363; *Hays v. Warren*, 46 Mo. 189; *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672; *Moore v. Bowman*, 47 N. H. 494; *Kelsea v. Ramsey & Gore Mfg. Co.*, 55 N. J. Law, 320, 26 Atl. 907, 22 L. R. A. 415; *First National Bank of Cincinnati v. Kelly*, 57 N. Y. 34; *Holmes, Lafferty & Co. v. German Security Bank*, 87 Pa. 525; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 846; *American Thresherman v. Citizens' Bank of Anderson, Ind.*, 154 Wis. 366, 141 N. W. 210, 49 L. R. A. (N. S.) 644.

SHIELDS v. COLUMBIA RIVER LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916.)

No. 2585.

BROKERS \Leftrightarrow 64—COMMISSIONS—WHEN EARNED.

Through the efforts of certain brokers, K. took an option to purchase land from defendant, under which he was to pay \$80,000 on delivery of the deed, and \$145,000 within five years, and was to secure defendant by placing in escrow for its benefit the entire capital stock of a proposed corporation, to which he was to have the title transferred. On the day the option was executed, defendant executed an instrument providing that, in consideration of the brokers' services, defendant agreed, "in event of said K.'s carrying out completely the said proposed sale," to pay a commission of \$15,000 "in manner and form following," and directing the escrow, when the stock was delivered to it, to set over and hold for the benefit of W., one of such brokers, \$10,000 worth of the stock, and when the cash should be paid to redeem the stock certificates to pay to W. \$10,000 to cover all claims of W. on account of the commissions. Defendant refused to sign this instrument until the quoted words were inserted therein. K. did not carry out the option, and a new agreement was reached, under which a new corporation was organized, to which the land was conveyed; all of the stock being owned by defendant, and K. being given an option to purchase the stock. The corporation borrowed and paid defendant \$80,000 on the purchase price of the land, but K. never exercised the option to purchase the stock. *Held*, that W. was not entitled to the agreed commission of \$10,000, as it was not intended that the escrow was to be a trustee for W. as to \$10,000 worth of the stock, but that the stock was to be held for his benefit and protection, and the money secured thereby was to be turned over to him only in case he earned the commission in accordance with the precise terms of the agreement, and no sale was ever completed, as defendant, as owner of all the stock of the corporation to which title was transferred, still owned the land.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 67, 97; Dec. Dig. \Leftrightarrow 64.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action by Thomas M. Shields against the Columbia River Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error, as the assignee of one Winsor, brought this action against the defendant in error to recover \$10,000 and interest on account of the alleged conversion of certain shares of stock. The parties will be named plaintiff and defendant, as they were in the court below. The defendant owned 50,000 acres of land in Chelan county, Wash. In the year 1911 it employed one Murray to obtain a purchaser for the land at the price of \$200,000, out of which sum Murray was to receive a commission of 5 per cent. Murray became associated with Winsor, and he and Winsor found a prospective purchaser in Kellogg. It was proposed that Kellogg buy the land at \$225,000, of which sum the defendant was to receive \$205,000, and the remainder was to be apportioned, \$5,000 to Murray and \$5,000 to one Steeves, who was associated with him, and \$10,000 to Winsor, which sum Winsor was to divide with Kellogg. On August 23, 1911, the defendant gave an option to Kellogg, under the terms of which he was to pay the defendant \$80,000 on delivery of the deed,

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

and \$145,000 on or about five years thereafter, of which sum \$5,000 was to be paid by Kellogg to Murray. Kellogg was to furnish the defendant a surety bond to guarantee the payment of the \$145,000, and was further to secure the defendant by placing in escrow for its benefit the entire capital stock of the proposed corporation, to which Kellogg was to have the title transferred.

In connection with that option, and on the day on which it was executed, Winsor presented to the defendant for its signature an instrument, in which it was stated that the defendant "has agreed to pay as a commission for perfecting the sale the sum of \$15,000." This instrument the defendant declined to sign, and insisted upon inserting therein, after the word "agreed," the following words: "In the event of said Kellogg's carrying out completely the said proposed sale," and further inserted after the figures "\$15,000" the following words: "In manner and form following," so that the instrument read as follows: "Now, therefore, in consideration of the services rendered by Thomas Winsor and R. H. Steeves in negotiating and effecting a sale of said property, the Columbia River Lumber Company have agreed, in event of said Kellogg's carrying out completely the said proposed sale, to pay as a commission for perfecting said sale the sum of \$15,000, in manner and form following: Now, you are hereby requested and directed that, when the certificates of stock mentioned in said agreements are delivered to you by F. P. Kellogg, or his assigns, for the benefit of the Columbia River Lumber Company, to set over and hold for the benefit of Thomas Winsor \$10,000 worth of said certificates, and for the benefit of R. H. Steeves \$5,000 worth of said certificates; and when the cash shall be paid to redeem said certificates and the interest thereon, you are hereby further directed to pay to Thomas Winsor, of Seattle, Wash., the sum of \$10,000, plus the interest at 6 per cent. accrued thereon, and further to pay to R. H. Steeves \$5,000, together with the interest accrued thereon at 6 per cent., said amounts to cover all the claim or claims of the said Thomas Winsor and R. H. Steeves against any of the parties to said transaction on account of commissions for the negotiating and completing of sale of said property, the same to be deducted as hereinabove stated from the amounts to be turned over by you to the Columbia River Lumber Company, and the amount of the escrow agreement entered into between F. P. Kellogg and the Columbia River Lumber Company is varied to the amount of \$15,000."

The option so referred to was never carried out, the corporation was not formed, and Kellogg did not furnish the bond therein mentioned. The result was that on November 29, 1911, a new option was given to Kellogg, under which a new corporation was to be organized, to be known as the F. P. Kellogg Lumber Company of Nevada, the capital stock of which was to be \$450,000, all of which was to be held and owned by the defendant, but which stock, excepting a certain portion thereof, Kellogg had the option to purchase from the defendant within a time stated. The defendant's land was conveyed to that corporation, and the corporation borrowed and paid the defendant the sum of \$80,000, but Kellogg never availed himself of the option to purchase the stock. The foregoing facts having been made to appear on the trial, upon the close of the plaintiff's case, the court below granted the defendant a judgment of nonsuit.

Edgar S. Hadley and Will H. Thompson, both of Seattle, Wash., for plaintiff in error.

George D. Emery, of Seattle, Wash., and Arthur W. Selover, of Minneapolis, Minn., for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). The plaintiff assigns error to the judgment of nonsuit, and contends that he furnished sufficient evidence to go to the jury to show that Winsor, the plaintiff's assignee, earned the commission which was contemplated

in the agreement of August 23, 1911, in that said Winsor found a purchaser for the defendant's lands, brought the parties together, and induced them to enter into the written instrument of November 29, 1911, in pursuance of which a corporation was formed, and the property of the defendant was deeded to that corporation; and the plaintiff relies especially upon that portion of the defendant's written instructions to the Union Trust Company, in which that company was requested and directed to set over and hold for the benefit of Thomas Winsor \$10,000 worth of the certificates of stock of the corporation that was to be formed, "said amounts," the instrument goes on to say, "to cover all the claim or claims of said Thomas Winsor * * * against any of the parties to said transaction, on account of commissions for the negotiating and completing of sale of said property." But the plaintiff omits to mention that, between the provisions so quoted, the instrument contains the following:

"And when the cash shall be paid to redeem said certificates and the interest thereon, you are hereby further directed to pay to Thomas Winsor, of Seattle, Wash., the sum of \$10,000, plus the interest at 6 per cent. accrued thereon."

The instructions to the escrow holder do not mean, and do not purport to say, that Winsor had earned his commission, or that the trust company was made a trustee of \$10,000 worth of stock certificates for Winsor. Those provisions are to be construed together with the terms of the contract between Winsor and the defendant of the same date, and when so construed it is clear that while the certificates were to be held for the benefit of Winsor, and for his protection, the money secured thereby was to be turned over to him only in case he earned the commission in accordance with the precise terms of his agreement with the defendant. When we turn to that agreement we find that the payment of Winsor's commission depended upon Kellogg's "carrying out completely the said proposed sale"—a provision inserted in the instrument at the defendant's special instance. In other words, the agreement makes it plain that Winsor was to be paid a commission only in the event that the defendant received the full purchase price for which it agreed to sell the lands, and that he was to be paid out of the money so realized and not otherwise. If it had been the intention that the shares of stock were earned by Winsor when the land was deeded to the F. P. Kellogg Lumber Company, there would have been no occasion to place the same in escrow. They would have been delivered to Winsor.

Now, it is clear that the sale never was completed. It is true that title to the lands was transferred from the defendant to a corporation of which the defendant owned the stock, but that was not a sale of the lands. It was but a step preparatory to a sale. As owner of the stock of the corporation the defendant still owned the lands. The sale would have been completed and perfected only when the land was paid for; that is to say, when Kellogg, the proposed purchaser, paid the defendant the agreed purchase price for the stock. That agreement was never carried out. On February 8, 1913, Kellogg abandoned the effort to purchase the stock, and the agreement of November 29, 1911, was surrendered and canceled. The defendant never re-

ceived a dollar in consideration for a sale of its land, and it never became liable to Winsor for the payment of a commission.

The judgment is affirmed.

SIERRA LAND & LIVE STOCK CO. v. DESERT POWER & MILL CO.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916.)

No. 2619.

1. APPEAL AND ERROR ⚡1008—REVIEW—SUFFICIENCY OF EVIDENCE TO SUPPORT GENERAL FINDING.

Under Rev. St. § 700 (Comp. St. 1913, § 1668), providing that, when an issue of fact in any civil cause is tried and determined by the court without a jury, the rulings of the court in progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed upon writ of error or appeal, and that when the finding is special the review may extend to a determination of the sufficiency of the facts found to support the judgment, an appellate court cannot, on writ of error, inquire into the sufficiency of the testimony to support a general finding, where at the close of the testimony there was no application for a declaration of law that upon the whole case the finding should be for plaintiff or for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. ⚡1008.]

2. APPEAL AND ERROR ⚡987—REVIEW—SUFFICIENCY OF EVIDENCE TO SUPPORT GENERAL FINDING.

The parties to an action tried without a jury cannot by consent or stipulation authorize the Circuit Court of Appeals to review the sufficiency of the evidence to support a general finding, as the authority of that court is regulated by statute, and its jurisdiction cannot be enlarged or extended by consent or stipulation of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. ⚡987.]

In Error to the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

Action by the Sierra Land & Live Stock Company against the Desert Power & Mill Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Sweeney & Morehouse, of Reno, Nev., for plaintiff in error.

Hugh H. Brown and J. H. Evans, both of Tonopah, Nev., for defendant in error.

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

RUDKIN, District Judge. This was an action to recover damages for the loss of a band of sheep, poisoned by cyanide which escaped from the milling and reduction works of the defendant in error, near the town of Millers, in Esmeralda county, Nev. By stipulation of parties the case was tried by the court without the intervention of a jury. The court made the general finding, "And the court, having fully considered the premises, finds the issue in favor of the defend-

ant," and entered a judgment accordingly. To reverse this judgment the present writ of error was sued out.

[1] Section 700 of the Revised Statutes (Comp. St. 1913, § 1668) provides:

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Under this section it has been repeatedly held by the Supreme Court that an appellate court cannot, on writ of error, inquire into the sufficiency of the testimony to support a general finding. Thus in *Dirst v. Morris*, 14 Wall. 484, 491 (20 L. Ed. 722), the court said:

"But, as the law stands, if a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence."

In *Insurance Co. v. Folsom*, 18 Wall. 237, 254 (21 L. Ed. 827), the court said:

"Like a special verdict, a special finding furnishes the means of reviewing such questions of law arising in the case as respect the sufficiency of the facts found to support the judgment; but where the finding is general the losing party cannot claim the right to review any questions of law arising in the case, except such as grow out of the rulings of the Circuit Court in the progress of the trial, which do not in any proper sense include the general finding of the Circuit Court, nor the conclusions of the Circuit Court embodied in such general finding, as such findings are in the nature of a general verdict and constitute the foundation of the judgment."

To the same effect, see *Cooper v. Omohundro*, 19 Wall. 65, 22 L. Ed. 47.

In *Stanley v. Supervisors of Albany*, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 1238 (30 L. Ed. 1000) the court said:

"And the first assignment of error is that the court erred in deciding that the plaintiff failed to establish the allegations mentioned, and the greater part of the oral argument of the plaintiff's counsel and of his printed brief was devoted to the maintenance of this proposition, which is nothing more than that the court below found against the evidence—a question not open to review or consideration in this court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. This limitation upon our revisory power on a writ of error in such cases is by express statutory enactment. Act March 3, 1865, § 4, 13 Stat. c. 86; Rev. Stat. § 700."

In *Lehnen v. Dickson*, 148 U. S. 71, 73, 13 Sup. Ct. 481, 482 (37 L. Ed. 373), after quoting section 700 of the Revised Statutes, *supra*, the court said:

"Under that, the rulings of the court in the trial, if properly preserved, can be reviewed here, and we may also determine whether the facts as specially found support the judgment; but if there be no special findings, there can be no inquiry as to whether the judgment is thus supported."

Notwithstanding these positive declarations by the Supreme Court, it has been held that the sufficiency of the testimony to support a gen-

eral finding may be brought before the appellate court for review by an application to the trial court for a declaration of law that upon the whole case the finding should be for the plaintiff or for the defendant, as the case may be, and an exception to the refusal to grant the application, after the analogy of a request for a peremptory instruction at the close of the testimony where the case is tried before a jury. Thus, in *Dunsmuir v. Scott*, 217 Fed. 200, 202, 133 C. C. A. 194, 196, after quoting the language of Mr. Justice Bradley in *Dirst v. Morris*, *supra*, this court said:

"The question whether or not, at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action is a question of law which arises in the progress of the trial. Where the trial is before a jury that question is reviewable on exception to a ruling upon a request for a peremptory instruction for a verdict. Where the trial is before the court, it is reviewable upon a motion which presents that issue of law to the court for its determination at or before the end of the trial. In the case at bar there was no such motion, and no request for a special finding. We are limited, therefore, to a review of the rulings of the court to which exceptions were reserved during the progress of the trial."

Inasmuch as the finding of the court stands upon the same footing as the verdict of the jury, the wisdom and justice of this rule is apparent. But, conceding that the sufficiency of the testimony to support a general finding may be brought before the appellate court for review in this manner, no such motion or application was made to the trial court in the case at bar, and no exception was reserved to the refusal of the court to so rule; and we are therefore limited to a review of such rulings as were excepted to during the progress of the trial. No ruling of that kind has been called to our attention by the assignments of error, and the judgment should be affirmed.

[2] This particular objection was not urged by the defendant in error, and it was stated on the oral argument that the parties had agreed to submit the case on its merits, regardless of the state of the record or of technical objections thereto. The objection in question is not a technical one, however. The authority of this court as an appellate tribunal is regulated by the acts of Congress, and its jurisdiction cannot be enlarged or extended by consent or stipulation of parties. But even if we were to waive all these objections it would not avail the plaintiff in error. The opinion of the court shows that the general finding for the defendant was based upon the ground that the proximate cause of the injury and loss was the want of ordinary care on the part of those in charge of the band of sheep, and this conclusion finds ample support in the testimony.

Finding no error in the record, the judgment is affirmed.

THE HARDY.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916.)

No. 2618.

1. TOWAGE ⚡4—DUTIES OF TUG TO TOW.

A vessel which undertakes a towing service is not an insurer of the safety of the tow, and meets the full measure of its obligation if it is reasonably adequate to the towing service, and is in charge of men who possess and exercise the skill and care ordinarily exercised by those having experience in like service.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 4; Dec. Dig. ⚡4.]

2. TOWAGE ⚡15—LOSS OR INJURY TO TOW—BURDEN OF PROOF.

Where the master of a vessel undertaking a towing service is experienced and competent, much must be left to his judgment and discretion, and the burden rests on the owner of the tow to prove that loss or injury thereto resulted from negligence on the part of the tug.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 30-38; Dec. Dig. ⚡15.]

3. ADMIRALTY ⚡118—APPEALS—REVIEW—QUESTIONS OF FACT.

In admiralty cases, when questions of fact are dependent upon conflicting testimony, the decision of the District Judge, who had the opportunity to see the witnesses and judge of their appearance, manner, and credibility, will not be reversed, unless it clearly appears to be against the weight of the evidence.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758-775, 794; Dec. Dig. ⚡118.]

Appeal from the District Court of the United States for the District of Oregon; M. T. Dooling, Judge.

Libel in admiralty by K. V. Kruse and another, copartners doing business as the Kruse & Banks Shipbuilding Company, on behalf of themselves and their underwriters, against M. J. Savage and others, claimants of the American steamer Hardy, her tackle, apparel, and furniture. From an adverse decree, the libellant appeals. Affirmed.

The steamer Hardy undertook to tow a barge for the appellants from Coos Bay to San Francisco. The steamer left Coos Bay with the barge in tow about 5 p. m. on September 5, 1913. The barge was equipped with a proper light and sufficient oil, but there was no one on board. At about 6:15 p. m. on that day, as the steamer and tow were at the outer bar, the light went out. The light was not relit, for the reason, as stated by the master of the steamer, that to attempt to do so would have been to endanger the lives of his men. At some time between 12 and 12:40 a. m. on September 7, 1913, the hawser parted, and the barge went adrift. The loss was discovered at 12:40 a. m., and the steamer was turned about and headed north, and she proceeded slowly while keeping a lookout for the barge. At about 6 a. m. of September 7th, the steamer was headed south, and a search was made for the barge. The steamer went a zigzag course, and the search was interrupted to some extent by fog. About 11:15 a. m. the steamer, being short of fuel, abandoned the search, and proceeded on her way, and arrived at San Francisco September 8th. The barge drifted ashore, and was salvaged by another steamer for \$1,000. The court below dismissed the appellant's libel, which was brought to recover the amount paid in salvage and repairs. The libel alleged that the tug and her

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

officers and crew were negligent in providing a defective rope for towing the barge, in not discovering that the barge was adrift until a long time after the breaking of the rope, in not making a diligent or sufficiently long search for the barge, and in allowing the light on the barge to go out, and not again lighting the same. The court found (1) that the appellants furnished the hawser to the steamer for the purpose of towing the barge, and that the steamer was not responsible for the parting of the hawser, "which was the real cause of the loss of the barge;" (2) that it was for the captain of the Hardy to determine whether or not the light on the barge could have been relighted without danger of losing his men in the attempt, and that the evidence shows that the possibility of such danger was so great that the action of the captain in that regard would not be reviewed; (3) that the loss of the barge under all the circumstances was discovered as seasonably as could reasonably be expected; (4) that the Hardy was not negligent in failing to keep up a longer search for the barge.

E. B. McClanahan and S. H. Derby, both of San Francisco, Cal., for appellants.

W. S. Andrews, of San Francisco, Cal., for appellees.

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

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] There is no dispute upon the law of the case. A vessel which undertakes a towing service is not an insurer of the safety of the tow. It meets the full measure of its obligation if it is reasonably adequate to the towing service, and is in charge of men who possess and exercise the skill and care ordinarily exercised by those having experience in like service; and where the master is shown to have been experienced and competent, much must be left to his judgment and discretion, and the burden rests on the owner of the tow to prove that loss or injury thereto resulted from negligence on the part of the tug. *The Syracuse*, 12 Wall. 167, 20 L. Ed. 382; *The Cayuga*, 16 Wall. 177, 21 L. Ed. 354; *The Margaret*, 94 U. S. 495, 24 L. Ed. 146; *The Adelia*, 154 U. S. 593, 14 Sup. Ct. 1171, 21 L. Ed. 672.

[3] The court below found upon testimony, the most of which was taken in open court, that the steamer was not responsible for the parting of the hawser, and that it was for the captain of that vessel to determine whether the light on the barge could have been relighted without danger of losing his men in the attempt, that his decision in that regard should not be reviewed, that the loss of the barge was discovered as seasonably as could reasonably be expected, and that the Hardy was not negligent in failing to keep up a longer search for the barge. While there are many features of the evidence which tend to discredit the testimony of the officers and men of the Hardy, and tend to prove that on the night of the 5th or during the daylight of the 6th the lantern on the barge might have been lighted without danger to the men, and that in fact no watch was kept of the barge on the night of the 6th, we are not convinced that the record is such as to take the case out of the well-settled rule, which has been followed by this and other courts, that in cases on appeal in admiralty, when questions of fact are dependent upon conflicting testimony, the decision of the District Judge, who had the opportunity to see the wit-

nesses and judge of their appearance, manner, and credibility, will not be reversed, unless it clearly appears to be against the weight of the evidence. *The Alijandro*, 56 Fed. 621, 6 C. C. A. 54; *Perriam v. Pacific Coast Co.*, 133 Fed. 140, 66 C. C. A. 206; *Peterson v. Larsen*, 177 Fed. 617, 101 C. C. A. 243.

The decree is affirmed.

ROBBINS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 21, 1916.)

No. 2635.

1. POST OFFICE \S 49—CRIMINAL OFFENSES—ADMISSIBILITY OF EVIDENCE.

On a trial for sending an indecent letter through the mails, in violation of Rev. St. \S 3893, as amended by Act Sept. 26, 1888, c. 1039, 25 Stat. 496, evidence as to the reputation of the addressee for chastity in the community in which she lived was properly excluded, as the statute has regard only to the character of the letter, and not to the character of the person to whom it is addressed.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. $\S\S$ 84-86; Dec. Dig. \S 49.]

2. CRIMINAL LAW \S 1171—APPEAL—HARMLESS ERROR.

On a trial for sending an indecent letter through the mails, where the jury's finding that the letter in question was of the character denounced by the statute was necessarily based upon the nature of the letter itself, while its finding that defendant wrote and mailed the letter rested upon evidence so clear and convincing that the jury could not have determined otherwise than as they did, defendant himself admitting that he wrote a portion of another letter, which was clearly and obviously written by the same hand, the misconduct of the district attorney in making certain remarks in the presence of the jury could have had no effect on the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 3126, 3127; Dec. Dig. \S 1171.]

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

E. E. Robbins was convicted of an offense, and he brings error. Affirmed.

Black & Clark, of San Francisco, Cal., for plaintiff in error.

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

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

GILBERT, Circuit Judge. [1] The plaintiff in error was convicted on an indictment which charged him with sending through the mails an indecent letter, in violation of section 3893, Revised Statutes, as amended by 25 Stat. 496. One of the assignments of error is that the trial court refused to permit the plaintiff in error to show the reputation of the prosecuting witness for chastity in the community

in which she lived. The ruling of the District Court was clearly correct. The statute has regard only to the character of the letter, and not to the character of the person to whom it is addressed. See *United States v. Musgrave* (D. C.) 160 Fed. 700, and cases there cited.

[2] Several assignments of error are based on the conduct of the District Attorney in making certain remarks in the presence of the jury, to which exception was duly taken. We find it unnecessary to discuss these assignments, for the reason that the alleged misconduct could have had no effect upon the jury's verdict. In arriving at their verdict the jury necessarily made two findings: First, that the letter was of the character denounced by the statute; and, second, that the plaintiff in error wrote it and mailed it. The first finding was based necessarily upon the nature of the letter itself. The second rested upon evidence so clear and convincing that the jury could not have determined otherwise than as they did. The plaintiff in error denied writing the letter; but he admitted writing a portion of another letter which was so clearly and obviously written by the same hand that expert testimony, although it was adduced, was unnecessary to show that the handwriting was identical. No possible misconduct on the part of the district attorney could have affected the conclusion which the jury was compelled to reach, and it is unnecessary to consider the matter, further than to say, as was said by the court below, that the district attorney's remarks were "hardly commendable."

The judgment is affirmed.

In re MURPHY.*

RYAN et al. v. MURPHY.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916.)

No. 2632.

BANKRUPTCY ⚡463—APPEAL—RECORD—MATTERS PRESENTED FOR REVIEW—
"JUDGE."

Bankr. Act July 1, 1898, c. 541, § 18d, 30 Stat. 551 (Comp. St. 1913, § 9602), provides that, if the bankrupt or any creditor shall appear and controvert the facts alleged in a bankruptcy petition, the judge shall determine the issues presented and make the adjudication, or dismiss the petition. Section 1 (16) (section 9535) defines "judge" as meaning a judge of a court of bankruptcy, not including the referee. General Order No. 36 (89 Fed. xxxvi, 32 C. C. A. xxxvi), provides that appeals from a court of bankruptcy shall be regulated, except as otherwise provided in the Bankruptcy Act, by the rules governing appeals in equity in the courts of the United States. *Held*, that an order or decree denying an adjudication and dismissing an involuntary petition could not be reviewed, where the testimony returned by the referee with his report was not in the transcript on appeal, either in form or in substance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 926; Dec. Dig. ⚡463.

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

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

*Rehearing denied May 8, 1916.

Appeal from the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

Proceeding by James R. Ryan and another against Herman Murphy to have Murphy adjudged a bankrupt. From an order or decree (228 Fed. 1018), denying an adjudication and dismissing the petition, the petitioning creditors appeal. Appeal dismissed.

Daniel O'Connell, of San Francisco, Cal., for appellants.

Herman Murphy, of San Francisco, Cal., pro se.

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

RUDKIN, District Judge. This is an appeal from an order or decree denying an adjudication in bankruptcy and dismissing the involuntary petition. The transcript on appeal consists of (a) report of the referee recommending a dismissal of the petition or a stay of proceedings; (b) exceptions to that report; (c) opinion or decision of the court denying the adjudication and dismissing the petition; (d) petition for an appeal, and order allowing same; (e) assignments of error; (f) statement or record on appeal; (g) order approving record or statement on appeal, and various other orders relating to the removal of the cause and the filing of the record in this court. That part of the transcript styled "Record on Appeal" sets forth the contentions of the respective parties, but contains none of the testimony. Section 18d of the Bankruptcy Act provides that:

"If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes the adjudication or dismisses the petition."

Section 1 (16) of the act provides that:

"'Judge' shall mean a judge of a court of bankruptcy, not including the referee."

And referring to these provisions in *Re King*, 179 Fed. 694, 103 C. C. A. 240, the court said:

"It requires, therefore, that the testimony be weighed and considered by a District Judge, and that his personal judgment be exercised in the determination of such issue, leaving no authority for delegation of either duty to a ministerial officer."

When the court below denied the adjudication and dismissed the petition, it was in possession of the entire case, and had before it, not only the report of the referee, which is contained in the record, but the 459 pages of testimony referred to therein and returned therewith as well. No part of that testimony has been brought to this court, either in form or in substance. Order No. 36 of the General Orders in Bankruptcy (89 Fed. xxxvi, 32 C. C. A. xxxvi) provides that:

"Appeals from a court of bankruptcy to a Circuit Court of Appeals, or to the Supreme Court of a territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in equity in the courts of the United States."

Under this provision it is manifest that this court cannot review or reverse the order of the District Court without having before it the testimony or record upon which that court acted.

The appeal must therefore be dismissed; and it is so ordered.

SAFETY CAR HEATING & LIGHTING CO. v. UNITED STATES LIGHT & HEATING CO.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 97.

PATENTS 328—**INVENTION**—**ELECTRIC CAR-LIGHTING SYSTEM.**

The Thompson patent, No. 926,518, for a car axle lighting system, *held void for lack of patentable invention, in view of the prior art.*

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

Suit in equity by the Safety Car Heating & Lighting Company against the United States Light & Heating Company. Decree for defendant, and complainant appeals. Affirmed.

This cause comes here upon appeal from a decree dismissing the bill in a suit for alleged infringement of patent. The patent sued upon is No. 926,518, issued June 29, 1909, to W. I. Thompson, for a lighting system. The system is adapted to car axle lighting, wherein the electricity which supplies the lamps is generated by a dynamo mounted upon or driven from the car axle. Judge Hazel's opinion will be found in 222 Fed. 320.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, H. S. Duell, and L. A. Watson, all of New York City, of counsel), for appellant.

W. C. Jones, of New York City, Arthur B. Seibold, of Chicago, Ill., and Charles Oakes, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The operation and advantages of the system are thus stated: The dynamo gives its output at various train speeds; the current passes through a circuit in which are the lamps, and also a storage battery to keep the lamps supplied when the dynamo is not running. In the same circuit there is a switch and also the coils of a solenoid. A train does not always run at the same speed, therefore there must be some method of regulation when the speed increases above normal. The coils of the field magnet of the dynamo are shunt wound; within the circuit formed by the leads from the field magnet there is a rheostat of the type which is known as a carbon-pile resistance. The bottom plate of this pile resistance is fixed; the upper

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

plate is movable, so as to regulate the strength of the resistance. An insulated arm projecting from the upper plate is connected, mechanically, not electrically, with one arm of a pivotally mounted lever. That lever, properly equipped with a retractile spring (and preferably with a dashpot), has its other arm mechanically connected with the plunger of the solenoid. As increased speed of the car increases the current in the main circuit, the plunger of the solenoid is drawn down, and, in consequence, the insulated arm and upper plate are drawn up, thus diminishing the pressure on the pile of carbon disks and increasing the resistance of the field of the dynamo. The specification says:

"The variations of resistance of the pile of carbon disks to slight variations in pressure are so great that a very slight movement of the solenoid will be sufficient to react strongly upon the dynamo and to compensate for the increase in speed. At low train speeds the carbons will be pressed together by the action of the retractile spring (owing to the rise of the plunger and the consequent depression of the arm and top plate), thus enabling the dynamo to build up rapidly.

"It will be apparent that this system provides means whereby a source of energy adapted to supply a current for any desired use may be caused to react upon itself in order to regulate the amount of energy supplied thereby tending always to bring the output of such energy to normal. The advantages of such self-regulatable system, both general and specific, will be clear without elaboration. Certain advantages to be noted, however, reside in the fact that with the proposed system I am enabled to regulate satisfactorily the output of a shunt wound dynamo, with a field produced by a single circuit only, thereby doing away with the complicated wiring of other systems, wherein the field is a compound one embodying differential series coils and the like. This facility of regulation is due, among other things, to the peculiar advantages of the variable resistance device which I use, and to the fact that the shunt circuit in which said resistance is introduced is taken off from the main circuit, as shown, at points nearer to the dynamo than the point at which the solenoid is introduced in the main circuit, so that the field circuit may be said to be independent of the controlling device in the main circuit."

The claims are:

"1. In combination, a shunt wound generator having serially included in its field circuit a plurality of contacting electrodes and positively acting electromagnetic means controlled by the current output of the generator for varying the pressure with which said electrodes contact.

"2. In a car axle lighting system, in combination, a dynamo adapted to be driven from a car axle, said dynamo having a single field circuit shunt wound from the main circuit, a variable resistance device included in said field circuit, said device embodying a material whose resistance varies with pressure, a controlling device, in series with the main circuit of the dynamo, said controlling device adapted to be operated by variations of current in said main circuit, and connections from said controlling device for varying the pressure on said resistance device.

"3. In a car axle lighting system, in combination, a dynamo adapted to be driven from a car axle, said dynamo having a field circuit shunt wound from the main circuit, a series of carbon disks interposed in said field circuit, a controlling device adapted to be actuated by variations in current in the main circuit of the dynamo and in series therewith, a connection between said controlling device and said disks such that pressure on said disks is decreased as the current in the main circuit increases, and a spring acting upon said disks in opposition to said controlling device to increase the pressure thereon.

"4. In a car axle lighting system, in combination, a dynamo adapted to be driven from a car axle, said dynamo having a field circuit shunt wound from the main circuit, a series of carbon disks included in said field circuit, a solenoid in series with the main circuit of the dynamo and independent of the

field circuit, a connection between the plunger of said solenoid and said disks, such that the pressure upon said disks is decreased as the current in the main circuit increases, and a spring adapted to act upon said disks to increase the pressure thereon in opposition to said solenoid."

Claim 1, like the others, must be limited to a dynamo in a lighting system driven from a car axle. It is quite evident from the patent and also from the record of the prior art that the device we have here is a specific one. Its elements are these: (a) An axle-driven generator, (b) having a shunt field winding; (c) a rheostat of the kind known as carbon-pile resistance; (d) such resistance being in series with the shunt field winding; (e) control of such resistance automatically by a solenoid; (f) the plunger of which is connected positively and directly with the movable part of the resistance; (g) the solenoid being in series with the current to be regulated. The testimony was taken by deposition; it is voluminous, and accompanied with many documents from the prior art. The District Judge has discussed the testimony and the prior art at considerable length. Inasmuch as we are generally in accord with him, it will be unnecessary to go over the ground which he has covered.

Defendant opens his brief with the assertion that what is known as the Moskowitz commercial system of car lighting "completely anticipates" the patent in suit and that the "claims in suit read upon" this Moskowitz structure. Examination of the record, however, shows that these words, "completely anticipates," are used in the sense frequently attributed to them by experts, who when they find a specific combination of enumerated elements in the claim of a patent, and also find the same combination with one change of element in the earlier art, insist that the one combination anticipates the other, on the theory that any one skilled in the art with the earlier combination before him would naturally make the single change required to produce the later combination. This is a confusion of two defenses, which are quite distinct—anticipation and lack of patentable novelty. This very Moskowitz device differs from that of the patent in element (d) above recited. In the Moskowitz device the carbon pile resistance is *in shunt with the shunt field winding*, while in the patented device it is *in series with the shunt field winding*. In like manner another device from the prior art has the combination of specific devices claimed by Thomson, (a) to (g) supra, with the single exception of (c); its rheostat being of the type known as "wire" or "step by step" resistance. Now it may be that changes of this sort will sometimes not involve patentable invention; it may be held that there was no invention required in changing one well-known type for another, or in locating a part differently relatively an electric circuit; but in the face of such changes it is incorrect to say that the one combination "completely anticipates" the other.

Judge Hazel evidently reached the same conclusion, for he did not defeat the patent because the prior art showed an anticipation, but because he was satisfied that invention could not be predicated in placing carbon-pile resistance in series with the shunt field winding instead of in shunt therewith, as in the prior Moskowitz structure. He says:

"My conclusion is that at the date of filing of the application in suit it did not involve any invention to place the carbon pile in series with the field winding, which was an essential feature of complainant's car-lighting system."

That is the fundamental question in the case, and, as so frequently happens with electrical patents, it is a difficult question for a court to decide. On that question the experts are quite positive in support of their respective sides, and there is not much to choose between their arguments. Results accomplished by a change of some element, seemingly slight and unimportant, will sometimes throw much light on a situation otherwise obscure. The District Judge expresses this in his opinion:

"If the proofs substantiate plaintiff's claim (that the patentee remedied defects and inefficiencies and did) solve the problem of overcoming difficulties in the way of efficient car lighting, then beyond doubt his improvement is of great merit and value and the protection of the patent laws should not be withheld from him. * * * If it were proven that Thomson succeeded where Moskowitz failed and made railroad car lighting systems more efficient by removing objectionable features, such as fluctuation of the current and constant flickering of the lights, then his patent was not devoid of merit, but was of superior value and entitled to corresponding praise and the protection from appropriations by others notwithstanding Ferrand's suggestions."

Instances are not infrequent—there have been several before this court—where what is seemingly a slight change of structure runs quickly into great demand, while alongside of it older systems, at one time selling readily, gradually sink into insignificance. The plaintiff contends that we have here a conspicuous instance of such commercial success; he has set forth the evidence quite fully, and represented its results by a chart. Considering merely the figures of sales and machines in use, the showing is a strong one. The commercial date of the Thomson device may be taken as 1905. In 1900 a device known as the Consolidated, employing a wire rheostat, was on the market. From 1900 to 1903 it sold 400 equipments; from 1903 to 1905, 800 equipments. From that date on their sale dwindled gradually, so that from 1909 to 1913 only 300 equipments were sold, 50 of them only in 1911, 1912, and 1913. In 1903 the Adams & Westlake device, also having a wire rheostat, was put on the market. It seems to have been well received for automobile cars; 4,000 equipments therefor having been sold. For railroad cars its sale has always been small, of late years gradually diminishing substantially to zero—manufactured only when specially ordered. The Moskowitz commercial type, in use prior to Thomson, began sales about 1903. It was the type which differed from Thomson by having the resistance in shunt with the shunt field instead of in series therewith. Sales began about 1903, they increased slowly to not more than 100 in one year (1908) and then gradually fell off to an insignificant amount, although, of course, some of those already sold were still in use. Contrasted with these are two other types. One is the Safety Company's device, marketed under the patent to Thomson, of which it is the assignee; the other is the modified Moskowitz, in which the location of carbon rheostat has been changed from shunt to series. The sales of the Safety type, beginning in 1905, rose steadily and rapidly year by year until in 1913 (when the testimony closed) 500 were sold and there were

2,300 in use. The sales of the modified Moskowitz type began in 1910 and increased with greater rapidity; in 1913 the sales were 1,500 and the total number in use was 3,000.

It may be noted, also, that sales of equipment of this sort are not made to ordinary individual consumers, where business enterprise and ingenious advertising are sometimes the inducing cause of sales and a purchaser buys something about which he knows little, because he is confronted by an alluring description of its merits every time he takes a seat in a trolley car. The purchasers are mainly railroad corporations, which have well-organized equipment and supply departments, with skillful and experienced engineers to study carefully the merits of every new device they are invited to purchase. The showing is a strong one; the dominant success of the two types, "Safety" and "improved Moskowitz," has reduced the sales of competing systems to insignificance. Of course there are still thousands of the other types in existence; they last some years and with the aid of repair parts may be kept going, without the expense of scrapping them for something better. But the record does seem to indicate that for new equipment the two types, "Safety" and "improved Moskowitz," dominate the field. If this were all, one might feel convinced that Thomson's new combination solved existing and baffling problems and was promptly recognized by those skilled in the art as supplying a long-felt want.

But there are two weak points in the argument. The sales of the type known as "improved Moskowitz" greatly exceeds those of plaintiff's "Safety" type. That the "improved Moskowitz" type infringes the Thomson patent we have no doubt; it has all the specific elements, (a) to (g), supra, of the combination, but it has other things besides, independent of and additional to the combination, some of which other devices the Thomson patent does not disclose. This is well shown in a simplified drawing of defendant's equipment (Exhibit Kennelly's Simplified Drawing), in which the parts making up the combination of Thomson's patent are printed in black and the parts not included in such combination are printed in red. The red parts are substantially as numerous as the black. How much of these rapidly increasing sales from 1910 to 1913 are due to the presence of the black parts alone, and how much to the presence of the red parts, we have no means of knowing.

Moreover, the "Safety" type, the sales of which have also increased since 1905, is not now exclusively the combination of the patent. Added elements were introduced in 1910 and 1912, independent of and additional to the elements, (a) to (g), of the specific claims of the patent. It must be assumed that these added elements in some way improved the equipment or they would not have been introduced. To what extent the sales of "Safety" type equipment are due to the presence of these added elements we have no means of knowing.

To sum up, then, the mere change from a resistance in shunt with the shunt field to a resistance in series therewith was a slight one; so also the mere substitution of the well-known carbon-pile resistance for the equally well-known step by step resistance was a slight one.

To one informed of the electrical art merely as a court is, such a change seems one within the ordinary skill of the calling; it so seemed to Judge Hazel and so seems to us. The evidence of the experts as to presence or advance of invention is conflicting and does not clearly establish patentable invention. The test, which not infrequently turns the scale when a court is considering these devices of an obscure art, viz., a measure of success which indicates the solution of a different problem, is not found persuasive. We are not inclined, therefore, to dissent from Judge Hazel's exhaustive and careful discussion of the questions presented.

The decree is affirmed, with costs.

RUUD MFG. CO. et al. v. BELER WATER HEATER CO. et al.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 118.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—WATER HEATER.

The Ruud patent, No. 1,028,284, for a water heater, *held* not anticipated and valid, and claims 2, 3, and 5 infringed; claims 1, 4, and 6 *held* not infringed.

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

Suit in equity by the Ruud Manufacturing Company and another against the Beler Water Heater Company and another. Decree for complainants, and defendants appeal. Affirmed.

This cause comes here upon appeal from a decree finding a certain patent valid and infringed. The patent is No. 1,028,284, issued June 4, 1912, to Edwin Ruud for a water heater. It set forth an apparatus intended to remedy certain defects in a prior water heater for which the same inventor had obtained United States patent No. 903,007, on November 3, 1908. Infringement was charged as to all the six claims of the patent; all were held valid, but infringement was found only as to claims 2, 3, and 5. No cross-appeal was taken from the holding that claims 1, 4, and 6 are not infringed.

The following is the opinion of Learned Hand, District Judge:

It is undoubtedly true that in this art invention has pressed close around Ruud's exact disclosures, and has left very little room for any broad scope of invention. Still the words of the claims are specific, and upon the question of infringement they should be allowed a reasonable interpretation as broad as the prior art will permit. This right is not limited by the fact that the patent has not been commercially exploited. The Paper Bag Patent Cases, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122. In view of the distinction clearly intimated in the claims between a double spring and any other kind of compound or divisible power device, I cannot accept the doctrine of equivalents as applied to claims 1, 4, and 6, and I find that they are not infringed. There remain claims 2, 3, and 5. In claim 2 the words used are "power device," which the water valve "in part" overcomes, while in claim 3 the words are "compound power device," of which "one part" is overcome. Claim 5 is mere-

ly an awkward piece of tautology, restating claim 3. Indeed, I think that there is no reason for distinguishing even between claims 2 and 3; but in view of the distinction attempted to be made I shall consider claim 3. Infringement therefore depends upon whether the defendant's heater has a compound power device closing the valve in opposition to the thermostatic means, and a mechanism which, when the water flows, overcomes one part of this compound power device.

Now, confessedly the spring, 41, of Ellis' patent is a power device which holds the valve closed in opposition to the thermostat, and this power device is overcome by the water piston, 35, when the water flows. Is there anything else which keeps the valve closed, and which the thermostat must overcome to open the valve? What does keep the valve closed when the water piston is moved down and releases it? In Ellis' patent the answer is easy; it is the spring, 9. But there is no such spring in the commercial device, because in it the valve is closed by the gas pressure and by the weight of the valve itself. Of course, we are to disregard the gas pressure, that not being included in the mechanism as described; there remains, therefore, only the weight of the valve.

The defendant argues that the claims clearly intend an element other than the valve proper, since the claims enumerate first the valve as one element and later a separate element closing the valve. To confuse the two into one is to disregard the combination actually prescribed and to substitute another; the weight of the valve is not a separate mechanical element from the valve, since it must have its weight, qua valve, as soon as it is put into the machine. How, then, the defendant says, can there be said to be a second power device, besides the valve, which holds it closed?

This argument is perfectly good if we insist upon a separate material element besides the valve as part of the compound power device; it ceases to be relevant if we look at the actual dynamic relation of the parts when we judge of the power device. For example, if the valve were made horizontal, it would be the same valve, with the same weight, in the same seat; everything would be the same, but the valve would never close if the water piston stuck. This would be so because the valve would not then be a power device closing itself. Its position, its relation to the seat, the direction of its permitted play, together constitute it a power mechanism operating through the force of gravity to close itself as soon as the thermostat has relieved it of pressure. The potential energy of position, which it obtains when raised above its seat, is as truly a reserve of power, the result of the necessary expenditure of energy, as is the reserve of potential energy within the coils of a spring, which is itself the result of the necessary expenditure of energy. Indeed, courts have specifically recognized the equivalence between the two. *Kenny Mfg. Co. v. J. L. Mott Iron Works (C. C.)* 137 Fed. 431, 433. Therefore, I find that the defendant's heater infringes claims 2, 3, and 5, and not claims 1, 4, and 6.

The next question is of invention, upon which the nearest reference is *Shook*, 993,723. This patent was in interference with *Ruud* in the Patent Office and won the claims. The defendant insists that the claims so contested are the equivalents of those in suit and that they are therefore invalid. Now, the controversy in interference was waged chiefly upon the question whether the claims in issue read upon *Shook*. *Ruud* asserted that they did not, because they contained the element "a normally seated valve." The board of examiners, for two appeals were taken, held that the words "normally seated valve" meant that the valve was seated when there were no extraneous controlling means at work. The examiner had drawn the claims, and it was held that they did not mean to describe an apparatus in which the valve was held closed by a compound power device when the water was turned off and the thermostat was cold. Obviously, such must have been the finding, because the *Shook* disclosure has no such structure.

Nevertheless, in the claims in suit this is certainly the meaning of the word "normally." It means that the thermostat tends to open the valve when it is cold, and that it is opposed by two forces which are together stronger than it, but not severally; at least it means that that one is weaker which is left in operation when the water valve is open. *Shook* is not so organized; on the contrary the thermostat, when cold, is not opposed by any power which

affects the valve at all. On the other hand, when hot, the thermostat presses against and overcomes the water valve spring, thus locking the valve, instead of being neutral, as in Ruud or in Ellis. Indeed, the spring, 33, is not necessary at all to the operation of Shook, except that it reinforces the thermostat, which without would have to withstand the whole force of the spring, 41, which would result possibly in rupturing or bending it. Again, the thermostat never overcomes any part of a compound power to open the valve; rather, it overcomes the single power which would otherwise open the valve. Finally, the water valve does not overcome a part of a compound power mechanism for closing the valve, because the mechanism is simple, not compound, when the thermostat is cold, and the water valve does not overcome the joint resistance of the thermostat and the spring, 33, when the thermostat is hot.

Owing to the quite different organization of these two disclosures, they have no correspondence in the claims. There only remains the question of whether it required invention to pass from one to the other. It is true that the patentee has never exploited the patent. Yet the examiner, with Shook before him, gave these claims preference over Shook, and it enjoys whatever presumption arises from that fact. The art, as I have said, is close; much ingenuity has been expended upon the different relations of all these parts, and, while there may be question of the value of the several results, I cannot say that such a new and workable arrangement is not an invention. The complication of the whole machine, the necessity for correlation between all its parts, the number and variety of the considerations which bear upon the result, all forbid an easy assumption that any new and operable adjustment would be within the competence of the routine artisan in the trade. I do not think that Shook constitutes an anticipation.

Walker, 886,100, hardly needs any extended consideration, for it operates in quite a different way from Ruud's patent. No compound power device closes the valve when the machine is "normal" against the thermostat; nor does the water valve overcome one part of the closing device. This was the first single valve heater, and, whether it will operate or not, it is organized quite differently from Ruud's.

In Humphreys there is no compound power device closing the valve, since we are to suppose the end of the rod, 41, to slide freely within the gas valve, pushing it open when the collar engages, but capable of sliding out when the rod is drawn back, after the valve is once seated. It must be admitted that the thermostat would tend to open the valve, if the water valve became stuck while the thermostat was hot and the water then cooled down. However, the water valve does not overcome one part of a compound power device to allow the thermostat to overcome the remainder. The whole plan of organization of the patent is so entirely different that it has no value as a reference upon these claims, limited as they are.

These are the only patents which require any comment, for the art is small. Whether Shook is a better single valve machine than Ruud I need not decide. It seems to me that there may be force in what Wadsworth claims for it—that it allows a lighter thermostat and a nicer adjustment. The fact that it has not been actually exploited does not finally contradict such a conclusion. The two patents are in the same hands, and with the machinery all built for making Shook it may be more economical to make it than to develop a trade upon Ruud. That would be a valid consideration, were Ruud's patent dependent for its existence upon some exploitation, but not as things are. There is nothing in the record to contradict the opinion of Wadsworth that the Ruud patent is an improvement on anything that went before. It may be that Ellis is an improvement upon Ruud.

A decree may pass upon claims 2, 3, and 5. No costs.

Paul M. Goodrich, of New York City, and J. H. Roney, of Pittsburgh, Pa., for appellants.

S. T. Cameron, of Washington, D. C., J. C. Bradley, of Pittsburgh, Pa., and R. L. Scott, of New York City, for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The District Judge found that, although in this art invention has pressed close around Ruud's disclosures, he did set forth a specific combination of parts, which was novel and meritorious. The opinion has discussed the patent, the prior art, and the various questions presented at considerable length, and it seems unnecessary to repeat the discussion here; we are inclined to affirm on his opinion, without taking up in detail the criticisms of that opinion which are found in appellant's brief. Judge Hand may have made some errors in undertaking to paraphrase the respective contention of Shook and Ruud during their long controversy in the interference proceeding in the Patent Office. From the many opinions filed in that interference, however, and from the text of the several claims, it is manifest that such controversy was confined to the generic claims, claims broad enough to cover the specific devices of either party to the controversy. Shook was awarded priority for these generic claims; but it by no means follows that specific claims, which would infringe the generic claims, were not properly granted for the specific improvements therein set forth. The authorities in the Patent Office found patentable invention in these specific claims of Ruud, although no one could embody them in a machine without infringing the broader claims of Shook. Judge Hand reached the same conclusion, and we see no reason to differ from him.

The decision in the Third circuit in the suit brought under the Shook patent against defendant's structure does not affect the question here presented. The device of defendant was properly held to infringe the Shook claims, but the court did not have before it the question whether this device (defendant's) was or was not constructed so as to embody the narrow claims of the Ruud patent here in suit.

Infringement seems to us clear: patents which are not pioneers are nevertheless entitled to a reasonable range of equivalents. The change from a spring to a weight is such a common and well-recognized substitute that it must be held an equivalent, unless the claim is specifically restricted by its language to a device which is moved by a spring—as are claims 1, 4, and 6, which Judge Hand held were not infringed.

The decree is affirmed, with costs.

VICTOR TALKING MACH. CO. v. THOMAS A. EDISON. Inc.
 (Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 115.

PATENTS 328—VALIDITY AND INFRINGEMENT.

The Johnson patents No. 814,786 and No. 1,060,550, for talking machine, construed, and *held* not infringed.

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

Suit in equity by the Victor Talking Machine Company against Thomas A. Edison, Incorporated. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of Learned Hand, District Judge:

Patent 785,362 being withdrawn, I have only to consider patents 814,786 and 1,060,550. The plaintiff urges that the "reorganized" machine infringes claims 16, 23, and 37 of patent 814,786 and claims 39 and 42 of patent 1,060,550. Claim 23 of patent 814,786, if considered verbally, is clearly not applicable. The "bent pivoted tube" is especially designed not "to carry the sound box in substantial alignment with the tapering portion of said arm." Therefore claim 23 may be disregarded at once, because, where so many claims are put into a patent, each element in a given claim must be supposed to be especially necessary to the combination. In such a patent there is little room for latitude of interpretation. In claim 16 the term, "sound tube," used in the claim should be confined to the movable section, 29, which is called a "sound tube" on page 2, lines 49, 50, 64, 70, and 93, and which is used in that sense in a number of the claims. The defendant has no "sound tube," because it has no such element as Johnson's disclosure; the whole organization of its machine being quite different and being derived from another part of the art—that is, from the solid horn art.

If, however, that part of the solid horn which comes above the record be deemed the "sound tube," so that the defendant infringes, then the claim in my judgment presents no patentable novelty over the prior art. I shall assume for the moment, and until I take up claim 37 that the Clark patent, 756,348, and the Lake patent, 1902, British, 785, show a sound tube with an end piece, to which the sound box is rigidly attached, but which itself moves freely upon two axes, vertical and horizontal. The proof of that I shall give later. If so, it was not patentable to give to the sound box that double motion when annexed to a solid horn. Johnson's own patent, 785,363, which was in the office at the same time as the patent in suit, would have been a good reference otherwise upon this very point. Moreover, Johnson's patent, 634,944, shows the horn bent through 90 degrees to meet the sound box with a solid connection. Surely it was not invention to make the straight tube of Clark and Lake into a bent tube like Johnson, 634,944, or to vary the bend into a semicircle, as the defendant has done. In the patent in suit the joint between the sound tube and the semicircular part may well be patentable, but the defendant does not use it, or anything like it. The bend in its tube is a twist in the solid metal, which puts the sound box in the same vertical plane with the horn, when the tube is in a straight line with the horn, but which has no functional significance. At least, I am not willing to attribute invention to that particular feature, and that is the only feature which is new. Therefore I think that claim 16 must be limited to the disclosure as shown, where there is a separated horn of which one part is a sound tube in the sense mentioned in the patent.

Claim 37 contains an element described as "a hollow sound conducting arm movable in a plane parallel with" the record support. The phrase "sound

conducting arm," or "tube," is used in the patent interchangeably with "sound tube" to mean the element, 29, distinct from the horn proper (page 2, lines 27, 41), but it may be (page 1, line 18) that this use is not throughout as consistent as in the case of the "sound tube." However that may be as mere matter of terminology, the element must be limited to the organization disclosed, or it is invalid, because, if the element include the whole of a solid horn, as it must to cover the defendant's device, it is invalid under Clark, supra, and Lake, supra. Here there is a hollow sound conducting arm in the sense of a horn which moves parallel with the record. The sound box has a vertical movement about the horizontal pivot, *i*, which permits the box to move from or to the record independently of the horn, sufficiently to remove the stylus. However, the plaintiff urges that, as the Clark and Lake patents are clearly for a feed machine, the sound box cannot, therefore, move freely laterally across the record, as the defendant's does and as the plaintiff's does. That in all feed machines there must be some play, which permits a slight amount of accommodation to the grooves of the record, all agree. The whole phonograph art shows this; but it is urged with some plausibility that such slight accommodation as this should not be confounded with a deliberate adaptation for tracking through the guidance of the record alone. Hence it is insisted that patents like Von Madaler, 1899, British, 23,497, and the MacDonald patents, are not applicable, and that there must be understood in the patent in suit a machine made like the original Berliner machine, where the stylus drifts freely in a lateral plane.

The organization of Clark's machine leaves no doubt in my mind that a lateral movement was contemplated about the vertical pivot, *j*, within the sleeve, *m*. Figures 5 and 9 show how this was to be done; the pin, *j*, being that on the upper end of which the guide arm, *D*, was fastened. The disclosure (page 1, lines 45-70) leaves no doubt as to the patentee's purposes; the phrase "universal joint," line 60, being wholly unambiguous. Just how much play was permitted depended upon the relative lengths of *m* and *k* within the joint and of their difference in caliber, but the degree of motion is not a patentable detail. The fact that the defendant's universal joint is a ball and socket is irrelevant.

Lake's patent, 1902, British, 785, illustrates precisely the same thing and quite as clearly, not, as the plaintiff thinks, confusedly. Thus the patentee says (page 5, lines 1-3) that the device "permits a very slight motion in the horizontal direction to the tubes of the diaphragm as arranged in Figures 15 and 16. This horizontal movement is just sufficient to permit the ball to follow smoothly the path of the spiral groove." All the defendant has done is to allow this play in a "horizontal direction" to be large enough "to permit the ball [stylus] to follow smoothly the path of the spiral groove." The fact that it allows the stylus to follow a spiral groove, which was of altogether different threading from that which the feed was meant to accommodate, cannot have any bearing upon patentability. The means are shown, and all that need be done is to proportion the parts *m* and *k*, so as to allow enough play to accommodate for whatever the total difference is between the feed and the record. No patent can reside in the mere size of these parts. Unless, therefore, claim 37 is limited to the disclosure, it will meet these two patents and it will be invalid. Therefore I find no infringement of patent 714,856.

Patent 1,060,550 was in the office more than 10 years, and the claims in suit were interjected into the application after the patent had been once allowed, and after the defendant's machine had appeared upon the market. Just how it can happen that a patentee can hold an invention secreted for so long, and can then adapt it so as to cover the subsequent art, does not appear. The result is, assuming that the claims do not constitute a new invention, that the patentee has got from 8 to 9 added years to his monopoly from the time when he would otherwise have been obliged to leave the art unhampered. To let him reserve his patent till the trade independently develops, and then to pounce upon it, for a full term, would seem to violate the conditions upon which his grant depends, and to convert the system into a mere means of checking industry. This is especially true where, as here, a fundamental patent like the Berliner protected the whole invention until 1912. The case certainly suggests a purpose to monopolize that invention still further by re-

servicing in the Patent Office patents upon other similar machines known long before. Whether this be true or not, the practice is so obviously mischievous that the courts should discourage it as much as possible, as well as the practice which permits 48 claims upon a simple and perfectly obvious machine like this. Such claims violate the very purpose of any claims at all, which is to define the forbidden field. In such a waste of abstract verbiage it is quite impossible to find any guide. It takes the scholastic ingenuity of a St. Thomas with the patience of a yogi to decipher their meaning, as they stand.

Claim 39 is certainly not infringed because the tapering sound amplifier has no "free swinging movement." On the contrary, it is rigidly controlled during its operation by the feed mechanism. The disclosure is of a freely floating horn, and it is only a literal reading of the claim which can cover any part of the "reorganized" machine but the little adjunct tube which carries the sound box, about which more in a moment. If, however, we disregard the limitation of the claim, and consider it as covering the tapering portion, we find that portion anticipated by Jeffries, 1900, British, 16,897, Von Madaler, 1899, British, 23,497, and Lake, *supra*, in all of which a tapering horn moves exactly as the tapering part of the defendant's horn moves in the "reorganized" machine and has a sound box which can be raised up and down into and out of co-operation with the record. Therefore the claim cannot safely be allowed an expansion which it would, as matter of interpretation, be absurd to permit; that is, to disregard the freely swinging movement. If, on the other hand, one were to disregard the other element of the claim—i. e., the taper in the arm—and apply it to the adjunct tube, which swings freely, one would get no further than Lake, *supra*, which, as I have shown at length, has a free swing in all directions, dependent in amount upon the proportion of the elements, *m* and *k*. Therefore, even with a latitude of interpretation which would be wholly unwarranted in view of patent as a whole, the claim cannot be regarded as infringed.

Claim 42 differs, in that the element of free swing is eliminated and the condition of parallel motion is substituted. This difference makes the claim more verbally applicable to the defendant's "reorganized" machine than claim 39, though here, too, the disclosure must be disregarded altogether. If, however, the claim be interpreted to cover a feed control tapering horn, then Von Madaler, *supra*, and Lake, *supra*, at once become good references because the tapering part of the defendant's horn is under feed control like them. If, again, as in claim 39, the taper of the horn be disregarded, notwithstanding the words of the claim, and it apply to the adjunct tube, then Lake, *supra* is as good a reference as upon claim 39. The only change in consideration of these two claims is that Jeffries *supra*, does not apply to claim 42.

It hardly seems necessary to consider the defendant's "normal" machine, except to note how far beyond any possible scope of the disclosure the plaintiff is willing to press the literal interpretation of the claims.

Blagden, 671,305, does not seem to me to be apposite to this patent, because the member which moves laterally parallel to the record is not the tapering horn. This patent is derived from the broken horn art, not from the solid horn. Edison's original patent does not seem to me very relevant either to claim 39 or 42. In all this art there was no room for any great pioneer invention in the mere relations of the horn to the sound box or its connections. The great invention was the floating of the stylus upon the face of the record, and that was Berliner's discovery. A mere glance at the defendant's machine shows that its original organization proceeded upon wholly different lines. When the Berliner patent expired, I see no reason in law or morals why they should not have availed themselves of an attachment of the floating sound box type to play Berliner records in the Berliner fashion. They, with the rest of the world, were the beneficiaries of that disclosure. While the floating sound box was somewhat crudely devised by Berliner, the pregnant idea became public, and I cannot see how the defendant has borrowed anything from the plaintiff, except the semicircular twist in its tube. However, amid the wilderness of words I have tried to find and tread a path of logic, though the simpler way might have been to rest the case upon broader lines.

The bill is dismissed, with costs.

Frederick A. Blount and Hector T. Fenton, both of Philadelphia, Pa., for appellant.

Gifford & Bull, of New York City (J. E. Bull, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed, with costs, on opinion of the District Judge.

TELESCOPE COT BED CO. v. GOLD MEDAL CAMP FURNITURE MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 92.

1. PATENTS ⇨328—VALIDITY AND INFRINGEMENT—FOLDING COT.

The Herman patent, No. 793,723, for a folding cot, was not anticipated and discloses invention, the structure, although simple, having superior utility; also *held* infringed.

2. PATENTS ⇨253—INFRINGEMENT.

Infringement may be found, although the infringing device does not obtain the advantages of the patented invention to the fullest extent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 362; Dec. Dig. ⇨253.]

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

Suit in equity by the Telescope Cot Bed Company against the Gold Medal Camp Furniture Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

This cause comes here upon appeal from a decree finding validity and infringement of United States letters patent No. 793,723, issued July 4, 1905, to R. L. Herman for a folding cot.

Almon C. Kellogg, of New York City (E. H. Bottum and F. E. Dennett, both of Milwaukee, Wis., of counsel), for appellant.

Kenyon & Kenyon, of New York City (A. D. Kenyon, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The patented structure is simple; it comprises a plurality of legs, which are connected in pairs by pivots, so that they can be closed to lie together or open to stand like the letter X. These legs are disposed or arranged transversely of the length of the cot, and the legs or horses are united lengthwise of the cot and on both sides of the cot by so-called braces, which are pivoted in pairs like the legs, so that they can be closed together or can be opened into the shape of the letter X. This construction provides a framework for a cot which can be either collapsed or opened in both the

transverse and the longitudinal direction of the cot. When opened, two bars connected by a canvas sheet are superimposed, constituting the surface upon which a person may be supported. Each of the legs has a bracket pivoted on the leg and connected therewith adjacent to each end. Each bracket has a pin which projects into a longitudinal slot provided at the end of the brace next to the bracket. These braces are slotted at both ends, so that the connection of slot, pin, and pivoted bracket is found at each end, forming a sort of hinge connection. The slots in the braces run longitudinally for a proper distance through the braces.

The specification says:

"In addition to being readily folded my improved cot presents the advantage that on account of the employment of slotted braces the legs *A B* will automatically spread in case the top should sag, so that the cot would always be in the proper serviceable condition. The use of the hinged brackets *D* also facilitates the movement of the braces both in the operative position of the device and during the folding or opening of the same."

The single claim in controversy is:

"3. A folding cot comprising pivotally connected legs, brackets secured to said legs adjacent to their end to swing about axes parallel to the connecting pivots of the legs, pivotally connected braces each having a pin and slot connection at both ends and with said brackets, and a top carried by the legs."

The advantage of the Herman cot as described in claim 3 is that it can be used on uneven ground, and so adjust itself that the top will be level, even though the cot is pitched upon rough ground frequently found in places selected for camps. This improvement is accomplished by connecting the different sets of legs and side braces by a pin and slot connection at both ends of each brace. This was a new feature as applied to cots, and constitutes the improvement of the Herman cot over those of the prior art. The Holge patent and the so-called "Yankee cot," which was a commercial modification of the Holge cot, are the best references, but neither of them had this particular feature.

Undoubtedly the change from the enlarged holes in which the studs played in the Yankee cot to the pin and slot arrangements of the patent, the slots running longitudinally of the braces, with pin and slot at each end of each brace, does effect results which were not accomplished by the old structure; it does allow the legs of any pair of legs to open and remain at a different angle from that of any other pair of legs. The utility of this new result is that, when there is stretching or sagging of the canvas top, it is compensated for by movement of the legs and braces; it is also useful for the reason that, when the cots are used on rough or irregular ground, there is a like compensation effected, and each leg will touch the ground, which would not happen with an organization like the Yankee bed. It is quite true, as defendant contends, that the patentee in his specification says nothing of the utility of his device when the cot is placed on uneven ground; but he does expressly say that there is an advantage in the employment of his slotted braces, which "will automatically spread in case the top should sag, so that the cot would always be in the proper serviceable condition." That the patentee did not at the time of his application realize all the advantages which might result from

his device is unimportant. He made a change of structure which he carefully describes. He indicates what modification of operation results from such change, and points out a useful purpose which it subserves. That is sufficient.

[2] Infringement seems too clear for discussion. In the Herman cot the slots are in the braces and the pins are on the brackets connected to the legs. In defendant's cot the slots are in the brackets and the pins are on the braces. It is wholly immaterial on which parts of the combination the slots and pins are respectively located so long as they function alike in both structures; this they do because defendant's slots in the brackets are so located that the play of the pins therein is in the same direction as the length of the braces. The amount of this longitudinal play is slightly less in defendant's structure because the slots are somewhat shorter, but they are long enough to secure a substantial longitudinal play. Infringement may be found, although the infringing device does not obtain the advantages of an invention to the fullest extent.

The decree is affirmed, with costs.

E. G. STAUDE MFG. CO. et al. v. LABOMBARDE et al.

(District Court, D. New Hampshire. February 18, 1916.)

No. 389.

1. PATENTS ⚡313—SUIT FOR INFRINGEMENT—VOLUNTARY DISMISSAL—
 GROUNDS FOR DENIAL OF LEAVE.

Where, in a patent suit, there had been no hearing touching the merits, and though considerable expense had been incurred through the taking of testimony and the doing of other things, the evidence was not closed upon either side, no substantial rights had accrued to defendants which would warrant the denial to plaintiffs of leave to dismiss on proper terms.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⚡313.]

2. PATENTS ⚡313—SUIT FOR INFRINGEMENT—VOLUNTARY DISMISSAL—CONDI-
 TIONS.

Where, in a patent suit, plaintiffs had taken testimony under circumstances compelling defendants to incur expense, and the case had proceeded beyond the point at which plaintiffs might dismiss as of right, and plaintiffs had instituted a proceeding in another jurisdiction, and had offered to stipulate into the record of that suit all the depositions taken on behalf of defendants, leave to dismiss should be conditioned upon substantial indemnity to defendants, and defendants should be indemnified, not only for taxable costs, but for incidental expenses, including counsel fees which would be lost in subsequent litigation.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⚡313.]

In Equity. Suit by the E. G. Staude Manufacturing Company and others against Elie W. Labombarde and others. On motion by plaintiffs for leave to dismiss. Motion granted conditionally.

Nathan Heard, of Boston, Mass., for complainants.

George A. Rockwell, of Boston, Mass., for defendants.

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

ALDRICH, District Judge. There was a hearing in this case on December 30, 1915, under a motion to dismiss upon the ground that rule 57 (198 Fed. xxxiv, 115 C. C. A. xxxiv) operated to that end, because the case was not reinstated upon the trial calendar within a year from the entry of the order dropping the case from the calendar. The motion was denied, upon the ground that the rule should not, under the circumstances of this case, operate to that end.

On January 10, 1916, the plaintiffs filed a motion for leave to dismiss without prejudice and subject to costs. This motion presents a question entirely independent of the one involved in the motion decided December 30, 1915.

Obviously under this motion the plaintiffs recognize the idea that the case has proceeded beyond the point at which they may in their own right dismiss their bill, and this, of course, is so because several things have been done under the proceeding which they instituted against the defendants. The defendants resist the motion upon the ground that substantial rights have accrued to them under the proceeding, and that they would be prejudiced by a dismissal at the present stage of the proceeding.

Under the circumstances of this case, it manifestly is a matter of discretion whether the plaintiffs shall have leave to dismiss. There is a world full of decisions relating to the question as to a plaintiff's right to dismiss. I need not consider them all. The case of *Pennsylvania Globe Gaslight v. Globe Gaslight Co.* (C. C.) 121 Fed. 1015, was one in which Judge Colt goes over the ground with a full measure of care, and the case of *Houghton v. Whitin Machine Works* (C. C.) 160 Fed. 227, is one in which Judge Lowell considers, not only the general aspects of the right of a plaintiff to dismiss, but the right as affected by the fact that the defendant is likely to be subjected to the hardships of another suit.

The case of *American Bell Telephone Co. v. Western Union Tel. Co.*, 69 Fed. 666, 16 C. C. A. 367, was one decided in the Circuit Court of Appeals in this circuit, and the opinion was by Judge Webb, who was a very able judge, and I must be governed here by the rule laid down in that case. Judge Webb, speaking for that court, says:

"All the authorities recognize that in the progress of a suit a stage may be reached when the right of the complainant to end the cause by dismissing his bill ceases. With sufficient exactness, the decisive point may be said to be when the cause has proceeded so far as to give the defendant rights of which he would be deprived by allowing the dismissal of the bill by the complainant on his motion."

In that case the plaintiff was not allowed to dismiss his bill, because there had been a hearing before a master, and because a draft of the master's findings had been submitted to counsel. Under such circumstances, it would be manifest injustice to a defendant that the plaintiff should withdraw.

[1] In the case at bar there has been no hearing touching the merits, and although considerable expense has been incurred through taking testimony and doing other things, the evidence is not closed upon either side. I see no ground, therefore, for saying that any substan-

tial rights have accrued to the defendant which would warrant me in saying that the plaintiffs should remain here and carry forward the litigation with reference to the patent or patents in question.

Apparently the strongest case cited by the defendants in opposition to the plaintiffs' motion to dismiss is that of *Hershberger et al. v. Blewett et ux.* (C. C.) 55 Fed. 170; but an examination of that case shows that there had been a hearing there on demurrer and resulting interlocutory decrees practically deciding the controversy, and thus the case is quite outside the field in which the case under consideration rests.

[2] It appears from the arguments and the papers in this case that the plaintiffs have instituted a proceeding in Chicago, putting in issue the same questions as those involved in the case here. I am satisfied that that was done upon the supposition that rule 57 would operate to dismiss the case pending in this jurisdiction. It also appears from the papers before me that the plaintiffs offer to stipulate into the record of the Chicago suit all the depositions taken on behalf of the defendants in the New Hampshire suit, except the deposition of the expert. My conclusion is that the plaintiffs should have leave to dismiss the case pending in this jurisdiction, but that it should be upon substantial indemnity to the defendants. Where a plaintiff institutes a legal proceeding for the purpose of establishing a right in a given jurisdiction, and goes forward and takes testimony under circumstances which compel the defendant to incur expense, and where the case has proceeded beyond that point at which the plaintiff may dismiss the suit as of his own right, and where the plaintiff asks the court in its discretion to permit his withdrawal, if permission is given, it should be upon substantial indemnity to the defendant. The plaintiff in this case concedes that, if he takes a dismissal under an exercise of discretion, it should be upon payment of costs. Under the circumstances of this case, I think the defendant should be indemnified, not only for taxable costs, but for incidental expenses, including reasonable expense of counsel fees which would be lost in subsequent litigation. I say this without regard to what the practice has heretofore been on the subject. If it has not been the rule that a defendant, under such circumstances as exist in this case, should be indemnified for expenses to which he has been subjected through the act of the plaintiff, and which are lost to him through the act of the plaintiff, I think it should be. The plaintiffs having offered to stipulate into the Chicago suit the depositions taken in the suit pending here, it is something to be considered upon the question of indemnity.

The matter of indemnity and the matter of costs is something that I cannot determine under the present hearing. Therefore I appoint Burns P. Hodgman commissioner to tax the costs and to ascertain the incidental expenses to which the defendants have been subjected by reason of the pendency of this case which will be lost to them in the new suit. The commissioner will not take into account the difference in the expense of trying the case here and in Chicago, but will tax costs and ascertain the expense to which the defendants have been subjected here, and which will be lost to them by reason of the dis-

missal of this case. It may be that all that has been done here by way of defense may be available to the defendants in the Chicago suit, and it may be that a part or all of it may be lost to them. That is something which I cannot say, and is something which the commissioner will ascertain. When such facts are reported to me, I will enter an order allowing the plaintiffs to elect whether they will take a dismissal or not.

EVANS v. ASSOCIATED AUTOMATIC SPRINKLER CO.
(District Court, E. D. Pennsylvania. February 21, 1916.)

No. 1431.

PATENTS \Leftrightarrow 62—PERSONS ENTITLED TO PATENT—EVIDENCE AS TO ORIGINALITY AND PRIORITY.

In a suit involving the question of priority of invention between parties, each of whom had applied for letters patent, and neither of whom had failed in due diligence, evidence *held* to show that defendant's assignor, who first applied for a patent, was also the first to conceive the invention, and was the original or first inventor of the device described.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig.

\Leftrightarrow 62.]

In Equity. Suit by Powell Evans against the Associated Automatic Sprinkler Company. On trial hearing on bill, answer, and proofs. Bill dismissed.

Howson & Howson, of Philadelphia, Pa., for plaintiff.
Fenton & Blount, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Since the trial of the case, and within the time allowed for the submission of paper books, the plaintiff asked leave to submit what is really after-discovered evidence. The testimony involved in the application was, by agreement, taken in the form of a mixture of affidavits and depositions, and was, by stipulation, added to the stenographer's notes; the testimony and evidence to be considered as part of the testimony and evidence taken and submitted in the cause. The decision of the case turns wholly upon a question of fact. The law of the case is settled, and has been so thoroughly considered and fully discussed in decided cases that nothing more is called for than reference to the case of *Christie v. Seybold*, 55 Fed. 69, 5 C. C. A. 33.

The trial and the argument were so conducted and so marked with the spirit of fairness, and the ability which always accompanies it, that we do not feel called upon to do more than to state the conclusions reached. The question is one of priority of invention. Tracing back the path which each inventor has trod, in order to find his starting time, we find two significant marks which have been made. Rowley, the defendant's assignor, filed his application for letters patent May 22, 1913. The plaintiff did not file his application until March 13, 1914. In consequence of this Rowley is to be found the first inventor, unless and until further evidence appears. No other mark

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

which either party has made is established by such evidence as that the mind can rest upon it as a certainty. Whatever other facts are found must be found by the aid of the rule of a fair preponderance of the evidence. This observation must be qualified by the statement that it is clear that both Rowley and Evans conceived the general thought of this invention, and each with due diligence perfected it and reduced the invention to practice. It is to be further qualified in the respect that other indisputable marks of progress in perfecting their respective inventions were made, although at such times as not to aid us in our search for the first inventor. So far as affects this case, then, we have certain knowledge only of the two facts—that each of the claimants invented this sprinkler, and that Rowley was a year ahead in filing his application.

In considering those features of the case which call for a weighing of the evidence, this further observation may be made. The experience of all attests the fact that testimony of when a conception first arose in the mind is unreliable. This is aside from any ethical considerations. The most common of remarks heard when one first examines an invention pertaining to something in which the examiner is interested is:

"That idea is old. I had that in mind years ago, and had always intended to work it out."

The truth is that, although the party did have some such general idea in mind, if he had attempted to produce a concrete embodiment of it, the idea would have disappeared. This is another very common experience. If one is at work upon a problem of any difficulty or complexity, time and again he has what he thinks is a complete conception of how to work it out. When he attempts a practical test of his idea, even by the simple method of formulating a description of it in words, it breaks down somewhere, because not complete. The only evidence which will fix a date is something done. With this in mind, the fair weight of the evidence inclines the balance of the judgment toward these conclusions:

Evans conceived his invention not before November 21, 1912. He does not lay claim to an earlier date. Rowley conceived his not later than November 6th or 28th. He makes claim to a date which goes back as far as 1905. With no thought of questioning the honesty of his belief in the correctness of the earlier date, there is no evidence from which we could find it as the date of his invention. We are satisfied, however, and so find, that he was before the plaintiff in the general thought of finding what they each afterwards found, and was first to work upon it. We are further satisfied, and so find, that he had so far progressed in accomplishing the task he had set himself that he was, at the time he entered defendant's employ, confident of his ability to produce this sprinkler, and sure of how he would make it. Because of his previous work upon the problem he was able in a few days to produce links in proof of his statement of his ability to do so. The design of the plaintiff was reduced definitely to practice on January 15, 1913. This is the date he himself fixed. The date of reduction to practice by Rowley cannot be fixed with equal positive-

ness. The fair weight of the evidence would place it at a date not later than December 25, 1912. No charge is made that either failed in due diligence of prosecution.

The finding would follow that Rowley was, and Evans was not, the original and first inventor of the invention in controversy, within the meaning of the patent laws. This finding has some confirmation in this thought: Had matters taken the usual and to be expected course, letters patent would have issued to Rowley, if acted upon before the Evans application was filed. If the patent had so issued, the evidence of prior invention by Evans would not have filled the measure of proof required to have overcome the prima facie priority of invention which the grant of letters patent would have imported. This is not, however, the measure required of the plaintiff under the conditions of the present trial. The case is to be disposed of upon a comparison of the fair weight of the evidence on the one side and the other. Counsel concede this to be the proper measure to apply. There is, in consequence, no occasion to prolong this opinion by any discussion of its proper application. Had the proofs in the cause stayed in the condition they were when the trial rested, we think the scales of evidence would incline toward the finding that the Rowley invention, in conception, was not later than November 6, 1912.

The judgment of the correctness of this date is shaken by the after-discovered evidence, and much plausibility is given to the argument in favor of the inference that the correct date is November 28th. The comparison in the first instance is between November 6th and November 21st. In the second instance it is between November 28th and 21st. The reading of the scale thus becomes as close as the dates. We still feel, however, that the inclination of the balance is toward the priority of the Rowley invention. The incline starts with the fact, already noted, that Rowley was the first to give his thoughts to the invention. He was also the first to think he had worked out the problem. The weight of the evidence would seem to be (although here is the crucial point where room for doubt exists) that he was the first to test the completeness of his conception by the production of an embodiment of his inventive idea in the form of a link, the effectiveness of which could be itself tested. The fact could quite confidently be found that Rowley believed, before he entered the employ of defendant, in his ability to produce his improved sprinkler. It is further clear that he at once employed himself at this task and promptly justified himself by the results. He fixes the date of this accomplishment as not later than November 6th, because it was shortly after he entered defendant's employ. This date he fixed as November 2d. He is corroborated both as to fact and date by Mr. Lewis. Rowley, at the time of his employment, disclosed his confidence in his ability to devise the desired link. He exhibited to Mr. Lewis what he had accomplished. Mr. Lewis in turn disclosed the invention to his brother in New York on two occasions. The first he fixes as election day, and the second as Thanksgiving Day, November 28th. This bears out the date of November 6th.

The existence of the device as one under test on December 25, 1912,

is fairly well established. This is promptly followed by the application for letters patent on May 22, 1913. The evidence thus weighed would justify the inference of the priority of the Rowley invention. The real strain of the Rowley claim is between the dates of November 6th and November 28th, and to establish the earlier date. The real strain of the Evans claim is on the date of November 21st. The race is thus seen to be a close one, because Evans claims to be ahead only in the conception of his invention, and as to that by the margin of seven days. Pursuing the suggested figure of speech, Evans can be declared the winner only by its being decided that the lap which he claims to have finished on November 21st was finished at that time, and that Rowley did not reach the same goal until November 28th. The argument in favor of this claim we have characterized as plausible. It is more. It is forceful. It is that Rowley is mistaken in the date of his employment by the defendant. He left his former employer, the International Company, not on November 6th, as he supposed, but on November 8th. The weight of the evidence strongly favors this. It follows that Lewis could not have shown the Rowley link on November 6th, but the real date was November 28th.

The argument, however, lacks full convincing power in this: It pushes the Rowley evidence from November 6th, but not to a later date than November 13th. It changes the conclusion to be drawn from the Lewis testimony that his conversations with Rowley were before Rowley came to work, and that it was on his second, and not his first, visit to New York he showed the tested link to his brother. In short, it somewhat weakens, but it does not overcome, the evidence that Rowley was ahead of Evans in first conception, as he undoubtedly was in every other accompaniment of the invention. The evidence that Rowley was ahead of November 21st remains quite as strong as that Evans had fully conceived his invention on that date. It is clear that experimental shopwork was done in the way of developing the Evans idea on that date. It is clear that a sketch of what Evans then wanted done was at that time given to the man in charge of the work. It could readily be found that the paper on which the sketch was made is the paper produced. It could not be found, with any satisfying degree of belief, that the sketch then shown is the sketch now shown on the paper. This uncertainty (indeed, the inference otherwise) is due to the fact that the experiment was continued and the inventive idea was being progressively developed to a much later date, and that when some time afterwards Evans himself came to date his sketch, he dated it January, 1913. This, of course, may have been an error; but the justifiable inference is that, with all the evidence before him then which we have before us now (except the evidence of the Rowley invention), Evans himself did not feel justified in placing the birthday of his completed idea before January, 1913.

The evidential value of this is as a declaration by him. The evidential force lies in the answer to this question. If he then could not give an earlier date than January, 1913, how can we now find the date was November 21st? The conclusion reached is that Evans cannot maintain his claim of right to this invention, because we are not

able to find that he was the original or first inventor of the device described in the patent in suit, but, on the contrary, do find that Rowley was such first inventor.

The bill of complaint is accordingly dismissed, with costs to defendant.

STEELE v. HALLIGAN.

(District Court, W. D. Washington, S. D. February 7, 1916.)

No. 1938.

1. REMOVAL OF CAUSES ⇄19—CAUSES REMOVABLE—CAUSES ARISING UNDER LAWS OF UNITED STATES.

Act March 3, 1891, c. 529, § 2, 26 Stat. 839 (Comp. St. 1913, § 10553), makes an appropriation for the fitting of workshops for the employment of prisoners, and provides that convicts shall be employed exclusively in the manufacture of supplies for the government, and shall not be worked outside the prison inclosure. Section 4 (section 10555) provides that the control of prisons is vested in the Attorney General, who shall have power to appoint a warden and other officers. *Held*, that an action by a prisoner in a United States penitentiary against the warden for negligently putting him to work beneath a bank of loose earth, which fell upon and injured him, was one arising under the laws of the United States, and removable to a federal court, where the accident and the injury occurred within the limits of the penitentiary and on land used exclusively for such penitentiary.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-46, 48, 52, 53; Dec. Dig. ⇄19.]

2. REMOVAL OF CAUSES ⇄19—CAUSES REMOVABLE—CAUSES ARISING UNDER LAWS OF UNITED STATES.

Const. U. S. art. 1, § 8, subsec. 17, provides that Congress shall have power to exercise exclusive legislation over all places purchased by the consent of the Legislature of the state in which they shall be for the erection of needful buildings. Const. Wash. art. 25, provides that the consent of the state is thereby given to the exercise by Congress of exclusive legislation over land held for needful buildings, and that civil process issued under the authority of the state may be served and executed thereon. Rem. & Bal. Code Wash. § 6853, gives the consent of the state to the acquisition of property for needful buildings, etc., and cedes jurisdiction over it, and provides as to the service of process. *Held* that, while municipal laws regulating private rights will, if not in conflict with the law of the new sovereignty or the purpose for which the land is acquired, be in force in territory ceded to the United States by a state until changed by the United States, the laws of the state, upon such cession, become laws of the new sovereignty, and the laws of negligence in force in territory in Washington acquired for a United States penitentiary were laws of the United States, so that an action for negligence was removable to a federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-46, 48, 52, 53; Dec. Dig. ⇄19.]

3. UNITED STATES ⇄3—ACQUISITION OF LAND FOR PUBLIC PURPOSES—PRESUMPTIONS.

As cession of jurisdiction by a state to the United States over land for a United States penitentiary was for the benefit of the state and the nation, it will be presumed that the government made a record of the

land acquired by it in the land records of the state, as required by the law of the state authorizing it to acquire such land.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 3; Dec. Dig. ☞3.]

4. UNITED STATES ☞3—UNITED STATES COURTS—TERRITORIAL JURISDICTION—FOLLOWING POLITICAL BRANCH OF GOVERNMENT.

Where the executive department of the government had long been imprisoning offenders against the federal laws in a penitentiary on land acquired by the United States within a state, and the expense had for years been defrayed by appropriations regularly made by Congress, the judicial branch of the government will follow the political branch and hold its jurisdiction to cover the whole tract.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 3; Dec. Dig. ☞3.]

5. UNITED STATES ☞3—AUTHORITY OVER PLACES ACQUIRED WITHIN THE STATES FOR PUBLIC PURPOSES.

The federal jurisdiction resulting from the cession by a state of jurisdiction over land acquired by the government, under Const. art. 1, § 3, subsec. 17, is exclusive of state authority and completely ousts the state's jurisdiction; a provision in the act of cession as to service of process, not retaining a concurrent jurisdiction, but merely being intended to prevent the lands becoming a sanctuary for fugitives from justice.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 3; Dec. Dig. ☞3.]

6. UNITED STATES ☞3—AUTHORITY OVER PLACES ACQUIRED WITHIN THE STATES FOR PUBLIC PURPOSES.

Legislative cession of jurisdiction to the United States over land acquired for governmental purposes after the purchase thereof has the same effect as if made before purchase.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 3; Dec. Dig. ☞3.]

7. UNITED STATES ☞3—AUTHORITY OVER PLACES ACQUIRED WITHIN THE STATES FOR PUBLIC PURPOSES.

The cession by a state of jurisdiction over land acquired by the United States for governmental purposes includes judicial as well as legislative jurisdiction.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 3; Dec. Dig. ☞3.]

8. UNITED STATES ☞3—STATUTORY PROVISIONS—ADOPTION OF STATUTES OF ANOTHER JURISDICTION.

Rev. St. § 5391, as re-enacted in 1898 (Act July 7, 1898, c. 576, § 2, 30 Stat. 717 [Comp. St. 1913, § 10462]), provides that, if any offense be committed in any place ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment for which is not specially provided, by any law of the United States, such offense shall receive the same punishment as the laws of the state "now in force" provide for the like offense when committed within the jurisdiction of such state. *Held*, that this only applies to state laws in effect at the time of the enactment of the act of 1898.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 3; Dec. Dig. ☞3.]

9. UNITED STATES ☞3—AUTHORITY OVER PLACES ACQUIRED WITHIN THE STATES FOR PUBLIC PURPOSES.

The municipal law of a state regulating civil rights, which is continued in effect after the cession of land by the state to the United States, is the law in effect at the time of the cession.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 3; Dec. Dig. ☞3.]

10. REMOVAL OF CAUSES ⇨25—SHOWING RIGHT TO REMOVE—BURDEN.

The rule that, before a cause is removable, plaintiff's statement of his own cause of action must show that it is based on the laws or Constitution of the United States, is not applicable to laws depending for their effect upon the territorial jurisdiction, as in the case of reservations, or sites purchased for federal purposes and uses, and in such cases, the federal jurisdiction being general and that of the state exceptional, the state's jurisdiction, rather than that of the federal courts, is to be specially shown.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. ⇨25.]

At Law. Action by John H. Steele against O. P. Halligan. On motion to remand. Motion denied.

Griffin & Griffin, of Seattle, Wash., for plaintiff.

George P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for defendant.

CUSHMAN, District Judge. [1] Plaintiff moves that the cause be remanded to the state court. By the complaint he seeks to recover damages in excess of \$3,000 for defendant's alleged negligence, and states as a cause of action:

"That at all times hereinafter named the plaintiff was a prisoner confined in the United States penitentiary at McNeil's Island, and that the defendant, O. P. Halligan, at all times hereinafter named was the warden of the United States penitentiary at McNeil's Island, in charge of the inmates and of the maintenance and control of all of the inmates confined therein, including the plaintiff, John H. Steele.

"That * * * the plaintiff was negligently and carelessly placed to work, by and through the direction of the defendant, beneath a steep bank of from 25 to 30 feet in height of sliding loose strata of sand, gravel, and earth, and * * * without any fault or negligence of the plaintiff, the said bank under which the plaintiff was working caved, gave way, and fell upon the plaintiff, greatly injuring and damaging the plaintiff. * * *

"That all of the injuries and damages sustained by the plaintiff were wholly caused by and due to the negligent careless acts and omissions of the defendant in negligently and carelessly placing the plaintiff to work under guard and underneath a bank of loose sliding clay, gravel, and earth."

The petition for removal to this court alleges:

"That the alleged accident and injury to plaintiff, as described in his complaint, occurred at the United States penitentiary, within the limits of the same, and on land and property used exclusively for a United States penitentiary, and exclusively within the jurisdiction of the United States and of the United States courts."

It clearly appears from the complaint that the defendant, the warden, is charged with negligently discharging the duty imposed upon him by law and the judgment of the court committing the plaintiff to his care and custody. It would appear to need no citation of authority to show that such suit is one arising under the laws of the United States. *Bachrack v. Norton*, 132 U. S. 337, 10 Sup. Ct. 106, 33 L. Ed. 377; *Feibelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; *Sonnentheil v. Moerlein Brewing Co.*, 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492; *Bryant Bros. Co. v. Robinson*, 149 Fed.

321, 79 C. (C. A. 259; *In re Dunn*, 212 U. S. 374, 29 Sup. Ct. 299, 53 L. Ed. 558; *Pacific R. R. Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; *Caha v. U. S.*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; *Cosmos Exploration Co. v. Gray Eagle Iron Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064. The acts of Congress affecting federal prisons are set out in volume 6, *Federal Statutes Annotated*, pages 23 to 47. Sections 2 and 4 of the act of March 3, 1891 (26 Stat. at Large, 839, c. 529), provide:

"That the sum of one hundred thousand dollars is further appropriated, to be expended under the direction of the Attorney General, in the fitting of workshops for the employment of the prisoners: Provided, however, that the convicts be employed exclusively in the manufacture of such supplies for the government as can be manufactured without the use of machinery, and the prisoners shall not be worked outside the prison inclosure. * * *

"That the control and management of said prisons be vested in the Attorney General, who shall have power to appoint a superintendent, assistant superintendent, warden, keeper, and all other officers necessary for the safe-keeping, care, protection, and discipline of such United States prisoners. He shall also have authority to promulgate such rules for the government of the officials of said prisons and prisoners as he may deem proper and necessary." Vol. 6, *Fed. St. Ann.* p. 25, *Comp. St.* 1913, §§ 10553, 10555.

[2] Counsel for plaintiff contends that, while the cause may be affected by laws of the United States, it is controlled, and therefore arises, under the municipal law—the general law of negligence, and does not arise under the laws of the United States, as required by chapter 2, section 24, of the *Judicial Code* (Act March 3, 1911, c. 231, 36 Stat. 1091 [*Comp. St.* 1913, § 991]). *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; *Starin v. N. Y.*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388; *Wichita Nat. Bank v. Smith*, 72 Fed. 568, 19 C. C. A. 42; *McFadden v. Robinson* (C. C.) 22 Fed. 10; *Foster Fed. Prac.* (4th Ed.) vol. 1, § 17, pp. 116 and 147. It is necessary to consider whether this assumption is correct and leads to a different conclusion than that already indicated.

The Constitution of the United States (article 1, section 8, subsection 17) provides:

"The Congress shall have power: * * * To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

The Constitution of the state of Washington, adopted October 1, 1889, provides:

"The consent of the state of Washington is hereby given to the exercise by the Congress of the United States of exclusive legislation in all cases whatsoever over such tract or parcels of land as are now held or reserved by the government of the United States for the purpose of erecting or maintaining thereon forts, magazines, arsenals, dockyards, lighthouses, and other needful buildings, in accordance with the provisions of the seventeenth paragraph of the eighth section of the first article of the Constitution of the United States: Provided, that a sufficient description by metes and bounds, and an accurate plat or map of each such tract or parcel of land be filed in the proper office of record in the county in which the same is situated, together with copies of

the orders, deeds, patents, or other evidences in writing of the title of the United States: And provided, that all civil process issued from the courts of this state, and such criminal process as may issue under the authority of this state, against any person charged with crime in cases arising outside of such reservations, may be served and executed thereon in the same mode and manner and by the same officers as if the consent herein given had not been made." Article 25.

Section 6853 of Remington & Ballinger's Code provides:

"The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy yards, naval stations, or other needful buildings authorized by any act of Congress, and all deeds, conveyances of title papers for the same shall be recorded as in other cases, upon the land records of the county in which the land so acquired may lie, and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States which may be set apart by the general government for any or either of the purposes before mentioned by an order, patent, or other official document or papers describing such land; the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of Congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing *without the bounds of any such tract*, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

[3] Whether the state has any power to impose, as a condition subsequent, the obligation upon the United States of making a record of the land acquired in an office of the state, it is not necessary to decide, as it will be presumed that such record was made, the cession being for the benefit of the state and the nation. *Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525 at 528, 5 Sup. Ct. 995, 29 L. Ed. 264. The original prison site was purchased and the prison erected while the state of Washington was still a territory, in pursuance of Act Jan. 22, 1867, c. 9, 14 Stat. at L. 377. After the state of Washington was admitted, additional land was acquired and buildings were erected pursuant to Act March 3, 1903, c. 1007, 32 Stat. at L. 1144.

[4] The executive is and has long been carrying into effect the process of the courts, by imprisoning offenders against the federal laws in this prison, the expense of which has, for many years, been defrayed by appropriations regularly made by Congress. The judicial branch of the government will follow the political and hold its jurisdiction to cover the whole tract, as its character and the purpose of its occupa-

tion are fixed by congressional act. *Benson v. U. S.*, 146 U. S. 325, at 331, 13 Sup. Ct. 60, 36 L. Ed. 991. The complaint avers that the defendant negligently put the plaintiff to work under guard, and the petition for removal alleges:

"That the alleged accident and injury to plaintiff as described in his complaint occurred at the United States penitentiary within the limits of the same and on land and property used exclusively for a United States penitentiary and exclusively within the jurisdiction of the United States and of the United States courts."

The foregoing shows that the act of the defendant, on account of which he is sued, is one directly imposed on him in the course of carrying out the governmental purpose for which the land was purchased as a prison site. It is strongly indicated in both *Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264, and *Chicago & P. R. R. Co. v. McGlinn*, 114 U. S. 542, 5 Sup. Ct. 1005, 29 L. Ed. 270, that in such matters the state's cession of jurisdiction is not necessary; that, in matters concerning the performance of a federal function, exclusive jurisdiction is in the national government without any cession or special consent on the part of the state. In the *McGlinn Case* it was said:

"This point was involved in the case of *Ft. Leavenworth Railroad v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264. We there held that a building on a tract of land owned by the United States used as a fort, or for other public purposes of the federal government, is exempted, as an instrumentality of the government, from any such control or interference by the State as will defeat or embarrass its effective use for those purposes. But, in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the state. This is the only mode prescribed by the federal Constitution for their acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended." 114 U. S. 545, 546, 5 Sup. Ct. 1006 [29 L. Ed. 270].

[5] The federal jurisdiction resulting from such cession is exclusive of all state authority.

"This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress, and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals, and of the Attorneys General." *Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, at 532, 5 Sup. Ct. 995, at 999, 29 L. Ed. 264.

The state's jurisdiction is completely ousted. *U. S. v. Cornell*, Fed. Cas. No. 14,867.

[6] Legislative cession of jurisdiction after purchase has the same effect as if made before purchase. *U. S. v. Tucker* (C. C.) 122 Fed. 518. The object of this provision (as to service of process, in the act of cession) is not to retain a concurrent jurisdiction, but to prevent the lands held by the United States for governmental purposes becoming a sanctuary for fugitives from justice on account of acts done:

within the acknowledged jurisdiction of the state. *Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, at 533, 5 Sup. Ct. 995, 29 L. Ed. 264; *U. S. v. Cornell*, Fed. Cas. No. 14,867. The state and the United States may deal with each other in any way they deem best to carry out the purposes of the Constitution. *Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, at 541, 5 Sup. Ct. 995, 29 L. Ed. 264; *Benson v. U. S.*, 146 U. S. 325, at 330, 13 Sup. Ct. 60, 36 L. Ed. 994.

"While Congress has enacted a complete criminal code in relation to crimes committed within places within which it has exclusive jurisdiction and on the high seas, it has provided no laws for the government in civil matters of the inhabitants of forts, arsenals, magazines, and dockyards. These places, when acquired in the manner defined by the clause of the national Constitution just quoted (article 1, § 8) are without laws in civil matters, except such general laws as may have been in force, respectively, in the states from which the United States derived them at the time of acquisition. * * * It [the Supreme Court] held specially that where laws thus left in force after the dates of cession reserved in one case a right of taxing certain property on the lands of the United States, and in the other case the right to recover damages for certain acts of negligence committed on such lands, such provisions of law could be enforced at any time after the cession." *Crook, Horner & Co. v. Old Point Comfort Hotel (C. C.)* 54 Fed. 604, 607.

[7] The cession by the state includes judicial as well as legislative jurisdiction. *In re Ladd (C. C.)* 74 Fed. 31. While the criminal laws of the state have been held to have no force after the cession within the territory ceded, unless adopted by legislative enactment of the new sovereignty (*In re Ladd [C. C.]* 74 Fed. 31, at 40), municipal laws, regulating private rights, will, if not in conflict with the law of the new sovereignty, or the purpose for which the land is acquired, do so, until changed by enactment of the new sovereignty. *Chicago & P. R. R. Co. v. McGlinn*, 114 U. S. 542, 5 Sup. Ct. 1005, 29 L. Ed. 270.

"With respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that change of government leaves them in force until, by direct action of the new government, they are altered or repealed." *Downes v. Bidwell*, 182 U. S. 244, at 298 and 345, 21 Sup. Ct. 770, 45 L. Ed. 1088; *Insurance Co. v. Canter*, 1 Pet. 511, at 542, 7 L. Ed. 242.

"In a territory acquired by conquest or cession the laws affecting personal property rights and domestic relations as they existed between the people under the government from which the territory was acquired remain in full force until altered by the government of the United States or by the territorial government under its authority." *In re Chavez*, 149 Fed. 73, 80 C. C. A. 451.

The *McGlinn* (114 U. S. 542, 5 Sup. Ct. 1005, 29 L. Ed. 270) and *Downs* (182 U. S. 298, 21 Sup. Ct. 770, 45 L. Ed. 1088) Cases hold that the law under the old sovereignty is preserved in the absence of a controlling federal statute, or its being antagonistic to the purpose for which the governmental site is acquired and used. In *Western Union Telegraph Co. v. Chiles*, 214 U. S. 274, 29 Sup. Ct. 613, 53 L. Ed. 994, where the state statute imposed a penalty for nondelivery of a telegram, it was held of no effect where the telegram was to be delivered within a United States navy yard; the state having ceded jurisdiction to the United States, although the act penalized was not

strictly a crime. The land in this case was ceded to the United States in 1800. The law providing a penalty was enacted in 1904.

[8] Section 5391, Revised Statutes, was re-enacted in 1898, providing that, when offenses are not specially provided for by any law of the United States, they shall be prosecuted in the courts of the United States and receive the same punishment as provided by the state. The latter act only applies to the state laws in effect at the time of the assimilation crimes act. *Franklin v. U. S.*, 216 U. S. 559, 30 Sup. Ct. 434, 54 L. Ed. 615.

[9] The municipal law of the old sovereignty regulating civil rights, which is continued in effect under the new sovereignty, as pointed out in the cases already cited, is the law in effect at the time of the cession. In *re Chavez*, 149 Fed. 73, 80 C. C. A. 451. There being two purchases of the land at McNeil Island, one in territorial days and the other after statehood, there would be two dates as of which these laws were adopted and fixed. This fact would involve the determination upon the trial of whether the accident to plaintiff occurred upon the land ceded prior to the admission of the state or subsequently.

"The fact that the state has ceded land in the city of Brooklyn, and political jurisdiction over it, to the United States, for the purpose of a navy yard, does not oust the state courts of jurisdiction as to private rights and remedies within such territory, at least so long as Congress makes no new regulations touching the administration of justice in civil actions arising therein; and therefore the City Court of Brooklyn, by virtue of the jurisdiction conferred on it by Code, § 263, subd. 3, respecting injuries to land within the city, has jurisdiction of an action of trespass committed on a part of such ceded land, which part had been leased by the federal government to the city, under whom plaintiff claims as a sublessee." *Barrett v. Palmer*, 135 N. Y. 336, 31 N. E. 1017, 17 L. R. A. 720, 31 Am. St. Rep. 835.

The state court being a court of general jurisdiction, it had jurisdiction to entertain this cause. The laws of the old sovereignty remaining in effect and the territory passing to the new sovereignty, they are no longer, so far as that territory is concerned, foreign laws; that is, they are not laws of the old sovereignty, but thereby become laws of the new, pending the enactment by the new sovereignty of appropriate laws on the same subjects. They are fixed as of the time of the cession, while the laws of the old sovereignty change without affecting those in existence at the time of the cession, so far as the new territory passing to the sovereignty is concerned.

It follows, therefore, that the laws of negligence in effect in the territory at the time the first portion of the present site was acquired and those of the state in effect at the time the second portion thereof was acquired became, so far as that territory is concerned, the laws of the United States, and, as modified by the then existing enactments of Congress and those subsequently passed, are the laws under which this case arises.

[10] The rule that, before a cause is removable, plaintiff's statement of his own cause of action must show that it is based on the laws or Constitution of the United States (*In re Winn*, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873, and *Louisville & Nashville R. R. Co. v. Mottley*, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126) is applicable rather to provisions of the Constitution and laws in effect throughout the United

States than to laws depending for their effect upon the territorial jurisdiction, as in the case of reservations and sites purchased for federal purposes and uses.

In the first class, the state's jurisdiction is general and the federal jurisdiction exceptional, and therefore to be made specially to appear. But, when the federal jurisdiction originates because of the territory within which the cause of action arose, its jurisdiction is general, and that of the state—so far as it exists—exceptional. The reason upon which the rule is based, then, requires the state's jurisdiction, rather than that of the federal courts, to be specially shown.

Motion to remand denied.

UNITED STATES v. MINNEAPOLIS THRESHING MACH. CO.

(District Court, D. Minnesota, Fourth Division. December 28, 1915.)

1. INTERNAL REVENUE ⚡28—CORPORATE EXCISE TAX—ACTIONS TO RECOVER.

Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300-6307), imposes on corporations an annual special excise tax, equivalent to 1 per cent. upon the net income over and above \$5,000 during the year, requires such corporations to make a return by March 1st in each year, stating their net income, and provides that the Commissioner of Internal Revenue shall make assessments thereon. Paragraph 8 of such section provides that all laws relating to the collection and refund of internal revenue taxes, so far as applicable to that section, are thereby extended to the taxes imposed thereby. Rev. St. § 3213, provides that internal revenue taxes may be sued for in the name of the United States in any proper form of action in the proper court. *Held* that, where a corporation's return incorrectly stated its net income and the tax based upon such return had been paid, an action of indebitatus assumpsit would lie to recover the balance of the tax, which should have been levied and paid, without any formal assessment of such additional tax.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76-81; Dec. Dig. ⚡28.]

2. INTERNAL REVENUE ⚡28—CORPORATE EXCISE TAX—ACTIONS—LIMITATIONS.

Act Aug. 5, 1909, § 38, par. 5, provides, as to the corporate excise tax thereby imposed, that all assessments shall be made on or before June 1st in each year, and that such assessments shall be paid on or before June 30th, except in cases of refusal or neglect to make the required return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon discovery thereof at any time within three years after the return is due, make a return upon information obtained as therein provided, and that the assessment made by the Commissioner thereon shall be paid by the corporation. *Held*, that neither the limitation contained in this paragraph nor any other statute of limitations bars an action by the United States to recover the difference between the amount of the tax levied and paid and the amount which should have been levied and paid, if the corporation's return had correctly stated its net income.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76-81; Dec. Dig. ⚡28.]

At Law. Action by the United States against the Minneapolis Threshing Machine Company. Judgment for the United States for \$742.66, with interest and costs.

This was an action to recover the difference between the special excise tax levied and assessed against the defendant under section 38 of the act of August 5, 1909, and paid by it, and the amount which it was alleged should have been levied, assessed, and paid. It was tried by the court on the admissions in the pleadings and certain stipulated facts, from which it appeared that defendant made its return for the year 1909, showing a net income of \$105,655.05; that thereupon a tax was assessed and paid on that basis; that no additional, corrected, or amended return was required or demanded within three years; and that no additional excise tax had been assessed; but for the purposes of the action it was stipulated that defendant's taxable income for the year 1909 was in fact \$179,921.23, as alleged in the complaint.

Alfred Jaques, U. S. Dist. Atty., of Duluth, Minn., for the United States.

Joseph A. Hosp, of Hopkins, Minn., for defendant.

BOOTH, District Judge. [1] It is contended by the defendant that an action such as the present, which may be considered an action of indebitatus assumpsit, will not lie under the facts in this case, and that, inasmuch as no assessment had been formally made by the collector of internal revenue, no action will lie, and, finally, that no assessment can be made, nor action maintained, because it is barred by the three-year limitation clause contained in the fifth paragraph of section 38, chapter 6, 36 Stat. at Large, 112; said section containing the provision under which the excise tax involved in this controversy was authorized. The eighth paragraph of said section 38, contains the following clause:

"All laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the taxes imposed by this section." Comp. St. 1913, § 6307.

In *United States v. Chamberlin*, 219 U. S. 250, 31 Sup. Ct. 155, 55 L. Ed. 204, which was a case arising under War Revenue Act June 13, 1898, c. 448, 30 Stat. 448, the court construed section 31, which makes applicable "all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed," as authorizing an action of debt under authority conferred by section 3213, Rev. St. (Comp. St. 1913, § 5937), for the recovery of the amount of a stamp tax payable, but not paid, under said War Revenue Act. The court in its opinion said:

"Whether an action of debt is maintainable depends, not upon the question as to who is the plaintiff, or in what manner the obligation was incurred; but it lies whenever there is due a sum either certain or readily reduced to certainty."

The language contained in paragraph 8 of the act under consideration in the present case is much clearer and broader than the language considered in the case of *United States v. Chamberlin*, supra, and clearly authorizes the present action. To the same general effect, see *King v. United States*, 99 U. S. 229, 25 L. Ed. 373; *Dollar Savings Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80; *United States v.*

Little Miami R. R. Co. (C. C.) 1 Fed. 700. This last case was reversed in the Supreme Court, in 108 U. S. 277, 2 Sup. Ct. 627, 27 L. Ed. 724, but on another point. That no formal assessment is necessary, see Dollar Savings Bank v. United States, 19 Wall. 227, 22 L. Ed. 80; King v. United States, 99 U. S. 229, 25 L. Ed. 373; United States v. Little Miami R. R. Co. (C. C.) 1 Fed. 700.

[2] That neither limitation of time upon the action of the Commissioner of Internal Revenue contained in paragraph 5 of said section 38, above referred to, nor any other statute of limitation, is binding upon the United States in bringing an action like the one at bar, see United States v. Thompson, 98 U. S. 486, 25 L. Ed. 194; United States v. Insley, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968; United States v. Norris, 222 Fed. 14, 137 C. C. A. 552 (C. C. A. 8); United States v. Little Miami R. R. Co. (C. C.) 1 Fed. 700.

Let judgment be entered for the plaintiff.

MEMORANDUM DECISIONS

FEDERAL CEMENT CO. v. SHAFFER. (Circuit Court of Appeals, Third Circuit. February 17, 1916.) No. 2058. In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge. Horace Stern and William Jay Turner, both of Philadelphia, Pa., for plaintiff in error. Calvin F. Smith and Smith, Paff & Laub, all of Easton, Pa., for defendant in error. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. The defendant in this case, the Federal Cement Company, having filed a bill in equity in the District Court to No. 1467, September term, 1915, in which this controversy can be more satisfactorily heard and determined, and having offered to pay into the District Court the money involved in this suit, it seems to us that the best way to meet the difficulties presented on this writ of error is to assent to the company's offer, and to reverse the judgment formally, but without expressing an opinion on the legal questions discussed below. 225 Fed. 893. It is therefore ordered that if the Cement Company, on or before the 4th day of March, 1916, pay into the District Court in the equity proceeding referred to above the amount of coupon interest sued for in this action, with interest thereon, the clerk of this court is directed to enter an order reversing the judgment.

MARSHALL v. BACKUS, Immigration Com'r. (Circuit Court of Appeals, Ninth Circuit. February 7, 1916.) No. 2486. Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge. Henry F. Marshall, and Albert Michelson, both of San Francisco, Cal., for appellant. John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for appellee. Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

PER CURIAM. On the authority of Healy v. Backus, 221 Fed. 358, 137 C. C. A. 166, and Choy Gum v. Backus, 223 Fed. 487, 139 C. C. A. 35, the judgment (213 Fed. 123) is affirmed.

NATIONAL PAC. OIL CO. v. UNITED STATES. MIDLAND OILFIELDS CO., Limited, v. SAME. (Circuit Court of Appeals, Ninth Circuit. February 8, 1916.) Nos. 2656-2659. Appeals from the District Court of the United States for the Northern Division of the Southern District of California. A. L. Well, of San Francisco, Cal., for appellants. E. J. Justice, Sp. Asst. U. S. Atty. Gen., of San Francisco, Cal., and Albert Schoonover, U. S. Atty., of Los Angeles, Cal. On motion made on behalf of counsel for the appellant to dismiss the appeal in each of said causes, without prejudice—ordered, motion granted and appeal in each of said causes dismissed, without prejudice.

OREGON-WASHINGTON R. & NAV. CO. v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. February 7, 1916.) No. 2471. In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge. Arthur C. Spencer and Charles E. Cochran, both of Portland, Or., and Hamblen & Gilbert, of Spokane, Wash., for plaintiff in error. Francis A. Garrecht, U. S. Atty., of Spokane, Wash., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. This case presents the same issues and the same state of facts that were before this court in the case of the same title (Case No. 2490, reported 222 Fed. 887, 138 C. C. A. 367), in which this court held that a carrier inadvertently and honestly omitting from the report required by order of the Interstate Commerce Commission under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended, instances in which employes were permitted to remain on duty for a longer period than that prescribed by Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913, §§ 8677-8680), is not subject to the penalties imposed by the Interstate Commerce Act. Following that decision, it is ordered that the judgment of the court below be reversed, and that this cause be remanded to the court below for a new trial.

SHERMAN, CLAY & CO. v. SEARCHLIGHT HORN CO. (Circuit Court of Appeals, Ninth Circuit. February 21, 1916.) No. 2677. Appeal from the District Court of the United States for the First Division of the Northern District of California. N. A. Acker, of San Francisco, Cal., for appellant. John H. Miller, of San Francisco, Cal., for appellee. On motion of counsel for appellant to withdraw and dismiss appeal, without prejudice, etc.—ordered appeal dismissed, with costs in favor of the appellee and against the appellant. See, also, 225 Fed. 497, 140 C. C. A. 539.

SOUTHERN PAC. CO. et al. v. DARNELL-TAENZER LUMBER CO. et al. (Circuit Court of Appeals, Sixth Circuit. February 18, 1916.) No. 2838. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. Action by the Darnell-Taenzler Lumber Company and others against the Southern Pacific Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed. Charles N. Burch and H. D. Minor, both of Memphis, Tenn. (Fred H. Wood, of New York City, and Robert Dunlap, T. J. Norton, Blewett Lee, and H. A. Scandrett, all of Chicago, Ill., of counsel), for plaintiffs in error. Allen Hughes, of Memphis, Tenn., for defendants in error. Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

PER CURIAM. This case is here a second time. It is an action by several shippers against several railway carriers, to recover reparation awarded by the Interstate Commerce Commission on account of excessive freight rates ex-

acted and paid. At the first trial verdict was directed and judgment entered for defendants. (C. C.) 190 Fed. 659. On review by this court the action of the trial court was defended on the ground of lack of evidence that plaintiffs had suffered damages. We held not only that there was substantial evidence of actual damage presented, but that, as the record stood, plaintiffs were entitled to direction of verdict in their favor for the amount of the alleged excessive freights, provided the jury should find the rates in effect unreasonable and excessive. We accordingly reversed the judgment of the District Court, and remanded the cause with directions to award a new trial. Darnell-Taenzer Lumber Co. v. Southern Pacific Co., 221 Fed. 890, 137 C. C. A. 460. Upon the new trial the jury found the old rate (85 cents) prevailing during the period of shipments involved to be unreasonable, and the new rate (75 cents) prescribed by the Interstate Commerce Commission to be reasonable, and upon instructions of the trial court rendered verdict for plaintiffs for the amount of such excessive freights. On this verdict judgment was entered, which we are asked to review. It is conceded that the evidence upon the second trial was in all respects identical with that presented on the first trial. The state of the record is such that no practical difference results from the fact that under the present direction the evidence must be taken most strongly in defendants' favor. The questions raised on this review are thus the same as on the former review. The action of the District Judge in denying defendants' requests to charge, and in directing verdict under the jury's express findings as to reasonableness and unreasonableness of the respective freight rates, must therefore be sustained, and the judgment below affirmed, provided our conclusions upon the former review were correct. Since our former opinion there has been no decision by the Supreme Court which throws any light upon the questions here involved. All these questions were fully considered and discussed in our former opinion, to which we now adhere. A rediscussion of these questions on our part would serve no useful purpose. The judgment of the District Court is accordingly affirmed upon and for the reasons stated in our former opinion.

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ALTERATION OF INSTRUMENTS.

↪7 (U.S.D.C.) Insertion of date of release after its execution *held* not such an alteration or addition as rendered the release void.—Gillespie v. Smith, 229 F. 760.

↪8 (U.S.D.C.) Indorsement on release of words, "Witness to signature, John M. Smith," *held* surplusage, and not an alteration; no witness being required.—Gillespie v. Smith, 229 F. 760.

AMENDMENT.

See Parties, ↪48.

AMOUNT IN CONTROVERSY.

See Courts, ↪328.

ANTICIPATION.

See Patents, ↪73, 328.

ANTI-TRUST LAW.

See Monopolies, ↪17, 28.

APPEAL AND ERROR.

See Admiralty, ↪118, 119; Aliens, ↪32; Bankruptcy, ↪440, 446; Certiorari; Courts, ↪405; Criminal Law, ↪1059, 1171; Exceptions, Bill of; Libel and Slander, ↪128; Mandamus, ↪4; Prohibition, ↪3.

I. NATURE AND FORM OF REMEDY.

↪5 (U.S.C.C.A.) Under Comp. St. 1913, §§ 1584, 1587, 1668, where jury was orally waived, *held*, that questions decided at the trial could not be reviewed on writ of error.—Illinois Surety Co. v. United States, 229 F. 527, 533.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) *Issues and Questions in Lower Court.*

↪173(5) (U.S.C.C.A.) An appeal will not be dismissed, on the ground that there was no proof of complainant's ownership of the cause of ac-

tion sued on, where the point was not made before the trial court.—Davis v. Virginia Ry. & Power Co., 229 F. 633.

(B) Objections and Motions, and Rulings Thereon.

⊖185(1) (U.S.C.C.A.) A defendant, by failing to raise objection to jurisdiction in equity in the trial court, waives the same, and cannot raise it on appeal.—El Dora Oil Co. v. United States, 229 F. 946.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(K) Questions Presented for Review.

⊖671(1) (U.S.C.C.A.) Under Rev. St. §§ 649, 700 (Comp. St. 1913, §§ 1587, 1668), only rulings during the trial in case tried without a jury held reviewable, where there was no agreed statement of facts, and only a general finding.—Good Pine Lumber Co. v. Duke, 229 F. 714.

⊖695(1) (U.S.C.C.A.) Refusal to withdraw one of plaintiff's claims from the jury as without supporting evidence held not shown to be erroneous, where bill of exceptions did not purport to set out all the evidence or its substance.—Pacific Mail S. S. Co. v. Balderach, 229 F. 562.

⊖697(5) (U.S.C.C.A.) A master's finding of facts cannot be reviewed, in the absence from the record of a certificate or other proof that it contains all the evidence taken relating to such findings.—Goldsmith Silver Co. v. Savage, 229 F. 623.

XVI. REVIEW.

(E) Presumptions.

⊖931(1) (U.S.C.C.A.) Where an order of reference requires the master to report his findings only, there is no presumption that his report contains all the evidence taken before him.—Goldsmith Silver Co. v. Savage, 229 F. 623.

(G) Questions of Fact, Verdicts, and Findings.

⊖987(1) (U.S.C.C.A.) The parties to an action tried without a jury cannot by consent authorize review of the sufficiency of the evidence to support a general finding.—Sierra Land & Live Stock Co. v. Desert Power & Mill Co., 229 F. 982.

⊖1008(2) (U.S.C.C.A.) Where, in action on bond, jury was orally waived, whether there was any evidence of a breach or of damages held not reviewable.—Illinois Surety Co. v. United States, 229 F. 527, 533.

⊖1008(2) (U.S.C.C.A.) Under Rev. St. § 700 (Comp. St. 1913, § 1668), in case tried without a jury, sufficiency of testimony to support general finding held not reviewable.—Sierra Land & Live Stock Co. v. Desert Power & Mill Co., 229 F. 982.

⊖1017 (U.S.D.C.) Finding of master, referee, or judge, seeing and hearing witnesses, held of great weight, and great caution to be exercised in disturbing it.—Fernald Woodward Co. v. Conway Co., 229 F. 819.

(H) Harmless Error.

⊖1033(5) (U.S.C.C.A.) In contractor's action for county's breach of contract, county not be-

ing entitled to instruction as to conclusiveness of engineer's report, instruction on that subject held favorable to it.—Lauderdale County v. Kittel, 229 F. 593.

⊖1039(1) (U.S.C.C.A.) Parties held not injured by rulings on pleadings, where they were permitted to give in evidence all matters of offense, defense, and reply.—Lauderdale County v. Kittel, 229 F. 593.

⊖1050 (U.S.C.C.A.) In action for injuries, testimony as to plaintiff's investments, tending to show that he was a man of means held prejudicial.—Quinette v. Pullman Co., 229 F. 333.

⊖1051(1) (U.S.C.C.A.) Admission of exhibit over objection held not reversible error, where no exception was reserved to oral testimony covering substantially the main facts contained in the exhibit.—Good Pine Lumber Co. v. Duke, 229 F. 714.

⊖1052(2) (U.S.C.C.A.) An objection to the admission of a letter in evidence on the ground that it was a copy was cured by the subsequent introduction of the original.—Lauderdale County v. Kittel, 229 F. 593.

⊖1058(2) (U.S.C.C.A.) Where witness had already testified to the same fact which party sought to prove by him, refusal to permit him to reiterate his statement held not prejudicial.—Lauderdale County v. Kittel, 229 F. 593.

⊖1060 (U.S.C.C.A.) In action for injuries, statements of defendant's counsel as to recovery by plaintiff against casualty company, and that he had been paid his damages two or three times, held misconduct requiring a reversal.—Quinette v. Pullman Co., 229 F. 333.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(F) Mandate and Proceedings in Lower Court.

⊖1207 (U.S.D.C.) After remand of suit to enjoin trespasses, with directions to grant injunction and damages, held, that judgment for statutory penalties could not be rendered.—United States v. Ash Sheep Co., 229 F. 479.

APPEARANCE.

See Patents, ⊖291.

APPORTIONMENT.

See Salvage, ⊖38.

ARGUMENT OF COUNSEL.

See Appeal and Error, ⊖1060; Criminal Law, ⊖1171.

ASSESSMENT.

See Taxation, ⊖498.

ASSIGNMENT OF ERRORS.

See Criminal Law, ⊖1129.

ASSIGNMENTS.

See Assignments for Benefit of Creditors; Carriers, Ⓒ58; Courts, Ⓒ312; Fraudulent Conveyances; Literary Property; Patents, Ⓒ200; Trade-Marks and Trade-Names, Ⓒ35.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Corporations, Ⓒ553; Courts, Ⓒ489.

ASSUMPSIT, ACTION OF.

See Internal Revenue, Ⓒ28.

ASSUMPTION.

Of risk, see Master and Servant, Ⓒ288.

ATTACHMENT.

See Execution; Exemptions; Indemnity, Ⓒ14.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

Ⓒ175 (U.S.C.C.A.) Under the law of Colorado an attaching creditor does not occupy the status of a bona fide purchaser for value, and an attachment can only operate upon the right and title of the debtor at the time of the levy.—*Nisbet v. Federal Title & Trust Co.*, 229 F. 644.

VIII. CLAIMS BY THIRD PERSONS.

Ⓒ294 (U.S.C.C.A.) An owner of property held not precluded by Mills' Ann. St. Colo. 1912, § 3067, from asserting his title against attaching creditors of one having the manual custody and possession.—*Nisbet v. Federal Title & Trust Co.*, 229 F. 644.

Ⓒ302 (U.S.C.C.A.) One whose property is attached as that of another may intervene, or bring replevin or conversion against the officer.—*Nisbet v. Federal Title & Trust Co.*, 229 F. 644.

ATTORNEY AND CLIENT.

See Appeal and Error, Ⓒ1060; Bankruptcy, Ⓒ123; Internal Revenue, Ⓒ19; Judgment, Ⓒ437.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

Ⓒ166 (U.S.D.C.) A contract by a corporation for the employment of counsel in a pending suit held valid, and to have been performed so far as to entitle the attorneys to recover the stipulated fee.—*Russell v. Shippen Bros. Lumber Co.*, 229 F. 461.

AUTHENTICATION.

See Evidence, Ⓒ376.

BANKRUPTCY.

See Assignments for Benefit of Creditors.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(C) Involuntary Proceedings.

Ⓒ57 (U.S.D.C.) Instrument appointing trustees to wind up corporation's affairs held not a conveyance or transfer with intent to defraud creditors within the Bankruptcy Act.—*In re Ambrose Matthews & Co.*, 229 F. 309.

Ⓒ60 (U.S.D.C.) Instrument appointing trustees to wind up corporation's affairs held not a general assignment for the benefit of creditors, within the Bankruptcy Act.—*In re Ambrose Matthews & Co.*, 229 F. 309.

An assignment, to constitute an assignment for the benefit of creditors, within the Bankruptcy Act, need not be formal, and need not even be valid for all purposes.—*Id.*

To constitute an assignment for the benefit of creditors, within the Bankruptcy Act, there must be an absolute transfer by the debtor of both the legal and equitable titles to his property.—*Id.*

Ⓒ95 (U.S.D.C.) A court of bankruptcy as a court of equity has power to appoint a special master to take evidence, and these special masters may be standing masters in chancery, or appointed pro hac vice in particular cases.—*United States v. Coyle*, 229 F. 256.

Ⓒ97 (U.S.D.C.) In involuntary cases, a bankruptcy may be examined on oath touching his estate and property, and the disposition thereof by him prior to adjudication.—*United States v. Coyle*, 229 F. 256.

Referee in bankruptcy, appointed as special master, held to have full power and authority to administer oath and conduct examination of bankrupt concerning his property and its disposition.—*Id.*

Ⓒ100(1) (U.S.C.C.A.) Under Bankr. Act, §§ 3d, 7, 21a, 59f, where action on creditor's petition for leave to defend after adjudication was refused until he appeared for examination, held, that this condition was prematurely imposed.—*Abbott v. Wauchula Mfg. & Timber Co.*, 229 F. 677.

Exercising power conferred by Bankr. Act, § 21a, as to requiring appearance for examination for purpose of obtaining evidence on issue of insolvency, held a perversion of the purpose of that section.—*Id.*

Where alleged bankrupt withdrew denial of insolvency, and admitted insolvency, application by party interested for leave to defend after adjudication held to call for the exercise of a sound discretion.—*Id.*

Where creditor sought leave to defend on issue of solvency, held, that conditions more onerous than could be imposed upon bankrupt under Bankr. Act, §§ 3d, 7, should not have been imposed.—*Id.*

(D) Warrant and Custody of Property.

Ⓒ116 (U.S.C.C.A.) Where there was evidence that parties other than bankrupts were interested in alleged dummy corporation, held, that trustee should have proceeded against corporation for surrender of its property in order that

such parties might be protected.—Cohen v. Bacharach, 229 F. 385.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(A) Appointment, Qualification, and Tenure of Trustee.

↪123 (U.S.D.C.) Under Bankr. Act, §§ 1 (9), 44, 56, practice of requiring power of attorney, though attorney appearing for creditor and desiring to vote for trustee is duly admitted attorney at law, *held* valid and binding.—In re Capitol Trading Co., 229 F. 806.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

↪136 (U.S.C.C.A.) Though trustee, seeking to compel bankrupts to turn over money, had burden of showing their possession, *held*, that the evidence sustained this burden, and the burden was on the bankrupts to show what became of the money.—In re Graning, 229 F. 370.

Bankrupts *held* to have given no reasonable or satisfactory explanation of disappearance of \$2,000, and to be adjudged in contempt for failing to restore it to the estate.—*Id.*

Though trustee, in proceeding to punish bankrupt for contempt for refusal to turn over assets has burden of proving concealment of assets, *held*, that such proof is usually established by presumptions drawn from the facts, and positive proof is not required.—*Id.*

↪140(1) (U.S.C.C.A.) Under either Ohio or Michigan rule, seller, in absence of fraud, *held* not entitled to reclaim goods from trustee in bankruptcy, though buyer was insolvent, without seller's knowledge.—Schroth v. Monarch Fence Co., 229 F. 549.

That bank, whose extension of credit to bankrupt enabled it to continue business while insolvent, was the principal creditor, *held* to create no equity in favor of one seeking to reclaim goods.—*Id.*

↪143 (U.S.D.C.) Under trust-fund doctrine, stockholders selling stock to corporation and taking bond and mortgage *held* not entitled, as against trustee in bankruptcy, to insurance money on mortgaged property.—Tepel v. Coleman, 229 F. 300.

↪148 (U.S.C.C.A.) After adjudication, bankrupts *held* authorized to pay on a mortgage money earned after filing of petition, or obtained from relatives or friends.—Cohen v. Bacharach, 229 F. 385.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

↪161 (U.S.C.C.A.) Under Bankr. Act July 1, 1898, §§ 47a (2), 60a, 60b, as amended by Act June 25, 1910, §§ 8, 11, mortgages given and promised more than four months before bankruptcy for a present consideration *held* voidable preferences, where they were not acknowledged until within the four months.—In re Caslon Press, 229 F. 133.

↪164 (U.S.C.C.A.) Under Bankr. Act §§ 60b, 64b (3), payment of pre-existing debt *held* preferential though debt was for legal services,

when not directly connected with the bankruptcy proceeding.—Magee v. Fox, 229 F. 395.

↪166(4) (U.S.C.C.A.) Facts *held* to show that, when defendant received payment of debts shortly before debtor's bankruptcy, he had reasonable cause to believe that he would receive a preference, and was acting for the purpose of procuring a preference.—Healy v. Wehrung, 229 F. 686.

↪196 (U.S.D.C.) A lien on personal property levied upon under execution four months before bankruptcy is not lost, unless the execution creditor does something to hinder, delay, or defraud other creditors, but no actual intent need be shown.—In re Zeis, 229 F. 472.

Where sale under execution issued more than four months before bankruptcy was repeatedly adjourned, and would not have been adjourned without consent of execution creditor, *held*, that it had become dormant as against trustee in bankruptcy.—*Id.*

Under Bankr. Act, § 47, as amended by Act June 25, 1910, § 8, trustee *held* entitled to attack execution lien acquired more than four months before bankruptcy on ground that it had become dormant because of delay in selling.—*Id.*

Where, by reason of delay, execution lien obtained more than four months before bankruptcy had become dormant, *held*, that it could not be revived, so as to restore the benefit of the original lien as against trustee.—*Id.*

↪196 (U.S.D.C.) Where sale under execution of property remaining in bankrupt's possession was several times adjourned with consent of execution creditors, *held*, that executions were dormant as against trustee, under Bankr. Act, § 47a, as amended by Act June 25, 1910, § 8.—In re Monarch Acetylene Co., 229 F. 474.

(D) Administration of Estate.

↪242 (U.S.D.C.) Bankr. Act, § 7, cl. 9, *held* not to render bankrupts immune from prosecutions for perjury committed on their examination.—United States v. Coyle, 229 F. 256.

(E) Actions by or Against Trustee.

↪288 (U.S.C.C.A.) In proceeding to compel bankrupt's wife to turn over money to trustee, evidence *held* to make question of fact as to ownership of money at one time on deposit in her name.—In re Hopkins, 229 F. 378.

↪290 (U.S.C.C.A.) A corporation's participation in the illegal issuance of its bonds, contrary to Stock Corporation Law N. Y. § 55, did not prevent relief to its trustee in bankruptcy, suing to compel their return.—In re Progressive Wall Paper Corp., 229 F. 489, 500.

↪293(1) (U.S.C.C.A.) If there are conflicting liens or claims upon property in the lawful custody of a court of bankruptcy, it has jurisdiction to determine the same, although the trustee has no interest in the question.—Nisbet v. Federal Title & Trust Co., 229 F. 644.

↪293(4) (U.S.C.C.A.) Persons asserting conflicting claims to property in possession of a court of bankruptcy *held* to have invoked the jurisdiction of that court to determine their respective rights.—Nisbet v. Federal Title & Trust Co., 229 F. 644.

↻303 (1) (U.S.C.C.A.) One seeking to reclaim goods from trustee in bankruptcy, on ground that they were purchased without reasonable expectation of making payment, *held* to have the burden of showing fraud.—*Schroth v. Monarch Fence Co.*, 229 F. 549.

↻303(3) (U.S.C.C.A.) In action to recover back money paid by bankrupt to creditor within 30 days before the adjudication, evidence *held* to show that the bankrupt was then wholly insolvent.—*Healy v. Wehrung*, 229 F. 686.

(F) Claims Against and Distribution of Estate.

↻326 (U.S.D.C.) Party for which bankrupt had been manufacturing wool into cloth *held* entitled under Bankr. Act, § 68a, to set off sums due bankrupt on bankrupt's note.—*Clifford v. Oak Valley Mills Co.*, 229 F. 851.

Creditor *held* entitled to set off and apply on bankrupt's note amount due bankrupt for rent, due to its taking over the bankrupt's plant to complete work which bankrupt was doing for it.—*Id.*

↻339 (U.S.D.C.) Though corporate treasurer had no right to coerce payment of increased salary and issuance of stock, *held* that contract was in force until rescinded, and creditors' objection to treasurer's claim in bankruptcy was not a rescission.—*In re Knox Automobile Co.*, 229 F. 241.

Objections to claims *held* to be made, and review proceedings taken, by trustee, or, if he declines to act, by creditors proceeding in his name by order of the referee.—*Id.*

↻340 (U.S.C.C.A.) Whether bankrupt's lessor, who, upon keys being sent to him, entered, cleaned premises, and displayed "For Rent" sign, accepted surrender, *held* a question of fact, and finding of referee that surrender was accepted was not erroneous.—*Dallam v. Reber*, 229 F. 554.

↻341 (U.S.D.C.) Referee's disposition of claim on contract for sale of automobile starters, which never got beyond experimental stage, by treating contract as abandoned and allowing for expense of experiments, *held* to constitute substantial justice.—*In re Louis J. Bergdoll Motor Co.*, 229 F. 262.

↻346 (U.S.D.C.) Under Bankr. Act, § 64a, court *held* authorized to decide amount or legality of tax presented as preferred claim, and not limited to such questions as the bankrupt might have raised against the tax.—*In re E. C. Fisher Corp.*, 229 F. 316.

State *held* not entitled to allowance of tax in bankruptcy, where it was based upon bankrupt's padded and false return, when, if real facts had been disclosed, no assessment could properly have been made.—*Id.*

↻346 (U.S.D.C.) Under Bankr. Act, § 64a, taxes *held* not preferred claim, but in a class by themselves, standing ahead of preferred claims.—*In re Ashland Emery & Corundum Co.*, 229 F. 829.

Interest on taxes, making payment, when received, equivalent to payment at appointed time, *held* a part of the taxes, and entitled to priority in payment, under Bankr. Act, § 64a.—*Id.*

Penalty imposed for nonpayment of tax when due *held* not a part of the tax, and not entitled

to priority of payment, under Bankr. Act, § 64a.—*Id.*

That statute requiring payment of additional sum if tax is not paid when due calls such sum interest *held* not conclusive on bankruptcy court that it is not a penalty.—*Id.*

Under 3 Gen. St. N. J. 1895, p. 3339, § 261, and page 3704, § 7, excess of interest borne by corporate franchise tax after it becomes due above legal interest *held* a penalty, and not entitled to priority in bankruptcy.—*Id.*

↻350 (U.S.C.C.A.) Transaction between bankrupt and claimant *held* not a consignment, but a conditional sale, and where St. Wis. 1913, § 2317, was not complied with a claim against the bankrupt was not entitled to priority.—*In re Leflys*, 229 F. 695.

IV. COMPOSITION.

↻387 (U.S.C.C.A.) Under Bankr. Act, §§ 21g, 70f, bankruptcy court *held* without jurisdiction of petition by bankrupt, after confirmation of composition, to require proceeds of property claimed by it to be paid to it or to the receiver.—*In re Hollins*, 229 F. 349.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

↻399(3) (U.S.D.C.) Under Georgia Constitution and Code Ga. 1910, § 3380, bankrupt, who turned over certain checks and money to pressing creditors without scheduling them and permitted his wife to use small checks for necessities, *held* to be denied his exemption.—*In re Hardy*, 229 F. 325.

↻400(4) (U.S.C.C.A.) Under Bankr. Act, § 47, and General Order in Bankruptcy, No. xvii (89 Fed. viii, 32 C. C. A. viii), *held*, that District Court had no discretion and could not permit filing of objections to trustee's report respecting exemptions more than 20 days after filing of report.—*In re Krecun*, 229 F. 711.

↻407 (U.S.D.C.) False statement of bankrupt partnership's financial condition *held* made knowingly and with view to obtaining credit through a deceitful statement.—*In re Josephson*, 229 F. 272.

False statement to prevent discharge under Bankruptcy Act, § 14b (2), must be false with knowledge of party making it and made with a view of deceiving or misleading.—*Id.*

Failure of partnership to keep books, and making of false statement to obtain credit, *held* not to prevent discharge of partner, not active in the business, who did not know what was being done.—*Id.*

↻409 (U.S.D.C.) Bankrupts, who kept no record of indebtedness, except by filing invoices or bills, *held* to have done so with intent to conceal financial condition, within Bankruptcy Act, § 14b (2).—*In re Josephson*, 229 F. 272.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(A) Superintendence and Revision.

↻440 (U.S.C.C.A.) Under Bankr. Act, §§ 24b, 25a, petition for reclamation of rugs, part of which had already been returned, with damages for unreturned rugs, *held* reviewable by appeal, and not by petition to revise.—*Howard D. Thomas Co. v. Beharrell*, 229 F. 691.

↪442 (U.S.C.C.A.) On petition to revise order in summary proceeding requiring bankrupt's wife to turn over money to trustee, *held*, that it was too late to object that plenary suit should have been brought.—In re Hopkins, 229 F. 378.

↪446 (U.S.C.C.A.) Circuit Court of Appeals *held* not justified in overruling finding of District Judge as to ownership of money which trustee sought to compel bankrupt's wife to turn over to him.—In re Hopkins, 229 F. 378.

(B) Appeal.

↪463 (U.S.C.C.A.) Under Bankr. Act, § 1 (16), and section 18d, and General Order No. 36 (89 Fed. xxxvi, 32 C. C. A. xxxvi), denial of adjudication *held* not reviewable, where testimony was not in the transcript.—In re Murphy, 229 F. 988.

VIII. OFFENSES AGAINST BANKRUPT LAWS.

↪486 (U.S.D.C.) Where bankrupt is required to submit to examination as to his property by order of bankruptcy court, *held*, that there is a sufficient issue to support a charge of perjury.—United States v. Coyle, 229 F. 256.

On examination of alleged bankrupt question as to transfers of money to wife or son *held* pertinent, and to support a charge of perjury.—Id.

Alleged bankrupt's denial that he had transferred, paid, set over, or placed money in his son's possession *held* untrue, if he had given his son a check which had been cashed.—Id.

↪494 (U.S.D.C.) Indictment charging alleged bankrupt with testifying falsely concerning transfers of money to wife or son *held* not insufficient for failure to show that his attention was called to a payment which he failed to disclose.—United States v. Coyle, 229 F. 256.

Indictment charging alleged bankrupt with perjury respecting denial of transfers of money to son *held* not defective because of failure to show that son was given legal possession or ownership.—Id.

In determining sufficiency of such indictment, language used in testifying and found in indictment *held* to be given its ordinary meaning.—Id.

BANKS AND BANKING.

See Internal Revenue, ↪9.

IV. NATIONAL BANKS.

↪253 (U.S.D.C.) Directors of a national bank *held* liable, on the ground of negligence, for losses to the bank through the thefts of an employé.—Bates v. Dresser, 229 F. 772.

↪256(3) (U.S.C.C.A.) Ratification by directors of national bank of issuance of certificate of deposit in violation of Rev. St. § 5209 (Comp. St. 1913, § 9772), *held* not to deprive the act of its criminal character.—Simpson v. United States, 229 F. 940.

↪257(4) (U.S.C.C.A.) In prosecution growing out of unlawful issuance of certificate of deposit by national bank cashier, instructions *held* to have given defendants the full benefit of

any inference that might be drawn from their payment of the certificate.—Simpson v. United States, 229 F. 940.

BAR.

See Equity, ↪71; Judgment, ↪551.

BEST AND SECONDARY EVIDENCE.

See Evidence, ↪166.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF LADING.

See Carriers, ↪58.

BILLS AND NOTES.

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

↪145 (U.S.C.C.A.) Whether note executed and payable in Missouri was negotiable, so as to be good in the hands of a bona fide purchaser, *held* governed by the law of Missouri.—Kobey v. Hoffman, 229 F. 486.

↪166 (U.S.C.C.A.) Note executed and payable in Missouri *held* not nonnegotiable, so as to make failure of consideration available against bona fide holder because of acceleration of maturity if collateral depreciated in value and additional collateral was not furnished.—Kobey v. Hoffman, 229 F. 486.

BLANKS.

See Alteration of Instruments, ↪7.

BONA FIDE PURCHASERS.

See Corporations, ↪123.

BONDS.

See Aliens, ↪54; Bankruptcy, ↪290; Corporations, ↪376, 469, 473, 474, 486; Insurance, ↪168, 285; Post Office, ↪10; Street Railroads, ↪52; Subrogation; United States, ↪67.

V. ACTIONS.

↪125 (U.S.C.C.A.) Every plea in discharge or avoidance of a bond should state positively and in direct terms the matter in discharge or avoidance, and such matter is not to be inferred arguendo or upon conjectures.—Illinois Surety Co. v. United States, 229 F. 527, 535.

BONUS.

See Corporations, ↪316.

BOOKS OF ACCOUNT.

See Evidence, ↪166, 376.

BROKERS.

See Factors; War, ¶10.

IV. COMPENSATION AND LIEN.

¶64(1) (U.S.C.C.A.) Under agreement as to payment of commissions on sale of land, executed when option was given, broker *held* not entitled to commission, though land had been transferred to corporation, stock in which defendant still owned.—*Shields v. Columbia River Lumber Co.*, 229 F. 979.

BURGLARY.

See Criminal Law, ¶878.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

¶2 (U.S.C.C.A.) Act Cong. Feb. 13, 1913, prescribing punishment for breaking or entering or stealing goods from any railroad car containing interstate shipments, *held* valid.—*Morris v. United States*, 229 F. 516.

II. PROSECUTION AND PUNISHMENT.

¶18 (U.S.C.C.A.) Indictment for entering railroad car containing interstate shipment, for purpose of committing larceny, *held* sufficient.—*Morris v. United States*, 229 F. 516.

¶22 (U.S.C.C.A.) Under Rev. St. § 1025 (Comp. St. 1913, § 1691), indictment for entering railroad car containing interstate shipment and stealing goods therefrom *held* not defective for failure to allege that railroad company was incorporated.—*Morris v. United States*, 229 F. 516.

¶31 (U.S.C.C.A.) On trial for entering railroad car and stealing shoes therefrom, question asked witness for purpose of identifying shoes stolen, though apparently irrelevant when standing alone, *held* properly admitted in connection with other evidence.—*Morris v. United States*, 229 F. 516.

¶42(3) (U.S.C.C.A.) Possession of property recently stolen, if unexplained, in connection with other evidence showing the presence of the defendant at the time and place where a theft was committed, justifies a finding of guilty.—*Morris v. United States*, 229 F. 516.

CANALS.**I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.**

¶18 (U.S.C.C.A.) A contractor engaged in work on the Erie Canal is liable for an injury to a boat using the canal, resulting from the negligent manner in which his work was performed.—*Otts v. I. M. Ludington's Sons*, 229 F. 538.

A decree affirmed, holding contractors on the Erie Canal in part in fault for stranding of two canal boats on stones left on the bottom of the canal, and the boats also in fault for negligent navigation.—*Id.*

¶18 (U.S.D.C.) Contractors, who left obstructions in Erie Canal, and a canal boat, which was injured thereon, *held* equally in fault,

and liable for the damage caused.—*Otts v. I. M. Ludington's Sons*, 229 F. 454.

A contractor for deepening a state canal *held* bound to exercise reasonable care to prevent obstructions due to the work, and liable for injuries to boats navigating the canal from such obstructions.—*Id.*

Injury to a canal boat in Erie Canal by striking a boulder left on the bottom by contractors *held* due in part to negligent navigation, and in part to negligence of the contractors in failing to sufficiently mark the place.—*Id.*

CANCELLATION OF INSTRUMENTS.

See Bankruptcy, ¶339; Election of Remedies, ¶2; Limitation of Actions, ¶37; Patents, ¶200; Quieting Title.

CARGO.

See Shipping.

CARMACK AMENDMENT.

See Removal of Causes.

CARRIERS.

See Shipping.

I. CONTROL AND REGULATION OF COMMON CARRIERS.**(A) In General.**

¶18 (U.S.C.C.A.) In suit to enjoin state Board of Public Utility Commissioners, grant or refusal of injunction pendente lite *held* to rest in the sound discretion of the District Court.—*Trenton & Mercer County Traction Corp. v. Board of Public Utility Com'rs of New Jersey*, 229 F. 140.

(B) Interstate and International Transportation.

¶37 (U.S.C.C.A.) Confinement of horses shipped between points in Canada for more than 28 hours, while passing through Michigan and to a point in Illinois, *held* a violation of Act June 29, 1906.—*Grand Trunk Ry. Co. v. United States*, 229 F. 116.

Failure purposely or intentionally, with knowledge of facts, to obey 28 hour law (Act June 29, 1906), *held* a violation, without any evil intent.—*Id.*

¶38 (U.S.C.C.A.) Allowances made by lessee of a railroad from a coal mining company on shipments by the lessor *held* illegal as rebates, under Interstate Commerce Act, § 1, as amended by Hepburn Act June 29, 1906, § 2.—*Central R. Co. of New Jersey v. United States*, 229 F. 501.

Good faith is not a defense to a prosecution for granting rebates in violation of the Interstate Commerce Act.—*Id.*

II. CARRIAGE OF GOODS.**(B) Bills of Lading, Shipping Receipts, and Special Contracts.**

¶58 (U.S.C.C.A.) Commission merchants, receiving and selling hogs shipped on straight bill of lading without notice of assignment of the

bill of lading, *held* not liable in trover to assignee.—*C. E. White & Co. v. Century Savings Bank of Des Moines, Iowa*, 229 F. 975.

CAUSE OF ACTION.

See Action.

CERTIFICATE.

See Appeal and Error, ⇨697.

CERTIORARI.

I. NATURE AND GROUNDS.

⇨5 (U.S.C.C.A.) Where proceedings in District Court would ultimately ripen into appealable judgment, *held*, that Circuit Court of Appeals would not by certiorari restrain further proceedings.—*In re Garrosi*, 229 F. 363.

CHANCERY.

See Equity.

CHARACTER.

See Criminal Law, ⇨829.

CHARITIES.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

⇨45(2) (U.S.D.C.) In action against hospital and trustees for death of patient from poison administered by mistake by a nurse, statement *held* demurrable for indefiniteness.—*Paterlini v. Memorial Hospital Ass'n of Monongahela City, Pa.*, 229 F. 838.

Charitable hospital and its trustees *held* not liable for nurse's negligence in administering poison by mistake.—*Id.*

CHEAT.

See Fraud.

CHECKS.

See Accord and Satisfaction, ⇨9.

CITATION.

See Process.

CITIES.

See Municipal Corporations.

CITIZENS.

See Aliens; Courts, ⇨307, 310, 311, 312.

CLAIMS.

See Bankruptcy, ⇨116, 339-346; Corporations, ⇨566; Patents, ⇨129, 165; Receivers.

CLAYTON ACT.

See Monopolies, ⇨17.

CLOUD ON TITLE.

See Quieting Title.

COLLISION.

VI. VESSELS IN TOW.

⇨61 (U.S.D.C.) A towing tug *held*, on the evidence in fault for a collision between her tow and the tender of a dredge at work in the channel.—*The Wyomissing*, 229 F. 306.

VII. VESSELS AT REST, AT ANCHOR, OR AT PIERS.

⇨71 (U.S.C.C.A.) In the absence of evidence that it was customary, an anchored steamship cannot be charged with fault for a collision because she did not keep up steam, so as to be prepared to move instantly.—*The Charles Hubbard*, 229 F. 352.

A moving steamship, which, in attempting to pass between two other vessels anchored on one side of the fairway in St. Mary's River, came into collision with one of them, *held* solely in fault.—*Id.*

⇨73 (U.S.C.C.A.) A moving vessel, which comes into collision with one at anchor without fault of the latter, is presumptively in fault, and has the burden of proof to exonerate herself from liability.—*The Charles Hubbard*, 229 F. 352.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

⇨95 (U.S.D.C.) A tug, passing around the Battery and across the East River to Brooklyn after dark, in a fog, *held* solely in fault for a collision with the tow of another tug on a crossing course in East River in the evening and in fog.—*The Port Johnson Towing Co. No. 7*, 229 F. 267.

⇨95 (U.S.D.C.) A collision between meeting tows at night in Delaware Bay *held* due to the fault of one of the barges in collision for negligent steering and that of the tug in lengthening the hawsers, in violation of the federal regulations.—*The Teaser*, 229 F. 476.

XII. SUITS FOR DAMAGES.

(D) Damages.

⇨144 (U.S.D.C.) Where a tug and her tow were jointly in fault for a collision in which the tow was injured, the tug is liable for one-half the damages sustained by the tow.—*The Teaser*, 229 F. 476.

COLOR OF TITLE.

See Adverse Possession.

COMBINATIONS.

See Conspiracy; Monopolies, ⇨17, 28.

COMMERCE.

See Carriers; Shipping.

I. POWER TO REGULATE IN GENERAL.

⇨5 (U.S.C.C.A.) Congress, in the exercise of its power over interstate commerce, *held* to have authority to enact Act Cong. Feb. 13, 1913,

punishing unlawfully breaking seal of railroad car containing interstate shipments, or entering such cars with intent to commit larceny, or stealing from such car any goods which are a part of or constitute an interstate shipment; the power of Congress being analogous to the police power.—*Morris v. United States*, 229 F. 516.

↪8 (U.S.C.C.A.) That the breaking into a railroad car for the purpose of committing larceny therein, or the larceny itself, may be punished under the laws of a state, *held* not to invalidate Act Cong. Feb. 13, 1913, punishing the unlawful breaking of the seal of a railroad car containing interstate shipments, or entering any such car, with intent to commit larceny, or stealing from any such car any goods which are a part of or constitute an interstate shipment.—*Morris v. United States*, 229 F. 516.

↪8 (U.S.D.C.) Under the Wilson Law and the Webb-Kenyon Act, sale of liquors received from other states to purchasers outside the state *held* subject to state laws (Acts Tenn. 1909, c. 1, § 1).—*Laughter & Fisher v. McLain*, 229 F. 280.

III. MEANS AND METHODS OF REGULATION.

↪69 (U.S.D.C.) The privilege tax imposed on railroad companies by Act Miss. March 16, 1912 (Acts 1912, c. 102), *held* unconstitutional and void, as imposing a tax on interstate commerce.—*Illinois Cent. R. Co. v. Mississippi Railroad Commission*, 229 F. 248.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION AND COMMISSIONERS.

See Aliens, ↪32.

COMMISSION MERCHANTS.

See Factors.

COMMISSIONS.

See Brokers, ↪64.

COMMON CARRIERS.

See Carriers.

COMPENSATION.

See Attorney and Client, ↪166; Brokers, ↪64; Corporations, ↪308; Eminent Domain.

COMPOSITIONS WITH CREDITORS.

See Bankruptcy, ↪387; Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Release.

↪6 (U.S.C.C.A.) Where employer, wrongfully discharging employe, sent check for amount, which included salary for one additional month, and employe had the check certified, *held*, that there was an accord and satisfaction; the dam-

ages being unliquidated.—*O'Brien v. American Agricultural Chemical Co.*, 229 F. 387.

↪8(1) (U.S.C.C.A.) A contract between two of three adverse claimants to oil rights in a tract of land, by which one leased to the other, *held* valid and enforceable as one of compromise and settlement.—*Kiefer Oil & Gas Co. v. McDougal*, 229 F. 933.

↪8(4) (U.S.C.C.A.) An agreement of compromise and settlement is not invalidated by a mistake of law by one of the parties.—*Kiefer Oil & Gas Co. v. McDougal*, 229 F. 933.

CONCEALMENT.

See Bankruptcy, ↪409.

CONCLUSIVENESS.

See Aliens, ↪32; Appeal and Error, ↪1008, 1017; Bankruptcy, ↪346; Equity, ↪409; Executors and Administrators, ↪531; Highways, ↪113.

CONDEMNATION.

See Eminent Domain.

CONDITIONS.

See Sales, ↪345, 371.

CONFLICT OF LAWS.

See Bills and Notes, ↪145.

CONSIDERATION.

See Compromise and Settlement, ↪6; Patents, ↪200; Release, ↪20.

CONSPIRACY.

See Indictment and Information, ↪86; Monopolies, ↪31.

II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

↪43 (U.S.C.C.A.) Where indictment charged conspiracy with persons unknown, fact that third parties testified before grand jury *held* not to show that they were known to be conspirators, so as to preclude conviction for conspiring with them.—*Mitchell v. United States*, 229 F. 357.

CONSTITUTIONAL LAW.

See Bankruptcy, ↪399; Commerce, ↪5, 8, 69; Highways, ↪113; Injunction, ↪21; Internal Revenue, ↪2; Removal of Causes, ↪19; Taxation, ↪47, 117; United States, ↪3; Witnesses, ↪306.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

↪62 (U.S.D.C.) Congress cannot delegate legislative power to any executive officer.—*Pittsburgh Melting Co. v. Baltimore & O. R. Co.*, 229 F. 214.

(B) Judicial Powers and Functions.

↪70 (U.S.C.C.A.) Contention that government should not prosecute for conspiracy to commit offense, when it has proof of the commission of the offense itself, *held* one to be addressed to Congress, and not to the courts.—*Mitchell v. United States*, 229 F. 357.

VI. VESTED RIGHTS.

↪105 (U.S.D.C.) There can be no vested right in claim for damages for tort not growing out of contractual relation until judgment, it being until then a mere expectancy or inchoate right.—*Carson v. Gore-Meenan Co.*, 229 F. 765.

X. EQUAL PROTECTION OF LAWS.

↪240 (U.S.D.C.) Act La. No. 10 of 1915, as to systematic payment in Louisiana of less price for sugar than is paid in other states, *held* so discriminatory as to deny the equal protection of the laws.—*American Sugar Refining Co. v. McFarland*, 229 F. 284.

CONSTRUCTION.

See Patents, ↪157; Statutes, ↪194.

CONTEMPT.

See Bankruptcy, ↪136.

CONTINUANCE.

See Criminal Law, ↪586, 1151.

CONTRACTORS' BONDS.

See United States, ↪67.

CONTRACTS.

See Abatement and Revival, ↪53; Accord and Satisfaction; Appeal and Error, ↪1033; Attorney and Client, ↪166; Bankruptcy, ↪339; Bills and Notes, ↪145; Bonds; Compromise and Settlement; Corporations, ↪308, 657, 659; Customs and Usages; Evidence, ↪121; Highways, ↪113; Indemnity; Judgment, ↪589, 744; Literary Property; Logs and Logging, ↪3, 8; Monopolies, 17; Pleading, ↪302; Release, ↪20; Sales; Specific Performance; Subrogation; Telegraphs and Telephones, ↪11; United States, ↪67, 70.

I. REQUISITES AND VALIDITY.**(E) Validity of Assent.**

↪96 (U.S.D.C.) Undue influence assumes a condition existing where such baneful influence can be exerted.—*Gillespie v. Smith*, 229 F. 760.

(F) Legality of Object and of Consideration.

↪138(1) (U.S.C.C.A.) Rule that courts will not aid party to illegal contract to enforce it, set it aside, or recover back money or property, *held* subject to exceptions as well established as the rule.—*In re Progressive Wall Paper Corp.*, 229 F. 489, 500.

II. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

↪169 (U.S.C.C.A.) Extrinsic evidence of the surrounding circumstances and condition of the parties when a contract was made must be considered in construing it with respect to the damages recoverable for its breach.—*Roller v. George H. Leonard & Co.*, 229 F. 607.

V. PERFORMANCE OR BREACH.

↪313(1) (U.S.C.C.A.) On repudiation by one party of an executory contract, if the other party elects to treat it as still in force, it is alive as to both parties, and he can enforce it only in accordance with its terms.—*Roller v. George H. Leonard & Co.*, 229 F. 607.

↪319(1) (U.S.D.C.) Parties justifiably ceasing work of removing timber under contract because of other party's breach *held* entitled to recover for the work done according to prices and values fixed by the contract.—*Fernald Woodward Co. v. Conway Co.*, 229 F. 819.

↪319(2) (U.S.D.C.) Where plaintiffs abandoned a logging contract by reason of embarrassment from defendant's failure to make payments and advancements as agreed, there was no ground for recoupment by defendant.—*Fernald Woodward Co. v. Conway Co.*, 229 F. 819.

Failure of party to logging contract to make agreed payments, whereby other party was rendered unable to perform, *held* a breach, justifying the other party in not performing.—*Id.*

CONVEYANCES.

See Assignments for Benefit of Creditors; Fraudulent Conveyances; Logs and Logging, ↪3; Mortgages.

COPYRIGHTS.

See Courts, ↪291; Judgment, ↪744.

I. NATURE AND ACQUISITION.

↪40 (U.S.C.C.A.) Copyright covering comic opera *held* lost as to vocal number by publishing and selling it separately, with nothing to show that the opera from which it was taken was copyrighted.—*Herbert v. Shanley Co.*, 229 F. 340.

II. TITLE, CONVEYANCES, CONTRACTS, AND REGULATIONS.

↪41, 42 (U.S.C.C.A.) The legal title to a copyright vests in the person in whose name it is taken out; but it may be held by him in trust for the true owner.—*T. B. Harms & Francis, Day & Hunter v. Stern*, 229 F. 42.

III. INFRINGEMENT.**(A) What Constitutes Infringement.**

↪66 (U.S.C.C.A.) Under Copyright Act of 1909, copyright of song *held* not infringed by rendering it in a public restaurant where no admission fee was charged, though performer was paid.—*Herbert v. Shanley Co.*, 229 F. 340.

(B) Actions.

↻81 (U.S.D.C.) Under equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), licensee of right to produce copyrighted drama on the stage held not proper party to suit for infringement by production of motion picture play.—Tully v. Triangle Film Corp., 229 F. 297.

↻82 (U.S.D.C.) Under the express provisions of Supreme Court rule 2 (29 Sup. Ct. xlviii), in a suit for infringement, a copy of the work alleged to be infringed should accompany the complaint, or its absence should be explained.—Tully v. Triangle Film Corp., 229 F. 297.

Whether, because incorrect copy of work alleged to be infringed was filed with complaint, payment of expenses should be made a condition of amendment, held to be left for determination on the trial.—Id.

↻85 (U.S.C.C.A.) Assuming that publisher of story held copyright as trustee for author, preliminary injunction against companies acquiring motion picture rights without notice of author's rights held properly denied, in view of Rev. St. § 4955.—Brady v. Reliance Motion Picture Corp., 229 F. 137.

CORPORATIONS.

See Bankruptcy, ↻290; Banks and Banking; Carriers; Commerce, ↻69; Courts, ↻274, 276; Insurance; Internal Revenue, ↻9; Monopolies, ↻17; Municipal Corporations; Railroads; Street Railroads; Taxation, ↻117; Telegraphs and Telephones; Witnesses, ↻306.

IV. CAPITAL, STOCK, AND DIVIDENDS.**(D) Transfer of Shares.**

↻123(11) (U.S.C.C.A.) The beneficiary of a pledge of stocks in trust to indemnify him against liability on a bail bond held a bona fide purchaser, with rights superior to the United States, which was defrauded of the money with which they were bought.—Leary v. United States, 229 F. 660.

VI. OFFICERS AND AGENTS.**(C) Rights, Duties, and Liabilities as to Corporation and Its Members.**

↻308 (U.S.D.C.) Board of directors held not without power to adjust dispute with treasurer as to salary, after expiration of salary year, their term in office not having expired.—In re Knox Automobile Co., 229 F. 241.

Where corporate treasurer was acting for himself in demanding increased salary, to which directors agreed, held, that contract, after being executed by treasurer, could not be set aside and the difference in salary recovered.—Id.

Though corporate treasurer had no right to coerce payment of increased salary and issuance of stock, held, that contract was in force until rescinded.—Id.

↻314 (U.S.D.C.) Act of corporate treasurer in taking commission on loan made by him to it held ratified by the directors, and not to be set aside.—In re Knox Automobile Co., 229 F. 241.

Officers of a corporation are not precluded from loaning money to it, so long as they deal fairly with it.—Id.

↻316 (U.S.D.C.) Stock issued by corporation to treasurer, who demanded the stock and an increase in salary, or payment of indebtedness to him, held not a bonus or gift.—In re Knox Automobile Co., 229 F. 241.

↻318 (U.S.D.C.) Where common officers and agents of two companies diverted sinking fund to benefit of one of them, held, that it was a fair inference that they were acting for it and by its command.—Brown v. Pennsylvania Canal Co., 229 F. 444.

VII. CORPORATE POWERS AND LIABILITIES.**(A) Extent and Exercise of Powers in General.**

↻376 (U.S.D.C.) Bond and mortgage executed by corporation on purchase of its own stock held void under Const. Pa. art. 16, § 7, and Act Pa. April 17, 1876 (P. L. 32) § 4.—Tepel v. Coleman, 229 F. 300.

(D) Contracts and Indebtedness.

↻469 (U.S.C.C.A.) Under Stock Corporation Law N. Y. § 55, held, that bonds could not be pledged for payment of pre-existing debt, notwithstanding extension granted or substitution of new note with same or different indorsers.—In re Progressive Wall Paper Corp., 229 F. 489, 500.

Creditor's payment to corporation of money immediately paid back to it to extinguish old indebtedness held not to authorize issuance of bonds as security for new indebtedness under Stock Corporation Law N. Y. § 55.—Id.

↻473 (U.S.C.C.A.) Under St. Wis. 1913, §§ 1676-27, 1684-7, 1753, issuance of negotiable corporate bonds for less than 75 per cent. of par value held not defense available against bona fide holders.—In re Footville Condensed Milk Co., 229 F. 698.

↻474 (U.S.C.C.A.) Where pledgee of corporate bonds did not agree not to sell them for less than their par value, stipulation after bankruptcy of corporation held not to validate them, in view of Bankr. Act, § 70.—In re Progressive Wall Paper Corp., 229 F. 489, 500.

Creditor, receiving bonds of corporation as security for pre-existing debt, contrary to Stock Corporation Law N. Y. § 55, held not a bona fide holder.—Id.

Bonds of a corporation, pledged by it as collateral security for a pre-existing debt, were "issued," within Stock Corporation Law N. Y. § 55, forbidding issuance of bonds, except for money, labor, or property.—Id.

↻482 (U.S.D.C.) Decree in suit to foreclose corporate mortgage held not to bar suit to require accounting by related corporation for diversion or depletion of sinking fund.—Brown v. Pennsylvania Canal Co., 229 F. 444.

↻486 (U.S.D.C.) Where railroad company agreed, when canal company's bonds were issued, to purchase unpaid interest coupons, bondholders held entitled to have prescribed sum set aside for sinking fund without first paying interest.—Brown v. Pennsylvania Canal Co., 229 F. 444.

Corporate bondholders held wronged by investment of sinking fund in such bonds, unless another corporation was liable for interest, or, if it was liable, by cancellation of the bonds.—Id.

VIII. INSOLVENCY AND RECEIVERS.

↪537 (U.S.D.C.) Corporation's capital stock held not a liability to be taken into account in determining whether it is solvent, especially in view of Bankruptcy Act, § 1a (15).—Tepel v. Coleman, 229 F. 300.

↪544 (U.S.D.C.) Under the law of Pennsylvania the capital stock of a corporation is a trust fund for the payment of company debts.—Tepel v. Coleman, 229 F. 300.

↪550 (U.S.C.C.A.) A deed to all the property of a corporation, duly made in trust for the benefit of creditors, constitutes an assignment, whether the corporation be solvent or insolvent.—Collins v. Williamson, 229 F. 59.

Proceedings on a general assignment by a corporation under the Ohio statutes held not void because they were in a county other than that in which the company's general office was fixed, where no objection was made to the jurisdiction.—Id.

A general assignment by a corporation held void, as made for the purpose of compelling stockholders to surrender certain bonus claimed to be illegal.—Id.

↪553 (U.S.C.C.A.) In a suit to set aside a deed of general assignment by a corporation, the court held warranted by the facts in appointing a receiver pendente lite.—Collins v. Williamson, 229 F. 59.

↪566 (U.S.D.C.) In determining the right of contract creditors for supplies, etc., to preference from the estate of an insolvent railroad company, special circumstances may justify the allowance of preference to claims accruing prior to the arbitrary period generally settled upon.—Pennsylvania Steel Co. v. New York City Ry. Co., 229 F. 465.

That orders for supplies, received and used by the lessee of a street railroad system, were on blanks of the lessor, held not to defeat the right of the seller to preference from the insolvent estate of the lessee.—Id.

Nature of supplies furnished to a street railroad company, which entitled the seller to preference from the estate in insolvency, considered.—Id.

XII. FOREIGN CORPORATIONS.

↪657(3) (U.S.C.C.A.) After foreign corporation's compliance with Const. Ala. 1901, § 232, and Code Ala. 1907, § 3642, parties to contract previously made held to have adopted it by recognizing it.—Montgomery Traction Co. v. Montgomery Light & Water Power Co., 229 F. 672.

↪659 (U.S.C.C.A.) Acts subsequent to foreign corporation's compliance with Act Fla. June 1, 1907 (Laws 1907, c. 5717), held to be an adoption of a contract entered into prior to such compliance, and other party was estopped to deny corporation's right to enforce contract.—Turner Const. Co. v. Union Terminal Co., 229 F. 702.

↪668(10) (U.S.C.C.A.) Authority of alleged agent of foreign corporation to receive service of process held dependent upon his character, the surrounding facts, and proper in-

ferences therefrom.—Boulton v. International Paper Co., 229 F. 951.

↪673 (U.S.C.C.A.) Finding that superintendent of foreign corporation's mill was not agent or attorney for purpose of service of process held not unsupported by the evidence, and not erroneous.—Boulton v. International Paper Co., 229 F. 951.

COSTS.

See Patents, ↪325; Receivers, ↪189.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

↪8 (U.S.D.C.) Where a patent infringement suit was dismissed for want of jurisdiction, no costs could be taxed.—United States Envelope Co. v. Transo Paper Co., 229 F. 576.

V. AMOUNT, RATE, AND ITEMS.

↪184(1) (U.S.C.C.A.) Where, though libels were not consolidated, they involved substantially the same issues and were tried on the same testimony, held that, under Rev. St. § 843 (Comp. St. 1913, § 1452), only one fee for attendance and travel should be allowed witnesses.—The Vera, 229 F. 557.

COURT RULES CITED.

Equity Rule 37—229 F. 297.

Equity Rule 51—229 F. 579.

Equity Rule 57—229 F. 633.

Equity Rule 58—229 F. 833.

COURTS.

See Appeal and Error; Bankruptcy, ↪293; Corporations, ↪550; Patents, ↪288; Prohibition; Receivers, ↪189; Removal of Causes; United States, ↪3.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

↪23 (U.S.C.C.A.) Though, where jurisdiction has attached, court may proceed upon consent with reference to matters before it, consent cannot confer jurisdiction not given by law or conferred by the Constitution upon a court.—In re Hollins, 229 F. 349.

↪37(2) (U.S.D.C.) Jurisdictional facts prescribed by statute held absolutely essential to federal court's jurisdiction, regardless of parties' consent, and want thereof may be raised at any stage.—United States Envelope Co. v. Transo Paper Co., 229 F. 576.

VII. UNITED STATES COURTS.**(A) Jurisdiction and Powers in General.**

↪255 (U.S.C.C.A.) United States courts held of limited jurisdiction, with only such powers as are expressly or by necessary implication conferred upon them.—In re Hollins, 229 F. 349.

↪274 (U.S.C.C.A.) Service upon agent designated by foreign corporation, pursuant to Pub. Laws Me. 1911, c. 152, § 1, held to give juris-

diction to federal court.—*Boulton v. International Paper Co.*, 229 F. 951.

To make service on agent of foreign corporation valid for purpose of conferring jurisdiction on federal court, *held*, that he must be representing the company in such sense that authority in him to receive service on its behalf could be properly implied.—*Id.*

↪274 (U.S.D.C.) Under Judicial Code, § 57, suit by New York telegraph corporation to enjoin Kentucky railroad corporation from interfering with telegraph lines in the Northern district of Georgia *held* maintainable in that district.—*Western Union Telegraph Co. v. Louisville & N. R. Co.*, 229 F. 234.

↪276 (U.S.D.C.) Defendant *held* to have waived right to object that suit between New York and Kentucky corporations was not brought in proper district, by appearing and filing motion to dismiss on the merits.—*Western Union Telegraph Co. v. Louisville & N. R. Co.*, 229 F. 234.

(B) Jurisdiction Dependent on Nature of Subject-Matter.

↪291 (U.S.C.C.A.) Under Judicial Code, § 256, right asserted and defense interposed in suit for infringement of copyright, *held* within the exclusive jurisdiction of the federal courts.—*T. B. Harms & Francis, Day & Hunter v. Stern*, 229 F. 42.

↪294 (U.S.D.C.) A suit by the receiver of a national bank in the course of winding up its affairs *held* within the jurisdiction of a federal District Court, under Judicial Code, § 24, par. 16.—*Bates v. Dresser*, 229 F. 772.

(C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.

↪307 (U.S.C.C.A.) Court *held* without jurisdiction of suit for administration of embarrassed debtor's estate through receiver, because party to whom trustees for creditors had contracted to sell was citizen of same state as certain complainants.—*Hawes v. First Nat. Bank of Madison*, 229 F. 51.

↪310 (U.S.C.C.A.) In suit to have court assume administration of estate conveyed to trustees for creditors, *held*, that debtor was an indispensable party.—*Hawes v. First Nat. Bank of Madison*, 229 F. 51.

↪311 (U.S.D.C.) Administrator appointed in Pennsylvania *held* not entitled to sue resident of West Virginia in federal court sitting in West Virginia by reason of diverse citizenship.—*Klug v. Martinsburg Power Co.*, 229 F. 861.

↪312(2) (U.S.C.C.A.) A suit by the grantee of a prior grantee to enjoin the cutting of standing timber *held* not one brought as assignee of a chose in action, but within the jurisdiction of a federal court, regardless of the citizenship of complainants' grantor.—*Crown Orchard Co. v. Dennis*, 229 F. 652.

(D) Jurisdiction Dependent on Amount or Value in Controversy.

↪328(2) (U.S.D.C.) Jurisdiction of federal court *held* dependent on amount claimed, unless it appears from face of complaint that plaintiff cannot recover jurisdictional amount, and that part of claim is colorable and fictitious.

and inserted in bad faith.—*Le Roy v. Hartwick*, 229 F. 857.

↪328(9) (U.S.D.C.) Where right to attorney's fees stipulated for in note sued on, dependent upon what law controlled, was in controversy, *held*, that the amount of the fee was to be included to make up the jurisdictional amount.—*Le Roy v. Hartwick*, 229 F. 857.

↪328(10) (U. S. D. C.) Where the amount claimed in a complaint would give a federal court jurisdiction, the fact that upon the trial the amount recovered is less than the jurisdictional amount does not defeat the court's jurisdiction.—*Le Roy v. Hartwick*, 229 F. 857.

(E) Procedure, and Adoption of Practice of State Courts.

↪344 (U.S.C.C.A.) Marshal's return, not showing that person served with process was agent of foreign corporation for service of process, *held* not aided by any presumption, as jurisdictional facts must appear affirmatively.—*Boulton v. International Paper Co.*, 229 F. 951.

↪347 (U.S.C.C.A.) Upon overruling of demurrer to replication, court *held* to have properly heard and determined issue raised by replication, though under Rev. St. Me. c. 84, § 35, judgment would have followed in state court.—*Boulton v. International Paper Co.*, 229 F. 951.

↪352 (U.S.C.C.A.) New equity rule 57 (198 Fed. xxxiv, 115 C. C. A. xxxiv), providing that a cause placed on the trial calendar shall not be continued over the term, except for cause shown, does not apply to a cause which has been heard where the term ends before entry of decree.—*Davis v. Virginia Ry. & Power Co.*, 229 F. 633.

(F) State Laws as Rules of Decision.

↪365 (U.S.D.C.) In determining whether equitable relief should be granted against default judgment obtained through misunderstanding of counsel, court *held* not bound by state decisions; the matter concerning the power of the court.—*Interurban General Contracting Co. of New York v. United States*, 229 F. 588.

↪366 (U.S.C.C.A.) Under Rev. St. § 721 (Comp. St. 1913, § 1538), Const. Okl. art. 9, § 43, and Comp. Laws Okl. 1909, §§ 5605, 5606, holding of Supreme Court of Oklahoma that railroad company was not entitled to plead limitations *held* binding on federal courts.—*Quinette v. Pullman Co.*, 229 F. 333.

↪366(14) (U.S.C.C.A.) As to contracts executed before the construction of a state statute by its court of last resort, the federal courts are not conclusively governed by the construction thereafter placed upon it by the state court.—*Kobey v. Hoffman*, 229 F. 486.

↪366(27) (U. S. C. C. A.) Decisions of state courts in construing state statutes *held* not to govern in construing indictment in federal court.—*McClendon v. United States*, 229 F. 523.

↪366(1) (U.S.C.C.A.) The decision of a state court of last resort as to the construction of a state statute is binding upon a federal court.—*Lauderdale County v. Kittel*, 229 F. 593.

↪372 (U.S.C.C.A.) In action in federal court, validity of release by sleeping car conductor of claims against sleeping car and railroad companies *held* governed by general law and decisions of United States courts.—Fowler v. Pennsylvania R. Co., 229 F. 373.

↪372(1) (U.S.D.C.) While the decisions of a state court upon a general legal proposition not covered by statute are not binding upon the federal courts, they are naturally given considerable weight by such courts.—Paterlini v. Memorial Hospital Ass'n of Monongahela City, Pa., 229 F. 838.

↪376 (U.S.C.C.A.) New Jersey crossing statute, relative to failure of traveler at protected crossing to stop, look, and listen, *held* to state rule of evidence, which federal courts should follow.—Delaware, L. & W. R. Co. v. Welshman, 229 F. 82.

(H) Circuit Courts of Appeals.

↪405 (U.S.C.C.A.) Though no objection because of a defect of parties was made in the District Court, the Circuit Court of Appeals must notice the defect itself, if it is jurisdictional.—Hawes v. First Nat. Bank of Madison, 229 F. 51.

↪405 (U.S.C.C.A.) Where District Court had no jurisdiction, *held*, that Circuit Court of Appeals could not consider the merits, though the parties did not raise the question of jurisdiction.—In re Hollins, 229 F. 349.

↪405(11) (U.S.C.C.A.) Though verdict was for only \$930.60, amount involved in appeal from District Court for Canal Zone *held* sufficient to give jurisdiction, in view of counterclaim and affidavit as to amount involved.—Pacific Mail S. S. Co. v. Balderach, 229 F. 562.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(B) State Courts and United States Courts.

↪489 (U.S.C.C.A.) A federal court *held* to have jurisdiction of a suit to set aside a deed of general assignment made under the laws of Ohio; state courts, under Gen. Code Ohio, § 1613, not having such power.—Collins v. Williamson, 229 F. 59.

↪508 (U.S.C.C.A.) Where plaintiff was proceeding in state court after filing of transcript in federal court, *held*, that temporary injunction against further proceedings in state court should have been granted.—Alabama Great Southern Ry. Co. v. American Cotton Oil Co., 229 F. 11.

CREDITORS.

See Bankruptcy, ↪100.

CRIMINAL LAW.

See Banks and Banking, ↪256, 257; Burglary; Constitutional Law, ↪70; Grand Jury; Indictment and Information; Injunction, ↪105; Internal Revenue, ↪47; Malicious Prosecution, ↪24; Monopolies, ↪31; Poisons, ↪4, 9; Post Office, ↪31, 35, 49; Prostitution.

V. VENUE.

(A) Place of Bringing Prosecution.

↪113 (U.S.C.C.A.) Under Judicial Code, § 42, prosecution based on unlawful issuance of certificate of deposit *held* maintainable in Idaho, where certificate was signed in blank, though it was filled in and negotiated outside that state.—Simpson v. United States, 229 F. 940.

VII. FORMER JEOPARDY.

↪182 (U.S.C.C.A.) Prosecution on defective indictment *held* not a bar to a subsequent prosecution, where jury was discharged without an acquittal on the merits.—Simpson v. United States, 229 F. 940.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

↪321 (U.S.D.C.) In the absence of proof that improper or illegal evidence was used before the grand jury to secure an indictment, the presumption is that the proceedings before the grand jury were regular in all respects.—United States v. Coyle, 229 F. 256.

(C) Other Offenses, and Character of Accused.

↪369(6) (U.S.C.C.A.) In a prosecution for carrying on the business of a liquor dealer without having paid the special tax therefor required by law, evidence of sales by defendant prior to the years named in the indictment *held* admissible.—Day v. United States, 229 F. 534.

↪370 (U.S.C.C.A.) On trial for conspiracy to violate Food and Drugs Act, where defendant denied knowledge of misbranding of coffee, orders for mixing and misbranding of other lots of coffee *held* properly admitted.—Mitchell v. United States, 229 F. 357.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

↪432 (U.S.C.C.A.) In prosecution for conspiracy to violate Food and Drugs Act by shipping misbranded coffee, evidence as to meaning of marks on lots of coffee *held* to make orders for branding and mixing other lots of coffee intelligible, so as to render them admissible on question of defendant's knowledge.—Mitchell v. United States, 229 F. 357.

(M) Weight and Sufficiency.

↪564(1) (U.S.C.C.A.) On trial for entering railroad car and stealing shoes therefrom, evidence, if insufficient to show that entry was within the district, *held* sufficient to sustain conviction for larceny; the stolen shoes having been brought within such district.—Morris v. United States, 229 F. 516.

XI. TIME OF TRIAL AND CONTINUANCE.

↪586 (U.S.C.C.A.) Refusal of continuance *held* matter addressed to trial court's discretion.—McClendon v. United States, 229 F. 523.

XII. TRIAL.

(H) Requests for Instructions.

↻829(8) (U.S.C.C.A.) Refusal of instruction as to evidence of good character or reputation *held* not error; the instruction given having been even more favorable to defendants.—*Morris v. United States*, 229 F. 516.

↻829(1) (U.S.C.C.A.) The refusal of a requested instruction, that defendant should only be convicted of the offense charged in the indictment, and of no other, was not error, where the court had already charged to that effect.—*McClendon v. United States*, 229 F. 523.

(K) Verdict.

↻878(2) (U.S.C.C.A.) Under indictment charging entry into railroad car containing interstate shipment, with intent to steal, and larceny therefrom, *held*, that defendants could be convicted on both counts.—*Morris v. United States*, 229 F. 516.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

↻1059(2) (U. S. C. C. A.) Exception to the charge separately and as a whole, to each and every charge, and also to them in toto, *held* too general, and not to be considered, where any part of the charge was good.—*McClendon v. United States*, 229 F. 523.

(E) Assignment of Errors and Briefs.

↻1129(3) (U.S.C.C.A.) An assignment of error that the verdict is contrary to the law is too broad and indefinite, and cannot be considered.—*McClendon v. United States*, 229 F. 523.

(G) Review.

↻1151 (U.S.C.C.A.) Refusal of continuance *held* matter addressed to trial court's discretion, and not reviewable, unless a gross abuse of discretion.—*McClendon v. United States*, 229 F. 523.

↻1171(1) (U.S.C.C.A.) Remarks of district attorney in presence of the jury, constituting misconduct *held* not prejudicial, because evidence was so clear and convincing that the jury could not have found otherwise than as they did.—*Robbins v. United States*, 229 F. 987.

↻1177 (U.S.C.C.A.) Where punishment imposed on two counts was the same and ran concurrently, defendants *held* not prejudiced, even though evidence did not warrant a verdict of guilty on one count.—*Morris v. United States*, 229 F. 516.

CUSTOMS AND USAGES.

↻15(1) (U.S.C.C.A.) Where contract was canceled by buyer and tender made in November, evidence as to custom to ship hops until February or March *held* not admissible to fix date for ascertainment of market price.—*Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 F. 913.

CUSTOMS DUTIES.

I. VALIDITY, CONSTRUCTION, AND OPERATION OF CUSTOMS LAWS IN GENERAL.

↻22 (U.S.C.C.A.) Negatives of prize fight, from which positives are to be made and exhibited before members and guests of clubs, etc., without limitation as to number of guests, *held* excluded from importation by Act July 31, 1912, as supplemented by Act Oct. 3, 1913, c. 16, par. 380, 38 Stat. 151.—*Kalithenic Exhibition Co. v. Emmons*, 229 F. 124.

DAMAGES.

See Collision, ↻144; Constitutional Law, ↻105; Contracts, ↻169; Executors and Administrators, ↻49; Libel and Slander, ↻128; Literary Property; Monopolies, ↻28; Negligence, ↻84; Sales, ↻371-384; Towing, ↻15; United States, ↻67.

IV. LIQUIDATED DAMAGES AND PENALTIES.

↻85 (U.S.C.C.A.) In case of penalty, measure of damages *held* ordinarily the actual loss; but in the case of liquidated damages the whole amount is recoverable, if consistent with the policy of the law.—*Illinois Surety Co. v. United States*, 229 F. 527, 533.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(C) Proceedings for Assessment.

↻208(1) (U.S.C.C.A.) Damages recoverable for breach of a contract to manufacture and sell oak extract for tanning *held* a question for the jury.—*Roller v. George H. Leonard & Co.*, 229 F. 607.

DEATH.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

↻25 (U.S.D.C.) Under Gen. St. Conn. 1902, § 399, prior to amendment in 1915, and section 1094, settlement with decedent's widow before appointment as administratrix *held* not defense to action by her as administratrix for wrongful death.—*Carson v. Gore-Meenan Co.*, 229 F. 765.

(D) Pleading and Evidence.

↻69 (U.S.D.C.) In action for death under Connecticut statute, evidence as to number and condition of beneficiaries *held* inadmissible, except to show absolute lack of beneficiaries or heirs.—*Carson v. Gore-Meenan Co.*, 229 F. 765.

DEBT.

See Schools and School Districts, ↻94.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances.

DECEIT.

See Fraud.

DEEDS.

See Courts, Ⓒ489; Mortgages.

DEFAMATION.

See Libel and Slander.

DELEGATION OF POWER.

See Constitutional Law, Ⓒ62.

DEPORTATION.

See Aliens, Ⓒ32.

DESCENT AND DISTRIBUTION.

See Executors and Administrators.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.**(A) Nature and Establishment of Rights in General.**

Ⓒ76 (U.S.D.C.) A claim for damages for a tort does not descend to a person's heirs until judgment is rendered.—*Carson v. Gore-Meenan Co.*, 229 F. 765.

DISCHARGE.

See Accord and Satisfaction; Bankruptcy, Ⓒ407, 409; Compromise and Settlement; Release.

DISCOVERY.

See Patents, Ⓒ292.

II. UNDER STATUTORY PROVISIONS.**(A) Interrogatories and Examination of Parties and of Other Persons.**

Ⓒ36 (U.S.D.C.) Under equity rule 58 (198 Fed. xxxiv, 115 O. C. A. xxxiv), party *held* not required to answer interrogatories suggesting a fishing expedition or attempting to pry into its case.—*Window Glass Mach. Co. v. Brookville Glass & Tile Co.*, 229 F. 833.

Ⓒ69 (U.S.D.C.) Party voluntarily answering improper interrogatories *held* not entitled to say that they ought not to have been propounded.—*Window Glass Mach. Co. v. Brookville Glass & Tile Co.*, 229 F. 833.

DISCRETION OF COURT.

See Admiralty, Ⓒ50; Bankruptcy, Ⓒ100; Criminal Law, Ⓒ586, 1151; Injunction, Ⓒ135, 161; War, Ⓒ16; Witnesses, Ⓒ268.

DISMISSAL AND NONSUIT.

See Appeal and Error, Ⓒ173; Judgment, Ⓒ570; Mandamus, Ⓒ169; Patents, Ⓒ313; Quieting Title, Ⓒ45.

DISSOLUTION.

See Injunction, Ⓒ135, 161.

DISTRIBUTION.

See Descent and Distribution.

DOCTORS.

See Physicians and Surgeons.

DOUBLE TAXATION.

See Taxation, Ⓒ47.

DRUGGISTS.

See Poisons.

DUPLICITY.

See Indictment and Information, Ⓒ124, 125.

DUTIES.

See Customs Duties; Internal Revenue.

EASEMENTS.

See Telegraphs and Telephones, Ⓒ11.

ELECTION OF REMEDIES.

Ⓒ11 (U.S.C.C.A.) Filing of suit to cancel patent to land *held* not election of remedy, preventing action at law for damages, where, before filing of suit, defendant had conveyed land, so that such remedy did not exist.—*Bistline v. United States*, 229 F. 546.

ELECTIONS.

See Bankruptcy, Ⓒ123.

ELECTRICITY.

Ⓒ19 (U.S.C.C.A.) In action for injuries to contractor's employé from electricity turned on without his knowledge, *held*, that there was a question for the jury, though his foreman knew the current had been turned on.—*Pennsylvania Utilities Co. v. Brooks*, 229 F. 93.

EMINENT DOMAIN.**III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.**

Ⓒ166 (U.S.D.C.) Where railroad company had ordered telegraph company to vacate right of way, court of equity *held* without power to condemn the property and fix compensation to be paid by the telegraph company.—*Western Union Telegraph Co. v. Louisville & N. R. Co.*, 229 F. 234.

EMPLOYERS AND EMPLOYÉS.

See Master and Servant.

EMPLOYERS' LIABILITY ACTS.

See Removal of Causes.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, Ⓒ240.

EQUITY.

See Appeal and Error,  185; Bankruptcy,  95, 140; Courts,  352, 365; Discovery,  36; Eminent Domain; Fraudulent Conveyances; Injunction; Judgment,  437, 551; Limitation of Actions; Mines and Minerals,  2; Patents,  238, 291-325; Quieting Title; Receivers; Specific Performance; Subrogation; Trusts; Waste,  17.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

 39 (U.S.D.C.) In suit to enjoin trespasses, *held*, that equity, under doctrine as to retaining jurisdiction for full relief, will not render judgment for statutory penalties.—United States v. Ash Sheep Co., 229 F. 479.

(C) Principles and Maxims of Equity.

 65 (U.S.C.C.A.) Judgment dismissing suit for specific performance *held* to prevent denial of relief in subsequent suit, on ground that plaintiff did not come into court with clean hands.—T. B. Harms & Francis, Day & Hunter v. Stern, 229 F. 42.

II. LACHES AND STALE DEMANDS.

 71 (U.S.C.C.A.) Suit brought more than 10 years after maturity of railroad bonds secured by deed of trust to land grant, seeking to hold company succeeding to rights in such grant personally liable, *held* barred by laches.—Waller v. Texas & P. Ry. Co., 229 F. 87.

 85 (U.S.C.C.A.) The United States *held* not barred by any laches of their officers in a suit brought by them as a sovereign government to enforce a public right.—Bistline v. United States, 229 F. 546.

IV. PLEADING.

(A) Original Bill.

 149 (U.S.D.C.) In equity, misjoinder of plaintiff having no interest, and entitled to no relief, *held* to render complaint multifarious and devoid of equity, and to require a dismissal.—Tully v. Triangle Film Corp., 229 F. 297.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

 395 (U.S.D.C.) A master, to whom a patent infringement suit was referred, had ample power, which he should not hesitate to use, to speed the cause and prevent unreasonable delay.—Rollman Mfg. Co. v. Universal Hardware Works, 229 F. 579.

 407 (U.S.D.C.) Under equity rule 51 (198 Fed. xxxii, 115 C. C. A. xxxii), *held*, that master's report in patent infringement suit should not contain unnecessary statement, argument, and debate regarding objections to evidence.—Rollman Mfg. Co. v. Universal Hardware Works, 229 F. 579.

 409 (U.S.C.C.A.) Under a reference of an entire case to a master by consent of parties, to report his findings of fact and conclusions of law, without the reservation of a right of re-

view his findings of fact are conclusive, if there is any competent evidence to support them.—Goldsmith Silver Co. v. Savage, 229 F. 623.

 409 (U.S.D.C.) A consent order of reference construed, with respect to the weight to be given by the court to the master's findings of fact.—Bates v. Dresser, 229 F. 772.

ERROR, WRIT OF.

See Appeal and Error.

ESTATES.

See Descent and Distribution; Executors and Administrators; Perpetuities.

ESTOPPEL.

See Aliens,  32; Attachment,  294; Corporations,  659; Judgment,  744; Mines and Minerals,  27; Patents,  129; Sales,  176.

EVIDENCE.

See Aliens,  32, 54; Appeal and Error,  695, 697, 1050-1058; Attorney and Client,  166; Bankruptcy,  136, 288, 303, 340; Burglary,  31, 42; Collision,  73; Contracts,  169; Corporations,  673; Courts,  376; Criminal Law,  369, 370, 432, 564; Customs and Usages,  15; Death,  60; Discovery,  36; Exceptions, Bill of,  27; Executors and Administrators,  531; Fraud,  50; Highways,  113; Insurance,  665; Master and Servant,  265-286; New Trial,  71; Patents,  45, 62, 91, 200, 312; Pleading,  11, 381; Post Office,  49; Process,  148; Sales,  181, 382; Taxation,  203; Towage,  15; Trade-Marks and Trade-Names,  93; Trial,  54; Trusts,  372; Witnesses.

I. JUDICIAL NOTICE.

 10 (U.S.D.C.) The court will take judicial notice that there are several schoolhouses, both public and private, wherein school is kept, within four miles of a particular place of business in the city of Memphis.—Laughter & Fisher v. McLain, 229 F. 280.

 29 (U.S.D.C.) The United States District Court for the Western District of Tennessee takes judicial notice of the laws of Tennessee establishing public schools.—Laughter & Fisher v. McLain, 229 F. 280.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

 116 (U.S.C.C.A.) Where, in action against county, plaintiff was permitted to prove admission of county's attorney that fund had been retained to pay any judgment recovered, evidence that no such fund had been retained *held* admissible.—Lauderdale County v. Kittel, 229 F. 593.

(B) Res Gestæ.

↪121(3) (U.S.C.C.A.) In contractor's action for defendant's refusal to permit him to complete contract, evidence that he replied to notice to discontinue work and did not acquiesce *held res gestæ* and admissible.—Lauderdale County v. Kittel, 229 F. 593.

(C) Similar Facts and Transactions.

↪142(2) (U.S.C.C.A.) In seller's action for buyer's breach, evidence as to sales several months after buyer's cancellation of contract, and in places other than place of delivery, *held inadmissible* to show market value.—Pabst Brewing Co. v. E. Clemens Horst Co., 229 F. 913.

V. BEST AND SECONDARY EVIDENCE.

↪166 (U.S.C.C.A.) Permitting witness to testify from figures compiled from books, where the books were accessible and unaccounted for, *held error*.—Pabst Brewing Co. v. E. Clemens Horst Co., 229 F. 913.

X. DOCUMENTARY EVIDENCE.**(D) Production, Authentication, and Effect.**

↪376(1) (U.S.C.C.A.) Books of account *held* incompetent, without testimony as to how or by whom they were kept, when entries therein were made, or the sources from which they were made.—Pabst Brewing Co. v. E. Clemens Horst Co., 229 F. 913.

EXCEPTIONS.

See Criminal Law, ↪1059; Indictment and Information, ↪111.

EXCEPTIONS, BILL OF.**I. NATURE, FORM, AND CONTENTS IN GENERAL.**

↪27 (U.S.C.C.A.) Where evidence was made part of the exceptions, *held*, that recital in the bill of exceptions could add nothing to what the evidence itself showed.—Boulton v. International Paper Co., 229 F. 951.

EXCISE.

See Internal Revenue.

EXECUTION.

See Attachment; Bankruptcy, ↪196; Exemptions.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

↪99 (U.S.C.C.A.) A writ of "pluries si. fa." is a writ issued where other commands of the court have proved ineffectual.—United States v. Board of Directors of Public Schools, Parish of Orleans, 229 F. 1.

EXECUTORS AND ADMINISTRATORS.

See Courts, ↪307, 311; Descent and Distribution.

III. ASSETS, APPRAISAL, AND INVENTORY.

↪49 (U.S.D.C.) A claim for damages for a tort does not pass to an administrator as assets, save by virtue of a statute.—Carson v. Gore-Meenan Co., 229 F. 765.

XIII. LIABILITIES ON ADMINISTRATION BONDS.

↪531 (U.S.D.C.) Where release of surety on executor's bond was under seal, *held*, that the seal was conclusive evidence of consideration, especially where recited consideration of \$1 was shown to have been paid.—Gillespie v. Smith, 229 F. 760.

Plaintiff's release of his uncle from liability on the bond of his father's executor *held* not shown to have been obtained by fraud, misrepresentation, or undue influence.—Id.

Plaintiff's release of surety on joint and several bond of his father's executor *held* to have released other sureties only to the extent to which the released surety would have been liable.—Id.

EXEMPTIONS.

See Bankruptcy, ↪399, 400; Taxation, ↪203.

I. NATURE AND EXTENT.**(A) Nature, Creation, Duration, and Effect in General.**

↪4 (U.S.C.C.A.) Statutes creating or giving the right of exemption to a debtor are subject to the rule of liberal construction, and are generally subject to the most liberal construction which the courts can possibly give them.—Hills v. Joseph, 229 F. 865.

(C) Property and Rights Exempt.

↪52 (U.S.C.C.A.) Under Rem. & Bal. Code Wash. § 563, householder *held* entitled, in lieu of exempt animals, to select merchandise from stock in trade, not exceeding \$250 in value.—Hills v. Joseph, 229 F. 865.

FACTORS.

See Brokers.

↪49 (U.S.C.C.A.) Factor *held* liable in tort to owner or lienor against whom placing of chattels with factor is a tort, but only where principal's right of possession was defective.—C. E. White & Co. v. Century Savings Bank of Des Moines, Iowa, 229 F. 975.

Where principal has good title and right of possession when chattels are delivered to factor, factor's possession *held* lawful, and authority to sell continues until notice of revocation.—Id.

FALSE IMPRISONMENT.

See Malicious Prosecution.

FEDERAL COURTS.See Courts, [↪274-347](#).**FEDERAL EMPLOYERS' LIABILITY ACT.**

See Removal of Causes.

FINDINGS.See Appeal and Error, [↪931, 1008, 1017](#).**FOOD.**[↪3](#) (U.S.D.C.) The Meat Inspection Act held not to apply to tallow oil not used or intended to be used in manufacture of oleomargarine, though it might be so used.—Pittsburgh Melting Co. v. Baltimore & O. R. Co., 229 F. 214.

Under the Meat Inspection Act, regulations of Secretary of Agriculture, extending its provisions to products "capable of being used as food by man," held in excess of his powers.—Id.

FORECLOSURE.See Corporations, [↪482](#).**FOREIGN CORPORATIONS.**See Corporations, [↪668, 673](#).**FOREIGNERS.**

See Aliens.

FORMER JEOPARDY.See Criminal Law, [↪182](#).**FORNICATION.**

See Prostitution.

FRANCHISES.See Taxation, [↪117](#).**FRAUD.**See Bankruptcy, [↪303, 407](#); Fraudulent Conveyances; Limitation of Actions, [↪37](#); Patents, [↪200](#); Post Office, [↪35, 48, 49](#); Sales, [↪45](#); Trade-Marks and Trade-Names, [↪85](#).**II. ACTIONS.****(C) Evidence.**[↪50](#) (U.S.D.C.) Fraud is never presumed, but must be clearly shown.—Gillespie v. Smith, 229 F. 760.**FRAUDULENT CONVEYANCES.**See Bankruptcy, [↪57](#).**I. TRANSFERS AND TRANSACTIONS INVALID.****(J) Knowledge and Intent of Grantee.**[↪170](#) (U.S.C.C.A.) Transfer of stock from husband to wife in payment of debt, rendering him unable to pay complainants' debt, held not fraudulent, though husband intended to defraud

complainants; wife having taken stock solely to obtain payment.—English v. Brown, 229 F. 34.

GARNISHMENT.

See Attachment.

GIFTS.See Charities; Corporations, [↪316](#).**GRAND JURY.**

See Indictment and Information.

[↪38](#) (U.S.C.C.A.) Presence in grand jury room of stenographer, who merely took testimony without attending the jury's deliberations, held not to invalidate indictment.—Wilson v. United States, 229 F. 344.

Act June 30, 1906, authorizing Attorney General or attorneys appointed by him to conduct legal proceedings, held not to enumerate all persons who may be present in grand jury room or to prohibit presence of stenographer.—Id.

GRANTS.

See Public Lands.

GUARANTY.

See Indemnity.

HABEAS CORPUS.**II. JURISDICTION, PROCEEDINGS, AND RELIEF.**[↪82](#) (U.S.C.C.A.) Practice of District Court to make preliminary determination as to propriety of issuing writ of habeas corpus without personal appearance of prisoner held not to violate statute as to such writs.—Murdock v. Pollock, 229 F. 392.**HARMLESS ERROR.**See Appeal and Error, [↪1033-1058](#); Criminal Law, [↪1177](#).**HARRISON ANTI-NARCOTIC LAW.**See Poisons, [↪4](#).**HEIRS.**

See Descent and Distribution.

HIGHWAYS.See Navigable Waters, [↪39](#); Public Lands, [↪47](#).**III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.**[↪113\(1\)](#) (U.S.C.C.A.) Under Const. Miss. 1890, § 170, and Laws 1910, c. 149, §§ 1, 5, as amended by Laws 1912, c. 145, road commissioners, in executing contracts held to act for county, which therefore may be sued thereon.—Lauderdale County v. Kittel, 229 F. 593.[↪113\(4\)](#) (U.S.C.C.A.) In contractor's action against county, evidence of payments on basis stated in contract held to make question for

jury as to meeting of minds on the price specified.—Lauderdale County v. Kittel, 229 F. 593.

In contractor's action for breach of highway construction contract, report of engineer that work was being unnecessarily delayed *held* not conclusive, and the issue was whether the work in fact was unnecessarily delayed.—Id.

In contractor's action against county for breaking contract for alleged reason that work was being unnecessarily delayed, instructions *held* to have fairly submitted the issue determinative of the merits.—Id.

HOSPITALS.

See Charities, 45.

HOUSEBREAKING.

See Burglary.

HUSBAND AND WIFE.

See Fraudulent Conveyances, 170.

IMMIGRATION.

See Aliens, 56.

IMPORTS.

See Customs Duties.

INDEMNITY.

See Corporations, 123.

14 (U.S.C.C.A.) One whose property is attached as that of another may intervene, or bring replevin or conversion against the officer, and the judgment will be binding on the attachment plaintiff, who gave bond and directed the acts of the officer.—Nisbet v. Federal Title & Trust Co., 229 F. 644.

INDIANS.

15(1) (U.S.C.C.A.) Act May 17, 1884, § 8, relative to Indians or other persons in possession of land in Alaska, *held* not to prevent Indians from selling their possessory rights.—Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 F. 966.

Act May 17, 1906, *held* not to terminate possessory rights of Indians in Alaska lands, or bar the alienation thereof.—Id.

16(3) (U.S.C.C.A.) An Indian allottee, who holds his land subject to Act May 27, 1908, § 2, authorizing leases with the approval of the Interior Department, and has leased the surface, may also lease it for oil, with the right to drill thereon.—Kemmerer v. Midland Oil & Drilling Co., 229 F. 872.

19 (U.S.D.C.) Rev. St. § 2117 (Comp. St. 1913, § 4107), providing penalty for grazing on Indian lands, *held* to apply only to lands so far in Indian occupancy and control that grazing will injure the Indians, and to which they might consent.—United States v. Ash Sheep Co., 229 F. 479.

Rev. St. § 2117 (Comp. St. 1913, § 4107), providing penalty for grazing horses, mules, or cat-

tle on Indian lands, *held* not applicable to sheep.—Id.

INDICTMENT AND INFORMATION.

See Bankruptcy, 494; Conspiracy, 43; Courts, 366; Grand Jury; Larceny, 28; Monopolies, 31; Post Office, 48.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

86 (U.S.D.C.) Indictment for conspiracy in restraint of trade, alleging that at Boston, in the district of Massachusetts, defendants entered into conspiracy, etc., *held* to sufficiently charge a crime as to each defendant, committed within such district.—United States v. King, 229 F. 275.

110(3) (U.S.D.C.) Counts in an indictment for violations of White Slave Traffic Act, §§ 2, 3, *held* substantially in the language of the statute, and sufficient.—United States v. Brand, 229 F. 847.

Indictment substantially following language of statute, which denounces acts or things as crime, *held* good.—Id.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

125(20) (U.S.C.C.A.) Indictment charging cashier of bank with issuing "and" putting forth a certificate of deposit with intent to injure "and" defraud the bank *held* not duplicitous and bad, under Rev. St. § 5209 (Comp. St. 1913, § 9772).—Simpson v. United States, 229 F. 940.

125 (U.S.D.C.) Indictment *held* not duplicitous, as charging both a conspiracy in restraint of trade and an actual restraint of trade; overt acts being alleged in support of the charge of conspiracy.—United States v. King, 229 F. 275.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

133(1) (U.S.C.C.A.) Objections to an indictment should be made by motion to quash, demurrer, or motion in arrest of judgment, and not by objections to testimony, or by requests for instructions.—Simpson v. United States, 229 F. 940.

INFORMATION.

See Indictment and Information.

INFRINGEMENT.

See Copyrights, 66, 81-85; Patents, 253-328; Trade-Marks and Trade-Names, 55-70, 85.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

See Copyrights, Ⓒ85; Courts, Ⓒ274, 312, 508; Equity, Ⓒ39; Mines and Minerals, Ⓒ2; Navigable Waters, Ⓒ39; Patents, Ⓒ302; Taxation, Ⓒ498; Trade-Marks and Trade-Names, Ⓒ57, 73, 79, 85; Waste, Ⓒ17.

I. NATURE AND GROUNDS IN GENERAL.

Ⓒ21 (U.S.D.C.) Alleged past harmful and lawless practices of sugar refining company in conduct of its business *held* not ground for denying it injunctive relief against enforcement of unconstitutional and discriminatory statute.—American Sugar Refining Co. v. McFarland, 229 F. 284.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) Actions and Other Legal Proceedings.

Ⓒ26(1) (U.S.D.C.) In suit against contributory infringer for conniving at unlawful use of lawful assemblage of parts, injunction against institution or prosecution of suits against defendant's customers *held* to be denied.—Sanitary Street Flushing Mach. Co. v. Studebaker Corp., 229 F. 591.

(H) Criminal Acts, Conspiracies, and Prosecutions.

Ⓒ105 (U.S.D.C.) Sugar refining company subject to provisions of Act La. No. 10 of 1915, *held* entitled to injunctive relief against its enforcement.—American Sugar Refining Co. v. McFarland, 229 F. 284.

III. ACTIONS FOR INJUNCTIONS.

Ⓒ114(2) (U.S.C.C.A.) The grantee of a prior grantee of standing timber *held* entitled to maintain a suit in equity to enjoin the cutting of the same by another.—Crown Orchard Co. v. Dennis, 229 F. 652.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

Ⓒ135 (U.S.C.C.A.) The granting or dissolution of an interlocutory injunction rests in the sound discretion of the court, which may take into consideration the relative damage which the respective parties will sustain if it be granted or refused.—Kemmerer v. Midland Oil & Drilling Co., 229 F. 872.

(B) Continuing, Modifying, Vacating, or Dissolving.

Ⓒ161 (U.S.C.C.A.) The granting or dissolution of an interlocutory injunction rests in the sound discretion of the court, which may take into consideration the relative damage which the respective parties will sustain if it be granted or refused.—Kemmerer v. Midland Oil & Drilling Co., 229 F. 872.

The dissolution of an interlocutory injunction *held* within the discretion of the court, where the resulting damage to complainant would be slight.—*Id.*

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy; Corporations, Ⓒ537, 566; Sales, Ⓒ45; Taxation, Ⓒ117.

INSPECTION.

See Food.

INSTRUCTIONS.

To jury, see Criminal Law, Ⓒ829.

INSURANCE.

V. THE CONTRACT IN GENERAL.

(B) Construction and Operation.

Ⓒ168 (U.S.C.C.A.) A mere recital in a surety bond given by an agent that he has been appointed agent at a certain place does not limit the scope of the bond or the liability of the surety to business done by the agent at such place.—Citizens' Trust & Guaranty Co. of West Virginia v. Globe & Rutgers Fire Ins. Co., 229 F. 326.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(B) Matters Relating to Property or Interest Insured.

Ⓒ285 (U.S.C.C.A.) A surety bond procured by an agent in favor of his principal *held* not invalid because the principal did not inform the insurer of the state of the agent's account at the time of its execution, where no inquiry was made.—Citizens' Trust & Guaranty Co. of West Virginia v. Globe & Rutgers Fire Ins. Co., 229 F. 326.

XII. RISKS AND CAUSES OF LOSS.

(C) Guaranty and Indemnity Insurance.

Ⓒ435 (U.S.C.C.A.) Policy insuring against loss on account of bodily injuries accidentally suffered by employes *held* to cover damages caused by employes' contracting typhoid fever from drinking water.—Ætna Life Ins. Co. v. Portland Gas & Coke Co., 229 F. 552.

XIV. NOTICE AND PROOF OF LOSS.

Ⓒ556 (U.S.C.C.A.) A provision of an insurance policy that no condition should be deemed waived except by certain formalities *held* not to prevent a waiver by the company, acting through its officers.—Citizens' Trust & Guaranty Co. of West Virginia v. Globe & Rutgers Fire Ins. Co., 229 F. 326.

Ⓒ560 (U.S.C.C.A.) Insured *held* to have waived a condition in a policy requiring immediate notice of a loss, by failing to object thereto.—Citizens' Trust & Guaranty Co. of West Virginia v. Globe & Rutgers Fire Ins. Co., 229 F. 326.

XVIII. ACTIONS ON POLICIES.

Ⓒ665 (U.S.C.C.A.) Evidence *held* to sustain a recovery on a policy insuring against loss by reason of "fraud or dishonesty" of an agent.—Citi-

zens' Trust & Guaranty Co. of West Virginia v. Globe & Rutgers Fire Ins. Co., 229 F. 326.

INSURRECTION.

See War.

INTENT.

See Bankruptcy, 3196; Post Office, 31; Prostitution, 1; Taxation, 58; Trade-Marks and Trade-Names, 55, 69.

INTEREST.

See Bankruptcy, 346; Corporations, 486; United States, 67.

INTERLOCUTORY INJUNCTION.

See Injunction, 135, 161.

INTERNAL REVENUE.

2 (U.S.D.C.) Tax imposed by Act Cong. Oct. 22, 1914, on bankers, held a privilege tax, and not invalid as a direct tax on property.—Real Estate Title Ins. & Trust Co. v. Lederer, 229 F. 799.

9 (U.S.C.C.A.) Under Corporation Tax Law, § 38, when a corporation ceases the conduct of the business subject to a tax by turning it over to another, it ceases to be subject to the tax.—Public Service Ry. Co. v. Herold, 229 F. 902.

Various acts of lessor public service corporations considered, and held not to constitute the carrying on or doing business within the meaning of the Corporation Tax Law.—Id.

A corporation, which had leased all of its property, held not carrying on or doing business, within the meaning of Corporation Tax Law, because of the fact that it was authorized by its charter to lease property.—Id.

9 (U.S.D.C.) What, if any, of the capital of a corporation engaged in banking and other kinds of business, is employed in banking, within Act Cong. Oct. 22, 1914, is a fact to be found.—Real Estate Title Ins. & Trust Co. v. Lederer, 229 F. 799.

Facts held not to show that title insurance company, also doing banking business, had no capital invested in the banking business, within Act Cong. Oct. 22, 1914, though deposits were kept separate.—Id.

19(3) (U.S.D.C.) Under Emergency Revenue Act Oct. 22, 1914, § 5, and Schedule A, warrant or power of attorney in bankruptcy proceedings held required to bear internal revenue stamp, even though executed and presented when not necessary.—In re Capitol Trading Co., 229 F. 806.

28 (U.S.D.C.) Under Act Aug. 5, 1909, § 38, par. 5, and Rev. St. § 3213 (Comp. St. 1913, § 5937), indebtedness assumpsit held to lie for balance of corporate excise tax, which should have been levied without formal assessment.—United States v. Minneapolis Threshing Mach. Co., 229 F. 1019.

Action to recover balance of special excise, which should have been levied, held not barred by limitation contained in Act Aug. 5, 1909, §

38, par. 5, nor any other statute of limitations.—Id.

38 (U.S.C.C.A.) Pleading of plaintiffs in suits to recover taxes paid under Corporation Tax Law held to have been based on the statute and subject to the limitations prescribed thereby.—Public Service Ry. Co. v. Herold, 229 F. 902.

A suit to recover taxes paid under the Corporation Tax Law cannot be maintained, where no claim therefor was presented to the Commissioner of Internal Revenue, within two years.—Id.

47 (U.S.C.C.A.) Evidence held inadmissible to establish the offense of carrying on the business of a wholesale liquor dealer without having paid the special tax therefor.—Day v. United States, 229 F. 534.

INTERNATIONAL LAW.

See War.

INTERSTATE COMMERCE.

See Commerce; Monopolies, 28.

INTERVENTION.

See Attachment, 302; Indemnity, 14; Parties, 48.

INTOXICATING LIQUORS.

See Commerce, 8; Criminal Law, 369.

INVENTION.

See Patents.

JEOPARDY.

See Criminal Law, 180.

JUDGMENT.

See Aliens, 32; Appeal and Error, 1207; Execution; Mandamus, 111; Schools and School Districts, 94.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

437 (U.S.D.C.) Defendant, against whom judgment by default was taken by reason of misunderstanding by the different attorneys representing it, held not entitled to equitable relief.—Interurban General Contracting Co. of New York v. United States, 229 F. 588.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

551 (U.S.C.C.A.) Final decree in equity held to bar further litigation at law, and final judgment at law to bar action in equity, except in matters within the exclusive cognizance of equity.—T. B. Harms & Francis, Day & Hunter v. Stern, 229 F. 42.

570(1) (U.S.C.C.A.) Judgment dismissing suit to cancel patent on motion of United States attorney held not res judicata in action for

damages for fraud in procuring patent.—*Bistline v. United States*, 229 F. 546.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

↪589 (U.S.C.C.A.) If complainants, to whom B. had contracted to transfer stock had equitable lien thereon, *held*, that it was merged in judgment for breach of the contract and no longer existed.—*English v. Brown*, 229 F. 34.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(C) Matters Concluded.

↪744 (U.S.C.C.A.) In suit for infringement of copyright, defendants *held* estopped by former judgment from asserting any equitable rights in copyrighted composition, or asserting that plaintiffs held title thereto as trustees for them.—*T. B. Harms & Francis, Day & Hunter v. Stern*, 229 F. 42.

XVII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

↪948 (U.S.C.C.A.) Plaintiffs *held* entitled to introduce judgment to estop defendant without pleading it, where it was merely set up as conclusive of a particular fact or question.—*T. B. Harms & Francis, Day & Hunter v. Stern*, 229 F. 42.

JUDICIAL NOTICE.

See Evidence.

JURISDICTION.

See Appeal and Error, ↪185; Bankruptcy, ↪293; Corporations, ↪550; Costs, ↪8; Courts, ↪37; Eminent Domain; Equity, ↪39; Patents, ↪288; Receivers, ↪189.

JURY.

See Appeal and Error, ↪1008; Grand Jury.

LACHES.

See Equity, ↪71, 85; Quieting Title, ↪29; Trusts, ↪372.

LANDLORD AND TENANT.

See Bankruptcy, ↪340; Indians, ↪16.

LANDS.

See Indians, ↪15, 16, 19; Public Lands.

LARCENY.

See Commerce, ↪5, 8; Criminal Law, ↪878.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

↪28(1) (U.S.C.C.A.) Indictment for stealing goods constituting part of interstate shipment from railroad car *held* sufficient.—*Morris v. United States*, 229 F. 516.

LEVY.

See Attachment, ↪175.

LEWDNESS.

See Prostitution.

LIBEL AND SLANDER.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

↪50½ (U.S.C.C.A.) Article *held* not privileged as fair and reasonable comment, though relevant, if it goes beyond reasonable limits.—*Press Pub. Co. v. Gillette*, 229 F. 108.

IV. ACTIONS.

(E) Trial, Judgment, and Review.

↪123 (U.S.C.C.A.) Whether reference to signers of memorial to the President regarding policy towards Mexico as "troop of Benedict Arnolds" transcended the limits of fair criticism; *held* properly submitted to the jury.—*Press Pub. Co. v. Gillette*, 229 F. 108.

Whether the limits of fair criticism have been transcended by an alleged libelous article may sometimes be a question of law, but ordinarily is one of fact for the jury.—*Id.*

↪128 (U.S.C.C.A.) In an action for libel, the finding of the jury as to the amount of compensatory damages cannot be disturbed by the Circuit Court of Appeals.—*Press Pub. Co. v. Gillette*, 229 F. 108.

LICENSES.

See Copyrights, ↪81; Patents, ↪129; Poisons, ↪2.

LIENS.

See Bankruptcy, ↪143, 196, 293; Judgment, ↪589; Logs and Logging, ↪3; Maritime Liens; Taxation, ↪117.

LIMITATION OF ACTIONS.

See Adverse Possession; Courts, ↪366; Internal Revenue, ↪28; Quieting Title, ↪29.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

↪11(1) (U.S.C.C.A.) The United States *held* not bound by statute of limitations in suit brought by them as a sovereign government to enforce a public right or assert a public interest.—*Bistline v. United States*, 229 F. 546.

(B) Limitations Applicable to Particular Actions.

↪37(1) (U.S.C.C.A.) Act March 3, 1891, § 8, limiting time for bringing suits to vacate and annul patents, *held* not applicable to actions for damages for fraud in procuring patents.—*Bistline v. United States*, 229 F. 546.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

↪182 (U.S.C.C.A.) In a suit in equity it is not essential that the statute of limitation should be specifically pleaded.—Waller v. Texas & P. Ry. Co., 229 F. 87.

LIQUIDATED DAMAGES.

See Damages, ↪85.

LITERARY PROPERTY.

See Copyrights, ↪40.

↪6 (U.S.C.C.A.) Author *held* to have complete rights in unpublished manuscript, with right to dispose thereof and invest grantee with full right of property, including right to secure a copyright.—T. B. Harms & Francis, Day & Hunter v. Stern, 229 F. 42.

Transferees of rights in musical composition *held* to take subject to equities of persons who, by agreement with author, were to have exclusive publishing rights, whether they had notice or not.—*Id.*

If a vendor sells future acquisitions of property, such as unwritten musical compositions, the equitable title thereto attaches the moment it comes into existence, and vests in the grantee.—*Id.*

Sale, assignment, and transfer of right to print, publish, and sell compositions to be thereafter written *held* not to vest legal title in the vendee.—*Id.*

Sale and assignment of right to publish musical compositions to be written *held* an executory agreement to sell, breach of which could be redressed in an action for damages.—*Id.*

LOGS AND LOGGING.

See Injunction, ↪212.

↪3(15) (U.S.C.C.A.) A contract for the sale of trees suitable for use as pulpwood from a tract of land, to be paid for by the cord, construed, and an action for breach *held* prematurely brought as to certain of its provisions.—Hutchinson v. New York & Pennsylvania Co., 229 F. 510.

↪3(11) (U.S.C.C.A.) A conveyance of standing timber *held* to give grantee eight years to cut and remove the same, and an absolute right to extension of time on payment of interest on the purchase price.—Crown Orchard Co. v. Dennis, 229 F. 652.

↪3(13) (U.S.C.C.A.) Tender of the first annual payment due under a contract and its unqualified refusal, *held* sufficient to preserve the rights of the party making the same.—Crown Orchard Co. v. Dennis, 229 F. 652.

↪8(3) (U.S.C.C.A.) Under contract for cutting and hauling logs, construction of roads from skidway to stream *held* condition precedent to making of payment by defendant, notwithstanding plaintiff's need of money.—Schultz v. Stack-Gibbs Lumber Co., 229 F. 920.

LUMBER.

See Logs and Logging.

MACHINERY.

See Master and Servant, ↪209.

MAIL.

See Post Office, ↪31, 35, 48, 49.

MALICIOUS PROSECUTION.

II. WANT OF PROBABLE CAUSE.

↪24(1) (U.S.D.C.) That plaintiffs were required to give bail to keep the peace *held* not to show probable cause for the proceeding.—Lanterman v. Delaware, L. & W. R. Co., 229 F. 770.

IV. TERMINATION OF PROSECUTION.

↪34 (U.S.D.C.) Termination of prosecution seeking to have plaintiffs held to bail to keep the peace, in plaintiffs' favor, *held* not necessary in New Jersey to maintenance of action for malicious prosecution.—Lanterman v. Delaware, L. & W. R. Co., 229 F. 770.

V. ACTIONS.

↪51 (U.S.D.C.) Complaint in malicious prosecution, alleging that the order requiring complainants to give bonds to keep the peace was procured through false testimony of one of defendants, and that the charge against them was false and made without probable cause, *held* sufficient.—Lanterman v. Delaware, L. & W. R. Co., 229 F. 770.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

↪1 (U.S.C.C.A.) The writ of mandamus was originally a high prerogative writ, directed to persons, corporations, and inferior courts, and is either peremptory or alternative.—United States v. Board of Directors of Public Schools, Parish of Orleans, 229 F. 1.

↪4 (U.S.C.C.A.) Where proceedings in District Court would ultimately ripen into appealable judgment, *held*, that Circuit Court of Appeals would not by mandamus restrain further proceedings.—In re Garrosi, 229 F. 363.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

↪111 (U.S.C.C.A.) Mandamus *held* to lie to require school board to obey Act La. No. 214 of 1912, § 68, as to payment of judgments and providing therefor in budgets.—United States v. Board of Directors of Public Schools, Parish of Orleans, 229 F. 1.

Under mandatory provisions of Act La. No. 214 of 1912, § 68, mandamus to compel school board to obey statute *held* not to be denied because of board's financial embarrassment.—*Id.*

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

↪143 (U.S.C.C.A.) Mandamus to compel compliance with Act Ia. No. 214 of 1912 *held* not to be denied as too late to apply to school budget of one year and too early for next year.—United States v. Board of Directors of Public Schools, Parish of Orleans, 229 F. 1.

↪169 (U.S.C.C.A.) The questions of law arising on a petition for a writ of mandamus may be disposed of on their face in the summary manner of a motion to dismiss.—In re Garrosi, 229 F. 363.

MARITIME LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(B) Under Statutory Provisions.

↪25 (U.S.D.C.) Where fishing schooner was being sailed on one-quarter "lay," under which master and crew were required to pay for supplies, the master had no authority to bind the vessel for supplies.—The Francis J. O'Hara, Jr., 229 F. 312.

Party furnishing supplies to fishing schooner, without making inquiry as to "lay" under which schooner was being operated, *held* not entitled to lien on the vessel under Act June 23, 1910.—*Id.*

MASTER AND SERVANT.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(E) Fellow Servants.

↪180 (U.S.C.C.A.) Under Pennsylvania Liability Act, § 1, failure of person in charge of work of running cars down tracks in coal breaker to warn sweeper *held* negligence, for which employer was liable.—Philadelphia & Reading Coal & Iron Co. v. Oravage, 229 F. 383.

(F) Risks Assumed by Servant.

↪209 (U.S.C.C.A.) Employer, attempting to make machinery, not guarded as required by Factory Act Pa. May 2, 1905, § 11 (P. L. 355), safe, by keeping employes away from it, *held* required to be scrupulously careful to make this method efficient.—Alpha Portland Cement Co. v. Corsi, 229 F. 381.

(H) Actions.

↪265 (U.S.C.C.A.) In action for death of employe, plaintiff *held* not required to show what defect in machine caused it to operate, killing the employe, after being placed out of operation.—Boston Excelsior Co. v. Sweatt, 229 F. 321.

↪270 (U.S.C.C.A.) Evidence that operator of machine had always been seen to stop it, as instructed, before leaning over a pit, *held* competent, as tending to show that he probably followed instructions at time of fatal accident.—Boston Excelsior Co. v. Sweatt, 229 F. 321.

In action for death of employe, objection to evidence concerning defects in machine and occurrences resulting therefrom as too remote *held* to raise a question for the trial court and to present no error of law.—*Id.*

↪276 (U.S.C.C.A.) In action for death of employe finding *held* warranted that he stopped operation of machine as instructed, and was injured by the machine being put into operation because out of repair.—Boston Excelsior Co. v. Sweatt, 229 F. 321.

↪278 (U.S.C.C.A.) In action for death of employe, finding that machine was out of repair, and that employer knew this, or should have known it, and was negligent in failing to repair it, *held* warranted.—Boston Excelsior Co. v. Sweatt, 229 F. 321.

↪278(6) (U.S.C.C.A.) Evidence that door in floor of car fell on employe working under the car, *held* insufficient to support recovery; the maxim of "res ipsa loquitur" not applying.—American Car & Foundry Co. v. Schachlewich, 229 F. 559.

↪285 (U.S.C.C.A.) In action for death of employe, evidence *held* to make question for jury as to whether worn condition of parts of machine caused accident by throwing machine into operation after its operation had been stopped.—Boston Excelsior Co. v. Sweatt, 229 F. 321.

↪285 (U.S.C.C.A.) In action for employe's death, evidence as to whether employer gave instructions to stop machinery before oiling it, and whether it was the custom or practice to do so, *held* to make question for jury.—Alpha Portland Cement Co. v. Corsi, 229 F. 381.

↪286 (U.S.C.C.A.) In action for death of sweeper in coal breaker, struck by car running down grade, evidence *held* to make question for jury as to whether warning was given.—Philadelphia & Reading Coal & Iron Co. v. Oravage, 229 F. 383.

↪286(4) (U.S.C.C.A.) In action for injuries to machinist's helper, struck in eye by piece of metal while machinist was chipping a journal or driving box, employer's negligence *held* a question for the jury.—Siegesmund v. Chicago, M. & St. P. Ry. Co., 229 F. 956.

↪288(5) (U.S.C.C.A.) Whether machinist's helper assumed risk of injury from flying chips, when he was not warned that chipping was to be resumed, *held* a question for the jury.—Siegesmund v. Chicago, M. & St. P. Ry. Co., 229 F. 956.

MAXIMS.

See Equity, ↪65.

MEDICINES.

See Poisons.

MEMORANDA.

See Witnesses, ↪255.

MERGER.

See Judgment, ↪589.

MINES AND MINERALS.

I. PUBLIC MINERAL LANDS.

(A) Reservation and Disposal in General.

↪2 (U.S.C.C.A.) A court of equity has jurisdiction of a suit by the United States to en-

join the taking of petroleum from land which it claims to own, and which constitutes its chief value, and where complainant also owns adjoining oil lands.—*El Dora Oil Co. v. United States*, 229 F. 946.

(B) Location and Acquisition of Claims.

☞27(1) (U.S.C.C.A.) Party *held* not estopped to claim land under mining lode locations by purchasing mill site locations located by others upon the same land.—*Worthen Lumber Mills v. Alaska Juneau Gold Mining Co.*, 229 F. 966.

Representations of mill site locators that land was nonmineral *held* not imputable to party claiming under mining lode locations on the same land and purchasing the mill site locations.—*Id.*

MISREPRESENTATION.

See Bankruptcy, ☞407; Fraud; Sales, ☞45.

MISTAKE.

See Compromise and Settlement, ☞8.

MONEY PAID.

See Bankruptcy, ☞303.

MONOPOLIES.

See Trade-Marks and Trade-Names, ☞67.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

☞10 (U.S.D.C.) Act La. No. 10 of 1915, as to systematic payment in Louisiana of less price for sugar than is paid in other states *held* invalid.—*American Sugar Refining Co. v. McFarland*, 229 F. 284.

☞17 (U.S.C.C.A.) Appointment by corporation of exclusive selling agent *held* not unlawful, if the corporation itself was not a combination obnoxious to the Sherman Act.—*American Sea Green Slate Co. v. O'Halloran*, 229 F. 77.

☞17 (U.S.D.C.) Manufacturer of syrup used in beverage and furnished only to its licensed bottlers *held* not to violate the Sherman Act, where distinctive tops and labels were used on its bottles and it guaranteed the beverage.—*Coca-Cola Co. v. J. G. Butler & Sons*, 229 F. 224.

Refusal of manufacturer of syrup used in beverage to sell to others than its licensed bottlers, or to allow others to use its trade-mark, *held* not a violation of Clayton Act, § 3.—*Id.*

☞17 (U.S.D.C.) Attempt of members of potato shippers' association to coerce nonmembers into refraining from dealing with blacklisted persons for purpose of restraining their trade *held* illegal under the Sherman Act.—*United States v. King*, 229 F. 275.

☞17(2) (U.S.D.C.) Manufacturers of lasts, who separately agreed with rubber company to sell lasts only to parties specified by it, *held* within their rights, and not liable under the Sherman Act.—*Hood Rubber Co. v. United States Rubber Co.*, 229 F. 583.

☞28 (U.S.C.C.A.) If corporation was unlawful combination, damages caused by its appointment of exclusive selling agent *held* recoverable under Sherman Act, § 7.—*American Sea Green Slate Co. v. O'Halloran*, 229 F. 77.

To recover, under Sherman Act, § 7, actual damages susceptible of expression in figures, and not speculative, remote, or uncertain, must be shown.—*Id.*

Damages recoverable, under Sherman Act, § 7, must be proved by facts from which they are logically and legally inferable, and not by conjectures or estimates.—*Id.*

In action under Sherman Act, § 7, damages to party compelled to pay more than market value *held* not recoverable, without evidence of market value, other than evidence of price at which combination purchased.—*Id.*

In action under the Sherman Act, damages *held* not recoverable on supposition that lost customers would have done as much business as in previous years, without evidence to support such supposition.—*Id.*

In action under Sherman Act, damages *held* not recoverable for loss of customers, without showing that the customers made their change because of the unlawful combination.—*Id.*

☞28 (U.S.D.C.) Declaration *held* not to allege a combination or conspiracy in restraint of trade, but at most contracts in restraint of trade, or a monopolization of trade.—*Hood Rubber Co. v. United States Rubber Co.*, 229 F. 583.

Contracts whereby monopoly was obtained *held* not outside the scope of the Sherman Act, as affecting a party, though purchases by him, prevented by the restraint of trade, would have been intrastate transactions.—*Id.*

Declaration alleging that defendant by means of contracts illegally restricted, limited, and controlled interstate trade *held* to state a cause of action, under Sherman Act, § 2.—*Id.*

☞31 (U.S.D.C.) Indictment for conspiracy in restraint of trade *held* to sufficiently allege that conspiracy was actually entered upon and engaged in notwithstanding use of the word "should" in describing the conspiracy.—*United States v. King*, 229 F. 275.

Indictment for conspiracy against members of potato shippers' association *held* not to show illegality as to blacklisting persons and agreeing not to deal with them.—*Id.*

Indictment for conspiracy in restraint of trade *held* to sufficiently show intent to restrain trade of blacklisted persons, where defendants controlled 75 per cent. of a commodity.—*Id.*

MORTGAGES.

See Corporations, ☞376, 482; Street Railroads, ☞52.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

☞169 (U.S.D.C.) Mortgagee *held* not charged with notice of prior mortgage, though former employé was present at interview between mortgagor and another creditor, in which he refer-

red to such prior mortgage.—In re Hereford, 229 F. 863.

IV. RIGHTS AND LIABILITIES OF PARTIES.

↪199(1) (U.S.C.C.A.) A mortgagor is under no obligation to pay over the income or profits to the mortgagee until demand.—Davis v. Virginia Ry. & Power Co., 229 F. 633.

↪205 (U.S.C.C.A.) Mortgaged property converted by the mortgagor may be followed by the mortgagee in the hands of third persons, except purchasers without notice, without proof of fraud.—Davis v. Virginia Ry. & Power Co., 229 F. 633.

MOTION PICTURES.

See Customs Duties.

MULTIFARIOUSNESS.

See Equity, ↪149.

MUNICIPAL CORPORATIONS.

See Schools and School Districts; Street Railroads.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(D) Taxes and Other Revenue, and Application Thereof.

↪966(7) (U.S.C.C.A.) Act Aug. 24, 1912, c. 387, § 9, 37 Stat. 512, held to prohibit municipal corporations in Alaska from levying any tax upon railways or railway property.—Alaska Northern Ry. Co. v. Municipality of Seward, 229 F. 667.

MUSICAL COMPOSITIONS.

See Copyrights, ↪86.

MUTUALITY.

See Specific Performance, ↪6.

NAMES.

See Trade-Marks and Trade-Names.

NARCOTICS.

See Poisons, ↪4.

NAVIGABLE WATERS.

See Canals.

III. RIPARIAN AND LITTORAL RIGHTS.

↪39(2) (U.S.C.C.A.) Laying out of street on tidelands, without consent of owner of upland or condemnation proceedings, held not to sever littoral rights from the upland, or merge them in the public right.—Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 F. 966.

↪39(5) (U.S.C.C.A.) Decree enjoining party from constructing, continuing, or maintaining on tidelands any structure obstructing or interfering with access of owner of upland and

building of wharf by it held not erroneous.—Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 F. 966.

NEGLIGENCE.

See Banks and Banking, ↪253; Canals, ↪18; Charities, ↪45; Collision; Electricity, 19; Judgment, ↪437; Master and Servant, ↪180-286, 288; Railroads, ↪328; Towage, ↪4, 15.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEUTRALITY LAWS.

See War, ↪16.

NEW TRIAL.

II. GROUNDS.

(F) Verdict or Findings Contrary to Law or Evidence.

↪71 (U.S.D.C.) Verdict for defendant in personal injury action on substantially conflicting testimony held not to be set aside, though regarded as wrong by the District Judge.—Stewart v. Boston & M. R. R., 229 F. 862.

NOTES.

See Bills and Notes.

NOTICE.

See Insurance, ↪560; Mortgages, ↪169; Trade-Marks and Trade-Names, ↪73.

NOVELTY.

See Patents, ↪45.

OATH.

See Bankruptcy, ↪486, 494.

OBJECTIONS.

See Appeal and Error, ↪185; Bankruptcy, ↪339; Courts, ↪37, 276, 405; Indictment and Information, ↪133.

OFFICERS.

See Banks and Banking, ↪253, 256, 257; Corporations, ↪308-316, 318; Food; Receivers.

OPIUM.

See Poisons.

ORDERS.

See Appeal and Error.

PARTIES.

See Admiralty, ↪50; Copyrights, ↪81; Equity, ↪149; Injunction, ↪114.

III. NEW PARTIES AND CHANGE OF PARTIES.

↪48 (U.S.C.C.A.) Denial of a motion to amend an intervening petition after a delay of

four years *held* not error, where intervening rights would be affected by the amendment.—*Davis v. Virginia Ry. & Power Co.*, 229 F. 633.

PARTNERSHIP.

See Bankruptcy, ¶407.

I. THE RELATION.

(A) Creation and Requisites.

¶20 (U.S.D.C.) Person purchasing liquor license and permitting proprietor of hotel to use it upon payment of interest *held* not a partner in the hotel business by operation of law.—*In re Howe*, 229 F. 854.

PATENTS.

II. PATENTABILITY.

(A) Invention.

¶27 (U.S.C.C.A.) A change in an old machine or instrument, which so affects its operation and construction as to adapt it to a new use, is patentable.—*Tate v. Baltimore & O. R. Co.*, 229 F. 141.

(B) Novelty.

¶45 (U.S.D.C.) In approaching the consideration of the patentable novelty of an article of wearing apparel, it is well, in a doubtful case, to weigh cautiously the influence of commercial utility.—*Epstein v. Dryfoos*, 229 F. 756.

(D) Anticipation.

¶62 (U.S.D.C.) Evidence *held* to show that defendant's assignor, who first applied for patent on invention, also conceived the invention before plaintiff, and was the original or first inventor.—*Evans v. Associated Automatic Sprinkler Co.*, 229 F. 1007.

¶73 (U.S.C.C.A.) Whether an alleged anticipating patent was a part of the prior art depends, not on priority of invention, but on whether the invention of the later patent was made prior to the issue of the first patent.—*Miner v. T. H. Symington Co.*, 229 F. 730.

III. PERSONS ENTITLED TO PATENTS.

¶90 (U.S.D.C.) As between two patents, the applications for which were in the Patent Office at the same time, neither is prior art as against the other.—*Mergenthaler Linotype Co. v. International Typesetting Mach. Co.*, 229 F. 168.

¶91 (U.S.C.C.A.) It requires clear proof to overcome the presumption of joint invention created by the grant of the patent.—*Cheshire v. Cox Multi-Mailer Co.*, 229 F. 415.

¶92 (U.S.C.C.A.) An invention may be joint, although both patentees did not hit upon the same inventive thought at the same time, but each contributed separate, but essential, elements of the combination.—*Cheshire v. Cox Multi-Mailer Co.*, 229 F. 415.

V. REQUISITES AND VALIDITY OF LETTERS PATENT.

¶129 (U.S.C.C.A.) A licensee is not estopped to deny the validity of the patent after the license has been ended.—*Tate v. Baltimore & O. R. Co.*, 229 F. 141.

Where the owner of a patent repudiates a license by suing the licensee for infringement, he cannot rely on it as an estoppel.—*Id.*

¶129 (U.S.D.C.) One who employed a patentee, who had assigned his patent, to design a competing device that would, if possible, avoid infringement, when sued for infringement, *held* estopped to deny validity of the patent.—*Mergenthaler Linotype Co. v. International Typesetting Mach. Co.*, 229 F. 168.

A complainant is not estopped to attack a patent, when introduced by defendant as a part of the prior art, by the fact that it was one of those originally sued on, but abandoned.—*Id.*

¶129 (U.S.D.C.) A corporation formed to manufacture a device alleged to infringe patents granted to and assigned by one of the incorporators *held* bound by any estoppel which bound him.—*Crown Cork & Seal Co. of Baltimore City v. Carper Automatic Bottling Mach. Co. of Baltimore City*, 229 F. 748.

VII. REISSUES.

¶139 (U.S.C.C.A.) A second patent, issued on cancellation of the first for an error therein, *held* valid as a reissue, although not so applied for, and although designated as an original patent, for the full term from its date.—*National Brake & Electric Co. v. Christensen*, 229 F. 564.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(A) In General.

¶157(1) (U.S.C.C.A.) The word "attached," in a patent claim, *held* properly used to describe the relation between two parts of a single structure.—*National Brake & Electric Co. v. Christensen*, 229 F. 564.

¶157 (U.S.D.C.) The construction placed upon a patent by the patentee should be adopted, whenever this can be done without excluding anything from it, or adding anything which is not fairly contained therein.—*Safety Car Heating & Lighting Co. v. Gould Coupler Co.*, 229 F. 429.

(B) Limitation of Claims.

¶165 (U.S.D.C.) Rules governing the construction of claims considered.—*Mergenthaler Linotype Co. v. International Typesetting Mach. Co.*, 229 F. 168.

¶168 (U.S.D.C.) The rejection or replacement of the claims of a patent by others, or the substitution of a new specification, do not necessarily require the limitation or narrowing of their scope.—*Safety Car Heating & Lighting Co. v. Gould Coupler Co.*, 229 F. 429.

X. TITLE, CONVEYANCES, AND CONTRACTS.**(B) Assignments and Other Transfers.**

☞200 (U.S.D.C.) Evidence *held* insufficient to show that patentee was deceived by assignee's agent respecting the unexpired term of the patent.—Thurston v. Reed, 229 F. 737.

Representation of party, in negotiating for assignment of patent having 5½ years to run, that it had only a short time to run, *held* not a material representation, authorizing cancellation of the assignment.—*Id.*

Evidence *held* to show that defendant's agent, in negotiating for assignment of patent, did not represent that he was sent to patentee by treasurer of corporation to which patentee had agreed to assign.—*Id.*

Misrepresentations in negotiating for assignment of patent as to patentee's right to assign *held* not to authorize cancellation of assignment because untrue representations were mere opinions as to a matter of law.—*Id.*

Clear, unequivocal, and convincing proof of fraud *held* necessary to warrant cancellation of contract.—*Id.*

Facts *held* not to show that person negotiating for assignment of patent, which patentee had previously agreed to assign to another, took any fraudulent advantage of the patentee's failing memory.—*Id.*

Evidence as to value of patent *held* insufficient to show that consideration of \$200 paid for assignment was so grossly inadequate as to raise a presumption of fraud.—*Id.*

(C) Licenses and Contracts.

☞218 (U.S.C.C.A.) The time for payment of a royalty for use of a patented construction in the building of a bridge *held* to have been extended until completion of the bridge rendering an action for nonpayment brought before that time premature.—Luten v. Bearce, 229 F. 391.

XII. INFRINGEMENT.**(A) What Constitutes Infringement.**

☞253 (U.S.C.C.A.) Infringement may be found, although the infringing device does not obtain the advantages of the patented invention to the fullest extent.—Telescope Cot Bed Co. v. Gold Medal Camp Furniture Mfg. Co., 229 F. 1002.

☞259 (U.S.D.C.) The manufacture of an essential part of an infringing structure, not adaptable to other uses, who sells it to another with the intention that he shall supply the remaining parts, is a contributory infringer.—Safety Car Heating & Lighting Co. v. Gould Coupler Co., 229 F. 429.

(C) Suits in Equity.

☞288 (U.S.D.C.) Under Judicial Code, § 48, suit for infringement *held* not maintainable in district where defendant had no established place of business, though agent therein in his business used infringing articles.—United States Envelope Co. v. Transo Paper Co., 229 F. 576.

Defendant in patent infringement suit, by its acts after plea to jurisdiction was overruled, *held* not to have waived question of jurisdiction, so as to prevent it from being raised by motion to dismiss.—*Id.*

☞291 (U.S.D.C.) Under Judicial Code, §§ 48, 50, foreign corporation, which had assumed defense of patent infringement suit against user of its alleged infringing device, *held* to be made a party to the record.—Dicks Press Guard Mfg. Co. v. Bowen, 229 F. 193.

☞292 (U.S.D.C.) Under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), defendant *held* not to be required, in patent infringement suit, to answer interrogatories, as information sought could be easily procured by inspection.—Window Glass Mach. Co. v. Brookville Glass & Tile Co., 229 F. 833.

Information as to which claims of patents would be relied upon *held* to be obtained by motion under supplementary equity rule 7, § 2 (228 Fed. viii) and not by interrogatory under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv).—*Id.*

☞302 (U.S.D.C.) Party which assumed and conducted defense of patent infringement suit brought against user of its alleged infringing device *held* bound by a preliminary injunction.—Dicks Press Guard Mfg. Co. v. Bowen, 229 F. 193.

☞312(2) (U.S.D.C.) In a patent infringement suit, the best evidence on the question of infringement is a comparison of the patented devices.—Window Glass Mach. Co. v. Brookville Glass & Tile Co., 229 F. 833.

☞313 (U.S.D.C.) Where, though expense had been incurred in taking testimony and in other ways, evidence in patent suit was not closed, plaintiffs still had right to dismiss.—E. G. Staude Mfg. Co. v. Labombarde, 229 F. 1004.

Leave to plaintiffs to dismiss patent case *held* to be conditioned upon substantial indemnity to defendants, not only for taxable costs, but for incidental expenses, including counsel fees which would be lost in subsequent litigation.—*Id.*

☞321 (U.S.D.C.) Plaintiff in patent infringement suit *held* entitled to notify defendant's customers of decree, warn them against buying or vending defendant's article, and of intention to sue for damages, and to propose terms of compromise.—Rollman Mfg. Co. v. Universal Hardware Works, 229 F. 579.

Plaintiff in patent infringement suit *held* to be prohibited from making representations to defendant's customers regarding interlocutory decree, without stating the limits and effect of the decree.—*Id.*

Where plaintiff was making unfair use of interlocutory decree finding infringement in certain respects, *held*, that court in which suit was pending had authority on motion to control the use of the decree.—*Id.*

☞323 (U.S.D.C.) Complainant in an infringement suit *held* not entitled to a decree against certain defendants for infringement by a device not within the issues as tried.—Cheatham Electric Switching Device Co. v. Brooklyn Rapid Transit Co., 229 F. 165.

☞325 (U.S.D.C.) A defendant, who pleads a large number of patents as anticipations, will be required, on application of complainant, to specify those on which he seriously relies, under penalty of being taxed with the costs, even if successful, for failure to comply in good faith.—Grand Rapids Showcase Co. v. Straus, 229 F. 199.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

328.

UNITED STATES.

ORIGINAL.

- 582,217. Bunk car, held not anticipated, valid, and infringed, 229 F. 145.
- 586,337. Space-band buffer for linotype machines, claims 1 and 2, held void for prior use, 229 F. 168.
- 618,065. Safety attachment for presses, claim 1, held infringed, 229 F. 573.
- 619,441. Vise jaw mechanism for linotype machines, claims 1 and 2 held not infringed, and claim 4 held void, as too broad, 229 F. 168, 407.
- 630,112. Pi-stacker or sorts holding attachment for linotype machines, held void for lack of invention, and also for prior use, 229 F. 168.
- 635,141. Process for reclaiming rubber from vulcanized rubber waste, held not anticipated, valid and infringed, 229 F. 150.
- 635,280. Combined air pump and electric motor, held not anticipated, valid and infringed, 229 F. 564.
- 643,289. Mold-resistant device for linotype machines, claims 1, 2, and 3, held valid and infringed, 229 F. 168.
- 643,560. Improvement in locomotives, claim 2, is void as too broad, 229 F. 141.
- 645,698. Yarn-dyeing machine, held not infringed, 228 F. 512.
- 645,816. Dumping car, held not anticipated, valid, and infringed, 229 F. 159.
- 654,125. Pivot axle cultivator, claims 12 and 13, held void for lack of invention, in view of the prior art, 229 F. 575.
- 693,643. Draft rigging for railroad cars, held not anticipated, valid and infringed, 229 F. 730.
- 718,781. Magazine channels for linotype machines, claims 2 and 3, held not infringed, 229 F. 168, 407.
- 719,436. Vise jaw mechanism for linotype machines, held not infringed, 229 F. 168.
- 739,996. Mold support for linotype machines, claims 1, 2, and 3, held infringed, 229 F. 168, 407.
- 745,157. Means for operating motor vehicles, claims 3, 7, 9, 12, 17, 18 and 20, held not anticipated, valid and infringed, 229 F. 719.
- 747,963. Machine for sewing sweatbands into hats, claim 4, held not anticipated, valid and infringed, 229 F. 726.
- 759,501. Magazine gate for linotype machines, claim 11, held void, as too broad, 229 F. 168, 407.
- 787,821. Gear wheel for actuating the second keyboard roll in linotype machines from the first, claims 1, 2, and 3, held void for lack of invention, 229 F. 168, 407.
- 793,723. Folding cot, held not anticipated, valid and infringed, 229 F. 1002.
- 795,059. Street flushing machine, held infringed, 229 F. 421.
- 797,412. Magazine supporting frame in linotype machines, claim 9, held not infringed, 229 F. 168, 407.
- 797,436. Keyboard lock for linotype machines, claim 1, held not infringed, 229 F. 168, 407.
- 799,662. Covering for automobile tires, held void for lack of invention, 229 F. 424.
- 814,786. Talking machine, construed, and held not infringed, 229 F. 999.
- 826,593. Vise jaw mechanism for linotype machines, held not infringed, 229 F. 168, 407.
- 830,436. Magazine supporting frame for linotype machines, claim 7, held infringed, 229 F. 168, decree reversed 229 F. 407.
- 837,276. Knife-adjusting device in slug-trimming mechanism for linotype machines, claims 1 and 9, held not infringed, 229 F. 168.
- 840,522. Spring cushion, construed, and as limited by the prior art, held not infringed, 229 F. 398.
- 842,827. Means for operating motor vehicles, claims 2, 3, 7, and 9, held not anticipated, valid and infringed, 229 F. 719.
- 848,338. Means for disconnecting the ejector slide in linotype machines, claim 4, held not infringed, 229 F. 168, 407.
- 887,610. Skirt or petticoat, claims 3 and 4, construed, and held not infringed, 229 F. 756.
- 888,402. Magazine gate or matrix locking device for linotype machines, claim 14, held not infringed, 229 F. 168, 407.
- 924,840. Improvement in pipe couplings, claims 1 and 3, held void for lack of utility, 229 F. 157.
- 925,843. Mold disc support for linotype machines, claims 1, 2, 3, and 4, construed and held not infringed, 229 F. 168, 407.
- 926,518. Car axle lighting system, held void for lack of patentable invention, in view of prior art, 229 F. 990.
- 971,245. Feeder for printing presses, held not anticipated, valid, and infringed, 229 F. 415.
- 1,012,984. Bottling machine, claims 28, 29, 37, 38, 39, 42 and 57, held valid and infringed, 229 F. 748.
- 1,028,284. Water heater, claims 2, 3, and 5 held not anticipated, valid and infringed; claims 1, 4, 6 held not infringed, 229 F. 995.
- 1,060,550. Talking machine, construed, and held not infringed, 229 F. 999.
- 1,070,080. Electric car-lighting system, held not anticipated, valid, and infringed, 229 F. 429.
- 1,105,873. Fastening for floor and sidewalk gratings, held valid but not infringed, 229 F. 154.
- 1,120,596. Bottling machine, claims 6, 9, 10, and 24, held valid and infringed; claim 1 held not infringed, 229 F. 748.

REISSUED.

- 13,125. Wire mattress, held valid and infringed as to claim 23, and not infringed as to claims 19, 20, 22 and 24, 229 F. 197; held not infringed, 229 F. 426.
- 13,489. Elevator for linotype machines, claims 6 and 7, held infringed, 229 F. 168.

PAYMENT.

See Accord and Satisfaction; Bankruptcy, ¶164; Compromise and Settlement; Contracts, ¶319; Corporations, ¶469; Logs and Logging, ¶3, 8; Mandamus, ¶111; Patents, ¶218; Subrogation.

PENALTIES.

See Aliens, ¶54; Appeal and Error, ¶1207; Bankruptcy, ¶346; Carriers, ¶20; Damages, ¶85; Equity, ¶39; Indians, ¶19; Railroads, ¶254.

PERJURY.

See Bankruptcy, ¶486, 494.

PERPETUITIES.

¶4 (U.S.C.C.A.) Will held not to violate New York statute of perpetuities, as vesting in the executors a trust estate, postponing the taking effect of an estate given trustees.—Hogg v. Maxwell, 229 F. 113.

PERSONAL INJURIES.

See Electricity; Master and Servant, ¶286, 288; Negligence, ¶84.

PHYSICIANS AND SURGEONS.

See Poisons, ¶4.

¶6 (U.S.D.C.) Under Gen. Code Ohio, § 1286, a person who examines patients, diagnoses their diseases, and then prescribes and sells his own proprietary remedies is engaged in the practice of medicine, although his ostensible and apparent motive may be the sale of his medicines.—Tucker v. Williamson, 229 F. 201.

PLACE.

See Indictment and Information, ¶86.

PLEADING.

See Appeal and Error, ¶1039; Bonds, ¶125; Copyrights, ¶82; Courts, ¶347; Equity, ¶149; Internal Revenue, ¶38; Limitation of Actions; Malicious Prosecution, ¶51; Monopolies, ¶23; Patents, ¶325; Removal of Causes, ¶25; United States, ¶67.

I. FORM AND ALLEGATIONS IN GENERAL.

¶11 (U.S.C.C.A.) In action in which failure to make payments was alleged as breach of contract to cut timber into logs, allegations as to plaintiff's financial condition and inability to perform unless such payment was made held

evidentiary, and not properly pleadable.—Schultz v. Stack-Gibbs Lumber Co., 229 F. 920.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

¶63 (U.S.C.C.A.) Whether exception or proviso need be pleaded held to depend upon separableness from description of the offense in respect of its being a part of the definition of the offense.—Grand Trunk Ry. Co. v. United States, 229 F. 116.

XII. ISSUES, PROOF, AND VARIANCE.

¶375 (U.S.C.C.A.) Unavoidable causes excusing compliance with the 28 hour law (Act June 29, 1906), held matters of defense, and allegation negating them was surplusage not required to be proved.—Grand Trunk Ry. Co. v. United States, 229 F. 116.

¶381(1) (U.S.C.C.A.) In contractor's action against county for breach of contract, where pleadings raised question of good faith of county's engineer, evidence of his collusion with plaintiff's surety to substitute another contractor held admissible.—Lauderdale County v. Kitel, 229 F. 593.

PLEDGES.

See Corporations, ¶123, 474.

POISONS.

¶2 (U.S.D.C.) Harrison Narcotic Act Dec. 17, 1914, § 2, construed with respect to the rights and duties of physicians in dispensing narcotics to patients.—Tucker v. Williamson, 229 F. 201.

The license exacted by Harrison Narcotic Act Dec. 17, 1914, is a mere form of imposing an internal revenue tax and implies nothing more than that the licensee shall not be subject to the penalties of the act.—Id.

Validity of departmental regulations promulgated under the Harrison Narcotic Act Dec. 17, 1914, considered.—Id.

¶4 (U.S.C.C.A.) Harrison Act, § 8, making possession of prohibited drugs by "any person" not registered thereunder unlawful, held not limited to persons required to register under section 1, but to apply to all persons not excepted thereby.—Wilson v. United States, 229 F. 344.

¶4 (U.S.D.C.) Physician, issuing prescription for unusually large amount of drugs to which the Harrison Narcotic Law, § 2 applies, or dealer filling it, held guilty of offense, unless prescription indicates necessity for such unusual quantity.—United States v. Curtis, 229 F. 288.

Sale or dispensing of large and unusual quantities of drugs, without explanation as to necessity, held evasion of Harrison Narcotic Law, and unlawful, under section 6.—Id.

¶9 (U.S.D.C.) Under Harrison Narcotic Law, §§ 1, 8, indictment charging sale of morphine sulphate tablets held to charge offense; but, when charged as violation of section 1, proof of registration and payment of special tax would be complete defense.—United States v. Curtis, 229 F. 288.

POSSESSION.

See Adverse Possession.

POST OFFICE.**I. POST-OFFICE DEPARTMENT, POST OFFICES, POSTMASTERS, AND OTHER OFFICERS.**

↪10 (U.S.C.C.A.) Government, though its liability for loss of registered package is limited to \$50, *held* entitled to recover full amount lost, upon bond of postal employé embezzling a registered package.—United States Fidelity & Guaranty Co. v. United States, 229 F. 397.

III. OFFENSES AGAINST POSTAL LAWS.

↪31 (U.S.C.C.A.) Under Penal Code, § 211, as to mailing information as to where abortions will be performed, though no promise to operate is essential, a positive intent that the act will be done must be indicated.—Bours v. United States, 229 F. 960.

"Abortion," in Penal Code, § 211, as to mailing information concerning abortions, *held* to be taken in general medical sense, irrespective of local statutes.—*Id.*

Notwithstanding Penal Code, § 211, *held*, that physician may lawfully use mails to give information respecting abortions necessary to save life.—*Id.*

Positive intent that abortion will be performed, necessary to render matter unmailable under Penal Code, § 211, *held* not required to appear from the document itself.—*Id.*

↪35 (U.S.C.C.A.) On trial for fraudulent use of mails, truth or falsity of financial statements sent to parties from whom credit was desired *held* controlling; the sending thereof being inconsistent with honesty, if knowingly false.—Kaplan v. United States, 229 F. 389.

↪48(4) (U.S.C.C.A.) Indictment for using mails in execution or attempted execution of scheme to defraud bank *held* not defective for failure to allege incorporation of bank, in view of Rev. St. § 1025 (Com. St. 1913, § 1691).—McClendon v. United States, 229 F. 523.

Indictment for fraudulent use of the mails need not plead the particulars of the scheme to defraud with all the certainty as to time, place, and circumstances required in charging the use of the mails.—*Id.*

Indictment for fraudulent use of the mails, alleging that further description of envelope inclosing letter was unknown to the grand jury, *held* not defective for failure to allege to whom it was addressed.—*Id.*

Indictment for fraudulent use of mails *held* not defective, because party intended to be defrauded was described as the estate of R.—*Id.*

↪48(2) (U.S.C.C.A.) Indictment for mailing information concerning abortions *held* required to charge that apparently innocuous words were used in wrongful sense, and to allege facts justifying the charge.—Bours v. United States, 229 F. 960.

Indictment for mailing information concerning abortions *held* fatally defective, as not alleging or showing intent to give information as

to where or by whom abortion would be produced, but only where it might be produced.—*Id.*

↪49 (U.S.C.C.A.) Where defendant in request for credit certified to correctness of accompanying financial statements, jury, on trial for fraudulent use of mails, *held* justified in refusing to hold defendant's bookkeeper solely responsible for false statements.—Kaplan v. United States, 229 F. 389.

↪49 (U.S.C.C.A.) On trial for sending indecent letter through the mails, in violation of Rev. St. § 3893, as amended by Act Sept. 26, 1888, evidence as to addressee's reputation for chastity *held* properly excluded.—Robbins v. United States, 229 F. 987.

POWERS.

See Internal Revenue, ↪19.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PREFERENCES.

See Bankruptcy, ↪161, 164, 166; Corporations, ↪544, 566.

PREMATURE ACTION.

See Bankruptcy, ↪100; Logs and Logging, ↪3; Patents, ↪218.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRESUMPTIONS.

See Appeal and Error, ↪931.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Charities, ↪45; Corporations, ↪318, 668; Courts, ↪274; Factors; Insurance, ↪168-560; Monopolies, ↪17; Patents, ↪200; Shipping, ↪180.

PRINCIPAL AND SURETY.

See Bonds; Executors and Administrators, ↪531; Indemnity; Insurance, ↪168, 285; Subrogation, ↪7.

PRIORITIES.

See Bankruptcy, ↪346, 350; Corporations, ↪566; Mortgages, ↪169; Patents, ↪73, 90; Receivers, ↪158; Trade-Marks and Trade-Names, ↪21.

PRIVILEGE.

See Witnesses, ↪306.

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PRIZE FIGHTING.

See Customs Duties, Ⓒ22.

PROCESS.

See Attachment; Corporations, Ⓒ668; Courts, Ⓒ274, 344; Execution; Injunction; Mandamus; Prohibition.

II. SERVICE.**(E) Return and Proof of Service.**

Ⓒ148 (U.S.D.C.) In action to set aside service of summons on ground that person served was not defendant's agent, evidence *held* insufficient to rebut prima facie presumption arising from marshal's return.—*Darrow v. Postal Telegraph-Cable Co. of New York*, 229 F. 314.

PROFITS.

See Mortgages, Ⓒ199.

PROHIBITION.**I. NATURE AND GROUNDS.**

Ⓒ3 (U.S.C.C.A.) Where proceedings in District Court would ultimately ripen into appealable judgment, *held*, that Circuit Court of Appeals would not by prohibition restrain further proceedings.—*In re Garrosi*, 229 F. 363.

PROMISSORY NOTES.

See Bills and Notes.

PROSTITUTION.

Ⓒ1 (U.S.D.C.) To constitute offenses under White Slave Traffic Act, §§ 2, 3, the intent to subject the girl transported to debauchery need not be consummated by any act of prostitution or debauchery.—*United States v. Brand*, 229 F. 847.

PROVISOS.

See Pleading, Ⓒ63.

PUBLIC LANDS.**II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.****(D) Reservations to United States.**

Ⓒ47 (U.S.C.C.A.) Act May 14, 1898, § 10, relative to reserving land abutting on navigable waters in Alaska, and reserving a roadway across the reserved land, *held* not to reserve such roadway across mill site locations.—*Worthen Lumber Mills v. Alaska Juneau Gold Mining Co.*, 229 F. 966.

(H) Grants in Aid of Railroads.

Ⓒ70 (U.S.C.C.A.) Under Act July 27, 1866, and Act March 3, 1871, §§ 9, 23, land granted to Southern Pacific Railroad Company *held* not subject to settlement and pre-emption.—*Pullinwider v. Southern Pac. R. Co. of California*, 229 F. 717.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Eminent Domain.

PUNISHMENT.

See Criminal Law, Ⓒ1177.

QUESTIONS OF LAW AND FACT.

See Trial, Ⓒ136.

QUIETING TITLE.**II. PROCEEDINGS AND RELIEF.**

Ⓒ29 (U.S.C.C.A.) Suit brought in 1913 to quiet title to mining claims sold by administrator and guardian in 1892 and 1894, on ground that court had no jurisdiction to authorize sales, *held* barred by laches.—*Jewell v. Trilby Mines Co.*, 229 F. 98.

Ⓒ45 (U.S.C.C.A.) In suit to quiet title, claim of title by payment of taxes under Rev. St. Colo. 1908, § 4089, *held* an affirmative defense, not justifying dismissal upon motion.—*Jewell v. Trilby Mines Co.*, 229 F. 98.

RAILROADS.

See Carriers; Commerce, Ⓒ69; Master and Servant; Municipal Corporations, Ⓒ966; Street Railroads; Taxation, Ⓒ47; Telegraphs and Telephones, Ⓒ11.

X. OPERATION.**(B) Statutory, Municipal, and Official Regulations.**

Ⓒ229 (U.S.C.C.A.) Under Act March 2, 1893, Act April 1, 1896, Act March 2, 1903, and Act April 14, 1910, § 2, permitting use of hand brakes in connection with required power brakes *held* unlawful.—*United States v. Great Northern Ry. Co.*, 229 F. 927.

Ⓒ254(2) (U.S.C.C.A.) In a civil action to recover a penalty, the Safety Appliance Acts are not to be construed by the rules which govern the construction of criminal statutes.—*United States v. Great Northern Ry. Co.*, 229 F. 927.

(F) Accidents at Crossings.

Ⓒ328 (U.S.C.C.A.) It is the positive duty of an automobile driver, approaching railroad tracks where there is a restricted vision, to stop, look, and listen, where it will be effective.—*Delaware, L. & W. R. Co. v. Welshman*, 229 F. 82.

Ⓒ330 (U.S.C.C.A.) Raising of crossing gates, though invitation to cross, *held* invitation only to cross with due care, and traveler must use sight, hearing, and other factors of safety required by the situation.—*Delaware, L. & W. R. Co. v. Welshman*, 229 F. 82.

Ⓒ350 (U.S.C.C.A.) Whether automobile driver, starting to cross railroad after gates were raised, was negligent in failing to stop before reaching track, and whether such negligence contributed to an accident, *held* for the jury.—*Delaware, L. & W. R. Co. v. Welshman*, 229 F. 82.

(G) Injuries to Persons on or near Tracks.

↪400 (U.S.C.C.A.) Where evidence showed contributory negligence, and would not have supported a finding for plaintiffs under the last clear chance doctrine, verdict for railroad company *held* properly directed.—*Marler v. Illinois Cent. R. Co.*, 229 F. 139.

RATIFICATION.

See Corporations, ↪314.

RECEIVERS.

See Abatement and Revival, ↪53; Corporations, ↪553; Courts, ↪294.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

↪147 (U.S.C.C.A.) A federal court *held* to have properly denied a petition to require its receiver of an insolvent corporation to retain money in his hands to await the determination of an action brought by petitioner in another court.—*Pennsylvania Steel Co. v. New York City Ry. Co.*, 229 F. 120.

↪158 (U.S.C.C.A.) Excess freight charges collected from shippers pending appeal from Corporation Commission's order, which upon Supreme Court's decision became payable within six months before receivership of railroad, *held* entitled to payment as preferred claims.—*Love v. North American Co.*, 229 F. 103.

Claims against railroad company in hands of receivers for refund of excess freight rates collected pending appeal from Corporation Commission's orders *held* preferred claims, on ground that duty to repay them was a public duty.—*Id.*

Claims for refund of excess freight rates collected pending appeal from Corporation Commission's orders *held* entitled to preferential payment, under rule applicable to current expenses of railroad in hands of receivers.—*Id.*

VI. ACTIONS.

↪189 (U.S.C.C.A.) Where a receivership is procured illegally, the costs of the receivership may be taxed against the complainant procuring the appointment of the receiver.—*Hawes v. First Nat. Bank of Madison*, 229 F. 51.

Where the court appointing a receiver had no jurisdiction, it cannot claim jurisdiction over the property seized without jurisdiction, and pay costs and expenses of the receivership therefrom.—*Id.*

RECORDS.

See Bankruptcy, ↪463.

REFERENCE.

See Appeal and Error, ↪697, 931; Bankruptcy, ↪95, 97; Equity, ↪395, 409.

REFRESHING MEMORY.

See Witnesses, ↪255.

REGISTRATION.

See Trade-Marks and Trade-Names, ↪45.

REHEARING.

See New Trial.

REISSUE.

See Patents, ↪139.

RELEASE.

See Accord and Satisfaction; Alteration of Instruments, ↪7; Compromise and Settlement; Executors and Administrators, ↪531.

I. REQUISITES AND VALIDITY.

↪12(1) (U.S.D.C.) Under ordinary conditions a man may without consideration voluntarily forgive his debtor his debt, though he may have been an unjust steward.—*Gillespie v. Smith*, 229 F. 760.

↪20 (U.S.C.C.A.) Contract whereby sleeping car conductor released the company and the railroad company from liability for injuries or death *held* not invalid, and to preclude a recovery for death.—*Fowler v. Pennsylvania R. Co.*, 229 F. 373.

RELEVANCY.

See Evidence, ↪116.

REMOVAL OF CAUSES.**I. POWER TO REMOVE AND RIGHT OF REMOVAL IN GENERAL.**

↪3 (U.S.D.C.) Where counts for same injury were alleged under federal Employers' Liability Act and under common law and state statutes, action *held* removable, notwithstanding Employers' Liability Act, § 6.—*Flas v. Illinois Cent. R. Co.*, 229 F. 319.

Within Employers' Liability Act, § 6, providing that no case arising thereunder shall be removed, the "case" referred to is what plaintiff makes it in good faith by his petition.—*Id.*

II. ORIGIN, NATURE, AND SUBJECT OF CONTROVERSY.

↪19 (U.S.C.C.A.) Under Judicial Code, § 24, subsds. 1, 8, section 28, and Carmack Amendment to Interstate Commerce Act, action against initial and connecting carriers for nondelivery of interstate shipment *held* removable.—*Alabama Great Southern Ry. Co. v. American Cotton Oil Co.*, 229 F. 11.

A suit arising under a law of the United States is no less removable because the law involved has already been decided, construed, and settled.—*Id.*

↪19(1) (U.S.D.C.) Under Act March 3, 1891, §§ 2, 4, prisoner's action against warden of United States penitentiary for injuries from negligence *held* to arise under the United States laws, so as to be removable.—*Steele v. Halligan*, 229 F. 1011.

Under Const. U. S. art. 1, § 8, subsec. 17, Const. Wash. art. 25, and Rem. & Bal. Code Wash. § 6853, cause of action for negligence arising on territory acquired for United States penitentiary *held* removable to federal court.—*Id.*

↪25(1) (U.S.D.C.) Rule that before cause is removable plaintiff's statement of cause of action must show it to be based on federal laws and Constitution *held* not to apply to reservations and sites to which territorial jurisdiction of federal courts extend.—*Steele v. Halligan*, 229 F. 1011.

REMOVAL OF CLOUD.

See Quieting Title.

RENUNCIATION.

See Contracts, ↪313.

REPLEVIN.

See Attachment, ↪302; Indemnity, ↪14.

RESCISSION.

See Bankruptcy, ↪339.

RES GESTÆ.

See Evidence, ↪121.

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See Judgment, ↪570.

RESTRAINT OF TRADE.

See Monopolies, ↪17, 28.

REVENUE.

See Customs Duties; Internal Revenue; Taxation.

REVIEW.

See Admiralty, ↪118, 119; Appeal and Error; Bankruptcy, ↪446; Certiorari.

RIGHT OF WAY.

See Telegraphs and Telephones, ↪11.

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See Patents, ↪218.

RULES OF COURT.

See Court Rules Cited.

SALES.

See Bankruptcy, ↪196, 350; Literary Property; Logs and Logging, ↪3; Monopolies, ↪17.

I. REQUISITES AND VALIDITY OF CONTRACT.

↪45 (U.S.C.C.A.) Goods *held* not purchased without reasonable expectation of being able to pay, so as to authorize reclamation, though purchaser was insolvent, where it had excellent credit and failed because of a bank's failure.—*Schroth v. Monarch Fence Co.*, 229 F. 549.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

↪164 (U.S.C.C.A.) Where order for steel bars was filled with bars exceeding specified length, making additional weight and additional cost, buyer *held* justified in refusing acceptance, either under the common law or under the rule of substantial compliance.—*Polson Logging Co. v. Neumeyer*, 229 F. 705.

↪176(3) (U.S.C.C.A.) Where buyer refused shipment of steel, claiming fraud and a lack of authority in its employé to order the steel, objection made long afterwards, just before trial, based on excess in quantity, *held* too late.—*Polson Logging Co. v. Neumeyer*, 229 F. 705.

↪181(5) (U.S.C.C.A.) In action against buyer for refusing to accept hops, because samples tendered were not satisfactory, evidence as to manner of picking, and that leaves and stems were put in, *held* improperly excluded.—*Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 F. 913.

VII. REMEDIES OF SELLER.

(E) Actions for Price or Value.

↪340 (U.S.C.C.A.) Seller, after fully performing, so as to pass title, *held* entitled to store property for buyer and sue for contract price, or sell it as buyer's agent and recover the deficiency.—*Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 F. 913.

↪345 (U.S.C.C.A.) Upon buyer's breach, seller *held* not entitled to sue for contract price, unless property is identified or appropriated to the contract.—*Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 F. 913.

(F) Actions for Damages.

↪371 (U.S.C.C.A.) Upon buyer's breach, seller *held* not entitled to sell property and sue for deficiency, unless property is identified or appropriated to the contract.—*Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 F. 913.

↪382 (U.S.C.C.A.) In action for buyer's refusal to accept hops, evidence as to market value *held* admissible, though not limited to air-dried hops to which contract related.—*Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 F. 913.

↪384(1) (U.S.C.C.A.) Seller, without storing property for buyer or selling it as his agent, *held* entitled to recover the difference between the contract price and the market price.—*Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 F. 913.

↪384(7) (U.S.C.C.A.) Where, in seller's action for damages, there was no allegation as to resale of property or price on resale, *held*, that measure of damages was difference between contract price and market price.—*Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 F. 913.

SALVAGE.

II. AMOUNT AND APPORTIONMENT.

↪38 (U.S.D.C.) Distribution of salvage awarded for the salving of a derelict considered.—*The Samuel B. Hubbard*, 229 F. 843.

SATISFACTION.

See Accord and Satisfaction; Compromise and Settlement; Release.

SCHOOLS AND SCHOOL DISTRICTS.

See Evidence; Mandamus, Ⓒ111, 143.

II. PUBLIC SCHOOLS.

(E) District Debt, Securities, and Taxation.

Ⓒ94 (U.S.C.C.A.) Act La. No. 214 of 1912, § 68, relative to payment of judgments by school board, held to apply to judgments recovered against former school board having different name.—United States v. Board of Directors of Public Schools, Parish of Orleans, 229 F. 1.

Act La. No. 214 of 1912, § 71, held to authorize pledging of only 95 per cent. of revenues by school board of parish of Orleans, in view of section 68.—Id.

SEALS.

See Executors and Administrators, Ⓒ531.

SECONDARY EVIDENCE.

See Evidence, Ⓒ166.

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See Criminal Law, Ⓒ1177.

SERVANTS.

See Master and Servant.

SET-OFF AND COUNTERCLAIM.

See Bankruptcy, Ⓒ326; Contracts, Ⓒ319.

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See Accord and Satisfaction; Compromise and Settlement; Death, Ⓒ25; Release.

SHERMAN ANTI-TRUST ACT.

See Monopolies, Ⓒ17, 28; Trade-Marks and Trade-Names, Ⓒ67.

SHIPPING.

See Admiralty; Collision; Maritime Liens; Salvage; Towage.

III. CHARTERS.

Ⓒ52 (U.S.C.C.A.) The action of the owner of a vessel under a time charter in withdrawing her at the end of a voyage for default in payment of hire held within his rights under the charter.—Luckenbach v. Pierson, 229 F. 130.

V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

Ⓒ84(5) (U.S.C.C.A.) Facts as to personal injury held to show that damages awarded were based on finding of contributory negligence, and that District Court followed the rule as to dividing the damages.—The Granville R. Bacon, 229 F. 715.

IX. DEMURRAGE.

Ⓒ174 (U.S.C.C.A.) Purchaser of a cargo of lumber, which agreed to furnish suitable berth for vessel on arrival, held liable to reimburse the charterer for demurrage it was required to pay because of delay caused by the purchaser.—Brooks v. Hilton-Dodge Lumber Co., 229 F. 708.

Ⓒ180 (U.S.C.C.A.) Under a provision of a charter party that the stevedore for discharging shall be subject to approval of charterer, a stevedore so employed is still the agent of the vessel, for whose delays the charterer is not liable.—Brooks v. Hilton-Dodge Lumber Co., 229 F. 708.

SINKING FUNDS.

See Corporations, Ⓒ486.

SLANDER.

See Libel and Slander.

SPECIFIC PERFORMANCE.**I. NATURE AND GROUNDS OF REMEDY IN GENERAL.**

Ⓒ6 (U.S.C.C.A.) Where power company had performed contract to furnish electrical current, and was ready to continue performance, decree enforcing the contract held not erroneous because of claimed lack of mutuality of remedies.—Montgomery Traction Co. v. Montgomery Light & Water Power Co., 229 F. 672.

Ⓒ12 (U.S.C.C.A.) Rule that specific performance by piecemeal will not be decreed held not applicable to contracts which contemplate a separate and piecemeal performance of separate parts.—T. B. Harms & Francis, Day & Hunter v. Stern, 229 F. 42.

II. CONTRACTS ENFORCEABLE.

Ⓒ32 (U.S.C.C.A.) A contract lacking in mutuality when it is entered into may by subsequent performance be cured of its defect.—T. B. Harms & Francis, Day & Hunter v. Stern, 229 F. 42.

IV. PROCEEDINGS AND RELIEF.

Ⓒ127(1) (U.S.C.C.A.) Where defendant had contracted to take electrical current from plaintiff, court held not to have exceeded powers, or abused or mistakenly exercised discretion, by enjoining it from taking current from others.—Montgomery Traction Co. v. Montgomery Light & Water Power Co., 229 F. 672.

STAMPS.

See Internal Revenue, Ⓒ19.

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STATUTE OF LIMITATIONS.

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STATUTES.

For statutes relating to particular subjects, see the various specific topics.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

194 (U.S.C.C.A.) The rule of "ejusdem generis" is that where special words are used, followed by words of more general import, the general words are limited to things of the same kind.—Hills v. Joseph, 229 F. 865.

217 (U.S.D.C.) In construing a statute the court may consider the history of the times, to ascertain the reason for the legislation and the meaning of particular provisions, and in a proper case the mode in which particular language was introduced into the law.—Tucker v. Williamson, 229 F. 201.

219 (U.S.D.C.) When the intention of a statute is doubtful, the construction placed upon it for many years by those charged with executing its provisions may be resorted to, in aid of its true construction.—Pittsburgh Melting Co. v. Baltimore & O. R. Co., 229 F. 214.

(D) Retroactive Operation.

267(2) (U.S.D.C.) Gen. St. Conn. 1902, § 1, as to effect on pending actions of passage of acts, held not to limit power of Legislature, nor to affect construction of laws when legislative intent is clear.—Carson v. Gore-Meenan Co., 229 F. 765.

276(1) (U.S.D.C.) Gen. St. Conn. 1902, § 1, as to effect on pending actions of repeal of acts, held not to limit power of Legislature, nor to affect construction of laws when legislative intent is clear.—Carson v. Gore-Meenan Co., 229 F. 765.

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STREET RAILROADS.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

¶52 (U.S.C.C.A.) A street railway company, which through stock purchases secured the ownership and control of the property of a competitor subject to mortgages thereon, held liable to the mortgage bondholders for any improper diversion of the same.—Davis v. Virginia Ry. & Power Co., 229 F. 633.

Junior mortgagees, who received the benefit of property diverted from the first mortgagees, held accountable to them therefor.—Id.

A bondholder of a street railway held entitled

to maintain a suit for diversion of mortgaged property, although the property, when sold, was insufficient to pay a prior mortgage.—*Id.*

II. REGULATION AND OPERATION.

⊖78 (U.S.C.C.A.) The Metropolitan Street Railway Company, as lessor of its system to the New York City Railway Company, *held* not liable jointly with its lessee for tort claims against the latter.—*Pennsylvania Steel Co. v. New York City Ry. Co.*, 229 F. 367.

STREETS.

See Highways.

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SUBROGATION.

⊖7 (U.S.C.C.A.) Rule that surety for independent consideration will not be subrogated when persons having independent equities will be prejudiced *held* inapplicable as between railroad bondholders and surety on bond to supersede corporation commissioner's order.—*Love v. North American Co.*, 229 F. 103.

SUIT.

See Action.

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See Physicians and Surgeons.

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See Pleading, ⊖375.

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See Bankruptcy, ⊖346; Commerce, ⊖69; Customs Duties; Internal Revenue; Municipal Corporations, ⊖966; Poisons, ⊖2.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

⊖47 (U.S.D.C.) The privilege tax imposed on railroad companies by Act Miss. March 16, 1912 (Acts 1912, c. 102), *held* not invalid, as additional property tax.—*Illinois Cent. R. Co. v. Mississippi Railroad Commission*, 229 F. 248.

III. LIABILITY OF PERSONS AND PROPERTY.

(A) Private Persons and Property in General.

⊖58 (U.S.C.C.A.) Intention to tax must be expressed in distinct and unambiguous language, and the language cannot be extended beyond its clear import, and doubts must be resolved in

favor of the taxpayer.—*State of Ohio v. Harris*, 229 F. 892.

(B) Corporations and Corporate Stock and Property.

⊖117 (U.S.C.C.A.) Under Const. Ohio, art. 12, § 2, and Gen. Code Ohio, §§ 5495, 5498, 5506, 5509, 5512-5514, 5520, 11974, 11975, corporations in bankruptcy or receivership *held* not subject to franchise tax for tax years subsequent to adjudication or receivership.—*State of Ohio v. Harris*, 229 F. 892.

Insolvent corporations in bankruptcy or receivership, not exercising their franchises, *held* not subject to Ohio franchise tax, though within the class to which Gen. Code Ohio, § 5495, applies.—*Id.*

Gen. Code Ohio, § 5506, making franchise tax a lien on property, whether employed in business or in hands of assignee, etc., *held* to simply afford security, and the lien is not a source of power to tax.—*Id.*

Where a corporation is being wound up by assignment or in bankruptcy, under Gen. Code Ohio, § 11975, and state officials know of its condition, failure to file certificate called for by section 11974 *held* not to authorize franchise tax.—*Id.*

That property of insolvent corporation seized prior to tax year is merely in the custody of a receiver not having title as in the case of a trustee in bankruptcy *held* not to affect liability for franchise tax.—*Id.*

(D) Exemptions.

⊖203 (U.S.C.C.A.) Exemptions from taxation will not be allowed, unless it clearly appears that such was the statutory intent; every reasonable doubt being resolved in favor of the taxing power.—*Alaska Northern Ry. Co. v. Municipality of Seward*, 229 F. 667.

V. LEVY AND ASSESSMENT.

(G) Review, Correction, or Setting Aside of Assessment.

⊖498 (U.S.D.C.) A court of equity has power to enjoin the intentional assessment of one class of property at a higher valuation than that placed on another class, but not an assessment intended in good faith to be on the same basis as that of other property.—*Illinois Cent. R. Co. v. Mississippi Railroad Commission*, 229 F. 248.

TELEGRAPHS AND TELEPHONES.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

⊖11 (U.S.D.C.) Under direct provisions of contract between railroad and telegraph companies, *held*, that it applied to railroad purchased from another company, with which the telegraph company had a working agreement.—*Western Union Telegraph Co. v. Louisville & N. R. Co.*, 229 F. 234.

Contract *held* to give telegraph company no irrevocable or perpetual right in railroad right of way, but simply a right to use and occupy it until the expiration of the contract.—*Id.*

TENDER.

See Logs and Logging, ¶3.

THEATERS AND SHOWS.

See Customs Duties.

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See Logs and Logging.

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See Bankruptcy, ¶161; Equity, ¶71; Logs and Logging, ¶3; Mandamus, ¶143; Patents, ¶218.

TITLE.

See Adverse Possession; Copyrights, ¶41, 42; Literary Property; Quietening Title.

TORTS.

See Collision; Factors, ¶49; Fraud; Libel and Slander; Malicious Prosecution; Street Railroads, ¶78; Waste, ¶17.

TOWAGE.

See Collision, ¶95.

¶4 (U.S.C.C.A.) Vessel towing another *held* not an insurer, and to fulfill obligation if reasonably adequate to the service and in charge of men possessing and exercising skill and care ordinarily exercised in like service.—*The Hardy*, 229 F. 985.

¶15(2) (U.S.C.C.A.) Where master of vessel towing another is experienced and competent, *held*, that much must be left to his judgment, and the burden is on the owner of the tow to prove negligence on the part of the tug.—*The Hardy*, 229 F. 985.

TOWNS.

See Municipal Corporations.

TRADE-MARKS AND TRADE-NAMES.**I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.**

¶1 (U.S.D.C.) Protection given by law to trade-marks *held* intended to protect the owner, and to protect the public from deception.—*Coca-Cola Co. v. J. G. Butler & Sons*, 229 F. 224.

¶21 (U.S.C.C.A.) Though party acquired no rights by bare license to use registered trade-mark, *held*, that by its own subsequent registration thereof it acquired a good title to its trade-mark.—*Standard Brewery Co. of Baltimore City v. Interboro Brewing Co.*, 229 F. 543.

II. TITLE, CONVEYANCES, AND CONTRACTS.

¶35 (U.S.C.C.A.) Party *held* to acquire no rights by license to use name registered by party never using it and unaccompanied by sale of any business or good will.—*Standard Brewery Co. of Baltimore City v. Interboro Brewing Co.*, 229 F. 543.

III. REGISTRATION, REGULATION, AND OFFENSES.

¶45 (U.S.C.C.A.) The rights which a person obtains by registration of a trade-mark under the federal statutes are coterminous with the territory of the United States.—*Standard Brewery Co. of Baltimore City v. Interboro Brewing Co.*, 229 F. 543.

IV. INFRINGEMENT AND UNFAIR COMPETITION.**(A) What Constitutes Infringement.**

¶55 (U.S.C.C.A.) In case of infringement of trade-mark, the intention of the infringer is immaterial.—*Goldsmith Silver Co. v. Savage*, 229 F. 623.

¶57 (U.S.D.C.) Use of any simulation of trade-mark likely to induce purchasers exercising ordinary care to buy the article to which it is affixed *held* unlawful and to be enjoined.—*Coca-Cola Co. v. J. G. Butler & Sons*, 229 F. 224.

¶65 (U.S.C.C.A.) To warrant a recovery for infringement of a trade-mark, it must be shown that the dress of the two articles is so similar as to probably deceive the public while in the exercise of reasonable care.—*Goldsmith Silver Co. v. Savage*, 229 F. 623.

(B) What Competition Unlawful.

¶67 (U.S.D.C.) The monopoly given the owner of a trade-mark by the trade-mark laws is not forbidden by the Sherman Act or any other act of Congress.—*Coca-Cola Co. v. J. G. Butler & Sons*, 229 F. 224.

¶68 (U.S.D.C.) Party selling beverage under name of plaintiff's product and using plaintiff's labels, etc., *held* guilty of unfair competition, and to be enjoined, though using syrup manufactured by plaintiff, but not authorized to use it in that way.—*Coca-Cola Co. v. J. G. Butler & Sons*, 229 F. 224.

¶69 (U.S.C.C.A.) To establish unfair competition, complainant must prove a fraudulent intent, or show facts and circumstances from which it may reasonably be inferred.—*Goldsmith Silver Co. v. Savage*, 229 F. 623.

¶70(4) (U.S.C.C.A.) To warrant a recovery for unfair competition, it must be shown that the dress of the two articles is so similar as to probably deceive the purchasing public while in the exercise of reasonable care.—*Goldsmith Silver Co. v. Savage*, 229 F. 623.

¶73 (U.S.C.C.A.) Persons formerly connected with business conducted under their name *held* entitled to use their name, if they did not invade good will of purchaser of business or employ its trade-marks and trade-names.—*Knabe Bros. Co. v. American Piano Co.*, 229 F. 23.

Corporation organized by persons formerly connected with the original Knabe piano business *held* not entitled to advertise their pianos as "Knabe's."—*Id.*

Use of defendant's name "Knabe Bros. Co." on pianos, *held* insufficient to distinguish them from pianos of party succeeding to original Knabe business, and therefore warning notice was properly required.—*Id.*

Court *held* to have erred in requiring defendant to distinguish its pianos from plaintiff's by

placing corporate name and warning notice in finely inscribed lines on metal plate, thus tending to discredit its pianos.—Id.

Court *held* to have erred in requiring notice on pianos of corporation organized by persons formerly connected with original Knabe business to state that the piano was not a "Knabe," or an "original Knabe."—Id.

Corporation organized by persons formerly connected with plaintiff's business, and having name similar to plaintiff's trade-name and trade-marks, *held* entitled to use its corporate name on the fall-boards of its pianos.—Id.

Where notice as to difference between pianos could not be placed on fall-board with name of manufacturer without mutilating the piano, proper notice attached to cheek-block *held* sufficient.—Id.

Form of warning notice to be attached to pianos manufactured by Knabe Bros. Co. to distinguish them from pianos of party succeeding to the original Knabe business prescribed.—Id.

Piano corporation, organized by persons formerly connected with original Knabe business, *held* entitled to advertise and represent that its pianos were the only pianos made by a living Knabe.—Id.

Corporation organized by persons formerly connected with original Knabe piano business *held* not to be enjoined from claiming that its pianos had quality of Knabe pianos.—Id.

Piano company, having name similar to plaintiff's trade-marks and trade-names, *held* to be required to insert notice clearly distinguishing the pianos in advertisements and to display it in salesrooms.—Id.

↪74 (U.S.C.C.A.) Defendant *held* entitled to advertise former connection of its officers and their familiarity with manufacture of Knabe pianos, provided it took precautions against confusion with pianos manufactured by purchaser of original Knabe business.—Knabe Bros. Co. v. American Piano Co., 229 F. 23.

(C) Actions.

↪79 (U.S.C.C.A.) Where defendant was arranging to put out piano bearing its corporate name similar to plaintiff's trade-marks and trade-names, plaintiff *held* entitled to sue for an injunction.—Knabe Bros. Co. v. American Piano Co., 229 F. 23.

↪79 (U.S.C.C.A.) Case *held* to be treated as one for unfair competition, where no trade-marks or violations thereof were alleged, or mentioned in calling defendant's attention to its violation of complainant's rights.—Pennsylvania Rubber Co. v. Dreadnaught Tire & Rubber Co., 229 F. 560.

↪85 (U.S.C.C.A.) Injunctive relief against infringement of trade-marks and trade-names *held* not to be denied, where misrepresentations by plaintiff were promptly discontinued when complained of and no deception was intended.—Knabe Bros. Co. v. American Piano Co., 229 F. 23.

That plaintiff sold pianos not Knabe pianos as bearing "Knabe guarantee" *held* not ground for denial of injunction against defendant's misuse of the word "Knabe."—Id.

Plaintiff's use of name, without showing that

it was merely the successor of the original party of that name, *held* not to deprive it of the right to protection against infringement.—Id.

↪93(3) (U.S.C.C.A.) Where it did not appear that intending purchasers of complainant's tire had been or could be misled by markings on defendant's tires into buying them, unfair competition *held* not established.—Pennsylvania Rubber Co. v. Dreadnaught Tire & Rubber Co., 229 F. 560.

V. TRADE-MARKS AND TRADE-NAMES ADJUDICATED.

"Knabe Bros. Co."—Knabe Bros. Co. v. American Piano Co., 229 F. 23.

TREES.

See Logs and Logging.

TRESPASS.

See Indians, ↪19.

TRIAL.

See Appeal and Error, ↪1033; Bankruptcy, ↪51, 340; Banks and Banking, ↪257; Costs; Courts, ↪352; Criminal Law, ↪829; Damages, ↪208; Electricity; Highways, ↪113; Libel and Slander, ↪123; Master and Servant, ↪270, 285, 286, 288; New Trial; Railroads, ↪350, 400.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

↪45(3) (U.S.C.C.A.) Exclusion of evidence *held* not error, because witness was permitted to testify to the only fact which the party offering the evidence stated it expected to prove.—Lauderdale County v. Kittel, 229 F. 593.

↪54(1) (U.S.C.C.A.) Where evidence was admissible for particular purpose, and no request that its effect be restricted to that purpose was made, *held*, that there was no error.—Lauderdale County v. Kittel, 229 F. 593.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

↪136(1) (U.S.D.C.) Evidential facts must be found by a jury, if the case is a jury case; but ultimate facts need not be submitted, if only one inference can fairly and reasonably be drawn.—Real Estate Title, Ins. & Trust Co. v. Lederer, 229 F. 799.

TROVER AND CONVERSION.

See Attachment, ↪302; Carriers, ↪58; Indemnity, ↪14.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Assignments for Benefit of Creditors; Charities; Copyrights, [§41](#), [42](#); Monopolies, [§17](#).

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.**(C) Actions.**

[§372](#) (U.S.C.C.A.) Ordinarily equity will not establish a state trust, unless clearly shown and the facts have been fraudulently concealed from the cestui que trust.—*Jewell v. Trilby Mines Co.*, 229 F. 98.

TUGS.

See Towage.

TWENTY-EIGHT HOUR LAW.

See Carriers, [§37](#); Pleading, [§375](#).

UNDERTAKINGS.

See Bonds.

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UNFAIR COMPETITION.

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UNITED STATES.

See Copyrights; Courts, [§274-347](#); Criminal Law, [§113](#); Customs Duties; Internal Revenue; Limitation of Actions, [§37](#); Mines and Minerals, [§2](#); Post Office; Removal of Causes; Trade-Marks and Trade-Names.

I. GOVERNMENT AND OFFICERS.

[§3](#) (U.S.D.C.) Government *held* presumed to have made record of land acquired by consent of state for penitentiary in land records of the state, as required by state statute.—*Steele v. Halligan*, 229 F. 1011.

Judicial branch of the government *held* to follow the political branch, and hold its jurisdiction to cover land acquired for United States penitentiary used and supported by the executive and legislative departments.—*Id.*

Federal jurisdiction over land ceded by state under Const. art. 1, § 8, subsec. 17, *held* exclusive, and to completely oust state's jurisdiction.—*Id.*

Legislative cession of jurisdiction to the United States over land acquired for governmental purposes after the purchase thereof has the same effect as if made before purchase.—*Id.*

The cession by a state of jurisdiction over land acquired by the United States for governmental purposes includes judicial as well as legislative jurisdiction.—*Id.*

Rev. St. § 5391 as re-enacted in 1898 (Comp. St. 1913, § 10462), providing for punishment for offenses on land ceded to the United States similar to that prescribed by state laws, *held*

to apply only to state laws in effect when it was re-enacted.—*Id.*

The municipal law of a state regulating civil rights, which is continued in effect after the cession of land by the state to the United States, is the law in effect at the time of the cession.—*Id.*

II. PROPERTY, CONTRACTS, AND LIABILITIES.

[§67](#) (U.S.C.C.A.) In action on government contractor's bond, technical objection that intervenor's statement of claim did not show failure of government to sue *held* sufficiently met by presumption that original plaintiff made all necessary allegations.—*Fidelity & Deposit Co. v. United States*, 229 F. 127.

Where the penalty of government contractor's bond was sufficient to pay all claims against the contractor, a claimant was entitled to recover such interest as might have been recovered against the contractor.—*Id.*

[§70](#) (U.S.C.C.A.) Restrictive provisions in a contract for the manufacture of torpedoes for the navy, designed to prevent publicity of the devices used, construed.—*United States v. E. W. Bliss Co.*, 229 F. 376.

USAGES.

See Customs and Usages.

UTILITY.

See Patents, [§62](#), 253.

VALUE.

See Evidence, [§142](#).

VENDOR AND PURCHASER.

See Bankruptcy, [§140](#); Sales; Specific Performance.

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VERDICT.

See New Trial, [§71](#).

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WAIVER.

See Bankruptcy, [§399](#); Courts, [§37](#), 276, 405; Insurance, [§560](#); Patents, [§288](#); Sales, [§176](#).

WAR.

[§10](#) (U.S.C.C.A.) That a time charter of a British steamship was annulled by reason of the European war *held* not to deprive the broker, who procured the same, of his right to the stipulated commission.—*Vellore S. S. Co. v. Steengrafe*, 229 F. 394.

[§16](#) (U.S.C.C.A.) Whether jurisdiction would be taken of libel in personam between British and Austrian corporations for coal furnished steamers at Algiers *held* within the discretion

of the District Court.—Watts, Watts & Co. v. Unione Austriaca di Navigazione, 229 F. 136.

District Court held not to have abused discretion in declining jurisdiction of libel in personam between corporations of countries at war with each other.—Id.

WASTE.

↪17 (U.S.C.C.A.) Equity has jurisdiction of a suit, the essential and primary purpose of which is to restrain waste which, if continued, would work irreparable injury to the property in controversy, although the defendant may be in possession.—El Dora Oil Co. v. United States, 229 F. 946.

WATERS AND WATER COURSES.

See Canals; Navigable Waters.

WAYS.

See Highways.

WEBB-KENYON ACT.

See Commerce, ↪8.

WILLS.

See Charities; Descent and Distribution; Executors and Administrators; Perpetuities.

WITNESSES.

See Costs, ↪184; Evidence.

III. EXAMINATION.

(A) Taking Testimony in General.

↪255(2) (U.S.C.C.A.) Permitting post office inspector to refresh memory by reference to notes made at time of investigation of case held not error.—McClendon v. United States, 229 F. 523.

(B) Cross-Examination and Re-Examination.

↪268(1) (U.S.C.C.A.) Where contractor claimed that county's engineer was in collusion with others to eliminate him and substitute a different contractor, cross-examination as to favoritism of such other contractor under former contracts held within the court's discretion.—Lauderdale County v. Kittel, 229 F. 593.

(C) Privilege of Witness.

↪306 (U.S.D.C.) A corporation is not a "person" privileged under Const. U. S. Amend. 5, to refuse to answer interrogatories propounded by a libel in admiralty on the ground that the answers might tend to incriminate it.—Orvig Dampskibsselskap Actieselskabet v. New York & Bermudez Co., 229 F. 293.

WORDS AND PHRASES.

"Abortion."—Bours v. United States (U. S. C. C. A.) 229 F. 960.

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"Any person."—Wilson v. United States (U. S. C. C. A.) 229 F. 344.

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"Capital investment."—Real Estate Title, Ins. & Trust Co. v. Lederer (U. S. D. C.) 229 F. 799.

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WORK AND LABOR.

⇒14(1) (U.S.D.C.) Plaintiffs *held* entitled to recover on quantum meruit, value of improvements made in connection with logging operations which they were forced to abandon by defendant's breach of the contract.—Fernald Woodward Co. v. Conway Co., 229 F. 819.

Parties compelled to abandon contract for removal of timber by other party's breach *held* not entitled to recover for improvements on the timber lands in connection with the work made by their subcontractors.—Id.

WRITS.

See Attachment; Certiorari; Execution; Habeas Corpus; Injunction; Mandamus; Process; Prohibition.

Of error, see Appeal and Error.

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